The Second Reconstruction: Civil Rights Revolution

The passage of the Voting Rights act along with other legal reforms of the 1960's caused decision makers on both sides of the political spectrum to adjust to affirmative action as well as districting plans necessitated by the implementation of suffrage to blacks. Regarding districting plans and affirmative action, there were two categories for the arguments for the reforms; one in favor of racial blindness and the other in favor of race awareness. The division between racial blindness and racial consciousness draws directly from the contradiction "between the Voting Rights Act and the Fourteenth Amendment: the former seemed to mandate race-conscious remedies, while the latter was interpreted as a constitutional requirement to be color blind.[1]"

Affirmative action is the preferential treatment of minority groups in a variety of forms such as jobs and college admission. The goal, according to defenders, is to mitigate the racial injustices that have resulted in a large gap between the standard of living of whites and their black counterparts. The alleviation is intended to compensate today's black community for past injustices and the consequent disparities between blacks and whites in contemporary society. A second argument for racial awareness is the belief that a diverse society should have diverse leaders. This argument was upheld by Justice Lewis Powell in Regents of the University of California v. Bakke (1978). Powell stated that race-based affirmative action was permissible under the Equal

[1] Keyssar, page 298

Protection Clause only if it was in the interest of the Government.[2] In a decision following Bakke, Richmond v. J.A. Croson Co. (1989), the decision was based on strict scrutiny applied to affirmative action cases. The court held that "For affirmative action programs to be justified as a remedy, a governmental body must identify specific patterns or incidents of past discrimination in which it was somehow implicated.[3]" In this ruling, the court ruled against affirmative action, which is logical considering the conservative drift in politics and the Rehnquist court.

The opponents of affirmative action argue that the fourteenth amendment advocates racial blindness, and that policy advocating otherwise is unconstitutional. In the recent decision, Grutter v. Bollinger (2003), the court ruled that educational institutions have a compelling interest to implement affirmative action. The four dissenting justices (Kennedy, Rehnquist, Thomas and Scalia) argue that race counts for too much, and that the school was attempting to "achieve rough racial proportionality, rather than merely making race a modest 'plus' in achieving the kind of diversity that enhances educational quality.[4]" The difference between the majority and the dissenting justices is how suspect they are of the role of race in the legislation evaluated.

Since the achievement of near unrestricted franchise in the 1960's, Southern conservatives have attempted to alter voting institutions in order to de-emphasize the black vote. Racial gerrymandering was the most common form of vote dilution, coming in various forms such as cracking and stacking. Cracking is the division of ethnic voters into multiple districts, and conversely, stacking is putting all ethnic voters in one district. Gomillion v. Lightfoot (1960) was the first case involving racial gerrymandering and the

[2] Fallon, page 126.
[3] Fallon, page 127.
[4] Fallon, page 128.

court ruled against such behavior. Fortunately, legislation under the Voting Rights Act created the pre-clearance procedure, "requiring targeted states and counties to get federal approval for any new or changed electoral procedures.[5]" The debate was not whether blacks should be represented equally, but whether the electoral institutions are fair and if not, whether it is coincidental or deliberate.

The early attempts to dilute the black vote were fairly conspicuous, such as the Tuskegee incident, but southern legislators became more discreet in their tactics. Lawmakers learned that intent was easy for the court to strike down, but effect was quite difficult. An electoral structure that left minorities unrepresented did not prove to be unlawful discrimination because in American elections, the condition for victory is achieving a majority of the votes. An argument to counter the first-past-the post system that left minorities unrepresented is proportional representation. Proportional representation is advantageous in a system with ethnic cleavages, such as the American South, because it gives a minority population representation in proportion to their population. However, this argument is not likely to satisfy the American public because of its emphasis on group rights and the possibility of balkanization. The argument against districting plans based on race raised in Shaw v Reno (1993) is that racial gerrymandering promotes racial balkanization and therefore, minority districts were illegal if they were not at all compact.[6] The courts have not been conclusive in their position on district apportionment. The recent trend has been towards color-blind districting, but that could be due to the conservative drift of politics.

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[5] Keyssar, page 288.
[6] Keyssar, page 296.

The main arguments since the legislative reforms of the 1960's regarding affirmative action and districting plans have been split between color blind legislation, as advocated by the fourteenth amendment and equal representation, as required by the Voting Rights Act of 1964. The arguments for racial blindness are that not all people of the same ethnicity think alike and the only way for minorities to achieve equality is by equal treatment under the law. Conversely, advocates for equal representation argue that both affirmative action and proportional representation gives afflicted minorities a chance to close the wealth and education gap between themselves and the white majority.