Introduction

> [I]t is the reason, alone, of the public, that ought to control and regulate the government.
> *James Madison, 1788*

> [I]n our political system it is not at all easy to have a public discussion of voting rights, at least in the context of race. Sometimes it seems as if judgments about race are analogous to theological convictions. They are not movable. . . . The whole area is pervaded by accusations, mischaracterizations and strange dichotomies.
> *Cass Sunstein, 1994*

For several weeks in the spring of 1993, national news coverage was dominated by the controversy surrounding Lani Guinier. Nominated by President Clinton to head the Justice Department's Civil Rights Division, Guinier drew strong criticism for her writings on the Voting Rights Act of 1965. Conservatives claimed that Guinier held "breathtakingly radical" views that, if realized, would reconfigure our entire scheme of representative government. In particular, critics portrayed Guinier as a "quota queen" who wished to institute a "racial spoils system," directly assigning legislative seats to minorities under the guise of ensuring fair representation. Guinier's supporters denounced conservative claims as distortions and defended her views as well within the mainstream of voting-rights enforcement. President Clinton initially downplayed fears of Guinier's radical impact on voting-rights policy: "I expect the policy to be made by the United States Congress. And I expect the Justice Department to carry out that policy." Later, in the face of mounting opposition, Clinton changed his position, withdrawing Guinier's nomination on the grounds that her views on minority representation did not agree with his own.[1]

[1] Guinier's critics focused largely on Guinier 1991a and 1991b. But see also Guinier 1992a, 1992b, 1993a, 1993b, and 1994. My account of Guinier's nomination is drawn from the *Los Angeles Times*, 22 May 1993, p. A1; 3 June 1993, pp. A1, A10; 4 June 1993, pp. A1, A32, A33; 22 May 1993, p. A12; and 4 June 1993, p. A1.

The Guinier episode led many to draw lessons about the inability of the Clinton administration to read the political winds. As with his early nominations for attorney general, Clinton demonstrated a penchant for self-inflicted wounds by selecting an individual unacceptable to opposition politicians. But the Guinier controversy calls attention to more than the failings of the president's appointment process. The hue and cry surrounding Guinier reveal a high-stakes politics of representation. Setting aside for the moment the question of whether Guinier was fairly treated, the welter of conservative charges suggest that many political actors take the issue of fair minority representation to be quite important. The degree of political hyperbole in such claims should not, of course, be underestimated. Still, the fact is that academic analyses of minority representation echo the seriousness of conservative fears. As the authors of a comprehensive book on the subject conclude, the current politics of minority representation raises problems that are so "broad and fundamental as to require rethinking our entire system of representation."[2]

How can we begin to make sense of this controversial politics of minority representation? In attempting to defuse the debate over Guinier, President Clinton located the responsibility for resolving voting-rights questions in Congress. One could argue that the configuration of congressional politics must be grasped before the politics of minority representation can be understood. Congress does indeed appear to provide a reasonable starting place for analysis. The issues of minority representation crystallized with the passage of the Voting Rights Act of 1965. Moreover, during the past thirty years, Congress has amended the act on four occasions, importantly altering debates over the meaning of fair minority representation each time.[3]

Congress has not, however, been the sole locus of significant decision making in this area. Nor did the participants in the Guinier controversy take Congress to be the only relevant player. Guinier's hotly contested writings were, after all, works of advocacy designed to influence *judicial* interpretations of the Voting Rights Act. Her efforts to shape judicial reasoning placed Guinier on a well-worn path: much of the politics of

[2] Grofman, Handley, and Niemi 1992, p. 110.

[3] The congressional re-enactments and extensions have also implicated a number of political actors worth studying. In this vein, one could point not only to the civil rights groups that have often stimulated congressional action, but also to the Justice Department, which has acted as the administrative organ responsible for enforcing congressional policy.

minority representation has been contested in the courtroom and developed by judges.[4] The worry about Guinier was not simply that, as a member of the Justice Department, she would flout current congressional policy. Critics also feared that she would successfully sway judicial decision making, persuading the Supreme Court to enforce a particular reading of a complex, open-textured statute. While Congress may set the broad outlines of policy, the Guinier incident indicated that the judiciary itself may make a crucial difference in how the politics of minority representation is conceptualized and practiced.

The importance of judicial action was conveniently underscored a few weeks after the withdrawal of Guinier's nomination, as the Supreme Court set new limits for legislative districting in *Shaw v. Reno* (1993).[5] In this case, the Court considered a North Carolina congressional district drawn pursuant to the Voting Rights Act. The district followed the I-85 corridor for nearly 160 miles, connecting disparate African-American neighborhoods. At points, the district was no wider than I-85 itself, prompting one state legislator to remark, "If you drove down the interstate with both car doors open, you'd kill most of the people in the district."[6] It was also from this district that Melvin Watt, the first black member of Congress from North Carolina since Reconstruction, was elected.

Shaw was a close decision, with a five-member majority ruling that race-conscious redistricting could violate the Constitution. More specifically, the majority concluded that stringing together geographically separated members of the same race into a single district approached "political apartheid."[7] The majority viewed such districting as a state-sponsored assertion that all members of a racial group thought alike and had the same political interests. These harms of racial stereotyping were compounded by the pernicious message segregated districts sent to elected officials, encouraging them to represent the dominant racial group in their district rather than their constituency as a whole.

The Court did not rule that the district at issue in *Shaw* actually inflicted the harms of "political apartheid." But *Shaw* did establish a framework in which the congressional districts designed to enhance minority representation could be contested. Following the 1990 census, the number of congressional districts in which African Americans were

[4] Grofman, Handley, and Niemi 1992, pp. 25–27.

[5] *Shaw v. Reno*, 509 U.S. 630 (1993).

[6] Ibid. at 636.

[7] Ibid. at 647.

a majority jumped from seventeen to thirty-two. The number of congressional districts in which Latinos were a majority increased from nine to nineteen.[8] In the wake of *Shaw*, voters around the country filed suits against many of these majority-minority districts.[9] The Court ruled on one such suit in *Miller v. Johnson* (1995).[10] The five-member majority in *Miller* fleshed out the general reasoning of *Shaw*, arguing that the harms of political apartheid were incurred whenever race was used as the "predominant factor" in legislative districting.[11] On this ground, the Court struck down a 260-mile-long congressional district in Georgia—a district that had compiled a majority of African Americans by grouping together black neighborhoods of urban Atlanta with the poor black populace of the Georgia coast.

Coming at a time when pundits increasingly blame majority-minority districts for harming Democratic candidates, *Miller* helped ensure that the Court's handling of minority representation would remain in the headlines.[12] The Court's profile was heightened by *Miller*'s apparent loose ends. Writing for the *Miller* majority, Justice Anthony Kennedy touched on the larger question of the Voting Rights Act's constitutionality but managed to skirt the issue by blaming the Justice Department for erroneously trying to maximize the number of majority-minority districts.[13] Moreover, Justice Sandra Day O'Connor filed a cautious concurrence to the majority opinion, indicating that she understood Justice Kennedy to establish a "demanding" standard that would subject only "extreme" instances of racial gerrymandering to meaningful judicial review.[14] O'Connor's equivocation blurred the message of *Miller*, leading one commentator to note that the case was best understood as a "5-to-5 decision."[15] The sense of indeterminacy persisted even as the

[8] Peterson 1995, p. 11. There were also marked increases in the number of majority-minority districts at the state legislative level. See Bositis 1994, pp. 54–59.

[9] *New York Times*, 9 Mar. 1994, p. A8.

[10] *Miller v. Johnson*, 115 S.Ct. 2475 (1995).

[11] Ibid. at 2488.

[12] The claim is that majority-minority districts help Republican candidates by lumping large numbers of loyal Democratic voters together. On the growing debate over the partisan consequences of racial districting, see Hill 1995; Bullock 1995; Engstrom 1995; Kelly 1995; Swain 1995; Pildes, Raskin, and Swain 1996; Rosen 1996; and NAACP 1994. See also *New York Times*, 7 Dec. 1994, p. A23; 10 Dec. 1994, p. A8, and 1 Jan. 1995, p. A9.

[13] *Miller* at 2491–94.

[14] Ibid. at 2497.

[15] See *New York Times* 14 July 1995, p. A1. O'Connor's equivocation in *Miller* was consistent with her claim in *Shaw* that minority representation raised some of "the most complex and sensitive issues" in the Court's recent history. See *Shaw* at 633.

Court used the *Miller* rationale to strike down additional majority-minority districts. Overturning three majority-minority districts in Texas, members of the Court produced *six* separate opinions, including two by O'Connor in which she announced the judgment of the Court and then concurred with herself.[16]

Thus, whatever the ultimate fate of racial districting is to be, events ranging from the aborted Guinier nomination to the most recent decisions demonstrate that the Supreme Court will be a focal point of policy-making and conflict. What is at stake in the Court's actions? How should judicial involvement in the politics of minority representation be understood? In the future, what direction should the Court pursue?

This book provides an answer to these questions. I begin with a historical review of the Voting Rights Act and its amendments, focusing on the Court's role in the development and enforcement of the act (chapter one). This history reveals an important dynamic: as the act has been repeatedly reaffirmed over the past thirty years, it has garnered ever-greater criticism and controversy. I argue that levels of disagreement have escalated as the Voting Rights Act has moved away from simpler questions of political access toward more complicated questions of political membership and representation. It is because the central issue has become *how* minorities should count, rather than *whether* they should count at all, that the act has become the target of increasingly contentious debate.

To understand the politics of the Voting Rights Act, one must understand the issues at stake in the struggle for meaningful political membership. To this end, I develop an analytical framework in which the Court's participation in politics of minority representation can be situated (chapter two). I argue that questions of political identity are always at the heart of debates over representation; this is so because claims about how representational institutions ought to be designed always hinge on prior conceptions of who is to be represented in the first place. Representational debates thus draw on competing notions of who "the people" are and turn on questions of how self-government ought to be achieved. The politics of minority representation, no less than other representational conflicts, engenders contests over fundamental political identities and basic governmental aims. Engaged in the politics of minority representation, the Supreme Court helps ascertain what the basic structure of the political community ought to be.

Indeed, I argue that the constitutive role of the Court extends even

[16] *Bush v. Vera*, 116 S.Ct. 1941 (1996).

further. Involvement in the politics of minority representation confronts the Court with the challenge of articulating the foundations of its own political authority. Since the earliest days of the republic, claims of judicial power have been derived from the Court's capacity to speak on behalf of the people as a whole. As a result, when the Court responds to questions of minority representation, it not only selects a notion of "the people" around which representational institutions may be organized but also chooses a conception of "the people" on which its own action may be premised. The Court does not stand outside the representational conflicts it adjudicates; the meaning of fair representation as well as the extent of judicial power rest on understandings of political identity.

At minimum, the intersection between fair representation and Court power suggests that judicial interpretations of the Voting Rights Act depend on assertions about who "the people" are. The centrality of political identity has not always been appreciated. Examining the public debate over the act, I demonstrate that ideological positions have been animated by sharply divided conceptions of "the people," which many commentators have either misapprehended or simply neglected (chapter three). Without acknowledging the conceptual depth of existing disagreements, attempts to advance the debate over minority representation are bound to fail.

Beyond suggesting that claims of identity should be recognized, the interdependence of fair representation and judicial power also indicates how notions of identity ought to be *used*. If our government is to remain democratic—if it is to engender rule by the sovereign people rather than to foster rule by an unaccountable judiciary—then the Court must not rely on conceptions of "the people" that prevent the citizenry from finally speaking for themselves. I use this standard to gauge the debate over the Voting Rights Act as it has developed on the bench. During the 1960s and 1970s, members of the Court adopted a diversity of approaches to minority representation, organizing their views around conceptions of popular vigilance, abstract individualism, legislative learning, and interest group competition (chapter four). I argue that each of these approaches is problematic, for each sustains an understanding of judicial authority that ultimately fails to preserve the capacity of the people to speak for themselves.

In the last twenty years, the Court has abandoned its original diversity of views, settling on a dichotomous treatment of minority representation polarized around "individualist" and "group" notions of political identity (chapter five). The individualist and group views have

fractured the Court, just as conflicting versions of political identity have splintered the broader ideological debate. Although the individualist and group camps each offer some valuable insights, I argue that both finally stumble over a mistaken account of political identity, which impairs the prospects for popular sovereignty (chapter six). In particular, I argue that both views have an important feature in common: each takes political identity to be something formed prior to and apart from politics itself. The shared belief that political identity is "prepolitical" has hardened the lines of opposition, creating a zero-sum debate that has foreclosed valuable democratic options. In short, by predicating judicial authority on essentialized conceptions of identity, the Court has truncated the range of political possibilities, ultimately leaving the people unable to control the grounds on which the political community is constructed.

Given these circumstances, I suggest that the emphasis on fixed, prepolitical notions of political identity should be left behind for a more flexible, politically informed rendering of "the people." More specifically, I argue that the Court should develop its earlier views of legislative learning, focusing on how understandings of political identity are forged *within* the process of political deliberation. Rather than policing claims about immobile identities, the Court should work to preserve the conditions that allow elected representatives to learn. The adjudication of representational controversies would thus remain sensitive to the concerns of democratic sovereignty, ultimately permitting the people to speak for themselves even as the Court speaks on their behalf.

Of course, by reorienting the jurisprudence of minority representation toward a theory of political deliberation, members of the Court cannot hope to resolve all disagreements over the Voting Rights Act. To expect such consensus is to ignore the complex struggle over political membership that has long characterized the politics of minority representation. Even among those who favor severe limits on the pursuit of fair minority representation, there is an acknowledgment that the issue will always be a center of controversy.[17] Still, if the turn toward political deliberation will not solve all the puzzles of minority representation, it will provide a new set of terms in which such puzzles can be framed. New terms allow for a new conception of minority representation, free from the problematic claims and strange dichotomies which currently plague

[17] Thernstrom 1987, p. 244.

public discussion. And, in the end, it is with the hope of advancing public discussion that this book is written.

More than 150 years ago, Alexis de Tocqueville wrote that "there is hardly a political question in the United States which does not sooner or later turn into a judicial one."[18] While many have agreed with Tocqueville's observation, agreement on how judicial action ought to be studied has been less common. In the field of political science, scholarship has emphasized the political origins of judicial decision making, treating judicial activity as the continuation of ordinary policymaking by other means. Such "political jurisprudence" views decisions in terms of political attitudes and, in doing so, typically pays little attention to the structure of judicial reasoning.[19]

In this book, my concern is less with the *origins* of judicial decision making than with the *meaning* of the principles articulated in those decisions.[20] Although I provide a general overview of leading cases, I also devote several chapters to a close examination of judicial reasoning, carefully evaluating the arguments justices use to support their conclusions. I take these arguments to be worthy of close study because I see judicial reasoning as a particular way of making sense, a technique of using analogies and metaphors to render issues so that they are suitable for judgment.[21] I view the law, in other words, as a resource for engaging in particular forms of thought and debate. Working with the law, judges construct arguments that operate like narratives—naming relevant characters and conditions, enumerating events, and investing these events with significance. Judges use legal discourse to frame "a set

[18] Tocqueville 1966, p. 270.

[19] The classic work of political jurisprudence is Shapiro 1964 (see also Shapiro 1981 and 1988; and Murphy 1964). Political jurisprudence draws on legal realism (Kalman 1986; Purcell 1973; and Horwitz 1992) and rejects the notion that judges are capable of arriving at singularly correct answers (cf. S. Barber 1989 and Dworkin 1977 with Shapiro 1983 and 1989). For a discussion of political jurisprudence as the conventional wisdom of political science, see Brigham 1987 (cf. Stumpf 1983; O'Brien 1983). For a strong, recent statement of political jurisprudence, see Segal and Spaeth 1993.

[20] For broad arguments in favor of studying judicial meaning, see Constable 1994; Gillman 1993; and Melnick 1994.

[21] White 1984 and 1985. See also Brigham 1978; Carter 1985; Geertz 1983; and Scheppele 1988 and 1990. The classic work describing the analogical structure of judicial reasoning is Levi 1949 (see also Minow 1987a; Fuller 1967, pp. 55, 65, 87–89, 115, 134–35; and, more generally, Lakoff and Johnson 1980; Quinn and Holland 1987; and Quinn 1991).

of questions that reciprocally define and depend upon a world of thought and action," creating "a set of roles and voices by which meanings will be established and shared."[22] Judicial opinions thus constitute a distinct "culture of argument" that defines issues and various ways to approach them.[23] My aim is to assess the culture of argument established in a specific context, focusing on how conceptions of political identity have been used to support different views of fair minority representation and judicial authority.[24]

Of course, in investigating the meaning of judicial arguments, I am not claiming that political preferences play no role in judicial decision making. Legal outcomes are clearly sensitive to membership change; as conservative politicians control more judicial appointments, judicial decisions become more conservative. But the terms in which judges frame legal controversies are also important. Indeed, the form of judicial argument, as a particular mode of envisioning the issues in question, often makes a crucial difference to the outcome.[25] The evaluation of judicial reasoning is necessary not only to understand a decision, but also to begin to see how decision making might be made more reasonable. It is to this evaluation that I now turn.

[22] White 1985, p. 71.

[23] Ibid., pp. 28–35. This approach differs from other approaches claiming that a broad "legal consciousness" or "community of understanding" influences entire cohorts of judges for distinct historical periods (See Kennedy 1980; Klare 1978; Mensch 1982; Garvey 1971; and Tushnet 1989). As a method of case analysis, legal consciousness studies tend to understate the importance of conflicts that do occur on the bench (see Smith 1988b). Within the context of a given legal order, judges still confront important choices.

[24] For studies of political identity in other judicial contexts, see Noonan 1976, pp. 3–64; Horwitz 1985; and O'Neill 1981.

[25] This proposition has received a good deal of empirical verification. See Segal 1984; Baum 1988 and 1992b; George and Epstein 1992; Lloyd 1995; H. W. Perry 1991; and, especially, Epstein and Kobylka 1992.