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CONGRESSIONAL REDISTRICTING"**

Panel 3: The Law of Redistricting

William Frenzel and **Thomas E. Mann**, Co-Chairs

Nathaniel Persily, University of Pennsylvania Law School

Sam Hirsch, Jenner & Block, LLP

Dale Oldham, Free Enterprise Coalition

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P R O C E E D I N G S

MR. FRENZEL: I wonder if Nathaniel Persily would come up along with Sam Hirsch and Dale Oldham, and we will proceed.

Ladies and gentlemen, this panel is called "The Law of Redistricting." We have Nathaniel Persily, University of Pennsylvania Law School, again, with a bio in your papers, and he is going to lead off with "Forty Years in the Political Thicket." His work will be discussed by Sam Hirsch of Jenner & Block and Dale Oldham of the RNC.

Nate, will you go ahead?

MR. PERSILY: Sure.

Thank you for inviting me to this. Perhaps more than most, I feel my world is colliding right now in that I see Nelson Polsby just walked into the room. So now I have both people who chaired my dissertation in here. I have lawyers with whom I have worked and discussed in my capacity as a lawyer. I have people like Marshall Turner and Karl Aro in the room, both of whom I worked with in the New York and Maryland redistricting processes when they were appointed by courts, and Dale who was involved most recently in the Georgia case where I was--well, I am not allowed to talk to him as well as I wasn't allowed to talk to almost anyone.

So I am still under a gag order for my involvement in the Georgia redistricting. I just want to talk a little bit about the public record in that case as a way of introducing the topic of legal constraints on redistricting because I think some of the--well, it has given us an insight on how the law has changed over the past few decades and also how it is being used to advance political interests in the courts.

Then, also, I think it gives us a sense of whether nonpartisan redistricting is possible or desirable. I think it is fair to say that this redistricting process that went on in Georgia where they appointed me--and I should say I also asked them to appoint about half the other people in this room, and for one reason or another, either you all were busy or someone objected. So I was left with Pat Egan [ph]. I was left with drawing 180 House districts for Georgia and 56 State Senate districts in the space of about 9 days, not the optimal conditions under which to draw representative and other types of districts reflecting the political considerations and the philosophical considerations we were talking about before.

That case arose out of a one-person/one-vote challenge to a state legislative district, say a redistricting plan, which was within a 5-percent deviation.

It was a response by primarily Republicans who felt, justifiably, that the Democrats had gerrymandered them while trying to hold onto power in Georgia.

They won at the three-judge district court level, and then, because at the time Georgia was a state that did not have Democrats controlling all three branches of government, the Democrats and Republicans were unable to decide on a plan. So, therefore, it fell to the courts.

This, I think, was probably the most nonpolitical line-drawing at least during this round. I mean, who is to say, but they were very, very strict about not looking at incumbency data at all, partisanship data at all. So we drew the plan using the other sort of traditional districting criteria that they forced upon us.

The result was, among other things, the first plan that we did paired half the black incumbents in the state against each other. It also ended up pairing all of the powerful black incumbents in the state against each other, at which point there was discussion of how African-Americans become the sacrificial lamb of the federal court plan that was being drawn. So we went back somewhat to the drawing board.

Then we had to incorporate incumbency into what was a nonpartisan plan, and the different parties to the

litigation made arguments as to what could be done. Some of them were pretextual arguments about communities of interest. Some were arguments based more explicitly on incumbency, and so, therefore, we ended up doing small tweaks to the lines that ended up protecting or reducing the number of paired incumbents.

The result of this process, as I frequently say, is that it is fair to say that the majority of troopers have two names that they are watching out for going down into Georgia: one is "Persily"; the other is "Sherman."

[Laughter.]

MR. PERSILY: I learned a lot from this process, and I think what it does signify is the use of the law and the courts as political actors and the re-expression of partisan conflict using the various legal tools that we have at our disposal.

The paper does a little more than that. It talks about ways to array the case law from Baker v. Carr to the present--first, to think about these cases not in the typical constitutional way, but, first, to think of it as different justices' preferences for rules over standards, whether in a given redistricting context we are going to prefer some kind of crystalline rule or more of a mushy discretionary standard. There are obviously advantages and

disadvantages to both, but this is also a context as was true with Baker v. Carr itself where one of the fights is over activism and restraint: to what degree will judges feel that these doctrines based on amorphous notions of fairness give them license to go into the political thicket and to try and rectify an inequality that they see there, or are judges more likely to say let the foxes guard the henhouse, this is not something the judiciary should be involved in?

Finally, and maybe most salient to the recent controversy, is the fight over group rights versus individual rights, whether it is in the racial context or re-expressed sometimes in partisan concerns.

So those are ways to array the case law. I don't mean to suggest those are the only ways. There are as many ways as there are law professors wanting to gain tenure in this area.

I think that what I would like to do is just talk a little bit about what the law is right now, where it is ambiguous, and then about what the consequences of judicial intervention have been, which are consequences for representation of certain groups. The other consequences were one that we have already discussed--and I don't spend much time on it--which is intra-district competition and also competition for control of state legislatures and the

House of Representatives, and then, finally, the recurrent theme which is the racialization of partisan conflicts, which has been discussed briefly, but which I want to hit on a little more.

First is the one-person/one-vote case. As I just suggested and as the previous two panels mentioned, it was thought that there was a certain safe harbor maybe for state legislative districting plans, rightly or wrongly, that could be within the 5-percent threshold. That was dispelled by the recent Georgia case.

There still remains the rule, the sort of crystalline rule for congressional districts, that they need perfect population equality, but again, it is a little bit mushier than that because you can depart from perfect population equality in order to satisfy legitimate concerns like respecting political subdivisions.

One of the consequences of the one-person/one-vote cases, what have they been, in terms of competition, people have already talked about the early literature that suggested that there was reduced competition at the district level. I think some of the revisionist history on that suggests that maybe it wasn't as reduced as we thought. Now it seems that maybe the full effect of the one-person/one-

vote cases may have come to light in the redrawing of Congress and making fewer seats competitive.

I should say also, though, that in Pat Egan, Thad Kousser and my study looking at the effect of this both on legislatures and control for legislatures, for some reason, there are a lot of states, obviously post-Baker v. Carr and post-Reynolds v. Sims, where control of the legislature changed hands from one party to the next, but it wasn't the case that it was more likely to change hands in state legislatures that were heavily mal-apportioned before. So it is hard to say that a lot of the changes in control of state legislatures were a production of the one-person/one-vote cases, as the first panel suggested that politicians figured out a way to bargain around the new constraints.

We do find, however, that it does eviscerate some of the differences between the two houses of the legislature, so that the Senate and the State House after Baker v. Carr and Reynolds v. Sims became more like each other, so that the partisan composition of states in the different houses tended to be similar.

Steve Ansolabehere and Jim Snyder and others have looked, I think, most recently as to the effect of this on representation--the effect of one person, one vote on representation--and they find what everyone may have

suspected but couldn't prove, which is that it helped urban areas, and they can even quantify it looking at disbursements following the one-person/one-vote cases and show that there has been about a \$7-billion transfer of-- [audio break].

MR. PERSILY: [In progress]--areas falling, one-person/one-vote.

Now, in contrast to the more hard-and-fast rule against mal-apportionment, we have the constraints on political gerrymandering where the Davis v. Bandemer standard has been relatively toothless, requiring a consistent degradation of political power and influence on the political process as a whole, although maybe one of my commentators will have some luck in the next month or two and get something out of the Supreme Court which is a lot more rigid.

In thinking about political gerrymandering, it is not enough to think about just the constraints on partisan gerrymandering. Also, we should think about incumbent and bipartisan gerrymanders. But bipartisan gerrymanders were almost specifically upheld by the Supreme Court in Gaffney v. Cummings where it said the desire to create districts that, in essence, represent proportionally the state, the

state's underlying partisan predispositions, is perfectly okay under the Constitution.

And more than that, the protection of incumbents has been seen as a traditional districting principle by the Supreme Court in Bush v. Vera and some other cases.

Finally, the most recent case in the Shaw line of cases, Easley v. Cromartie, suggests that you can intentionally--not only might it be okay to intentionally draw districts based on partisan lines, but it could be a defense against a charge of racial gerrymandering.

So what have been the consequences of the judicial non-involvement with respect to political gerrymandering? First is, I think, the legal argument, which is that we still have partisan gerrymandering claims. We just call them something else. We call them one-person/one-vote cases. We call them Section 2 Voting Rights Act cases or Shaw claims. Those are the tools now that are often used by political interest groups in order to express partisan gripes that they couldn't win out in the political process or with an authentic partisan gerrymandering claim.

I think I will leave, if others are interested, the discussion of polarization and competition to the first panel and just would refer you to the paper on that, but let me just say briefly that, for the most part at this point,

no one thinks that there is a political constraint on the redistricting process unless you live in one of those states which has a state law that restricts it.

With respect to racial gerrymandering, at least before the Shaw line of cases, everyone thought that what racial gerrymandering was about was the use of race, the intentional use of race by those in power to subjugate and under-represent those who are out of power.

The Supreme Court reinterpreted that or at least added an analytically distinct claim in Shaw v. Reno and its progeny that suddenly race, whenever it was the predominant factor in the district, would trigger strict scrutiny, and how do you show that race is the predominant factor? Well, by showing that race subordinated traditional districting principles like compactness, contiguity, and respect for political subdivisions.

The fact that it would trigger strict scrutiny does not mean that all districts drawn on the basis of race as the predominant factor were unconstitutional. It just meant that you would have to justify them as narrowly tailored to comply with the Voting Rights Act, which is a very difficult thing to do and in part requires some mind reading of Justice O'Connor, but it hasn't been completely

unsuccessful as those who know the Chicago Earmuff District can attest.

What have been the consequences of the Shaw line of cases? The first, as I say in my paper, is environmental—the number of trees that have been slaughtered in order to produce the law review commentary on this has been dramatic, that everyone—law professors in the voting rights world who got tenure in the 1990s—tended to do so on the backs of Shaw v. Reno. It was just because it is a very difficult case to square with other constitutional precedent, which is predicated on using the Fourteenth Amendment as a tool to prevent a caste system or subjugation. Even without a demonstration of actual injury, someone would have a Shaw claim.

What I think is worth realizing with the Shaw line of cases is that all of us--well, at least I think most of us in this field--thought that the availability of the Shaw claim coming into the 2000 round of redistricting would have flooded the courts, that this was going to be an avalanche. It turns out this is the dog that didn't bark. There is not a single Shaw claim that when has made its way to the Supreme Court, at least not in a full hearing, and we--I think most of us--thought that, hey, this would be another way that political parties would try and re-express partisan

gripes in a racialized form with the Shaw line of cases, yet they didn't.

I think one of the interesting questions is why didn't that dog bark, and there are a lot of reasons. One is that despite the fact that it is an "I know it when I see it" standard, sort of like pornography, that most redistricting officials knew it when they saw it, which means that, if you are going to draw districts which are squiggly-shaped, make sure they are not the heavily minority districts. That didn't stop people from drawing very funny-shaped white districts, but now that you have this additional constraint on the process, that was something that people would do.

Secondly, I think that there was not the same push by the Department of Justice or the NAACP or other interest groups to increase the number of majority/minority districts. This was, in part, because they have been so successful during the 1990s rounds, and the minority politicians who occupied those seats, specifically due to the aggressive enforcement earlier on, now they could defend their own interests. So that, I think, is another argument for why that dog didn't bark.

Finally, also, Easley v. Cromartie, the last incarnation of the Shaw line of cases, allowed incumbents or

parties who controlled the redistricting process to defend their drawing of particular lines as partisan-motivated as opposed to racial-motivated.

I think I am bordering on the tolerance of time here. So I will quickly go through the Voting Rights Act.

Section 5 of the Voting Rights Act is the area in the last year where I think there has been the most radical revolution. Whereas, before, using the standard articulated, Beer v. United States, most people thought that the way to avoid a denial of pre-clearance at the Justice Department was to maintain the same number of majority-minority districts and maintain comparable percentages in those majority-minority districts.

The Supreme Court in Georgia v. Ashcroft said that a state is allowed to opt for an increased number of influence districts, whatever an influence district means-- and that is, I think, an open-ended empirical question--so that you could actually decrease the number of districts in which minorities control the outcome and increase the number in which they have some substantial influence, whether it is 20 percent-, 25 percent-, 30 percent-minority districts. In fact, all of those numbers end up in the opinion. So it is hard to say exactly what an influence district is.

That decision, I think, significantly defangs Section 5 of the Voting Rights Act and prevents DOJ from denying pre-clearance to what would have been thought to have been retrogressive plans.

So what is going to be the consequence of this? I think that what is going to happen, if Texas is any indication, is that we could see that when Republicans controlled the redistricting process, they are more likely to apply the Beer standard to make sure there are majority-minority districts, and that when Democrats are controlling the redistricting process, they are more likely to try to spread out minority influence as efficiently as possible to maximize Democratic advantage for the reasons that were discussed in the previous panel.

Finally, let me talk a little bit about Section 2 of the Voting Rights Act, or I should say just looking more globally at Section 5 and Section 2 of the Voting Rights Act. The dramatic increase in the number of African-American and Hispanic legislators is a chief achievement of the Voting Rights Act following the 1990s and now sustained in the 2000 round.

Section 2 helped out in that regard, especially in the breaking of multi-member districts throughout the South into single-member districts in which minorities could be

elected, but primarily, I think it has become yet another tool in a lot of cases, certainly not all, for re-expression of partisan gripes whether it is by Republicans in the New Jersey redistricting process or Democrats more recently in Texas.

The temptation is that since this is the tool in your arsenal that it is one that you use in order to call partisan gerrymandering racial vote dilution, because that is the most hopeful way of getting it struck down.

Just last month, though, another curve ball was thrown into the jurisprudence where the First Circuit has sustained an influence district claim in Massachusetts. It was about a month ago in Metts v. Murphy that the First Circuit sustained an influence district claim which says that you don't have to be a majority in a single-member district in order to launch a valid Section 2 claim, that maybe even if you are less than a majority you can launch one of these claims. So there's additional confusion in an area which was already pretty cloudy.

I know I went pretty quickly through a lot of that. Let me turn it over to my able commentators to tell me where I went wrong.

MR. FRENZEL: Thanks very much.

Sam Hirsch, will you begin, please?

MR. HIRSCH: Sure.

Reading Nate's paper, it struck me that it was both a terrific paper and at the same time completely ordinary. Terrific that by invoking three themes very familiar to those of us who are attorneys, which are activism versus restraint, individual versus group rights, and rules versus standards, he managed to illuminate in a really beautiful way a particularly murky area of law; completely ordinary in that this is typical of Nate's scholarship.

I think he may be unique among legal academics in being able to combine a real social science perspective, a practitioner's wisdom, and first-rate legal analysis. So it is really an honor to be able to comment on his paper and also to do so with Dale Oldham.

I probably was involved at least in some small way in most of the cases that Nate cites in his paper post-2000, and the one common theme of all of them is I walk into the courtroom and see Dale.

[Laughter.]

MR. HIRSCH: So he obviously was key in advising the Republicans. I lean the other way, and I will try to keep my partisanship in check here.

Finally, I also just want to thank Congressman Frenzel and Tom and Bruce for putting this conference on. I think it is an extremely important topic, and I am glad to see that Brookings is investing in this topic for the long haul.

In Nate's paper, even more than in his oral presentation, there is really interesting and clever use of these three themes: activism and restraint, rules and standards, individual versus group rights. What I would like to do is to reiterate something that he says in his paper, which is these are all continua. They are not on/off switches. It is not like you have activism or restraint or a rule or a standard. Most things fall somewhere on a spectrum, and these are basically representations of the poles.

So, drawing on a little bit of personal experience in the last two years, I would like to raise some interesting issues that are going on in pending cases as well as recently resolved cases, but illuminating the way, following Nate, under these three themes.

So let's start with the one that is probably most familiar to non-attorneys, the idea of traditional activism versus traditional restraint.

Sometimes it is very obvious what activism and what restraint are in redistricting law. Other times, it is not. In Section 5 of the Voting Rights Act, you have a kind of odd thing. Usually activism means you rule in favor of the plaintiffs, and restraint means you rule in favor of the defendants. Everything is flipped in Section 5 because the state or the locality has to come to the D.C. Court and seek pre-clearance under Section 5 of the Voting Rights Act. So, in some ways, restraint is allowing the state to do what it wants, which means to rule in favor of the plaintiff.

The key new case in this area, as Nate mentioned, is Georgia v. Ashcroft, although the difference in opinion between the majority and dissent in Georgia v. Ashcroft is about influence districts which is, I think, something we all in the business understand as a somewhat murky concept.

The most important development in my view in Georgia v. Ashcroft was what all nine justices agreed about, and the main thing they agreed about in my view was that there was not a really meaningful distinction between a majority black district and what they refer to as a coalitional district, not an influence district, a coalitional district which is a district that, although less than half black in population, was likely to elect candidates preferred by black voters.

Typically, this will be pretty much certainly a Democratic district where blacks are either a majority of the Democratic primary electorate or a very substantial minority. You can count on predictable allies from non-black voters. I am using blacks here. Obviously, the same logic would apply to a Latino claim.

There is a question as to whether this is basically a federalism case where they were saying, "Let's be less tough on states and localities," or whether it is basically a racial integration or colorblindness case saying, "Let's move away from a world where we have majority black districts or overwhelmingly black, majority white districts or overwhelmingly white, and let's allow the law to tolerate more mixed districts."

The 5-4 alignment could lead you to either of these conclusions, and I just recently represented the State of North Carolina in what has become the first major follow-on case to Georgia v. Ashcroft, where ultimately the Justice Department and the State were able to settle effectively and reach agreement that the plans at issue were not retrogressive and, therefore, were okay under Section 5.

As Nate mentioned, there is an interesting other issue boiling up, which is if coalitional districts are okay under Section 5 of the Voting Rights Act where states are

saying we replaced a majority black district, but we replaced it with a coalitional district which is effectively the same, does that mean the plaintiffs now in Section 2 cases can come to court and demand the creation of a coalitional district, or can they demand that a coalitional district that is already in existence not be destroyed? That was the issue in Metts v. Murphy, which is the Rhode Island case just decided en banc by the First Circuit. It is unclear whether that will be going to the Supreme Court directly, although it might.

The same issue effectively was definitely already in the Supreme Court in a case where I represent the Democrats in Texas where a minority coalitional district in Fort Worth was destroyed by the new Texas redistricting plan, and we have asked the Court to rule that under Section 2, the distinction between coalitional districts and majority black districts should not hold, just as it does not hold under Section 5 according to Georgia v. Ashcroft.

The point there is we are asking them to use something that may have been cooked up in the atmosphere of judicial restraint for a piece of judicial activism to rule in favor of plaintiffs in a Section 2 case.

As an aside before leaving the activism/restraint spectrum, I would like to say for those of you who are in

the academic world, I think something that needs to be studied a lot more is the effect of state courts, because, in the '60s and now again in this decade, state courts have played a very important role. This is primarily because of a 1993 Supreme Court precedent that gave them precedence over federal courts in redistricting matters.

State courts often are elected, sometimes elected on partisan ballots, and a lot of these issues about partisanship and competition get very dicey when you are litigating in front of a state court of elected judges rather than a federal court of judges with life tenure and salary protection. So it is a different world, and it is something that really needs to be studied closely.

The second dimension that Nate focused on was individual versus group rights. This seems to be a stark distinction, but again, sometimes the two can meld.

We think of one-person/one-vote as an individual right to cast an undiluted vote, but it is also a group right not to effectively discriminate against those folks who live in areas of relative economic stagnation and in favor of those who live in relative economic growth. Traditionally, that is rural on the one hand, metropolitan on the other. Something that is actually an individual

right can be very easily translated or reconceived as a group right.

Section 2 of the Voting Rights Act has always been perceived as a group right to some extent, the idea that you should not have unequal opportunities among blacks, whites, Latinos to elect candidates of choice, but there is a way to reconceive it as an individual right which is a right to have the ability to cast an equally effective vote.

There is a very interesting piece of work being put together by Gary King and Jonathan Katz based on discussions that the three of us had during the earlier round of the Texas litigation that basically tries to examine minority voting strength on this basis.

Is it unfair to have a map where minorities are disproportionately put in noncompetitive districts because they just won't matter as much? It is a different way of thinking about Section 2 and thinking about minority vote dilution, but it is one that I think deserves further exploration, and we can talk about it more, if you like.

The last thing that Nate pulled together was the rules-versus-standards distinction. This is an old standard for attorneys. An example of a rule would be no mid-decade redistricting. That would get rid of what happened in Colorado and Texas, for example.

Vote dilution claims, whether they are based on race under Section 2 or on party, tend to be inherently standard-like, and this is their real risk. Everyone understands--I will put it in First Amendment terms--that discriminating against voters on the basis of their political viewpoint or partisan affiliation is problematic.

Everyone also understands that a certain amount of partisanship is inherent in redistricting. The question becomes how much is too much, and you get into a question of degree, and that is a classic sort of standards kind of problem because there is one clear rule.

In representing the Democratic plaintiff/appellants in Vieth v. Jubelirer, which is the Pennsylvania partisan gerrymandering case currently in the Supreme Court, we faced this problem, and we wanted to demonstrate to the court that there were fairly rule-like ways to approach this issue.

I don't know if Alan has distributed the handout. Let me walk through that. What this is--these are tables that were presented by Professor Ostdiek of Rice University who was our expert on partisan issues in the Texas litigation.

Effectively, what we decided legally was that we wanted to model this after a voting rights claim under

Section 2 where there are certain prerequisites the plaintiffs have to meet. Ultimately, they have to convince the court in the totality of circumstances that there is something desperately discriminatory going on.

We didn't want it to be a demand for proportional representation because single-member systems don't readily lend themselves to that, and we thought that the most we could hope for was a rule that prevented the thwarting of majority rule. In other words, the basic idea of democracy is that if you get more votes statewide, you should have at least a fighting chance of getting more seats, not a guarantee, but a fighting chance.

That if you had a system where you could consistently get a majority, maybe a narrow majority, but a majority of the votes and be certain you would never get as many seats as the guy who drew the map, that was what would cross the constitutional line.

Usually, you get into these fights in these cases about how do you measure partisanship, and someone says, "I think you should use the presidential race because none of those candidates are from here and there is no regional biases," and someone else says, "We should use a down-ticket race like a state superintendent of education." Other

people say you should use old races, you should use only very recent ones, and you get bogged down on these issues.

Our attitude was look at all of the races in the last decade. This is basically a decennial process. Look at all of them.

So we asked our expert to look at all 64 statewide contests in the State of Texas and plot a classic seats/vote curve. That is what you see in Graph 1 for the plan that was drawn by the court. A federal court drew the plan in 2001 that was used in the 2002 election. It is sort of a classic vote/seats curve. Whereas, the fraction of votes goes up, the fraction of seats goes up, and basically it runs, more or less, through the 50/50 point. So that if you get half the votes, you are going to get about half the seats.

Graph 2 on the next page is what happens under the new Republican-enacted map that was enacted in 2003 amid all the hoopla you all heard about. There, you see it is no longer really a curve.

As you get into the upper forties, the Republicans are getting close to 70 percent of the seats, and then they basically lock in at that level. That is 22 seats out of 322. That is why you get that sort of bizarre line just below the 70-percent mark on the Y axis.

If you go to Chart 2, this is just basically a chart showing how many of the seats go to the Republican candidates, the gray bar as being the court-drawn plan, the black bar as being the Republican, what we call the Republican gerrymandering. Dale will take issue with that, I am sure.

[Laughter.]

MR. HIRSCH: What you see there, most of the statewide candidates in Texas in the last decade who have won have been Republicans, and you get a variety of results with the gray bars under the court-drawn plan. Typically, about 20 seats would go Republican, about 12 would go Democratic, which I think says something about the accusations that that court-drawn plan was somehow a rather terrible Democratic gerrymander. It really wasn't.

Under the new plan, a huge number of the elections would result in 22 seats going Republican, but we thought the problem with that is you are mixing a lot of apples and oranges, some races where Democrats are winning, some races where Republicans are winning often by huge margins.

What if you normalized them all to simulate a 50/50 result? That is what the next page does, Chart 1. It says if we had a tied election statewide, how many seats would each party get? Again, under the gray bars

representing the court-drawn plan, it is typically about 17 out of 32. It is not perfectly symmetric. It is not 16 out of 32, which would be half the seats for half the votes, but it is pretty close and there is some spread.

If you look at the black bars, what you see is that even if Democrats were getting just as many votes as Republicans, they would be getting 10 seats to the Republicans' 22. That is that tall black bar all the way to the right, and that is what we think is a sign of a strong partisan bias, but what is really notable is not a single election results in the Republicans getting 16 seats, half the seats with half the vote, much less, less than 16.

So you get a situation where under 64 different patterns of distribution of vote across the state, Republicans are guaranteed a majority of seats, in all likelihood, more than a two-third majority of seats. So, with half the vote, they get two-thirds of the seats. With the same amount of votes, my party gets less than a third.

The tables that follow are just the exact same thing but expressed in tabular form, and you see in the right-hand column of Table 1, 38 of the 64 elections result in a 22-to-10 split of seats, even after you have normalized these elections to represent tied votes statewide.

The only thing the remaining pages do is to break that down to show that--and if you flip to Table 2--if you confine yourself to more recent elections, not from the last 12 years, but the last 4 years, the pattern is even starker where 17 out of 20 elections result in a 22-to-10 split, 3 out of 20 result in a 21-to-11 split.

The idea here is to say that if it is basically unimaginable that a party with half the vote or a slim majority could ever get half the seats, that is just going too far. So it is an example of taking something that is famously mushy--a partisan gerrymandering claim--and trying to give it some rule-like quality so that it has enough teeth to attract a court and seem to be a judicially manageable standard.

With that, I will pass the microphone to Dale who I am sure disagrees with most of it.

MR. FRENZEL: Dale?

MR. OLDHAM: Just largely the part about Texas.

[Laughter.]

MR. OLDHAM: I am actually not going to deal with Texas first. I am going to get back to that because I want to deal with Professor Persily's paper for just a moment.

I actually found it to be a very good sort of overview of where we are, and I am sure that is what you

intended it to be. The only thing I would cite to is--and Dr. Hofeller has heard me say this numerous, numerous times--in terms of when you are speaking to someone who is not a member of the usual suspects (and a large portion of the people in this room are). Every time we go into a courtroom, it is easier to count who isn't there instead of who is. The problem becomes redistricting is full of paradoxes. That is why the average reporter, the average politician, the average voter looking in on this box from the outside is totally confused.

It is why reporters have a hard time writing stories about this because every one of your political instincts that you would naturally have that would drive you to a conclusion without thinking deeply upon the topic first will take you to exactly the wrong conclusion, and that is what causes large portions of the problem.

What we have here is this is a good exposition of what is going on, but the devil is in the details. In some ways, I don't think some of the traditional ways, the three ways in which you tried to pigeonhole the cases really work well for redistricting cases.

This is kind of an aside, but one of the things we did in 1990 was realize that the Westlaw key system was useless when it came to redistricting cases. We outlined

them ourselves and essentially created an outline of what was then existing redistricting law. It helped us tremendously in our research. You have to think about this instead from kind of basic redistricting questions instead of the traditional ways we think about the law. What are your cases under 10 percent? Where are we talking about a plan that involves an incumbency protection?

You have to look at the actual fundamental issues that someone drawing a map would be looking at and someone looking at it from a political perspective would be looking at it, and then you have to reanalyze the cases inside of that concept. That will suddenly bring tremendous illumination.

It can also bring confusion, and I am going to discuss one of the things I think brings confusion because you actually point to one of these which is this difference between congressional and legislative.

Those of us who are lawyers and have been raised on equal protection doctrine and rational scrutiny and strict scrutiny all understand that distinction and are used to that from the Fourteenth Amendment. People tend to forget that the command for one-person/one-vote comes from a different place in the Constitution for legislative districts than it comes from congressional districts.

For congressional districts, it is a command. It is a requirement. It is in Article I. For legislative districts, it is a question that is traditionally decided by traditional equal protection standards.

The court, when it first tried to apply those, discovered that they didn't apply neatly to this area. So instead they came up with essentially this tripartite kind of arrangement that was put out in White and Gaffney, the main case from Virginia, where somewhere above 16.25--and if you believe the court at the time, it isn't very far above 16.25--any map is going to be per se unconstitutional.

Between 16.25 and, I would suggest, 9.9 percent--I know my opponents in Georgia would suggest it is 10--the state is required to justify the deviation. Below 9.9 percent, the plaintiffs have to prove that the deviation is in some shape, form, or fashion discriminatory.

That is a little different than we are used to seeing in equal protection, and it partially occurs because standard equal protection analysis is so rudderless in that area, they had to do something to bring it into that concept. So, until you begin to look at it in terms of the specific problems, I think it is difficult for a lot of people to be able to really understand what is going on here.

One thing I really did like about the paper is you touched on a problem that, while they talk about it being individual rights, you can't talk individual rights and group rights in the area of redistricting. They are really inseparable in a lot of ways. You can't think about individual rights wholly without thinking about group rights.

Personally, I think one of the reasons the court said that was they really didn't want to go through the idea of putting in class actions for all of these cases. It is a quick way out of the class-action morass of having to certify class before you do each one of these cases, and it really just may be a shorthand, but it is hard to separate out that individual-and-group-right aspect.

Where you hit on this and where I think one of the key problems that we have seen in the future is we probably haven't seen the last of Shaw, and this is where that problem really comes to the fore because you talked about this issue and the problem in Shaw. A problem from my perspective--and I am not a fan of Shaw--is that you can't identify what the harm is.

If you look at it for just a second, in the Shaw case, yes, they drew a bunch of funny-looking majority black districts. Were blacks over-represented in North Carolina's

congressional delegation after Shaw? No. Were whites under-represented in North Carolina after Shaw? No.

I think you really have to look at Shaw in terms of--and the majority on the Court wouldn't like the use of this term--reverse discrimination cases. In some ways, it is an outgrowth of Adarand and that whole line of cases. The 5-4 majority is the same in that case as in Adarand, but there is a distinct difference.

You are talking about a college admission. You are talking about a promotion. You are talking about a contract. You have got a specific person who is harmed. It cost them money. It cost them some tangible thing. In this case, the majority could not state what the harm was other than to say it creates a stereotype.

Now, I am a conservative. I am a Republican. I know that if anybody said anything like that in the Federalist Society about any other case, laughter would start. So what really is the harm in this case? This is a case where you have now identified not two, not three, but I think at least four--it may be five--distinct positions on the Court because the Court has managed to drive itself into a place where it is self-contradictory from its own decisions.

Several members of the Court recognized the self-contradiction. They all have different ways of solving it, however, and that is why they are in the self-contradiction.

Three justices have apparently identified themselves--Kennedy, Scalia, Thomas--from the concept that we will cut loose the Gordian knot by saying, as it is currently being applied, the Voting Rights Act is unconstitutional. That is a simple solution. It is logical. It is consistent. I personally don't think it is wise, but it does meet all of those, the basic concept of logical consistency.

You also have Justice Stevens, who it appears is bringing Justice Souter in tow, who skewered the Shaw majority and has continued to do so with a very simple piece of logic: that if partisan gerrymanders aren't a subject for the Court's review, then clearly you can't sit back and review them when they only apply to racial minorities. It is why you get to the situation that Dr. Persily mentioned a moment ago that the squiggly districts are the white districts. It is okay to draw them without any reference to geography. You just can't draw the minority districts without any reference to geography.

Stevens catches the conflict, and of course, Stevens pointed out that in the predecessor case to Shaw,

Pope v. Blue, he thought that was a political gerrymander, and the Court should have reviewed it. This is the problem. He has a totally different solution for eliminating that conflict; that is, we are going to look at all of these strangely shaped districts. They are going to be a red flag for us across the board.

Then you have Justices Breyer and Ginsburg whose positions are not nearly as well elucidated for us at this point because they haven't had an opportunity to write on as many cases, but so far, they have pretty much supported the positions of most of the minority groups as they have come before the Court.

Then, of course, you get to the two cruxes of the matter, Justices O'Connor and Rehnquist. Rehnquist is admittedly a bit of an enigma on this subject. It is not quite clear exactly where he is. He could be with Scalia and Thomas and Kennedy. He could be with O'Connor. He may have yet another position that is different from them all, but he hasn't written very much in most of these cases. He has merely voted with one group or the other.

But Justice O'Connor is the one who actually has attempted to rationalize this and right now is the crux and the person who cast the fifth vote on all the cases. This is why something that you noted, but probably didn't fully

explain, is unlike Justice Kennedy who wrote the Miller opinion, Justice O'Connor has said pretty clearly that shape is not just a part of a Shaw proof; it is the threshold of a Shaw proof. So, if you don't have a strangely shaped minority district, you can't have a Shaw case.

You are right. Most people who have drawn this round picked that up, but the question is: How long will that remain the law? This is an area where depending on which justice goes off the Court first, who replaces them, what does that justice look like, it could create an entire sea-change in this area of the law and could, in fact, create a whole new round of litigation as a result.

I think that is the thing we are all watching, and of course, the truly serious thing about it is it really doesn't matter in some ways who the president is because they won't know to ask this that deeply, and what his ideological perspective is is probably not terribly indicative of which way he will go on this issue. So it is going to be a real mystery. It will be, frankly, a real crap shoot as to how that is going to go over the next cycle of litigation.

Let me move on because I do have to respond to what Sam said, and I know I am supposed to respond to your paper, but I can't let that go.

On the influence districts, Sam makes one very good point. It is very hazy, and there is also another aspect of influence districts. There are really two kinds of an influence district. There is an influence district where a group is alleging that we can, with a coalition of other voters, elect a minority out of this district. There is yet another type of influence district which is absolutely no different whatsoever from the types of districts that were litigated against in the South and in other parts of the country throughout the '60s and '70s and '80s where, yes, minorities are voting for this non-Hispanic white Democrat, but it is because they have no hope of getting their guy in and it is the lesser of evils.

That is exactly the argument. This influence district was exactly the argument that was made by numerous--who I guess I will leave nameless since they aren't here today--expert witnesses that testified for jurisdictions from Mississippi to Alabama to the City of Mobile, to the City of Norfolk, all across this country making exactly that allegation. By God, our map is representative because look at all of these minority candidates of choice we have. These nice non-Hispanic, white Democrats were being elected to these seats, and see, they vote for them in the general election against the Republican.

It goes to an issue that Judge Joe Flatt of the Eleventh Circuit talked about in the Solomon v. Liberty County case. In some ways, in viewing polarization, you have to look at why and how it polarizes. Is polarization because of ideological differences, or is polarization a function of race? That becomes a real issue when you look at it.

You will note a large portion of most Republican voters, they will vote for Hispanics, they will vote for African Americans when they are conservatives. You are looking at me, but as I have always said, the bravest people I know are African-American conservatives. They really are. If the rest of us took the kind of flack they took, we wouldn't do it, and we know that is the case. And you consistently see Republicans will vote for them when they are in those elections.

There are a group of white Democrats, however, who when the candidate of their party is African American or is Hispanic, even though they are Democrats, will turn around and vote for the Republican as long as he isn't African American or Hispanic. So the question really becomes: Where is the polarization coming from, and what is the group of voters that causes the polarization?

When you begin to understand that aspect of it, you understand both the frustration of minorities, and you understand that that type of influence district is not a fix for that frustration.

Now to Texas. Texas was described in the 1990s by the Almanac of American Politics as the most gerrymandered state in the Union, and it wasn't a Republican gerrymander. We also did seat vote curve analyses, and essentially, a Republican had to get 57, 58 percent of the statewide vote in Texas before they began to take the majority of the seats.

Yeah, I know. I don't agree with your graphs either.

[Laughter.]

MR. HIRSCH: Your expert did actually in litigation.

MR. OLDHAM: Well, not exactly.

When the court drew the map in Texas, it was ameliorated to some extent. The two new seats went to Republicans. That did not change the fact that Texas was still a gerrymander map.

Republicans redrew the map. The one thing I would have you look at that map--and this is a question of what is a gerrymander--is look at the 1990s map. Look at the map

that was just passed. Ignore the numbers for just a second, and follow your eyes and see which one you will think is the gerrymander map. It won't be a close question.

My buddy Sam here litigated a case in Michigan. They described that as one of the most gerrymandered maps in the country. Look at that map. Look at Georgia, when in the litigation I am just facing, I have constantly been told was a fair map. Your eyes won't lie to you. It will be obvious.

Is it a fair map if you get to a desired political result, but to do so, you have to turn the state into a pile of spaghetti? It goes down to a much more basic question that we seldom talk about as we kind of brush through redistricting, but what is it that you are trying to represent in a district? Is it that you were trying to get to a fair political result, an allocation of the seats that looks somewhat like proportionality, or is what you are trying to do is get to a result that represents fairly sections of the state or sections of the county that you are proceeding with?

Can I take it by that, I am running low on time?

MR. FRENZEL: That is a fair interpretation.

MR. OLDHAM: I have been reading judges for a long time.

[Laughter.]

MR. OLDHAM: So I kind of leave you with that thought, and I will hand it back to the moderator, but I would like to thank Professor Persily for his paper. While I can't say anything about Georgia, I would also like to thank him for his service there. Thank you.

[Laughter.]

MR. FRENZEL: The moderator's cup runneth over.

I think that we will ask our beginning presenter, Nate, if he would like to have a couple of minutes to express his views on those of the discussants. We will probably give Sam about a minute of rebuttal. We are overdue for lunch, anyway. Our nutritional deprivation program is not intentional. We are going to get you there as soon as we can.

Go ahead, Nate.

MR. PERSILY: I will just take a minute, because I don't really disagree with most of what was said.

Let me point out where I do agree on things that I actually didn't talk about which is Dale's comment or criticism that the way to think about redistricting is to reevaluate the cases according to things like 10-percent threshold. I completely agree with that. I mean, I think that is probably right in the small-c catholic sort of

delineations here. The categories are, if anything, an attempt to avoid a 150-page paper as well as maybe to talk about it in the ways that most of us in the field have talked about it.

I am glad that Sam picked up on the rules/standards, activism and restraint, and group rights and individual rights discussion because I don't think in my oral commentary I spoke about it as much, but there are other dimensions that you can look at in these cases.

The one I didn't really mention is the sort of dimension between representation on the one hand and competition on the other, and so you alluded to that at the end, which is, to a certain extent, there are sometimes tradeoffs between representation and competition, that sometimes the most competitive plan will end up being the least representative and vice versa.

I am going to leave it with that, and I will turn it over to them, if they have anything they want to say.

MR. FRENZEL: You get the moderator's prize for the length of your discussion.

Sam, could you equal that?

MR. HIRSCH: I will try to be even shorter.

First of all, although I am a Democrat, I didn't, in fact, probably would not have defended the Georgia maps.

That is something that when you work for the Party, you have got to do everything, I suppose, but I get to pick and choose, and I did not pick and choose that one.

Secondly, on Texas, after Professor Ostdiek presented the kinds of tables and analyses that I summarized at lightning speed and hopefully in a comprehensible way, the State's expert, the Republicans' expert, it was Keith Gaddy of the University of Oklahoma, a terrific guy, who basically filed a report saying, "I agree." He was deposed. He said, "I really agree," and then they pulled him at trial and did not put up an expert on these issues. So I think the facts I have laid out through a very quick summary of Ostdiek's report hold very well.

Finally, as to the court-drawn plan being a Democratic gerrymander, basically there are 14 districts in that map where the Republican candidate for every single statewide office won in 2000 and 2002, 11 where every single Democratic candidate won. That is 25 of the 32.

The other seven were competitive seats. In some elections, they went one way; in some elections, they went the other. But what happened is six of those seven leaned Republican in terms of how they did in these statewide elections. Six of the seven also--a different six, but six of the seven--also actually elected Democrats to Congress.

Henry Bonilla, a Mexican-American Republican, managed to win one of the competitive seats, and then there were six Anglo Democrats who won the other six competitive seats mostly because they are conservative or moderate Democrats with a lot of seniority who have built up reputations as centrists and could convince voters to split their tickets. That is why we ended up with a narrow majority in the congressional delegation in what I certainly admit is a Republican State, but you had seven competitive seats and the voters, not the map-makers, decided who would represent those constituents in Congress, and that is as it should be.

If the Republicans had simply run strong candidates over the course of this decade, my guess is under the court-drawn map, they would have ended up with a 20-to-12 advantage. All they had to do was win in the old-fashioned way, at the ballot booth, not through fancy political cartography.

MR. FRENZEL: Thank you very much, Dale and Sam and Nate.

I believe if you go out the rear door, you will find a buffet lunch set up, to the left. Thank you very much.

You can bring your food back in here. If it is really a nice day, you can wander in the front garden.

We are going to try to resume somewhere near 1:15. So bolt your food, and thank you very much for your attention.

[Luncheon break.]