Showcase Panel II

Judicial Decisionmaking: The Case of Judicial Oversight of the Political Process

Sponsored by: Free Speech & Election Law and Civil Rights

Dr. Abigail Thernstrom, *U.S. Civil Rights Commission*
Professor Nelson Lund, *George Mason Law School*
Professor Dan Lowenstein, *UCLA Law School*
Mr. Michael Carvin, *Jones, Day, Reavis & Pogue; Counsel in Bush v. Gore*
Mr. Joshua Rosenkranz, *President and CEO, Brennan Center, NYU Law School*
Mr. Paul Clement, *Deputy U.S. Solicitor General (moderator)*

MR. CLEMENT: Thank you and good morning. It's my immense pleasure to moderate, or at least attempt to moderate, this morning's panel on judicial oversight of the political process. Before I introduce our distinguished panelists, let me say that the events of the last year make amply clear why this particular topic was chosen as a Showcase Panel.

In fact, it was exactly one year ago to the day — November 16, 2000 — that the Florida Democratic Party and Al Gore filed a law suit in the 2d Circuit Court for Leon County, Florida. And, as all of you know, that lawsuit spawned two remarkable Supreme Court decisions. It managed to convert countless former Supreme Court law clerks into TV commentators and it made many of you, and many lawyers in Washington, D.C., to be sure, temporary experts on Article II, Section 1, Clause 2 of the Constitution, and the provisions in 5 U.S.C. It has had a tremendous impact on the Court and the judicial process and, presumably, the political process as we move forward.

Without further ado, I would like briefly to introduce our panel, and I will do that in the order that they will speak.

Abigail Thernstrom is a Senior Fellow of the Manhattan Institute; a member of the Massachusetts State Board of Education; and, most relevantly for this morning's discussion, a Commissioner on the United States Commission for Civil Rights. She is an author, as well, and occasionally a co-author with her husband. In that capacity, she's written a number of influential books, such as *America in Black and White*, *One Nation Indivisible* and *Whose Votes Count? Affirmative Action in Minority Voting Rights*.

Our next speaker will be Professor Nelson Lund, who is a professor and former Associate Dean at the George Mason University School of Law. Professor Lund has had a distinguished career in both academia and government. In Government, he served in a variety of capacities in the Justice Department, including in the Solicitor General's Office, the Office of Legal Counsel, and the White House Counsel's Office. In his academic career, he has written on a variety of subjects and, again most particularly relevant here, on topics involving election law.

Next, we will hear from Professor Dan Lowenstein. He is a Professor of Law at UCLA Law School. After graduation from Harvard Law School, Professor Lowenstein went to work for the newly elected Secretary of State of California, Edmond Brown. While working for Mr. Brown, he specialized in election law and was the main drafter of the Political Reform Act, which is the act that kicked off, with earnest, the initiative process in California, which we have all seen the results of over the years. He is currently, in his academic position, a leading expert on election law. He is a co-author of the leading textbook on election law, and he has represented Democratic members of the House of Representatives in litigation regarding reapportionment and the constitutionality of term limits.

Our next speaker will be Mike Carvin from the Law Firm of Jones Day in Washington. Mike, too, has had a distinguished career in government before going to Jones Day. He served in the Civil Rights Division. He served in the Office of Legal Counsel in the Justice Department. Of course, Mike played a prominent role in the litigation involving *Bush v. Gore* and some of the predecessor cases, most prominently in the Florida Supreme Court.

Finally, we'll hear from Joshua Rosenkranz. Josh is the founder and current President of the Brennan Center for Justice at NYU Law School. The Brennan Center does a number of things, but one of its principal areas of focus is on election law and election issues — everything from campaign finance to ballot access. In particular, the Center has represented people as diverse as Steve Forbes, John McCain and Ralph Nader in a variety of ballot access litigation.

Josh, before he came to the Brennan Center, had a distinguished career in the Appellate Defender's Office and clerked for a variety of folks, from Justice Brennan to Justice Scalia.

DR. THERNSTROM: I'm always delighted to be at the Federalist Society. Even though I am not a lawyer, I feel that this is one of my most important homes, so I thank the Federalist Society for inviting me.

As everybody in this audience surely knows, this past Monday, the *New York Times*, the *Wall Street Journal*, and other papers carried a long analysis of the million-dollar study of the Florida election returns that was con-

ducted by a consortium of eight news organizations. Voter error was an implicit theme that ran through all the stories. The *New York Times*, however, did not explicitly admit to the problem of voter mistakes. The consortium's analysis, the *Times* said, "illuminates in detail the weakness of Florida's system that prevented many from voting as they intended." In other words, the system prevented voters from casting ballots as they wished.

The black ballot error rate was more than three times that of whites, the consortium found. And that, by the way, is a figure that is much lower than what the U.S. Commission on Civil Rights continues to advertise.

The *Times* quoted political scientist Philip Klinkner, who wondered whether the voting system was "set up" to discriminate against blacks, to which the *Times* added its own editorial. "To sense the pattern of seeming discrimination raises suspicions," it said.

The story also quoted historian Alan J. Lichtman, who did what I regard as very shoddy statistical work for the report on Florida issued by the U.S. Commission on Civil Rights. "Not just disparate impact," Lichtman said, "but disparate treatment is what the Consortium's findings suggest."

There's no question that the rate of ballot error was higher for blacks than whites, for reasons that are not entirely clear. Education was one factor, the *Times* said. I suspect it was a much bigger factor than the Consortium believed. Blacks with less than nine years of school are likely to be elderly, basically illiterate; in addition, many may have been first-time voters. That, of course, is a small group. More important, years of schooling—that is, years spent warming a seat—which the Consortium looked at, do not measure actual literacy levels. And average black literacy levels are very low—suggesting a criminal failure on the part of American educators. At the end of high school, after twelve years of schooling, blacks typically read at a 7th grade level. That average, of course, means that half are reading below the 7th grade level. Ballot instructions are, in a way, a literacy test, and until we close the racial gap in academic achievement, black ballot error rates are likely to be higher than those of whites.

Neither the *Times* nor the U.S. Commission on Civil Rights, however, recognized the concept of voter error, as opposed to disenfranchisement. The Commission's majority report, in a masterful bit of obfuscation, declared that "persons living in a county with a substantial African-American of people-of-color population are more likely to have their ballots spoiled or discounted." Have their ballots spoiled by whom? A spoiler in the middle of the night? Jeb Bush; perhaps Kathryn Harris? It is a serious, and it is an irresponsible charge.

Needless to say, black disfranchisement was once all too real. In 1965 when the Voting Rights Act was passed, only 6.7 percent of eligible black voters in Mississippi were actually registered and it was not because they did not want to vote. But, with the passage of the Voting Rights Act, that problem was largely solved. By the early 1970s, the civil rights community, the courts, and the Department of Justice had moved on to the more controversial and complex problem of alleged voter dilution. Astonishingly, however, in the wake of the 2000 November election, disfranchisement, in the basic sense of votes cast and properly counted, has been resurrected as an issue, having lain dormant for more than 30 years.

Thus, today much of the media and those on the political left have circled back to the concerns of many decades ago when America was a very different place. Little has changed, they say; America is still a nation that denies the right to vote to blacks. The whole argument is symptomatic of a larger problem. When it comes to race, the left never moves on. It's always 1960 in Mississippi, wherever they look. But this racism forever and everywhere view is dangerously out of sync with reality. The past is not the present. We have been steadily moving forward. And nothing we saw in Florida can legitimately be called disfranchisement.

The courts obviously got dragged into the political thicket in Florida. But the problems that resulted in over-votes, hanging chads, and the like — none of them lend themselves to judicial resolution. Legislative action can make elections a bit more voter-friendly, perhaps. Poll workers can be better trained, maybe. But elections will never be perfect. Error-proof voters are a fantasy. Some voters will make mistakes. The problem will be particularly severe among black voters, I suspect, as long as black literacy rates remain so disproportionately low. And that suggests that better schools — not the courts and not Congress — may be the real remedy to the problem that most concerns those who studied the 2000 election: the high rate of black voter error.

Thank you very much.

PROFESSOR LUND: I am going to start with a very simple-minded idea. The federal courts should interfere in the electoral process whenever the law requires them to do so, and not otherwise. This simple point should leave the courts with a correspondingly simple question in every case: What does the law require? Answering that question will often be difficult, of course, but no more difficult than it is in a thousand other areas of the law. I see no reason at all for giving the electoral process some kind of special treatment, whether in the direction of special hesitation by the courts or in the direction of extra aggressiveness.

Bush v. Gore illustrates what it means to treat the electoral process issues like any other legal issues. And I should note at the outset that almost every commentator in America has misunderstood that decision. In the case of our friends on the left, that should be no surprise, since they misunderstand almost everything. What is more troubling, though, is how many prominent conservatives have been equally misguided about *Bush v. Gore*. Ever since the Federalist Society

was founded some 20 years ago, we have been aspiring to be more principled—and to have better principles—than the dominant left-wing legal establishment. I think our response to *Bush v. Gore* calls our success into question.

Fortunately for you, time will not permit me to remind you of all the fascinating details of the process that culminated in the Supreme Court's decision last December. I will just set the stage by very briefly summarizing the holding in the case.

After the ballots were first counted in Florida, Bush was ahead, but we had a statistical tie and Gore filed a lawsuit. The Florida Supreme Court eventually ordered a partial and selective statewide hand recount. At the same time, the court gave Gore credit for votes he had picked up in certain counties that had initiated complete recounts of their ballots. Some of those recounts had been finished while others had not.

The U.S. Supreme Court held that the Florida court order violated the Equal Protection Clause. That holding followed almost ineluctably from the Court's geographic vote dilution precedents, starting with *Reynolds v. Sims*, which established the one man/one vote rule. In *Reynolds* and other early cases, the Supreme Court had used the stuffing of ballot boxes as the paradigmatic example of vote dilution. What the Florida court did was simply a variant on that practice.

In Florida, the court ordered the *selective* addition of legal ballots, which has exactly the same effect as the addition of illegal ballots. Or, to put it another way, the Florida court devised a complex system of vote weighting, in which certain kinds of ballots were more likely to be counted as legal votes in some places than in others, thus discriminating for and against certain different groups of voters based on where they happened to reside. The complexity of the geographic vote dilution ordered by the Florida court did not convert it into something other than vote dilution.

In light of the precedents, then, this was an easy case. And one sign of just how easy it was can be found in the dissenting opinions. Not a single one of the dissenters offered any substantive criticism of the majority's legal analysis.

There *is* another way of looking at the case, though, which probably never even occurred to the dissenters. Even if this was an easy case under the precedents, it is not an easy case under the Constitution. Or, more likely, it is an easy case under the Constitution, but it should have come out the other way. I think that argument is almost certainly correct.

The Court's vote dilution decisions, beginning with *Reynolds v. Sims*, have no discernible basis in the Constitution. Now, this quaint idea of sticking with the Constitution rather than with the Supreme Court's bogus precedents has considerable merit if it means overruling *Reynolds* and all its progeny. The Court's critics, however, including its conservative critics, have emphatically not taken this approach, preferring instead to assert that the opinion in *Bush v. Gore* was unconvincing, or that it may lead to undesirable consequences, or that it is somehow inconsistent with some vaguely described conservative jurisprudence.

Now, suppose that the Court had gone back to the Constitution instead of the precedents in *Bush v. Gore*. I think that would have raised some genuinely difficult legal questions. First, you would have to ask whether the recount ordered by the Florida Supreme Court violated Article II of the Constitution, as Chief Justice Rehnquist, along with Scalia and Thomas, argued in a concurring opinion.

I believe that the conclusion Rehnquist reached is correct, but I do not believe that it is clearly or obviously correct. In the interest of time, let's just assume for the moment that Rehnquist was right. That brings us, I think, to what is the most difficult issue of all, which is whether the Court should have held that *Bush v. Gore* was non-justiciable under the so-called Political Question Doctrine.

Nobody on the Court contended that the case was non-justiciable, presumably because there was a very clear 1892 precedent to the contrary. But that does not mean they could not have revisited the justiciability issue, and maybe they should have. If they were going to revisit the 1892 precedent, though, I think they should have also been willing to take a hard look at the rest of the Political Question precedents as well. Very briefly, here is what I think they should have found, if they had done that.

There are lots of political questions that should be decided by institutions of government other than the courts. But the Supreme Court's Political Question Doctrine is almost completely useless in figuring out what those issues are. The Doctrine is at least as old as *Marbury v. Madison*, but its modern formulation came in *Baker v. Carr*. That case held, ironically though probably correctly, that geographic vote dilution claims are justiciable, thus paving the way for *Reynolds v. Sims.*

Justice Brennan's opinion in *Baker v. Carr* offered a legal test that I think basically boils down to something like this: Whenever we do not think it would be a good idea for us to perform what *Marbury* said was emphatically the province and duty of the judicial department, we will call it a non-justiciable political question.

In contrast to what the Court announced in *Baker*, the right way to analyze a Political Question issue is to ask whether the Constitution assigns the authority to make final decisions about an issue to some institution other than the federal courts. Under that standard, are the issues raised in Rehnquist's concurrence justiciable or not? I think that is a hard question. Article II and the Twelfth Amendment *can* be read to assign Congress the exclusive authority to rule on the validity of electoral votes. But that reading is not compelled by the text, and I am not entirely sure where an adequate analysis of the Constitution's history and structure would lead.

But I am sure that it would not lead down the road taken by Justice Breyer in his dissent in *Bush v. Gore*. Without quite making a non-justiciability argument, Breyer argues that the Constitution should be read to offer the courts a "counsel of restraint." He finds a few clues to this counsel in the Constitution and a few more in congressional practice. But he comes to rest, finally, on a self-serving political rationale. "*Above all*," he says, "in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the court itself." This politicized approach to judging makes explicit what I think was implicit in *Baker v. Carr*, and it is exactly this approach that the *Bush v. Gore* majority rejected.

It is also the approach that I had thought the Federalist Society was founded to combat. But when I see how few conservative commentators have endorsed both the court's decisionand its opinion, I cannot help wondering whether we have almost come to the point where someone could say that we are all Brennanites now.

Thank you.

MR. CLEMENT: We will next hear from Professor Lowenstein.

PROFESSOR LOWENSTEIN: Thank you, Paul.

I am going to talk rather generally about the question of judicial review, especially constitutional review, of election laws and procedures. To make it not too abstract, I will try to give some examples as I go along.

Most of my colleagues at UCLA would roll up their eyes with horror and/or disbelief at the thought that I might be to the left of center on a panel

My examples were not exactly chosen for this reason, but I am happy to say they are fairly well calculated to tweak the noses on the sea of conservative faces that I would be seeing, if I could see anything with this bright light that is shining in my face.

The most influential statement of the principles of judicial review under the Constitution is the famous footnote in the *Carolene Products* case. It was decided in the late 1930s, when the Supreme Court was rapidly bailing out on the practice of reviewing, in any kind of aggressive way, various forms of economic and social regulations. The general reason given for that was that these are matters that, in a Democratic society, ought to be decided through the political process. Those who did not like the regulations that were being adopted should find the remedy in the political process, not through the courts, the courts not being particularly qualified to resolve such matters.

But, footnote four gave three types of exceptional cases in which judicial review of a more aggressive nature might be appropriate. One — probably the least controversial — applies to cases where there is a pretty specific provision of the Constitution that decides the matter. If I understand Dean Lund's comments just now, he believes all constitutional cases come within that. I do not agree with that, for reasons I will mention in a minute. In some cases I do; but not too many.

In election law, I think the most prominent example is the *U.S. Term Limits* case, in which the Supreme Court struck down congressional term limits. Although that was a five-to-four decision in which the so-called conservative justices dissented, I think that is one of the easiest constitutional cases that has ever gone up to the Supreme Court.

Although the language of the Constitution itself is ambiguous, a study of the debates in the Philadelphia Convention and of early commentators on the qualifications clauses, and a remarkably unanimous body of precedent over a very long period of time in state and federal courts all make it quite clear that neither the states nor Congress can set qualifications for being elected to Congress, other than those that are set forth in the Constitution. Fortunately, by a five-to-four decision, the court got that one right under the law.

If you want to see details of that, I published an article going into exhaustive analysis shortly before that case was decided, I'm happy to say, in the Federalist Society's publication, the *Harvard Journal of Law and Policy*. It does not mean that the Federalist Society necessarily endorses the views set forth in that article.

The reason that, unlike Dean Lund, most people who study constitutional law do not think that most cases are so specifically decided by the Constitution is that most of them come up under portions of the Constitution such as the 1st Amendment and the 14th Amendment that are very, very broad in their wording, that are susceptible to a very wide range of legitimate meanings.

The second category that the court identified was those cases in which the political process disadvantages discrete and insular minorities. Obviously, that has been a very important aspect of constitutional law. There are some cases in which it comes into play in election law, but it has not been a predominant theme in election law. I am going to pass over it in the interest of time. If it comes up later, I can comment on it.

But the third one is the one that is most obviously relevant. And that is, they said, when restrictions on the political process may interfere with the ability of the political process to repeal or change laws that are unfair or that are bad in some way, then it may be the job of the courts to clean up the political process.

That is the approach that I want to criticize because it assumes that, whereas economic and social regulations raise questions that are controversial and that everybody is going to disagree on and that the only way to resolve them

is through the political process, that there is some neutral understanding — consensual understanding, perhaps — of what a properly functioning electoral process or political process is. And, therefore, the courts can apply neutral standards to fix it up.

Now, it's commonly said — and I certainly agree with this; I think most of us probably do — that the function served by our Constitution is not to impose a particular theory of government or society, but rather to set up a structure in which those who hold different views of society and government can debate those differences and work out their differences, either through compromise or persuasion. The simple point that I would make is: that should apply to people who hold different political theories, as well as those who hold different social and economic theories, because, in fact, if we look at the issues that come up in connection with the electoral system, whether they be districting or campaign finance or political party regulation — a whole host of issues — we find that people differ on those things, just as they do on economic and social regulation.

I will just mention this; I do not have time to go into detail. *Carolene Products* has been updated from time to time. There was an influential book by John Hart Ely around 1980, called *Democracy and Distrust*.

More recently, in my field of election law, the predominant view, which I think has been quite wrong, is that the key to election law, at least under the Constitution, is to prevent entrenchment or what one group of authors calls "partisan lock-ups" — conspiracies by parties to freeze out other parties. The analysis that these authors present, I think, is just superficial. I do not have time to do justice to the shallowness of these academic approaches. So, I will just state that in a conclusory way.

Now, because I do not agree with that prong of *Carolene Products* does not mean that I do not think there should be judicial review. I agree with Dean Lund. I do not think it should be approached especially differently when we are dealing with election matters than when we are dealing with other matters that come up under the Constitution.

But I do not think that we can say, "just apply the law," because the 1st Amendment and the 14th Amendment are too general to make that very helpful in most situations. I do not think there is a theoretical approach, such as *Carolene Products* or any of these modern variants, that is really going to help us. I just favor case-by-case adjudication using good judgment, using restraint, and using what we very rarely see — a certain amount of humility that the nine people in the Supreme Court might bear in mind: That they don't necessarily understand everything that is driving election laws, just as Peter Friedrick, as most of you probably know, made the point at great length that there is no one person who understands all the dynamics of the economic system, and that's a reason for caution with respect to regulation. The same is true with the political system.

Let me give one example, and conclude with that. Dean Lund talked about the principles that conservatives apply to these questions, and expressed some concern that these principles were not being applied by conservatives to *Bush v. Gore*. I would like to suggest that those principles are fraudulent; they are not fooling anybody in the population, and I would suggest that you give them up.

The example I will give is the racial gerrymandering cases, which is a two-fer because it exposes two areas of fraudulent claims by conservatives to principle, one with respect to judicial restraint and the other with respect to Federalism.

The racial gerrymandering cases — first of all, if we are going to say, just apply the law — as Dean Lund pointed out, it is pretty clear that the Equal Protection Clause of the 14th Amendment was never intended to apply to election matters or political rights. The racial gerrymandering cases, if we were to apply that standard, would go down on that ground. However, I do not favor that approach because, even though I think it is historically correct, I am nevertheless a supporter of *Reynolds v. Sims* still, there is nothing in the history of the Constitution that suggests the racial gerrymandering cases are in any sense dictated or suggested by the 14th Amendment. Furthermore, the use of precedent in the racial gerrymandering cases, particularly *Shaw v. Reno*, is simply laughable.

Now, what about what the cases do? Abby Thernstrom wrote a book in the 1980s. It was referred to in the introductions. In it she argued, to me not entirely but substantially persuasively, that there was a very strong case, that the federal government has gone much too far in mandating districts intended to reach certain results in terms of the racial or ethnic identity of the people who will be elected in those districts.

Quite logically, the question she raised was whether that mandate should be cut back. That is a sensible approach, which I think people can reasonably disagree on. It is not the approach that the Supreme Court took. By the way, Abby may have been shocked to discover that her book was not warmly embraced by what is known as the voting rights community.

And Abby's approach was not put into application by George Bush, Senior's Justice Department, which required an extreme version of this. So we got all these strange-shaped districts.

The Court, instead of saying the federal mandate was going too far, said there is a vice hitting the states from this direction; let's really put the squeeze on by coming from the other direction. The Court pretended that the states were obsessed with race when redistricting. In fact, the only reason the states were obsessed with race when they were redistricting was because the federal government was holding a gun to their heads. This was a classic case of blaming the

victims.

To impose a constitutional doctrine that so drastically interferes with a state activity that is so close to the autonomy of the states is anything but showing respect for Federalism; anything but showing judicial restraint; and anything but the so-called principles espoused by the conservatives who have so warmly welcomed those decisions.

Thank you.

MR. CLEMENT: Thanks. We may now hear a slightly different view from Mike Carvin.

MR. CARVIN: It is an advantage going last. I will tell you the areas where I agree and disagree. That might be the easiest way to go about this.

On the threshold question, I think Nelson makes a very valuable insight: it is important to distinguish the authority of the courts to decide political issues and how they analyze the merits of, say, the equal protection issue that is confronted by the court.

I think *Baker v. Carr* was correct in that political issues affecting voting and the like are justiciable. Dan makes a helpful point that, if anything, you want courts to be involved in these issues perhaps more than in other issues because one of the rationales for judicial restraint is that democratic majorities can make policy decisions.

If you have a situation like *Baker v. Carr*, where you posit that an entrenched minority is never going to allow the majority to make policy decisions, then the argument is perhaps stronger that the courts need to correct that injustice. At the end of the day, I agree with Nelson that I do not think it is a thumb on the scales either way, but I certainly would not come to the conclusion that the Court should stay out of the process of adjudicating voting rights disputes.

That is not to say, of course, that *Baker v. Carr* was correctly decided — that the equal protection clause mandates population equality among certain districts. But it is to say that the courts can apply equal protection principles in this context no less than in any other.

Let's turn to the most recent political decision of the court, the one that's engendered the most controversy, which is *Bush*, and ask ourselves, was this a proper object of Supreme Court review? Again, I think that the people who are arguing that the Court shouldn't get involved in that controversy are not really seriously arguing that this is not a proper subject for Supreme Court review, except for Nelson. I think what they are doing is expressing disagreement with the merits of the decisions.

To illustrate through an example, let's assume it was a different equal protection violation in Florida. Let's assume Florida said, we are not going to count ballots from precincts with black populations of greater than 90 percent. Or, in those precincts, we are going to use entirely different standards than we use for the white precincts. I do not think you would get 500 law professors in the *New York Times* saying the court should really stay out of that, follow principles of Federalism, state autonomy, and allow Maxine Waters and her colleagues in Congress to decide that Electoral College dispute. That's a facial violation of the Equal Protection Clause. It's a facial violation, it seems to me, of the basic democratic guarantee of the 14th and 15th Amendments.

So, what were the merits of the equal protection violation in *Bush v. Gore*? It was not as obvious, but it seemed to me, quite frankly, a fairly run-of-the-mill decision in terms of the equal protection clause and the Court's prior precedents. The Court said, when you are counting votes, you cannot throw them down the stairs. You cannot come up with a system that is inherently irrational, if you are trying to achieve something approaching an accurate vote count.

What the Florida Supreme Court had done was not only to authorize but mandate different counting standards, not only between counties but within the same county. We can get into the details, but that's clearly what they said would be the system for counting better. And, as Nelson points out, that problem is exacerbated by the fact that the counties selected were selected by one political party and the ballots were selected by one political party.

So, it is really no different than, in fact, I would argue it is worse than, a state law that said, for ballots cast in Dade County before noon, we will count dimpled chads as a vote, and for those after noon, we will count pursuant to a different standard. Or, votes north of Tallahassee will be counted one way and votes south of Tallahassee will be counted another. If this was a sheriff's race or a normal race, I do not think anybody would suggest that passed muster under basic rationality standards of the Equal Protection Clause.

The argument we have heard that Dan was advancing was: "well, wasn't that inconsistent with conservative jurisprudence?" We talk a lot about Federalism and deference to states and that sort of thing, and it is really improper for the court to override the state's decisions. But, I would suggest that's a cartoon version of Federalism that nobody in the Federalist Society or elsewhere endorses.

Justice Scalia does not say, you defer to states. He says, you defer to states unless they violate a provision of the Constitution. You do not defer to states when they are segregating schools or excluding black people from the polls. You defer to them unless and until they violate a constitutional provision, which was precisely what was going on here.

And even under the cartoon version of Federalism, I do not know anybody who suggests you defer to

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state court. If anything, they are saying, we defer to state legislatures because they express the will of the people. And, if there was ever a court that was not entitled to deference, it was the Florida Supreme Court.

That was a personal observation. They weren't attuned to the nuances of the statutory scheme. And, of course, in this unique context under Article II, Section 1, which we are all now experts on, the Constitution mandates that you do draw a distinction between what the state legislature did and state courts did, because it gave the plenary power to the state legislatures to mandate the rules of Presidential election.

Now, having said all that, I do want to emphasize that there is, in my mind, a very serious departure from principles of textualism and principles of judicial deference in the voting rights cases, in particular. The problem is (I think Nelson touched on this briefly)that the Court has adopted one view of political philosophy and political theory and elevated it to that of constitutionally-mandated status. The Court is no more empowered to do that than it is to take one view of economic freedom or one view of cultural issues, like gay rights, and elevate that to a constitutional mandate, if the text structure and history of the Constitution does not require it.

What they have particularly done over the last 30 years is clearly say that political systems that help guarantee proportional representation are the constitutionally preferred system. Specifically, what they have said is single-member redistricting is preferable to an at-large system or a multi-member system and that it is constitutionally mandated. And it is constitutionally mandated in a way which insists that racial groups get a proportionate or fair share of those single-member districts.

This political theory issue has been debated for centuries. On the one hand, people have argued that you want a representative system where the representative represents everyone in the community (an at-large system). That makes him a better representative because he elevates the common good above parochial interests of particular factions within the community. And that is what you get from at-large systems. To use a simple example, that's what you get, allegedly, in the United States Senate, because each Senator is representing the interests of an entire state.

The other competing view, equally plausible, is you want to create a system where each group has its representative. So, what you do is carve out districts, for example, where a representative is beholden to that group, and then he will voice that group's concerns within the legislature and the factions will fight it out. Neither one is constitutionally proscribed, but certainly, neither one is constitutionally required.

The Court, I think, has made it clear that it has adopted the second view, the view from the House of Representatives as opposed to the view from the United States Senate, and said that this is the mandatory view because a group will not have proportional representation unless you carve out these ghettoized districts where their representative, beholden to them, is able to express their views.

There is certainly nothing in the Constitution that requires that as a general matter. And there is certainly nothing that requires it along racial lines. I would argue, the Constitution strenuously prohibits it along racial lines.

But that is what we have come to. And you have seen in this redistricting cycle a very interesting phenomenon because one of the problems with parochial, ghettoized representation is that it leaves the other representatives free to ignore those parochialized representatives. In this case, for example, if you create black majority districts, they will have a black representative, but the rest of the politicians can ignore black concerns because they do not have to answer to them anymore. In today's political climate, what that means, of course, is that you get more Republicans in the legislature because the districts adjacent to the black majority districts will become that much more white and that much more Republican, particularly in southern jurisdictions.

So, ironically, in this redistricting cycle there were a bunch of Democratic people who are now arguing for the virtues of the old system, where each representative represents the community as a whole, and we certainly do not want to create these little pockets of black majority districts because, obviously, that hurts the Democratic Party. So you have seen a dramatic shift. We have seen it play out in the laboratory, where you have seen a dramatic shift of Democrats now taking the old approach. Here again is an illustration of what happens when the Court injects itself into the political thicket and the law of unintended consequences.

I will end by responding to Dan's criticism of the *Shaw* decision. *Shaw* essentially said that, if you subordinate traditional redistricting principles for the predominant purpose of creating a black majority district, that violates the 14th Amendment. I would argue it violates the 15th Amendment, as well, perhaps, and that is no good.

Now, Dan again says that that's a laughable view because it does not take into account Federalism and state autonomy. It is always an interesting intellectual exercise to just reverse the races.

What if a state legislature came to the Justice Department or federal court and said, yes, we have created a spaghetti-like district in North Carolina, and our avowed purpose is to ensure that we have a white majority district where we have excluded, to the extent practicable, all black voters from being able to participate in the democratic process? Would it be seriously argued that that does not raise a cognizable equal protection concern since *Brown v. Board of Education*, I think it is clear that state action designed to separate the races, not simply to exclude the races from participation in government programs, is unconstitutional.

I do not think that reflects a judgment about political philosophy by the court any more than *Brown*

represented a judgment about educational philosophy. What it represents is a judgment about the government's use of race to distinguish among its citizens, regardless of the political or educational consequences. That is impermissible.

Thank you.

MR. CLEMENT: Last, but by no means least, we'll now hear from Joshua Rosenkranz of the Brennan Center.

MR. ROSENKRANZ: Sorry, Mike. You don't get the last word.

You know, Dean Reuter told me that my role here was to be the human pinata, but I thought that I was supposed to speak first before people beat up on me.

I am not here to pick a fight about *Bush v. Gore*. And I hasten to add that it isn't because I've counted the noses and realized that Dan and I are vastly outnumbered, maybe with Nelson, three to 854.

I am thrilled, by the way, to hear that we're all Brennanites now.

And I'm also happy that I brought my thousand pledge forms for all of you to fill out at the end of this panel.

I am not here to pick a fight about *Bush v. Gore* because I think of the case as so aberrational that it actually does not teach us very much about what the Supreme Court itself thinks about its appropriate role in political regulation. When Justices issue opinions that seem so vastly at odds with their own principles, I just do not think it teaches us very much.

What I want to do instead is step back, talk about some of the general principles about when it is appropriate for courts to enter the political fray, and then reflect on three more mundane areas in politics where the courts do get involved.

I, of course, begin where Nelson begins. But for the reasons that Dan describes much better than I could, I just do not think that gets us very far. You can find a constitutional command very easily, if you're clever enough, in the 1st Amendment, the 5th Amendment, the 14th Amendment, or any number of other constitutional provisions. When I think about the appropriate role of the courts, I focus on what areas the court is best suited to play: In what context do the courts play the most important role in the political arena. And I come up with a slightly different taxonomy than Dan's.

It seems to me, there are two major areas. One is that for which *Baker v. Carr* is the quintessential model. It is the situation where those in power have rigged the rules to make it virtually impossible, or in *Baker v. Carr* actually impossible, for those out of power ever to compete. The second is, when political regulation ends up potentially infringing on individual liberty. The quintessential example there, at least in theory, is the Court's role in scrutinizing campaign finance regulation. So, those are my two broad principles of where the court really ought to be involved.

The problem I have is with the execution of those principles, and I am a little schizophrenic about this. I firmly believe, obviously, based on these principles, that the Court has done a lot of important things in the arena of political regulation. In the past 10 years or so, however, I think the Court has gone astray. And it's all in, as I said, the execution. I think of this as Frankfurter's Revenge. So, there are three areas that I want to look at. They are campaign finance, third-party rights, and districting.

Campaign finance. Put aside for a moment what I think of as a bizarre constitutional framework that the Court generated a generation ago. That framework treats two brands of financial transactions — contributions, on the one hand, and spending, on the other hand — as if they are entirely different, when they are both directed toward political speech.

Look at, for example, most recently, a case the Supreme Court decided, called *Colorado Republican*, where it based a constitutional judgment on the premise that there existed a political animal - the political party that is independent of its own candidates - that no political scientist had ever heard of or even conceived of.

Third-Party Rights. For the better part of the last century, the two major political parties across the United States, state by state, have colluded to rig the rules to exclude competition from third parties, mostly by manipulation of ballot access burdens. To its credit, the Supreme Court said, yes, we have a role in scrutinizing these barriers. But the Supreme Court and the lower courts have essentially ceded the turf and rarely ever invalidate these very heavy burdens.

Now, contrast that with the ironic position that the Court took in a case called *Timmons* not too long ago. That case involved two political parties. They both wanted to nominate the same candidate, and each wanted the other to nominate the candidate. But there was a law that said they couldn't. And the Supreme Court upheld that law. Why? Because it accepted as valid the state's asserted compelling interest in protecting the two-party system, which seems backwards. Protecting it from what, by the way? The Supreme Court was never particularly clear about how fusion candidacies, such as the ones that we have in New York State, completely undermine the two-party system.

Finally, redistricting. There has been some conversation about this already. Again, I want to emphasize the premise of *Baker*, which is that the Court intervenes when the party in power rigs the system so the others cannot compete. Well, the race-based districting is the opposite proposition. That involves those in power for once—whether because of Federal law or otherwise—actually sharing power with those out of power. And the Supreme Court tells us you cannot do that.

And then there is this wonderful ironic twist that *Davis v. Bandamer* introduces, which Ralph referred to earlier. What now happens is that those who want to defend those redistricting lines walk into court and say: "No, no, no. We were not thinking about race; we were not thinking about sharing power with others. God forbid, what we were doing was protecting those who are already in power. We were protecting incumbents." *Davis* says, in essence, that is perfectly fine. So, yet another example of Frankfurter's Revenge, in which the courts seem to get things exactly backwards, and it is a trend that troubles me and that I hope the courts start taking notice of and reversing.

Thank you.

MR. CLEMENT: Thank you, Josh. And as those of you who have been here for a day already know, this is the part of the program where we move to questions. There are a couple of microphones set up for that purpose.

I am going to take the privilege of asking the first question. I am not quite sure who this is best directed to; maybe Josh wants to answer it. A couple of the comments focused on the question of when the courts should intervene in these election disputes. That theme is suggested by the title of the panel, which is "Judicial Involvement in the Political Decisionmaking Process". Is there a reason that courts should analyze that independently of the underlying constitutional right? The text of the Constitution does not talk much about the Political Question Doctrine. Could much be resolved by just looking at the nature of the claim that's brought — often an Equal Protection Clause claim — and saying, this is either an unbelievable loser, so the court will get involved briefly to say this claim is a loser; or, this is a serious claim and we will grant relief. Is there merit in a preliminary inquiry that's unmoored from the underlying constitutional claim, or at least somewhat decoupled, that asks the question of whether the Court should get involved?

MR. ROSENKRANZ: Well, since you directed the question originally to me — I think you are right. I may be expelled from Brennan circles, but I never understood the construct in *Baker v. Carr*.

I share the view that *Baker v. Carr* does not make a lot of sense in all the respects that have been described earlier.

It does not strike me as worthwhile to engage in a threshold inquiry whether the courts ought to be staying out, certainly when you have clear constitutional commands. But I agree with the premise of the question that it makes much more sense to go to the merits, and I've always thought of Political Question as a way of punting, when the court really ought to be going to the merits.

MR. CLEMENT: If nobody else wants to jump in on that one, I'll open it up to the floor.

AUDIENCE PARTICIPANT: Thank you very much. My name is John Curry. I'm a trial lawyer. I'm an elected Republican official in the City of Chicago, and an election official in the City of Chicago. I think I know something about voter irregularity.

I concur with the view that voter error is a non-issue, if not a disingenuous issue. And if we are going to look at election reform, we first must look at voter fraud. I think that is a more cancerous effect on the issue of what goes on in the election.

Frankly, if I would make a suggestion, I would open up judicial review. Keep in mind, I think *Bush v. Gore* made it patently clear there is a quasi-judicial effort that takes place, and that is the local boards of elections and commissions of election, which have tremendous power in this process, both administratively and in a quasi-judicial sense.

I think we ought to move towards true non-partisan or multi-partisan boards of elections around our country because, if they are dominated by one party, you are going to have these non-issues coming to the fore like under-voting. I would just like your reaction to that. Thank you.

DR. THERNSTROM: I am delighted that you brought that issue up because the U.S. Commission on Civil Rights, in its report on Florida, simply ignored the very serious problem of voter fraud. Also, practically all writing on this issue assumes that under-votes are spoiled ballots, that they are ballot errors. And yet, voters obviously often deliberately leave ballots partially blank. I am very concerned about any system in which ballots registering an under-vote, a failure to vote for any candidate for a particular office, are spat back at the voter, at which point some election official says, for example: "Did you really mean to leave the choice of President blank?" That would be, of course, an intimidating, coercive question about a private decision.

Since I have the microphone, let me just say one other thing in response to Josh. He said that race-based districting was aimed at the goal of sharing power. That's only true if you assume that black candidates cannot get elected unless they are protected from white competition. That is the point of safe black districts: protecting black candidates from the competition of white office-seekers who will not bother to run in a 65 percent African American setting.

Voting rights decisions have delivered an unmistakable and unfortunate message to potential black candidates: Do not bother to run unless you are protected in a safe black district. That message had not been andwas not in the public interest, or in the interest of black voters.

E n g a g e

Thank you.

DR. THERNSTROM: Section 5 of the Voting Rights Act originally had a life of only five years. If it had been given a longer life, it never would have gotten through Congress. It would not have passed constitutional muster. It was considered an emergency provision, and yet, as the emergency subsided over the years, the powers of enforcement grew. It is one of the ironies of the Voting Rights Act.

My first book, *Whose Votes Count?* came out in 1987 and asked: Do we really want to herd black voters into these 65-percent, 75-percent safe black districts? Republicans were laughing all the way to the political bank, but it seemed dreadful public policy to me. It diluted the power of the black vote, for one thing. But I was called a borderline racist for even raising the question of pasting racial and ethnic labels on all voters and drawing districts accordingly.

Yet, as Mike said, it is very interesting that today the civil rights community and the Democratic Party are starting to say, wait a minute, maybe this isn't such a good idea at all. Even Adam Clymer of the *New York Times*, who wrote a vicious review of *Whose Votes Count?*, has now changed his mind on the question of racial gerrymandering.

MR. CLEMENT: Attorney General Pryor?

AUDIENCE PARTICIPANT: Yes. Bill Pryor, Attorney General of Alabama. My question is for Professor Lund.

I wonder whether you overstate the dependence of *Bush v. Gore* on *Reynolds v. Sims*, and whether you could conclude that viewing *Bush v. Gore* totally in terms of the Constitution, as opposed to what the Court has said about it — that it is much more difficult to say that *Bush v. Gore* is wrong than say it is *Reynolds v. Sims* that is wrong.

You can look at *Reynolds v. Sims* as a case about whether states can structure representation and legislatures on something other than just one person-one vote, a strict mathematical basis, and do something more akin to what the United States Senate is all about.

That is a different case from saying that when a state is conducting a Presidential election, the two federal offices in this country that we all elect, the state can tell its voters beforehand, all of your votes are going to be counted equally, and then do something completely different, as Mike Carvin said, it establishes a rule that we're going to count based on throwing the votes down a staircase. If you view that vote as a form of political expression and speech protected by the 1st Amendment, isn't there a better case for *Bush v. Gore* than even for *Reynolds v. Sims*?

PROFESSOR LUND: If I understand the question correctly, or the suggestion correctly, it's that *Bush v. Gore* could have been decided the way it was under the Constitution, even if *Reynolds v. Sims* had never been decided. I think it probably could have been, but I don't think it would have been correct.

I think the 14th Amendment just doesn't cover voting. It's quite clear, I think, both from the text of Section 2 of the 14th Amendment — that's the part on voting, and that's all it says about voting. And it is clear from the history that everybody understood that the 14th Amendment did not cover voting. It did not require black suffrage. If the 14th Amendment didn't require black suffrage, then I don't see how it can be applied to these much less problematic practices that we see in cases like *Bush v. Gore*.

Now, the idea of using the 1st Amendment also is a little doubtful under the Constitution, although I think it would be a better argument to use the 1st Amendment, as General Pryor just suggested. That would be a long story to see whether you could do that. It would require both an interpretation of the 1st Amendment and a consideration of the Incorporation Doctrine and its validity, none of which I'm going to inflict on all of you today.

AUDIENCE PARTICIPANT: Mr. Carvin, Article II, as we all know, says that the state legislature shall be responsible for appointing the manner of electors. From a textual decision, you've discussed the Florida Supreme Court; you said they were mandating a process regarding the recount, and you also later noted that the State of Florida's legislature had also mandated rules; you used the word "mandate." I guess I'm confused as to what the word "manner" means in the context of the Constitution, and how equal protection is relevant to an appeal of the Supreme Court, because it seems to me that the Florida Supreme Court was acting as if they were engaged in a manner of selecting electors.

MR. CARVIN: Yes, I think the equal protection analysis and the Article II analysis are two separate points. The Article II analysis point is that the Florida legislature had prescribed the manner for choosing electors. It had passed an election code. The Florida Supreme Court rewrote, by my count, eight different provisions of that code to get to the result they wanted. Most obviously, there was a seven-day deadline to get in your manual or any other kind of recount you were doing, which was missed by all but one county in Florida. It was missed by Broward, Dade and Palm Beach, and they extended that to 20 odd days. There were a number of other problems in their analysis, but that was the most obvious one, and that was the one that actually infected some of their later reasoning.

It was amusing to me during this entire debate. All the law said was, you may do a manual recount. You

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must do it in seven days. Immediately, pundits, who could blithely tell you what McPherson meant in 1895 and could tell you about the equal protection clause, looked at that statute and said, gee, we can't figure this one out.

Does this mean if you take more than seven days, you can do it? It was about as simple an administrative law case as you could imagine, and the Florida Supreme Court violated it.

The Supreme Court gives them a second bite at the apple and says, look, this doesn't really square terribly with what we were thinking. The Florida Supreme Court issued the second opinion without even responding to the first USSC opinion. We mention that, obviously, very prominently in our brief. Justice O'Connor mentions it at oral argument. And then on the Monday afternoon after the argument in the Supreme Court, the Florida Supreme Court issues the opinion responding to the first Supreme Court opinion. It's sort of like, well, we've been going through our in-box here; we noticed that we had forgotten this. And then, our 18 references to the state Constitution — well, please ignore that; this was a very straightforward statutory interpretation. It was fairly obvious, at any minimal level of intellectual honesty, what they had done. They took the federal prescribed power from the legislature, which had set the rules prior to the election, and re-adopted them.

That is particularly troublesome, from a Federal statutory perspective, as well as from a policy perspective, because obviously there's a reason you want the rules of the election to be set before the election occurs. Nobody in Florida — Republican or Democrat — could put their hand on a Bible and say, my view of manual recounts versus machine recounts was wholly unaffected by my anticipated view of how it would affect the candidate I support. Of course, if you set the rules before the election, you can take a relatively honest view, which is preferable.

I think we all know, if the positions were reversed, Bush would have been arguing for the sanctity of manual recounts and Gore would have been arguing for the sanctity of machine recounts. It just illustrates precisely why, once the election has occurred and people can start toting up numbers to figure out the effect of various methodologies for counting votes and who will be a winner, that that's a system to be avoided.

MR. ROSENKRANZ: Well, having said that I am not going to pick a fight on *Bush v. Gore*, I just cannot resist. This is really a quibble; not a wholesale attack on what you just said, Mike. It is a quibble on how far that reference to the word "legislature" really gets you. It seems to me, it could not possibly be the case that the framers who wrote that word imagined a legislature unhooked from its moorings in a three-part governmental system. Certainly, it seems to me, a supreme court of a state is entitled to interpret what the legislature said and decide what it meant, especially in a context where, as here, the Supreme Court says it finds ambiguity.

That is at least the story the Supreme Court is telling itself. To conclude otherwise, it seems to me, is to go down a road where you're saying that, if a legislature passes a law related to this set of election issues and the governor vetoes it, then the governor is violating the Constitution.

MR. CARVIN: The question becomes whether or not under Article II the Supreme Court should do a *de novo* review of state law or give some reasonable deference to the Florida Supreme Court's interpretation.

My own view is the question is academic because there was no theory of deference that got you to the result that they were actually trying to interpret that statute, as opposed to rewrite it. So, the hypothetical I asked in the moot court was should they use the same method of statutory analysis that the Supreme Court used in the *Weber* case, where they rewrote Title VII. And if that's the standard, then I think they passed it.

But if there's any higher standard, then I don't think they did.

PROFESSOR LOWENSTEIN: I do not know if any of you noticed, but when Josh began his initial comments, he mentioned me as one who would be on his side on *Bush v. Gore*. I didn't say anything about *Bush v. Gore* and I have never talked to Josh about *Bush v. Gore*. I think the fact that he felt comfortable in making that assumption tells you a lot not only, as Michael pointed out, about how you could expect officials or judges, after the fact, to come down on these issues, but how academic commentators, I am sorry to say, came down on these issues.

In fact, on the merits, although one could improve on the way *Bush v. Gore* was written, I really do not disagree with the equal protection conclusion, I agree with that — and also the conclusion with respect to what the deadline was. I think that the Rehnquist concurring opinion is pernicious.

AUDIENCE PARTICIPANT: This is for Professor Lund.

You ended your talk with, I think, a very provocative query: Are we not all Brennanites now? It was so ironic and provocative that I didn't quite understand it.

Are you saying that the Justices on the Court are Brennanites in the sense that *Bush v. Gore* was a result-oriented decision, or are you saying the commentators are Brennanite because they wanted that decision, but now they are switching their commentary in a direction that might be more useful to them for other decisions in the future?

I would also like to ask you, speaking of quasi-Brennanites what you think of how Judge Posner came out

on *Bush v. Gore*. He concludes that it was basically a pragmatic decision. If you have two ways of interpreting the Constitution, one of which suggests a constitutional crisis and one of which does not, it makes sense to lean in the direction of the one that does not.

PROFESSOR LUND: The questions are actually related. I was referring to the commentators, not the majority of the Court. The majority of the Court, I think, acted in a principled and proper way.

It is the commentators, including the conservative commentators, that I was referring to. For example, Judge Posner takes the position that the majority's decision in *Bush v. Gore* was legally wrong, but we should be glad that they made this mistake because the practical consequences of letting the recount chaos continue would have been so bad for the country. That is the kind of politicized approach to judging that is reflected in Justice Breyer's dissent, though with different results. But it is the same kind of politicized approach to judging that the majority of the court properly resisted, and all of us should be praising them for it, not criticizing them for it.

AUDIENCE PARTICIPANT: My name is Dan Lungren. I was the Attorney General of California; before that, a member of Congress. I would like to ask a question on Federalism as it relates to pre-clearance.

There cannot be too many other examples of a violation of the general concept of Federalism in the pre-clearance requirement under the Voting Rights Act. And it is based on a factual determination.

In the 1980s, when Henry Hyde, Jim Sensenbrenner and I were on the subcommittee that dealt with the question of re-upping the Voting Rights Act, we did it on a historical analysis. We came in with the notion that this is a real hurdle over which we must jump in order to continue this aspect of the Voting Rights Act and we wanted to be shown proof that it was necessary.

There was a famous hearing down in Texas where Henry Hyde announced that he was going to support the extension, and many of us were with him because of the parade of horribles that had been exhibited in terms of actual practice.

As Attorney General of the State of California, I had to be involved in pre-clearance. Believe it or not, there are about five jurisdictions in California, five separate counties, that require pre-clearance, not because of actions from the old Confederacy but rather from minority language coverage.

And so, my question is this, to all the members of the panel: Do you believe that there is sufficient evidence of a parade of horribles at the present time that would support the continuation of the pre-clearance requirement? This not only is an invasion of the states' rights by the judiciary but through the pre-clearance concept by the Justice Department of the federal government. Second, is there a reason to continue the coverage for minority language jurisdictions under this Act?

MR. CLEMENT: Why don't we start on this end with Josh, and we will work down and give everybody a right to pass, if they like.

MR. ROSENKRANZ: I'll pass. I am not an expert on pre-clearance.

PANELIST: As we have mentioned, it is going to expire in 2007, and I hope that the second Bush Administration lets it expire. There are three prongs. First, you are distinguishing between the states, essentially, of the old Confederacy along with pockets of New York, California and others scattered around in the rest of the country. There is really no longer any empirical basis for suggesting that voter registration or election of minority officers, for example, in South Carolina or Texas, distinguishes those states from Michigan or Ohio or other places. So, just dividing the country that way, I think, is a very serious policy problem.

It also makes all the states come to the Justice Department without any judicial review and justify these redistricting plans. One thing that the *Shaw* case has vividly revealed is what practitioners knew all along. During the 1990s, all these folks from the Voting Rights Section — some of them are here — went around saying, "We're not looking for black maximization. And they would sit down at their computers and, for example, in the *Miller* case, there was a plan called Black Max. If you did not meet that standard that was drawn up by either the local civil rights groups or by the Justice Department itself, you were not going to get pre-clearance.

Legislatures in North Carolina, Georgia and Texas created extraordinarily ugly districts that departed from any reasonable system in order to satisfy people at the Department of Justice.

As to the real problems, the parade of horribles that apparently convinced Representative Hyde — we do not need this bureaucratic system to get at that. If there is a serious kind of voter intimidation or obvious scheme to deny ballot access, those are all quite reachable under Section 2. If it is a simple case, it is easily provable. Section 5 only comes into play in this gray area, where they can force the state legislatures to maximize through a gerrymander.

Now, given the *Shaw* cases, the state legislatures are in an impossible position because, on the one hand, they cannot subordinate redistricting principles to create black majority districts under the Constitution and, under Section

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5, they must subordinate traditional districting principles to create the black majority district. So, it's clearly outlived its usefulness, in my mind.

DR. THERNSTROM: Section 5 has certainly outlived its usefulness but don't hold your breath anticipating congressional action before 2007, when the "emergency" provisions are due to expire once again, 42 years after the passage of the original act. Of course, the parade of horribles does not exist. In the wake of the *Shaw* decision, Ted Shaw of the NAACP Inc. Fund, predicted the near-disappearance of the Congressional Black Caucus. Its members, he said would soon all fit in the back of a taxi cab. But every black incumbent was re-elected. And that wasn't due to their status as incumbents; they were running in reconfigured districts.

The coverage of groups other than blacks was always dubious, in my view. They were depicted as black-like groups, although even with respect to Mexican-Americans, the analogy was shaky.

I am very critical, in my book, of Representative Hyde. He was an important player behind the 1982 amendment of Section 2—a grave mistake, in my view.

PROFESSOR LOWENSTEIN: When the original Voting Rights Act of 1965 was challenged constitutionally — it went up to the Supreme Court in *South Carolina v. Katzenbach* — the Court was unanimous in upholding all but one of the provisions of the Voting Rights Act. The one which was not unanimous was the pre-clearance requirement in Section 5.

Justice Hugo Black dissented, saying this was just too much of an in-road on Federalism. More significant than that is that the majority opinion itself recognized that the pre-clearance requirement was a very serious in-road into our federal system and said that, however, very dire circumstances justify strong medicine. That is not a quotation, but a paraphrase.

I personally believe that the majority was right to reach that result. But I think it is nonsensical to suggest that such dire circumstances exist today. The Supreme Court, in the past decade, has given signals that it is not about to go back and revisit whether Section 5, which was constitutional when it was passed, is still constitutional. Therefore, I do believe that Congress and the Administration, whatever administration it is, should look very seriously at this. But, I guess it was Abby who said "don't hold your breath".

If there is to be an effort to repeal the pre-clearance requirement, it requires very careful thought about how it is going to be presented. In 1981 and '82, the Reagan Administration came out and said, "we are going to oppose renewal of the Voting Rights Act", which I think was simply calculated to make sure that the Voting Rights Act would be strengthened. If there is a second Bush Administration, and if they do choose to take that on, they have got to be a lot cleverer about it. It will be very difficult to do.

Let me add one thing, in light of the identity of the questioner. I was at an election law conference at Stanford a few years ago, when you were Attorney General of California. And somebody on one of the panels made some uncomplimentary reference to something said by Dan Lowenstein. And there were two men standing behind me, and I overheard one of them say to the other, "What's he talking about?" And the other one said, "Something about Dan Lungren."

DR. THERNSTROM: By the way, Dan, I did not mean do not hold *your* breath; I meant don't hold your breath that it will be taken up before 2007. That was my point.

AUDIENCE PARTICIPANT: My name is Michael Patrick Carroll. I sit in the New Jersey Assembly. And with due respect to the gentleman from Chicago, we taught them all they know about voter fraud.

Our New Jersey Supreme Court is every bit as bad, if not worse, than Florida's.

We just went through the redistricting process on the legislative level. In part, because the Democrats have now adopted that unpacking scheme, they successfully took control of the New Jersey Assembly, picking up nine seats.

The Republicans lost a suit. They contended that they, in fact, did have to create more majority black districts. They did not get very far. The question I have: Is there no constitutional provision, other than strict equality of district size, which would enable a federal court or federal adjudicator to step in and set aside a legislative determination as to districts?

PROFESSOR LOWENSTEIN: The controlling authority on this question is *Davis v. Bandamer*, which is another one of these rather cryptic Supreme Court decisions. It held that a constitutional attack under the 14th Amendment against what is alleged to be a partisan gerrymander is justiciable. But what it says beyond that has been a matter of dispute.

I believe that if you look at subsequent decisions, mostly in lower courts and a summary affirmance in Supreme Court, which does not mean too much, basically the answer to your question is, no, there is no remedy for the major parties.

I have written an article about that. If you want, I can give you a reference to it. It is a rather long and

complicated argument. I believe, if you look at the lower court decisions, in practice, they do not go through the analysis, but that seems to be the position that they take. That it is essentially a dead-end.

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