

Mistaken Identity: The Supreme Court and the Politics of Minority Representation. By Keith J. Bybee. Princeton, NJ: Princeton University Press, 1998. 194p. \$55.00

In a series of contentious, confusing, and contradictory opinions beginning with *Shaw v. Reno* (1993), the U.S. Supreme Court has outlawed some, but not all congressional and state legislative districts that were designed to insure that African-American and Latino voters had real opportunities to elect candidates of their choice. Citing only Supreme Court opinions and a small part of the huge secondary literature on voting rights and redistricting, Keith Bybee claims that in voting rights cases, “conservatives” and “progressives” have fundamentally struggled over the definition of “who ‘the people’ are” (7), and that he has discovered a way to circumvent this non-terminating disagreement. His analysis and prescriptions are unconvincing because he too readily dismisses or ignores empirical scholarship, because he disregards all or parts of Supreme and lower court opinions that do not fit his scheme, and because he provides no justification in logic or constitutional law for his key proposal.

Since 1993, Bybee maintains, the five-person majority of Chief Justice William Rehnquist and Justices Anthony Kennedy, Sandra Day O’Connor, Antonin Scalia, and Clarence Thomas, has consistently adopted an individualist notion of political identity, while the four-person dissenting minority of Stephen Breyer, Ruth Bader Ginsburg, David Souter, and John Paul Stevens (and Harry Blackmun and Bryon White before their retirements) has consistently considered political identity to be group-based. Instead, Bybee urges the Court to base its jurisprudence on the idea of “political deliberation,” a basis that he believes will tend to reunite the fractured public and strengthen the role of the Court itself. In less exalted terms, he opposes the actual or effective repeal of Section 2 of the Voting Rights Act, which under *Thornburg v.*

Gingles (1986) protects large, geographically compact minorities against repeated defeats by white majorities in racially polarized elections. This would guarantee diversity in legislative membership, he contends. To encourage deliberation, he would have the Court force redistricting to be bipartisan.

A political theorist, Bybee scorns those who believe debates might turn on “simple matters of fact,” who support their arguments with “an immense amount of historical detail,” or who reduce complexities to “a few bits of numerical data.” (63, 43, 55) Empiricists like Justice Byron White or political scientist Bernard Grofman, who employ qualitative or quantitative evidence to determine the intent or effect of electoral laws on minority representation, Bybee announces, are guilty of “evasion of theoretical issues” or “evasion of conceptual issues.” (60, 115) In contrast, Bybee neither analyzes data himself nor evaluates the conflicting empirical literature on disputed topics. Rather, he merely adopts convenient assumptions about reality: Political identity, he asserts, “develops during the process of debate and discussion, making it possible for decisions to be made in the common interest.” (171) Bipartisan redistricting “loosens incumbents’ grip on their constituencies and keeps the legislature responsive to the electorate as a whole. Through conflict and counterargument, policy is made in the common interests of all.” (169)

Bybee’s selective treatments of legal cases undermine his statements about the nature and consequences of Supreme Court opinions. His contention that *Mobile v. Bolden* (1980), showed that “the search for discriminatory intent in the design of political institutions was likely to be fruitless,” (23) for example, is weakened by the fact that the plaintiffs successfully proved such an intent when the case was remanded to the district court. His description of the Supreme

Court as a representative of “the people as a whole” (37) ignores the body’s self-conscious role after the famous Footnote 4 of *U.S. v. Carolene Products* (1938) as the special guardian of the rights of “discrete and insular minorities,” as well as its more common historical role as the guardian of majority persecution of those minorities in such cases as *Dred Scott v. Sandford* (1857) and *Korematsu v. U.S.* (1944). His declaration that group and individual conceptions of rights form the central issue and dividing line in voting rights cases is undercut by the existence of other dividing lines (intent vs. effect, symbolic vs. real harm, descriptive representation vs. influence, judicial activism vs. deference to Congress, the Justice Department, or state legislatures), none of which he discusses systematically, as well as by the inconsistency with which both sides have held to the group and individual conceptions. In *Shaw v. Reno*, for example, Justice O’Connor, an individualist in Bybee’s scheme, posits three symbolic or “expressive” harms to “our society” that ungainly minority opportunity districts may produce: stereotyping, exacerbating racially polarized voting, and cuing representatives to be attentive to only one group in a district. Because, as she notes, redistricting “does not classify persons at all; it classifies tracts of land, or addresses,” none of these three alleged harms, which are crucial to her opinion, is really based on an individualized notion of political identity. In *Davis v. Bandemer* (1986), the case in which the Court ruled partisan gerrymandering justiciable and which Bybee, surprisingly, does not discuss, O’Connor would have denied the Democrats standing to sue because, unlike “racial minority groups,” they “cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group.” And since at least the 1840s, during the first Boston school integration struggle, racial progressives have condemned irrational distinctions that harm individuals and the use of what

Justice Thurgood Marshall later called “crude, inaccurate racial stereotypes.” (*Batson v. Kentucky* (1986))

Bybee derives his “political deliberation” theme from his speculative extension of Chief Justice Earl Warren’s discussion in *South Carolina v. Katzenbach* (1966) of the care with which Congress considered the initial Voting Rights Act. Warren, Bybee says, “seemed to suggest” that jurisdictions which were required to submit changes in their electoral laws to Congress before putting them into effect should conduct “Congress-like deliberations,” should “deliberate on behalf of the entire people.” (85, 155) But Warren did not say this, the Department of Justice has never mandated it, and the bargaining over election laws and redistricting seldom resembles the “nondiscriminatory deliberation . . . broad legislative learning” that Bybee imagines. (87) Even granting the possibility of “deliberation about the interests that all hold in common as well as the policies best suited to serve those interests” (154), the logical connections between this utopia and race-conscious and bipartisan redistricting are unclear. Mandatory bipartisan gerrymanders might reduce minority influence and representation, and cross-party redistricting deals or minority representation might inhibit, rather than foster, a polite search for legislative consensus. These are empirical questions that Bybee does not pursue. And curiously in a book on constitutional law, Bybee makes no effort to tie bipartisanship or deliberation to any constitutional phrase, doctrine, or theory. Is the Constitution a mandate for the majority of the Supreme Court to institute any political notion it fancies?

J. Morgan Kousser, California Institute of Technology

