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The Story of *Shaw v. Reno*: Representation and Raceblindness

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The Voting Rights Act of 1965 ("VRA") is probably the most successful civil rights statute in the history of the United States. Although the Fourteenth and Fifteenth Amendments promised equal protection of law and equal access to the ballot, the decades between Reconstruction and the 1960s made a mockery of that promise. Throughout the states of the former confederacy, African Americans were almost completely shut out of the political process. As late as 1964, for example, only 6.4 percent of black Mississippians were even registered to vote.[1] Outside of the South, blacks and other people of color enjoyed the formal right to vote but were seldom elected to office. The United States Congress and state legislative bodies thus remained predominantly – and many of them exclusively – white institutions.

Things changed after enactment of the VRA, which opened up the political process to people who had long been excluded from it, most notably African Americans in the South. By the 1990s, the VRA was beginning to integrate legislative bodies that had been almost entirely white for decades. The change was so profound that it has been called the "quiet revolution,"[2] and it is no overstatement to describe the changes wrought by the Voting Rights Act of 1965 in such dramatic terms.

When *Shaw v. Reno*[3] (*Shaw I*) was decided in 1993, it seemed as though a reversal of the changes inaugurated by the VRA might be on the horizon. In *Shaw I*, the Supreme Court recognized a new kind of equal protection claim that it acknowledged to be "analytically distinct" from any that had previously been articulated.[4] Specifically, the decision allowed white North Carolinians to state a claim against their state, for having deliberately created a majority-black district that the Court deemed "bizarre" in shape.[5] The *Shaw I* Court imported into voting rights law the raceblindness principle, stated in the first Justice Harlan's dissenting opinion

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[1]SAMUEL ISSACHAROFF, ET AL., THE LAW OF DEMOCRACY 546 (2d ed. 2001).

[2]QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994).

[3]509 U.S. 630 (1993)("*Shaw I*").

[4]*Id.* at 652.

[5]*Id.* at 655-56.

in *Plessy v. Ferguson* and honed in the Court's affirmative action jurisprudence from *Regents of the University of California v. Bakke*[6] to *City of Richmond v. J.A. Croson*.[7] In so doing, Justice O'Connor's majority opinion deployed unusually provocative rhetoric, comparing North Carolina's creation of a majority-black district to "political apartheid" and warning that districts threatened to "balkanize us."[8]

The Court applied the raceblindness principle to the drawing of legislative districts, despite the fact that African Americans had been locked out of southern politics for most of the preceding century. During Reconstruction, Southern blacks were allowed to vote, were elected to state legislatures, and even served in Congress. By the turn of the 20th Century, however, white Democrats had regained their monopoly on political power in the South. This iron grip on the reins of power was maintained through a now-familiar array of exclusionary tactics, including literacy tests, poll taxes, interpretation tests, grandfather clauses, gerrymandering, all-white primaries, at-large elections, fraud, physical intimidation, violence, and even murder.[9] Notwithstanding its relatively progressive self-perception,[10] the State of North Carolina was not an exception.[11] Between 1900 and 1992, it did not send a single African American to Congress.[12]

To understand the story of *Shaw v. Reno*, it is essential to recount this long and ugly history of racial exclusion, as well as the phenomenal success of the Voting Rights Act of 1965 in suspending it. Understanding this story also necessitates an examination of the post-1990 redistricting process, during which the Justice Department of President George H.W. Bush adopted a facially surprising policy of

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[6]438 U.S. 265 (1978).

[7]For a sustained critique of the application of the colorblindness principle to democratic politics, see J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION (1999). *See also* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind," in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 257 (1995).

[8]*Shaw I*, 509 U.S. at 647, 657.

[9]KOUSSER, *supra* note 7, at 23-27. *See also* BERNARD GROFMAN, ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 8-10 (1992)(itemizing mechanisms of disenfranchisement in South).

[10]KOUSSER, *supra* note 7, at 245.

[11]William R. Keech & Michael P. Sistrom, *North Carolina*, *in* Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990, at 154-75(Chandler Davidson & Bernard Grofman eds., 1994).

[12]J. Morgan Kousser, Shaw v. Reno *and the Real World of Redistricting and Representation*, 26 RUTGERS L.J. 625, 631 (1995).

aggressive enforcement of the Act, insisting that southern states maximize the number of safe minority districts – a policy that had the side-effect of packing the most reliably Democratic-voting citizen group (i.e., blacks), and thereby facilitating gains in Republican legislative power. The Justice Department's effort to increase the number of majority-minority districts led directly to the litigation in North Carolina and, eventually, to the opinion in *Shaw v. Reno* ("*Shaw I*"). But the most fascinating part of the story is what has transpired since the Court's 1993 opinion in *Shaw I*. This includes the opinion in *Shaw v. Hunt* ("*Shaw II*") which held North Carolina's majority-black 12th District unconstitutional, and two more Supreme Court opinions after the state's congressional map was withdrawn. These opinions have left the *Shaw* doctrine in a state of limbo, creating a voting rights jurisprudence that can most generously be described as muddled.

In the immediate aftermath of the Court's opinion in *Shaw I*, many commentators and voting rights lawyers thought the decision to be a disaster, both analytically and practically. Criticisms of *Shaw I*'s reasoning were accompanied by apocalyptic premonitions of what the decision portended. There were two major fears about what the opinion's consequences might be. One was that it meant the beginning of the end of the Voting Rights Act. For if the Constitution truly required raceblindness in the area of redistricting, the Voting Rights Act, as it had come to be interpreted, would at best become a dead letter and at worst be struck down entirely. The other, concomitant fear was that the decision would lead to the resegregation of state legislative bodies. If states were forbidden from drawing majority-minority districts, then the federal government would be deprived of the tools that had been vital to undoing the exclusion of African Americans and other minorities from the democratic process. Voting rights advocates were thus afraid that the fate of the second reconstruction would be the same as that of the first – that a short period of minority inclusion would be followed by yet another lengthy period of exclusion.[13]

While the legacy of *Shaw I* and the doctrine it spawned remains murky, it is abundantly clear that the decision set in motion a chain of events that have resulted in an internally unstable, if not self-contradictory, voting rights jurisprudence. In concurring with the Supreme Court's most recent interpretation of the Voting Rights Act's preclearance provision, Justice Kennedy properly noted the "discord and inconsistency" in the Court's jurisprudence.[14] As one prominent commentator even

[13]Laughlin McDonald, *The Counterrevolution in Minority Voting Rights*, 65 MISS. L.J. 271 (1995)(seeing *Shaw* cases as emblematic of a "counterrevolution" in voting rights that threatened to undo the gains won since VRA).

[14]Georgia v. Ashcroft, 539 U.S. 461, 491 (2003).

more bluntly puts it, voting rights law is now "at war with itself."[15] The problem, reduced to its essence, is that the VRA has long been understood to require race-consciousness, but *Shaw I* and its progeny stand for a qualified rule of raceblindness. This internal instability makes it difficult to imagine either voting rights doctrine or minority representation remaining static for long. While the second reconstruction has not yet met the same fate as the first, the tension between raceblindness and minority representation remains very much unresolved – and *Shaw*'s legacy therefore the subject of vigorous contestation.

Before the Revolution

To understand the story of *Shaw v. Reno* it is first necessary to examine the history of voting rights in the South. That history is, of course inextricably linked to the experience of African Americans as they moved from slavery, to freedom and equality during Reconstruction, to subjugation and exclusion under Jim Crow, and then to greater inclusion if not equality during second half of the 20th Century. Like the struggle for racial equality of which it is part and parcel, the expansion of voting rights has not proceeded in a linear fashion. It has instead been marked by fits and starts, by short bursts of progress followed by decades of stasis and backsliding. Though mentioned only in passing in the Court's opinion, this experience provides an essential context for the post-1990 redistricting that gave rise to litigation in North Carolina and other states.

The first lesson that the history of voting rights teaches is that declaration of a right is one thing but realization of that right quite another. After enactment of the Fourteenth Amendment, over 700,000 African Americans were registered to vote under the supervision of federal troops.[16] Yet it quickly became apparent that this would be insufficient to ensure that newly freed slaves were afforded equal voting rights.[17] In 1870 the Fifteenth Amendment, specifically prohibiting the denial or abridgement of the right of citizens to vote "on account of race, color, or previous condition of servitude," was ratified. Congress followed by passing a series of Enforcement Acts, which provided for supervision of congressional elections,

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[15]Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002)

[16]GROFMAN, *supra* note 9, at 5.

[17]Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEORGETOWN L.J. 259, 269 (2004)(Congress recognized "almost immediately that Section 2 [of the Fourteenth Amendment] would protect neither northern political interests nor the rights of the freedmen").

proscribed the suppression of the vote through violence or intimidation.[18]

For a longer period of time than is commonly supposed, the federal laws enacted to enforce the Fourteenth and Fifteenth Amendments allowed African American men to participate in electoral politics. In 1872, there were over 300 southern blacks serving in state legislators and Congress – a threshold that was not again reached until the 1990s.[19] The number of black legislators declined precipitously from 1872 until 1878.[20] Yet even after this dramatic decline in the number of blacks elected to office, blacks continued to vote in substantial numbers until the end of the 19th Century, during which time the number of black legislators continued to decline, though more gradually than it had in the mid-1870's.[21] Although Reconstruction is generally considered to have ended with the Compromise of 1877, in which Republican Rutherford B. Hayes became President in exchange for the removal of federal troops from the Deep South, approximately two-thirds of black males voted in the election three years later. Blacks continued to vote through the 1890's during which several southern states enacted restrictions on the vote.[22]

By the start of the 20th Century, however, almost all blacks in the South had been denied the vote.[23] This was largely a consequence of the rewriting of state constitutions, so as to "exclude blacks from the electorate without obviously violating the Fifteenth Amendment."[24] Disfranchisement was accomplished through a battery of practices including literacy tests, interpretation tests, property qualifications, criminal disenfranchisement, white primaries, poll taxes, and gerrymanders.[25]

For many years thereafter, neither Congress nor the Supreme Court showed much interest in intervening to stop even the most blatantly exclusionary practices. Although the Supreme Court declared the right to vote "fundamental" in the 19th Century, it did little to stop the suppression of African Americans' voting rights until

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[18]KOUSSER, *supra* note 7, at 18.

[19]*Id.* at 19.

[20]*Id.*

[21]*Id.* at 20.

[22]*Id.* at 20-21.

[23]GROFMAN, *supra* note 9, at 10

[24]*Id.* at 8.

[25]*Id.* at 8-10; *see generally* J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 (1974).

the late 20th Century.[26] Instead, the Court turned a blind eye to southern states' actions that effectively cut blacks out of democratic politics altogether. It upheld Mississippi's literacy test in 1898, on the ground that it did not facially discriminate against blacks.[27] And in two cases arising out of Alabama, the Court rejected a challenge to several provisions of the state constitution designed to deny blacks the vote.[28] The 1903 opinion in *Giles v. Harris* , authored by Justice Oliver Wendell Holmes, is an especially noteworthy feat of judicial legerdemain. That opinion held that, by claiming that the Alabama voting system was racially discriminatory to its very core, the African American plaintiff had effectively foreclosed the Court from granting relief. In particular, Justice Holmes concluded that the Court was without power to grant the black plaintiff the relief that he sought – namely, that he be placed on the registration rolls – given his claim that the "whole registration scheme of the Alabama constitution is a fraud upon the Constitution of the United States."[29] For if this was indeed true, Justice Holmes reasoned, then ordering the plaintiff registered pursuant to state law would give effect to a "void instrument," namely the state's racially discriminatory constitution.[30] Thus, under Justice Holmes' twisted theory of constitutional law, the systemic racism of which Mr. Giles complained precluded the Court from granting him relief.

The *Giles* decisions effectively gave a green light to states that had adopted new voting rules to deny blacks the vote at the end of the 19th Century. And so things stood for the next half century. Although the Supreme Court declared Oklahoma's grandfather clause unconstitutional in *Guinn v. United States*,[31] decided in 1915, it declined to intervene when the state legislature reacted by decreeing that those who were *not* on the registration list do so within a one-time-only period of 12 days.[32] The Supreme Court's decisions upholding the white primary,[33] the poll tax[34]

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[26]Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

[27]Williams v. Mississippi, 170 U.S. 213 (1898).

[28]Giles v. Teasley , 193 U.S. 146, 166 (1904); Giles v. Harris, 189 U.S. 475 (1903).

[29]*Id.* at 486.

[30]*Id.*

[31]238 U.S. 347 (1915).

[32]GROFMAN, *supra* note 9, at 11. That requirement was not held unconstitutional for another 23 years. *See* Lane v. Wilson, 307 U.S. 268 (1939).

[33]Grovey v. Townsend, 295 U.S. 45 (1935). The death knell of the all-white primary did not come until Smith v. Allright, 321 U.S. 649 (1944), which expressly overruled *Grovey*.

[34]Breedlove v. Suttles, 302 U.S. 277 (1937).

and, the literacy test[35] ensured the continuing exclusion of blacks from democratic politics throughout the South. As of 1940, only 3 percent of voting-age blacks in the South were even registered to vote.[36]

Race and Representation in North Carolina

Despite its relatively progressive self-image, North Carolina's history of excluding African Americans mirrored that of other southern states. If North Carolina was a step behind some of the other southern states in cutting blacks out of the political process at the end of the 19th Century, it was only a small step. And if it was a step ahead of other southern states in re-enfranchising blacks in the second half of the 20th Century, it was again by a small margin – one that other southern states quickly closed, under more vigorous pressure from the federal government to reform their election practices after the Voting Rights Act of 1965.

Among the peculiarities of North Carolina history is that Reconstruction was *not* the first time that African Americans in the state were allowed to vote. Free blacks in North Carolina were actually allowed to vote under the first state constitution, adopted in 1776.[37] It was not until the 1835 state constitutional convention that free blacks were wholly deprived of the right to vote, and this prohibition remained in effect until after the Civil War.[38] The Second Military Reconstruction Act of 1867 re-enfranchised African Americans and, by 1868, they constituted 70,444 of North Carolina's 196,872 registered voters[39] As a condition of readmission to the Union, North Carolina and other southern states were required to adopt constitutions giving blacks the right to vote. Restoration was also conditioned on the states agreeing that its constitution "shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote," except as punishment for those convicted of felonies.[40] North Carolina amended its

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[35]Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

[36]Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 29 (Chandler Davidson & Bernard Grofman eds., 1994).

[37]EQUAL PROTECTION OF THE LAWS IN NORTH CAROLINA 5 (1963).

[38]EQUAL PROTECTION, *supra* note 37, at 6; WILLIAM MABRY, THE NEGRO IN NORTH CAROLINA POLITICS SINCE RECONSTRUCTION 3 (1940).

[39]*Id.*

[40]Chin, *supra* note 17, at 271.

constitution accordingly in 1868.[41]

During and after Reconstruction, a substantial number of blacks were elected to federal, state, and local office in North Carolina. Four blacks represented the second congressional districts (commonly known as the "black second"[42]) from 1868 to 1901. The last was Rep. George White, who was also the last African American to serve in Congress from *any* state until 1929 and the last to serve from any southern state until 1973.[43] A total of 59 blacks sat in the North Carolina house and 18 in the state senate, between 1876 and 1900, although they had little influence in a legislature dominated by whites.[44] At the local level, white Democrats engaged in exhaustive efforts to limit black influence, modest though it was, from 1870 through 1900. An 1875 constitutional amendment replaced the popular vote with legislative control of county government, to promote white control of eastern counties with substantial black populations.[45] Centralization of authority over elections was critical to the White Democrats disenfranchisement efforts. The state board of elections supervised the appointment of local election officials, with those officials given broad discretion over the information required of voters, the time the books were open, and challenges to voter eligibility on election day.[46]

Still, North Carolina's blacks continued to vote in substantial numbers for over two decades after the end of Reconstruction.[47] An alliance of Populists and Republicans actually captured the state's general assembly in 1894, with the support of blacks.[48] Another so-called "fusion ticket" prevailed again in 1896 elections.[49] The electoral success of the Republican-Populist fusion led to an enormous backlash on the part of white Democrats, whose successful 1898 campaign was based on an

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[41]EQUAL PROTECTION, *supra* note 37, at 7.

[42]*See generally* ERIC ANDERSON, RACE AND POLITICS IN NORTH CAROLINA, 1872-1901 : THE BLACK SECOND (1981).

[43]Keech & Sistrom, *supra* note 11, at 156.

[44]*Id.* at 157.

[45]EQUAL PROTECTION, *supra* note 37, at 9; Keech & Sistrom, *supra* note 11, at 157.

[46]Keech & Sistrom, *supra* note 11, at 157.

[47]EQUAL PROTECTION, *supra* note 37, at 10.

[48]*Id.* at 11.

[49]Keech & Sistrom, *supra* note 11, at 158.

explicit platform of white supremacy.[50] But the pivotal election for black voting rights in North Carolina occurred two years later.

The 1900 election resulted in a decisive victory for the openly racist gubernatorial candidate Charles Aycock, and for a package of constitutional amendments that he supported on the ground that they were needed to stop the "Negro domination" of state politics.[51] The amendments provided that, in order to be registered, voters had to pay a poll tax and to "be able to read and write any section of the constitution in the English language" to the registrar's satisfaction.[52] This requirement was accompanied by a grandfather clause that allowed citizens to vote, if they could trace their ancestry to someone who had voted before January 1, 1867.[53] After passing the necessary legislative hurdles, the amendments were submitted to voters for August 2, 1900 election. Democrats forthrightly asserted that the object of the amendments was elimination of the "ignorant and irresponsible negro vote," estimating that between 80,000 and 90,000 blacks would be disfranchised by the educational clause.[54]

Both Aycock and the suffrage amendment prevailed by a wide margin in the August 1900 election.[55] As in other states, "good government" was the coded term for disfranchisement of black voters. Yet after the election, Governor Aycock was remarkably candid about what he and other white North Carolinians had accomplished:

> I am proud of my State, moreover because there we have solved the Negro problem.... We have taken him out of politics and have thereby secured good government under any party and laid foundations for the future development of both races.
>
> I am inclined to give you our solution to this problem. It is first, as far as possible under the Fifteenth Amendment, to

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[50] EQUAL PROTECTION, *supra* note 37, at 11; Brief for Congressional Black Caucus as Amici Curiae, Shaw v. Hunt, 517 U.S. 899 (1996) (No. 94-923), 1995 U.S. Supreme Court Briefs LEXIS, at *21; *see also* MABRY, *supra* note 38, at 57-72 (detailing the steps taken by White Democrats to disenfranchise North Carolina blacks between 1899 and 1900).

[51] HELEN G. EDMONDS, THE NEGRO & FUSION POLITICS IN NORTH CAROLINA 1894-1901 199-200 (1951).

[52] Keech & Sistrom, *supra* note 11, at 158; EQUAL PROTECTION, *supra* note 37, at 11.

[53] EQUAL PROTECTION, *supra* note 37, at 11.

[54] EDMONDS, *supra* note 51, at 203.

[55] *Id.* at 209-10.

> disfranchise him; after that let him alone, quit writing about him; quit talking about him ... let the Negro learn once and for all that there is unending separation of the races ... that they cannot intermingle; let the white man determine that no man shall act or thought or speech cross this line, and the race problem will be at an end.[56]

The 1900 election marked the effective end of African Americans' right to vote in North Carolina for most of 20th Century, reducing them to a "political nonentity." The literacy test, requiring that voters read a section of the state constitution to the registrar's satisfaction, was the main device by which blacks were excluded from voting. North Carolina's elimination of the poll tax in 1920 may have made it possible for some poor whites to vote, but did little for blacks, who were still effectively kept out of politics by the literacy test.[57]

The discretion given local registrars to enforce the literacy requirement made it practically impossible to detect discrimination, and courts showed little interest in intervening until the 1960s. In 1936, two black schoolteachers brought a lawsuit after they had been prevented from voting by a local registrar, but the North Carolina Supreme Court upheld the literacy test, praising it for having "brought light out of darkness as to education for all the people of the State."[58] In 1959, the U.S. Supreme Court also upheld the state's literacy test.[59] But two years later, the North Carolina Supreme Court revisited this test in *Bazemore v. Bertie County Board of Elections*, holding it unconstitutional in part.[60] The state supreme court held that the state could require that voter be able to read with "reasonable proficiency" and to write provisions of the Constitution put before them, but that the state could not require writing from dictation. Finally the court stated that the literacy test could not be administered so as to "discriminate between citizens," but left little clue as to how

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[56]Charles B. Aycock, Speech Before the North Carolina, Baltimore (Dec. 18, 1903), *in* NORTH CAROLINA EXPERIENCE: AN INTERPRETIVE AND DOCUMENTARY HISTORY 415 (Lindsey S. Butler & Alan D. Watson eds., 1984), *quoted in* Brief for Congressional Black Caucus as Amici Curiae, Shaw v. Hunt, 517 U.S. 899 (1996) (No. 94-923), 1995 U.S. Supreme Court Briefs LEXIS, at *22-*23.

[57]Keech & Sistrom, *supra* note 11, at 158.

[58]Allison v. Sharp, 209 N.C. 477, 482 (1936); EQUAL PROTECTION, *supra* note 37, at 16; Keech & Sistrom, *supra* note 11, at 158.

[59]Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45 (1959).

[60]Keech & Sistrom, *supra* note 11, at 159; Bazemore v. Bertie Co. Bd. of Elections, 254 N.C. 398 (1961).

to go about detecting violations or enforcing this requirement.[61] Despite the *Bazemore* decision, the North Carolina Advisory Committee to the U.S. Commission on Civil Rights found a "bewildering variety of methods" used to assess literacy as of 1963, resulting in an electorate that was "overwhelmingly and disproportionately white."[62] It is true that the percentage of African Americans registered in North Carolina had risen significantly even before passage of the Voting Rights Act of 1965, going from 5 percent in 1940 to 45 percent in 1965. While seemingly impressive, the statewide statistics disguised the fact that very few African Americans were registered in eastern counties with concentrated black populations.[63] In other words, it was in those counties with a large proportion of blacks – where their votes could actually make a difference – that election officials took the most vigorous steps to prevent them from registering or from voting.

Although some of North Carolina's blacks were allowed to vote before passage of the Voting Rights Act, their ability to influence elections was severely limited, with very few elected to office. A handful of African Americans were elected to local office in some Piedmont cities, including Winston-Salem and Durham, during the 1940's and 1950's. As had occurred at the end of the 19th Century, the election of blacks to office provoked a backlash – with whites resurrecting strategies that had served them so well after Reconstruction. For example, after a black alderman was elected in Winston-Salem in 1947, a districting plan was adopted to restrict black influence. And after a black won election in Wilson, a small eastern city, the city adopted an at-large electoral scheme, causing the city council to become all white again.[64] The North Carolina legislature also joined in the act, passing a law to prohibit "bullet voting" in multimember races, a practice aimed to avoid "wasting" votes on white candidates – and thus from diluting their collective – in at-large elections.[65] Most remarkably, blacks in North Carolina remained completely shut out of the state legislature and Congress. Not a single African American legislator was elected in North Carolina from 1900 until 1968.[66]

To be sure, the Warren Court had begun to show some interest in stopping the exclusion of blacks from southern politics, even before the Voting Rights Act of

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[61] *Id.* at 406.

[62] EQUAL PROTECTION, *supra* note 37, 43 (1963)

[63] As of 1960, less than 20 percent of eligible blacks were registered in the state's 23 majority-black counties. Keech & Sistrom, *supra* note 11, at 159.

[64] *Id.*

[65] *Id.* at 159-60.

[66] *Id.* at 166.

1965. Among its most notable opinions was *Gomillion v. Lightfoot*, in which the Court struck down an Alabama law that altered the City of Tuskegee's boundaries from a square to a 28-sided figure, in a transparent effort to keep African Americans out of city boundaries and thus city politics.[67] And a few months before enactment of the 1965 Act, the Supreme Court struck down the State of Louisiana's interpretation test, as violative of the Fifteenth Amendment.[68] Still, the intransigent character of white resistance to black voting rights necessitated a drastic remedy – more drastic, than the Supreme Court could implement on its own, particularly given the "massive resistance" that had emerged in the wake of its 1954 decision in *Brown v. Board of Education*. Eventually, Congress enacted just such a remedy.

The Voting Rights Revolution

Although the Voting Rights Act of 1965 was not the first federal effort to protect voting rights, it was by far the most successful. Congress actually passed three previous voting rights bills, but none of them were effective in undoing the practices used to keep blacks from voting in the South. In 1957, Congress passed the first civil rights bill since Reconstruction.[69] The Civil Rights Act of 1957 authorized the appointment of an assistant attorney general for civil rights and allowed the Justice Department to intervene in private civil actions. The 1957 Act also allowed the Attorney General to bring actions for injunctive relief in federal district court but only four such suits were brought between 1957 and 1960, and those cases were stymied by difficulties in obtaining registration records and other dilatory tactics.[70] Congress passed another Civil Rights Act in 1960, the most significant provision of which allowed federal district courts to vest oversight of elections in federal referees, if a "pattern and practice" of discrimination was found. But the referee provision was seldom used and the 1960 Act turned out to be almost as ineffectual as its predecessor. A contributing factor was the reluctance of federal district judges, some of whom were unsympathetic to the plight of black voters, to stop disenfranchising practices in their home states. Even when practices were declared illegal, new ones were put in their place – or, in some cases, court orders

[67] 364 U.S. 339 (1960).

[68] Louisiana v. United States, 380 U.S. 145 (1965).

[69] ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 260 (2000).

[70] GROFMAN, *supra* note 9, at 12-13; KEYSSAR, *supra* note 69, at 260.

were simply disregarded.[71]

A series of events that took place between 1963 and 1965 finally made it politically feasible for Congress to enact the stringent measures that would be needed to overcome the intransigence of southern states. They included the 1963 bombings of African American churches in Birmingham, and the 1964 murder of three civil rights workers in Philadelphia, Mississippi.[72] Northern outrage over these events facilitated passage of the Civil Rights Act of 1964, which included some provisions regarding voting but was mainly focused on public accommodations, education, and employment. Then came Fannie Lou Hamer's riveting testimony before the Credentials Committee at the 1964 Democratic National Convention, describing how she and others had been beaten by Mississippi highway patrolmen for simply trying to register and "become first-class citizens."[73] And on March 7, 1965, in an episode that would come to be known as "Bloody Sunday," the Alabama police attacked voting rights demonstrators after they crossed the Edmund Pettus Bridge outside Selma – beating some of them, including future Congressman John Lewis, to the point of unconsciousness.[74] Public horror over these events gave newly-elected President Lyndon B. Johnson the support he needed to push through Congress the "goddamndest, toughest, voting rights bill" that his staffers could devise.[75]

That bill was the Voting Rights Act of 1965. Passed by an overwhelming majority of Congress, the 1965 Act included unprecedented measures to root out the practices that had kept blacks from voting since the turn of the century, and to prevent southern states from putting new ones in their place. Section 2 of the Act prohibited practices denying or abridging the vote on account of race, while Section 3 strengthened the procedures available in cases brought by the attorney general. But the lynchpin of the Act was the provisions contained in Sections 4 and 5. Under Section 4, jurisdictions were deemed "covered" and subjected to special requirements, if (1) they conditioned voting on a test or some other device, and (2) less than 50 percent of the voting age population was either registered or actually voted in the 1964 presidential election. Even if the state as a whole was not

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[71] GROFMAN, *supra* note 9,at 13-14.

[72] *Id.* at 14.

[73] TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65, 461-62 (1998).

[74] KOUSSER, *supra* note 7, at 12.

[75] ABIGAIL THERNSTROM, WHOSE VOTES COUNT? 15 (1987)(quoting Washington Research Project, *The Shameful Blight: The Survival of Racial Discrimination in Voting in the South* 2 (1972)).

"covered" under Section 4, those counties which satisfied both criteria would be. All covered jurisdictions were required immediately to suspend their tests and devices, including literacy tests. And under Section 5, covered jurisdictions were obligated to "preclear" any changes to their voting procedures, by submitting them for approval to either the Justice Department or the U.S. District Court in Washington, D.C. Those changes could only take effect if they were found to have neither the purpose nor the effect of weakening minority voting strength.[76] Through the Section 5 preclearance requirement, states and counties that had used a literacy test or other disenfranchising device could be prevented from adopting new measures that would have the same effect.[77]

Under Section 4's coverage definition, six southern states were captured in their entirety (Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia).[78] Although the State of North Carolina was not entirely covered, 40 of its 100 counties were.[79] Those jurisdictions were required to eliminate any tests or devices used to screen voters, and to preclear any subsequent changes to their voting procedures.

In the immediate aftermath of the 1965 Act's passage, the provisions that attracted the most attention were not the Section 5 preclearance requirements, which would come to play a central role in the events leading up to the *Shaw* decisions. Southerners in Congress were much more concerned with the provisions eliminating the literacy test, providing for federal examiners, and requiring states to apply to the D.C. federal district court (rather than to friendlier federal judges in the South) in order to escape coverage. Attorney General Katzenbach noted that the provision was intended to prevent southern legislatures from "outguess[ing]" both Congress and the federal courts, by developing new disfranchising devices when old ones were struck down.[80] The focus on the ban on literacy tests and other devices is understandable, given that those provisions had a much more immediate effect than the Section 5 preclearance requirement. In Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, black registration increased dramatically within two years

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[76]Under the Supreme Court's 1974 decision in *Beer v. United States*, 425 U.S. 130 (1976), Section 5 prohibits only those changes are "retrogressive" – that is, ones that weaken minority strength compared to what it had been previously.

[77]GROFMAN, *supra* note 9, at 16-17.

[78]*Id.* at 17.

[79]Keech & Sistrom, *supra* note 11, at 160; Shaw v. Barr, 808 F. Supp. 461, 463 (E.D.N.C. 1992).

[80]THERNSTROM, *supra* note 75, at 21.

after the Act's passage. In Alabama, for example, black registration rose from 19.3 percent to 51.6 percent between 1965 and 1967, while in Mississippi it increased from 6.7 percent to 59.8 percent. Overall, black registration increased from 29.3 percent to 52.1 percent in the seven covered states in these two years.[81]

At the time of the Voting Rights Act, North Carolina had a higher percentage of blacks registered than any other southern state. But two years later, its black registration was actually *lower* than every other covered state except South Carolina.[82] Although the 1965 Act would eventually have a dramatic effect on North Carolina politics as well, those effects were somewhat slower in coming. That is partly because a higher percentage of blacks were registered in North Carolina even before the Act's enactment.[83] It is also because election officials in North Carolina aggressively pursued an array of strategies designed to dilute black voting power, while failing to preclear most of the changes being implemented. Gaston County went to court in 1966, seeking to reinstate its suspended literacy test, but was rebuffed by the Supreme Court.[84] In 1966, the state legislature authorized 49 county boards to move from district-based to at-large election systems, in which it would be more difficult for black voters to elect candidates of their choice. Six counties immediately moved to at-large election systems, while six others changed their boundaries. Yet very few of the changes that took place in North Carolina during the early years of the 1965 Act were submitted for preclearance. Between 1965 and 1971, there were 88 changes to election law proposed, but only 12 of them were submitted to the Justice Department – all of which were precleared.[85] To be fair, it was not until 1969 that the Supreme Court made clear the full range of election practices that were subject to preclearance, holding in *Allen v. State Board of Elections* that the Act was "aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race."[86] Still, it is safe to say that the preclearance requirement had very little

[81] GROFMAN, *supra* note 9, at 23.

[82] *Id.*

[83] THERNSTROM, *supra* note 75, at 18; see also GROFMAN, *supra* note 9, at 23.(reporting that black registration in North Carolina showed a modest increase, going from 46.8% to 51.3% between March 1965 and September 1967).

[84] Gaston County v. United States, 288 F. Supp. 678 (D.D.C. 1968), *aff'd* 395 U.S. 285, 297 (1969).

[85] Keech & Sistrom, *supra* note 11, at 162.

[86] 393 U.S. 544, 565 (1969).

effect on North Carolina politics, during the early years of the VRA's life.[87]

That is not to say that the 1965 Act's effects on North Carolina were inconsequential. Particularly in the 40 covered counties, there was a significant impact during the Act's first ten years. The percentage of blacks registered in the state's covered counties – the ones in which election officials had most aggressively used the literacy test to prevent blacks from voting – increased from 32.4 to 54.0 percent between 1964 and 1976.[88] In 1968, Henry Frye became the first black elected to the state legislature in the 20th Century.[89] It was not until the 1980s and 1990s, however, that blacks in North Carolina were elected to legislative office in substantial numbers. The biggest jump in state legislative representation came after the 1982 election, in which the number of blacks in the state house increased from 3 to 11. By 1990, there were 5 blacks in the 50-person state senate, and 13 blacks in the 120 person state house.[90] But until 1992, *no* blacks had been elected to either Congress or statewide elected office from North Carolina during the 20th Century.[91]

In North Carolina and throughout the South, 1992 was the pivotal year for black representation in Congress. Black candidates Eva Clayton and Mel Watt were elected from the newly drawn First and Twelfth congressional districts – the two districts that would be at issue in the *Shaw* litigation. Overall, the number of blacks elected to the House from southern states increased from 5 in 1990 to 17 in 1992,[92] "solely as a consequence of the increase in the number of black majority congressional districts."[93] Of the 17 blacks elected to Congress in 1992 and 1994 from the South, *all* were elected from majority-minority districts.[94]

Three features of the 1965 Act's implementation account for its extraordinary

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[87]Although the Act suspended literacy tests in the covered North Carolina counties, no federal examiners were ever sent to the state. Keech & Sistrom, *supra* note 11, at 160 (citing Thompson 1986, at 143-45).

[88]Keech & Sistrom, *supra* note 11, at 160 (citing Thompson 1986, at 143-45).

[89]KOUSSER, *supra* note 7, at 246.

[90]Keech & Sistrom, *supra* note 11, at 166.

[91]*Id.* at 163.

[92]Bernard Grofman, Lisa Handley, & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1394 (2001).

[93]Bernard Grofman & Lisa Handley, *1990s Issues in Voting Rights*, 65 MISS. L.J. 205, 220 (1995).

[94]Brief for American Civil Liberties Union and Lawyers' Committee for Civil Rights Under Law as Amici Curiae, Shaw v. Hunt, 517 U.S. 899 (1996) (No. 94-923), 1995 U.S. Supreme Court Briefs LEXIS 551, at *6.

success in increasing minority participation in the electoral process and, ultimately, in securing minority representation in legislative bodies. The first is that the original Act stopped nominally race-neutral practices like literacy tests, which were used to prevent blacks from voting. The discretion vested in local election officials had made it difficult and time-consuming to prevent these tests from being implemented in a discriminatory manner. The second critical aspect of the Act's implementation was its unprecedented rearrangement of state-federal power, in requiring that covered jurisdictions preclear changes in election procedures with the Justice Department or the D.C. federal court before they could take effect. The significance of this aspect of the Act did not become apparent until *Allen*'s holding that preclearance applied not only to blatant obstructions of the vote, but also to more "subtle" means of diluting minority voting strength. After this holding the Department of Justice began objecting to state election changes much more frequently than it previously had.[95] Third and perhaps most importantly, the Act's eventual success in increasing minority representation is a consequence of the fact that it was *not* colorblind, but instead was interpreted to require race-conscious action by both the courts and the United States Department of Justice. This is manifest in both the 1982 amendments to section 2 of the Act, and in the manner that the Justice Department interpreted the preclearance requirements of section 5, particularly in the post-1990 redistricting cycle.

Starting with the former, the Supreme Court in 1980 held that voting rights plaintiffs show discriminatory *intent*, and not simply discriminatory effects, in order to make out a section 2 claim.[96] Congress reacted by amending section 2 in 1982, to make clear that practices that "result[] in" the dilution of minority voting strength may also violate the Act. These amendments were enacted over the vigorous opposition of some conservatives within the Reagan Administration – most notably a 27-year old attorney in the Department of Justice. That attorney was the future Judge Chief Justice John Roberts, who acknowledged that section 2 was "an important part of what has been uniformly described as the most successful civil rights law ever enacted" but argued that incorporation of a results test "would establish essentially a quota system for electoral politics."[97] Roberts was wrong to characterize section 2 as a "quota." But it is certainly true that the 1982 amendments to the Act require that courts take into consideration whether minorities are able to

[95]Davidson, *supra* note 36, at 32.

[96]Mobile v. Bolden, 446 U.S. 55 (1980).

[97]Memorandum from John Roberts, Assistant to the Attorney General, to Brad Reynolds, Assistant Attorney General, Civil Rights Division, *Why Section 2 of the Voting Rights Act Should Be Retained Unchanged* (Dec. 22, 1981), at 1-2.

elect candidates of their choice – and that usually means minority candidates – in determining whether section 2 has been violated.[98]

Even more important than the 1982 amendments to section 2, at least in terms of minority representation, was the Justice Department's interpretation and enforcement of section 5 of the Voting Rights Act. Under President George H.W. Bush, the Justice Department aggressively enforced section 5' s preclearance requirement to block proposed election changes that did not include an adequate number of districts in which racial minorities had the opportunity to elect a candidate of their choice.[99]

At first glance, it might seem incongruous that a Republican Administration would insist upon the creation of safe black districts, given that African Americans are among the most reliably Democratic voters. But from a partisan political perspective, the creation of districts with a supermajority of blacks makes great deal of sense for Republicans. Creating majority-black districts has the effect of "whitening" the surrounding districts, and draining Democratic candidates in those districts of reliable voters. There is great controversy over the magnitude of this effect, but it appears to be true that in general the creation of safe black districts tended to advantage Republican candidates.[100] This has been referred to as the "happy coincidence" between the interests of blacks and Republicans.[101]

The Post-1990 North Carolina Redistricting

The redistricting that led to *Shaw v. Reno* took place against a backdrop of

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[98]The Supreme Court articulated the test for section 2 vote dilution claims in *Thornburgh* v. Gingles, 478 U.S. 30 (1986), which concerned the NAACP Legal Defense Fund's challenge to North Carolina's 1982 redistricting plan. One of the three "preconditions" for such a claim established by *Gingles* is that the minority group's preferred candidates usually have been defeated due to racial bloc voting.

[99]Some argued that this requires a district to be at least 65 percent African American, to compensate for the higher percentage of voting-age citizens and turnout among whites, though the Justice Department disclaimed any rigid numerical threshhold. DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS 45-46 (1997); *see also* United Jewish Organizations v. Carey, 430 U.S. 144, 152 (1977)(noting that a member of New York's legislative reapportionment committee "testified . . . he 'got the feeling [from Justice Department officials] . . . that 65 percent would probably be approved figure' . . . .").

[100]Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CALIF. L. REV. 1589, 1609-10 (2004)(noting estimates of between 2 and 11 congressional seats won congressional seats won by Republicans due to race-conscious districting).

[101]THERNSTROM, *supra* note 75, at 234.

racially charged politics that had stretched over a century and had continued into the very recent past. Still fresh in the minds of the state's voters was the bitter campaign for U.S. Senate in 1990 between the archconservative white Republican incumbent Jesse Helms and his black Democratic challenger Harvey Gantt. For anyone who thought that racial politics in North Carolina was a thing of the past, the Gantt-Helms campaign demonstrated otherwise. The campaign featured a notorious television advertisement that played upon the white backlash against affirmative action programs. The ad showed a pair of white hands crumpling up a job rejection notice, while in the background a narrator's voice intoned: "You needed that job and you were the best qualified, but they had to give it to a minority because of a racial quota. Is that really fair?" Although Gantt was leading in the polls until the final days, the ad helped turn the tide toward Helms, who prevailed by a narrow margin.[102]

The Helms' campaign's use of the term "quota" presaged a white backlash that would come to the fore in the North Carolina redistricting litigation. One of the most striking aspects of this backlash, which culminated in the *Shaw* opinions, is how quickly it materialized. Even *before* the election of North Carolina's first two African-American congressional representatives in over nine decades, white voters were in court challenging the deliberate creation of majority-black districts. Such favoritism toward blacks, it was argued, violated the equal protection rule mandating "colorblind" government decisionmaking. The white voters who brought the *Shaw* case were undeniably correct that one of the principal motivations behind North Carolina's plan was the creation of majority-black districts, under pressure from the George H.W. Bush Justice Department. But it was not the only motivation for the "bizarrely shaped" districts at issue in *Shaw*. As the tortuous saga of North Carolina's post-1990 redistricting shows, these shapes were as much the product of incumbent and partisan self-interest as they were of a desire to promote black political power. The oddly shaped districts with which the *Shaw* decisions found disfavor were a product not only of the Justice Department's demand for two majority-black districts, but also of the state legislature's desire to promote the interests of Democratic incumbents.

It is often said that, if elections are the process through which voters choose their representatives, then redistricting is the process through which representatives choose their voters. Every ten years, after the decennial census, states must draw new district lines to account for population shifts. This requirement is a function of the U.S. Supreme Court's "one person, one vote" jurisprudence, which requires that

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[102]Daniel Patrick Tokaji, *The Persistence of Prejudice: Process-Based Theory and the Retroactivity of the Civil Rights Act of 1991*, 103 YALE L.J. 567, 581-82 (1993).

legislative districts (other than the U.S. Senate), be of approximately equal size.[103] Special exactitude is required with respect to U.S. House districts.[104]

The 1990 census resulted in the addition of one U.S. House Seat in North Carolina, increasing the state's delegation from 11 to 12.[105] Under North Carolina law, the state's General Assembly has sole responsibility for drawing legislative districts. At the time, North Carolina's legislature was dominated by Democrats, who also enjoyed a 7-4 majority in the state's congressional delegation.[106] Democrats wished to maintain their advantage, in Congress and in the state legislature. On the other hand, Republicans generally favored the creation of majority-black districts. This would make it more difficult for incumbent Democrats to be re-elected and would increase the chances of Republican candidates being elected in the "whitened" districts around majority-black ones. Although the state's then-Governor Jim Martin was a Republican, North Carolina was the only state in which the chief executive had no veto power. Governor Martin was therefore powerless to stop a reapportionment that hurt his party.[107]

The problem that the Democratic legislature faced in seeking to draw majority-black districts is that North Carolina's black population was relatively dispersed. Although 22 percent of the state's population was African American, that population is scattered among smaller urban areas such as Charlotte, Durham, Raleigh, Wilmington, Winston-Salem, and Greensboro, as well as more rural areas in the northeast. Even the creation of a single majority-black district was a challenge, given this geographic dispersal.[108] While in some other states it is possible to combine African Americans with Latinos to create a majority-minority district, the negligible percentage of Latinos or any other minority group made this impossible in North Carolina.[109]

After the 1990 census, the state's General Assembly appointed a redistricting

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[103] Reynolds v. Sims, 377 U.S. 533 (1964); Pildes, *supra* note 15, at 1519-20 (2002)(observing that every ten years, "there is an automatic constitutionally grounded trigger that requires ... updating of the law's application based on the most current social-scientific findings ....").

[104] Karcher v. Daggett, 462 U.S. 725 (1983).

[105] DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION 99 (1999).

[106] *Id.*

[107] *Id.* at 104.

[108] *Id.* at 102.

[109] *Id.* at 105; *Shaw I*, 509 U.S. at 634 (noting that North Carolina's population was 78% white, 20% black, 1% Native American, with the remaining 1% mostly Asian). .

committee – heavily loaded with both Democrats and black legislators – to come up with a redistricting plan.[110] This process led to legislative consideration of no less than twenty proposed congressional plans.[111] On July 9, 1991, the General Assembly approved a plan that included one majority-black congressional district.[112] That was the First District, located in the northeastern part of the state where it was feasible to draw a reasonably compact district with an African-American majority. In drawing only a single black-majority district, the state legislature acted contrary to the wishes of civil rights groups such as the NAACP and ACLU, who had argued for the creation of a second black district. These civil rights groups criticized the plan for serving the interests of incumbent legislators rather than black voters, arguing that in a state that was 22 percent black, one black congressional district out of twelve was inadequate.[113] For its part, the Republican Party advocated a plan with two majority-black districts, but one that would give Republicans the edge in seven of the twelve, effectively reversing the partisan makeup of the state's congressional delegation.[114] In making this proposal, the Republicans hoped to replicate the gains they had made in state General Assembly during the 1980s, when the changes required by the district court's decision in *Gingles* helped the GOP double its legislative delegation.[115]

Because some of North Carolina's counties were covered jurisdictions under section 5 of the Voting Rights Act, the 1991 plan could only take effect if it were precleared by either the Justice Department or the federal district court in Washington, D.C. As interpreted by the Supreme Court, Section 5 requires that changes be "nonretrogressive"[116] — in other words, one of those entities would have to find that the plan did not make blacks worse off than they had been before. On December 18, 1991, the Justice Department denied preclearance of North Carolina's plan, citing the fact that it only created one black district and pointedly noting that this one district was of "unusually convoluted" shape.[117] The Justice Department's

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[110]Canon, *supra* note 105, at 104.

[111]KOUSSER, *supra* note 7, at 268.

[112]Pope v. Blue, 809 F. Supp. 392, 394 (W.D.N.C. 1992).

[113]CANON, *supra* note 105, at 105, 107.

[114]*Id.* at 106. This was known as the "Balmer Plan," named after its author, Republican state representative David Balmer.

[115]THERNSTROM, *supra* note 75, at 234.

[116]Beer v. United States, 425 U.S. 130, 141 (1976).

[117]CANON, *supra* note 105, at 109.

objection letter further explained that "the proposed configuration of the district boundary lines in the south-central to southeastern part of the state appear to minimize minority voting strength given the significant minority population in this area of the state," noting that there were "several plans" that would provide a second majority-minority district, including the one that the Republicans had supported.[118] Reading between the lines, it was not too difficult to discern that the Justice Department would be likely to approve this plan, which both created a second minority-black district and enhanced the prospects of Republicans' taking most of North Carolina's congressional seats. Although some accused the Justice Department of using its preclearance power for partisan purposes, the North Carolina General Assembly chose to go back to the drawing board, rather than to seek preclearance of its plan from the U.S. District Court in Washington.[119]

The Justice Department's disapproval of the 1991 plan seemed to leave North Carolina's Democratic-dominated state legislature with a dilemma. It was apparent that the Justice Department would continue to deny preclearance unless a second majority-black district was created. One possibility was to create a second black district in the southern part of the state, similar to that which the state's Republicans had proposed. From the Democratic perspective, this option was unpalatable because it would drain black voters from incumbent Democrats' districts, thus reducing their chances of reelection. And the Democratic members of North Carolina's congressional delegation were keeping close tabs on the state legislature's redistricting process.[120]

The solution upon which they arrived was proposed by John Merritt, an aide to a Democratic Congressman Rep. Charles Rose of North Carolina.[121] Merritt suggested creating a second black district, the 12th District, of a much different configuration from that which the Republicans had espoused. Merritt's proposed 12th District would stretch some 160 miles along I-85 from Charlotte in the southern part of the state to Durham in the north. This the advantage of creating an urban district composed of people with similar interests, travel across which would be relatively easy.[122] From the Democrats' perspective, the appeal of this plan was that

[118] Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, to Tiare B. Smiley, Special Deputy Attorney General, State of North Carolina (Dec. 18, 1991), *quoted in* Shaw v. Barr, 808 F. Supp. 461, 463-64 (1992).

[119] CANON, *supra* note 105, at 110.

[120] *Id.* at 116.

[121] KOUSSER, *supra* note 7, at 268-69; CANON, *supra* note 105, at 110.

[122] KOUSSER, *supra* note 7, at 269.

it would create a second majority black district[123] – thus placating the Justice Department and civil rights groups – without sacrificing the interests of Democratic incumbents. In fact, Merritt's plan slightly improved Democratic prospects, giving them eight of the state's twelve congressional seats, with a chance of picking up a ninth.[124] The problem with the plan is that it resulted in districts that, from an aesthetic perspective, were quite oddly configured in appearance. Most of the criticism was directed at the new 12th District, but some criticism was also directed at, the more rural 1st District, which included pieces of four prior congressional districts. To create the 12th District, portions of the 1st District had been removed and other areas added, leaving the 1st District less compact than under the 1991 plan. The new 1st District had a hooked shape going southward from the Virginia border down to the southern part of the state, and then back up again in a westerly direction.[125] From the Democrats perspective, this new plan was the best of both worlds. It would create a second black-majority district without sacrificing Democrats' prospects – and in fact, it slightly improved those prospects.

Predictably, Republicans who had been hoping to pick up at least one additional congressional seat from North Carolina were livid. They noted that for much of its length, the 12th District was no wider than I-85 and that, at one point, the district actually "changed lanes" along the highway.[126] Even some Democrats were apologetic. Speaker of the State House Daniel Blue, a moderate African American Democrat, admitted that it was an "ugly plan." The State Assembly nevertheless approved the Merritt plan in January 24, 1992, and the Department of Justice granted preclearance on February 6, 1992.[127]

The *Shaw* Litigation

Following through on a vow made during the legislative debate, the Republicans immediately brought suit to challenge the 1992 plan. The complaint

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[123]Under Merritt's plan, the 1st and the 12th Districts both had a voting age population that was just over 53 percent black.

[124]CANON, *supra* note 105, at 110. In fact, Democratic candidates ended up winning only eight of the twelve seats in 1992, because Republican incumbent Charles Taylor won in a district with a slight Democratic majority. *Id.*; *see also* Kousser, *supra* note 7, at 268 (predicting eight seats from Merritt plan).

[125]*Id.* at 113.

[126]*Id.* at 110-11.

[127]Pope v. Blue, 809 F. Supp. at 394-95.

in *Pope v. Blue*, was filed in the U.S. District Court for the Western District of North Carolina, on behalf of the Republican Party of North Carolina and 42 individual voters. Plaintiffs did not make a race discrimination argument, instead asserting that the 1992 plan was an impermissible political gerrymander that violated the Fourteenth Amendment. By federal statute, challenges to the constitutionality of congressional districts are assigned to three-judge district courts,[128] and on April 16, 1992, the three-judge court in *Pope v. Blue* dismissed the complaint. The three-judge court explained that, while claims of political gerrymandering are not categorically foreclosed by the Constitution, the Supreme Court's 1986 decision in *Davis v. Bandemer*[129] makes them very difficult to establish. The *Bandemer* plurality had said that plaintiffs in a political gerrymandering case "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."[130] The *Bandemer* plurality went on to state that a discriminatory effect prong meant that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[131] The district court in *Pope v. Blue* concluded that the Republican Party could not show that it had been "shut out of the political process," and therefore rejected its Fourteenth Amendment claim. On October 5, 1992, the Supreme Court affirmed without opinion.[132]

Even before the district court opinion in *Pope v. Blue*, a separate group of voters had brought suit in the Eastern District of North Carolina, challenging the 1992 plan on an entirely different theory. The complaint in *Shaw v. Barr*, filed on March 12, 1992, alleged that the State Assembly's consideration of race in the redistricting process violated the Fourteenth Amendment. The plaintiffs were five voters from Durham County, all of whom had been residents of the old 2nd congressional district which had been split up by the 1992 plan. Only two of the plaintiffs (Ruth O. Shaw and Melvin G. Shimm) were registered to vote in the majority-black 12th District at the time of the plan's adoption, and none resided in the majority-black 1st District.[133] The complaint named as defendants not only North

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[128] 28 U.S.C. § 2284.

[129] 478 U.S. 109 (1986).

[130] *Id.* at 127.

[131] *Id.* at 132.

[132] 506 U.S. 801 (1992).

[133] *Shaw II*, 517 U.S. at 904; *see also* Shaw v. Barr, 808 F. Supp. at 464 (noting that only Shaw and Shimm resided in 12th at time of plan's enactment, and that James Everett registered to vote after plan's enactment and was to vote in 12th). For this reason, the *Shaw II* Court concluded

Carolina state officials, but also the Attorney General of the United States William Barr and Assistant Attorney General for Civil Right John Dunne, for their role in compelling the creation of a second majority-black district.

Defying the motto that the lawyer who represents himself has a fool for a client, one of the five named plaintiffs was also their lead counsel. That was Robinson O. Everett, a member of the Duke Law School faculty and self-described "loyal Democrat."[134] Everett had served as Chief Judge of the U.S. Court of Military Appeals between 1980 and 1990, but had little experience in the area of voting rights at the time he brought the *Shaw* complaint. In explaining how his interest in redistricting developed, Everett has written that he was "incredulous" when he saw the two majority-black districts that emerged in the 1992 plan.[135] From his perspective, the state's consideration of race in drawing legislative districts was indistinguishable from the use of race as a basis for peremptory strikes in court trials,[136] a practice struck down in *Batson v. Kentucky*.[137] As he puts it: "My own motivation for initiating a court action to overturn the gerrymander was my firm belief that use of data about the racial composition of census blocks in the creation of congressional districts appeared to give governmental approval to the use of racial stereotypes and racial quotas."[138] Everett's experience with the Armed Services led Everett to believe in the principle of raceblindness.[139] Though denying any partisan motivation for initiating the *Shaw* litigation, Everett acknowledged that – if he had known at the time what he came to learn later – he would also have opposed the deliberate creation of majority-black districts on the ground that they "mak[e] it more difficult for moderate white Democrats to be elected."[140]

The three-judge district court to which Everett's case was assigned dismissed it at the pleading stage. The court announced its judgment after a hearing on the defendants' motion to dismiss on April 27, 1992, and subsequently issued a written

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that only Shaw and Shimm had standing, and only with respect to the 12th. 517 U.S. at 904.

134 Robinson O. Everett, *Redistricting in North Carolina – A Personal Perspective*, 79 N.C. L. REV. 1301, 1311 (2001).

135 *Id.* at 1309.

136 *Id.*

137 506 U.S. 801 (1992).

138 Everett, *supra* note 134, at 1310.

139 *Id.* at 1310-11.

140 *Id.* at 1311.

opinion explaining the reasons for its decision.[141] All three judges agreed that the claims against the federal defendants should be dismissed, but the court was divided over plaintiffs' equal protection claim against North Carolina officials. The two-judge majority of Judges Phillips and Britt thought those claims should be dismissed, while Chief Judge Voorhees would have allowed them to proceed.

The court's written opinion first addressed the claim against Justice Department officials – namely, that they had "coerced" the state into adopting an unconstitutional plan by denying preclearance.[142] All three judges concluded that jurisdiction was lacking over the claims against these federal officials.[143] Through this provision, Congress sought to prevent federal judges in the South, who were likely to be unsympathetic to voting rights, from attempting to obstruct the Justice Department's enforcement of the VRA. The district court thus disposed of the claims against federal defendants without addressing the merits.[144]

The claims against the state defendants, on the other hand, required the distirict court to confront Everett's constitutional arguments. It was on these claims that the majority and dissent diverged. The majority noted that some allegations in the complaint seemed to suggest that *any* consideration of race during the redistricting process was unconstitutional.[145] While observing that the plaintiffs had cited several textual bases for this claim (including the Equal Protection Clause, Fifteenth Amendment, Article I, Section 2, and Article I, Section 4), the court considered equal protection to be the appropriate vehicle.[146] On this claim, the majority at first expressed puzzlement over the fact that the plaintiffs had not identified their race in the complaint, and specifically that they had not identified themselves as being of a different race than that of the black voters for whom the challenged congressional districts were created.[147] They took this omission to be "a deliberate (and humanly, if not legally, laudable) refusal to inject their own race[s] into a claim whose essence is to deplore race-consciousness in voting-rights matters,"

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[141]808 F. Supp. 461 (E.D.N.C. 1992).

[142]*Id.* at 465.

[143]42 U.S.C. §1973l(b)(vesting exclusive jurisdiction in Washington D.C. federal district court, over actions seeking injunctive relief against federal officers pursuant to VRA).

[144]Alternatively, the majority concluded that the claim against the federal defendants should be dismissed, because the Justice Department's section 5 power is "discretionary" and therefore not subject to judicial review. 808 F. Supp. at 467.

[145]*Id.* at 468.

[146]*Id.*

[147]*Id.* at 470.

but nevertheless took judicial notice of the fact that all five plaintiffs were white.[148]

The majority concluded that the equal protection claim was foreclosed by precedent, specifically the Supreme Court's decision in *United Jewish Organizations v. Carey*.[149] In that case, Hasidic Jewish voters asserted that their votes were diluted by the New York state legislature's deliberately creation of a majority-black district. Rejecting this claim, the UJO plurality declared that "the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with [the Voting Rights Act]."[150] The majority went on to reject plaintiffs' contention that the Supreme Court's later affirmative action opinions, including *City of Richmond v. J.A. Croson*,[151] revealed a new commitment to a colorblind Constitution that undermined *UJO*.[152]

Judge Voorhees dissented from the dismissal of the equal protection claim against the state defendants. In his view, the majority's dismissal of this claim would "give the North Carolina legislature unbridled discretion to implement race-conscious reapportionment plans."[153] He distinguished *UJO* based on the odd shape of the two North Carolina districts. In a description later quoted by the Supreme Court, Judge Voorhees asserted that the legislature had drawn a "First District map which looks like a Rorschach ink-blot test and in a serpentine Twelfth District that slinks down the Interstate Highway 85 corridor until it gobbles in enough enclaves of black neighborhoods to satisfy a predetermined percentage of minority voters."[154] The strange shape of these districts, according to Judge Voorhees, belied any suggestion that they were drawn according to "traditional and constitutionally-espoused redistricting principles."[155] He would therefore have allowed the claims to proceed, citing in the conclusion to his opinion a *Wall Street Journal* op-ed that had labeled the North Carolina districts "political pornography."[156]

With the district court opinions nicely framing the controversy over the scope

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[148]*Id.*

[149]430 U.S. 144 (1977).

[150]*Id.* at 161.

[151]488 U.S. 469 (1989).

[152]Shaw v. Barr, 808 F. Supp. 461, 471-73 (1992).

[153]*Id.* at 474 (Voorhees, J., dissenting).

[154]*Id.* at 476.

[155]*Id.*

[156]*Id.* at 480 (citing *Political Pornography-II*, WALL ST. J., Feb. 4, 1992, at A14).

of *UJO* and, more broadly, its viability under more recent equal protection cases emphasizing raceblindness, the case moved to the Supreme Court. The procedure for review of three-judge district court decisions is different from that applicable in other types of cases. A direct appeal may be taken in the Supreme Court, by-passing the courts of appeals.[157] And rather than filing a Petition for Writ of Certiorari, litigants seeking review of three-judge district court orders file a jurisdictional statement, identifying the questions that the appellants asks the court to address. The Supreme Court may respond to a jurisdictional statement by summarily affirming the district court's decision as it did in *Pope v. Blue*, by summarily reversing (which rarely happens), or by noting probable jurisdiction with respect to one or more of the questions identified. The effect of noting probable jurisdiction is roughly equivalent to a grant of a petition of certiorari in other cases, indicating that the matter will be fully briefed and argued.[158]

Everett filed a jurisdictional statement on behalf of himself and the other plaintiffs on August 25, 1992. The plaintiffs' jurisdiction purported to raise six separate questions. The first broadly asked whether the state legislature had "violate[d] Article I, Section 2, and the Fourteenth and Fifteenth Amendments of the United States Constitution by Creating Two Majority-Minority Congressional Districts for the Purpose of Assuring the Election of Minority Persons from These Districts to the United States House of Representatives." So stated, this question effectively encompassed all of the constitutional arguments pressed below. Plaintiffs' second question was more narrow, asking whether the district court erred in holding that *UJO* "authorized the North Carolina Legislature to create two majority-minority congressional districts for racially conscious purposes." The third question was whether the state legislature had a "discriminatory or invidious purpose." While not defining the source of the constitutional right asserted, both these questions implicitly addressed whether the plan violated equal protection. The remaining three questions were whether the U.S. Attorney General misinterpreted the Voting Rights Act, whether the plaintiffs had standing, and whether the appellants were entitled to sue the federal defendants.[159]

The Supreme Court's deliberations over whether to note probable jurisdiction, like its deliberations over whether to grant certiorari petitions, are not made public. The papers of the late Justice Harry Blackmun, however, shed some light on what went on behind closed doors during the Court's consideration of the

[157] 28 U.S.C. § 1253.

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[159] Jurisdictional Statement in Shaw v. Barr, 808 F. Supp. 461 (1992), No. 92-357, Aug. 25, 1992, available at 1992 WL 12012102.

first *Shaw* appeal. Included among these papers are not only the notes of Justice Blackmun and his clerks, but also memoranda circulated by the justices regarding the case.

In late November 1992, the Court voted, apparently unanimously, to note probable jurisdiction.[160] On November 30, 1992, Justice O'Connor wrote a memorandum to the other justices suggesting that the questions raised by Everett be reframed for purposes of briefing and oral argument. Her memorandum stated that the first question was unworthy of review because it asked "nothing more" than whether the plan was constitutional. She also agreed with the three judges in the court below, who had concluded that the Attorney General's implementation of the Voting Rights Act was beyond that court's jurisdiction under section 14(b), and thus not properly reviewable on appeal. Justice O'Connor opined that the question of standing was also inappropriate for review since she saw "nothing in [the district court's] decision suggesting that appellants might lack standing because of their race." That left the two questions relating to the scope of *UJO v. Carey* and to racially discriminatory purpose. Justice O'Connor suggested an order which combined the questions, to ask: "Whether, under *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes, in a suit brought outside the District Court for the District of Columbia, a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own." In explaining the need to restate the issue, Justice O'Connor stated: "I know that this order may be unusual, but I fear that appellants are unusually needful of firm guidance on what to brief and what to ignore."[161] Her question would focus on an apparent difference between *Shaw* and *UJO*, although this was a tenuous basis for distinguishing the two cases since the Attorney General technically has the power to grant or deny preclearance but not to make "suggestions."

Before this order was released, Justice Scalia successfully prevailed upon her to the wording of the question. In a November 30, 1992 memo, Justice Scalia made two significant suggestions: first, that the Court's order not single out *UJO* for special consideration and, second, that the Court's consideration not be limited to cases arising outside the Washington, D.C. district courts. Justice O'Connor agreed

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[160]Preliminary Memorandum from Sherry Colb (Oct. 20, 1992)(available in Blackmun Papers Box 624)(indicating conference date of November 25, 1992).

[161]Memorandum from Justice O'Connor, to the Conference (Nov. 27, 1992)(available in Blackmun Papers Box 624).

to Justice Scalia's suggestion, reframing the question as: "Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own." On December 7, 1992, the Court issued an order noting probable jurisdiction and directing the parties to brief and argue this single question. So framed, the question practically answers itself. The intent to comply with the VRA could not possibly immunize a plan from a *constitutional* challenge.[162]

The question highlighted the tension between the Justice Department's interpretation of the VRA and the Supreme Court's interpretation of the Fourteenth Amendment in the *Croson* line of cases. The desire to focus on this tension explains another suggestion made by Justice Scalia and agreed to by Justice O'Connor: that the order "make clear that *all* parties (including the [United States] Attorney General) are requested to brief the reformulated question."[163] Justice Scalia noted that the federal appellees' motion to affirm had not addressed the constitutionality of North Carolina's redistricting plan, apparently out of a desire to "avoid that difficult subject." Concerned that the federal appellees might feel they were off the hook by virtue of the Court's decision not to grant probable jurisdiction over the claims against them, Justice Scalia requested – and the rest of the Court agreed – that "all parties" be directed to brief the reframed question. This signaled that the Justice Department's race-conscious interpretation of the VRA was in play, even if federal officials were not proper defendants.

The caption of *Shaw v. Barr* (later changed to *Shaw v. Reno* after Janet Reno became U.S. Attorney General) is therefore odd in one sense, but quite appropriate in another. It is odd in that the Supreme Court unanimously agreed with the unanimous conclusion of the three-judge district court that Justice Department officials were *not* appropriate defendants, given the district court's lack of jurisdiction over the claims against them. It is appropriate in the sense that, although they were properly dismissed as defendants, the constitutionality of the Justice Department officials' interpretation of the VRA was clearly at the center of the case.

Everett's brief and oral argument drew on the rhetoric of raceblindness, including Justice John Harlan's famous statement in his *Plessy v. Ferguson* dissent

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[162]See Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 S. CT. REV. 245, 277 (1993)("The answer to this question was obvious and probably could have been answered unanimously by a two-sentence per curiam.").

[163]Memorandum from Justice Scalia, to Justice O'Connor (Nov. 30, 1992).

that the "Constitution is color-blind."[164] Creating majority-minority districts in order to elect a "quota of minority persons to Congress" was, according to Everett's brief, flatly inconsistent with this principle. Everett also emphasized the odd shape of the two majority-black districts, deploying particularly heavy artillery at the "snaking" 12th District, which emphasized its "bizarre" shape and compared it to "black townships under South Africa's apartheid system."[165] Everett even borrowed from a *Wall Street Journal* editorial that had referred to the plan creating two majority-black districts as "political pornography."[166] At oral argument, Everett sounded a similar refrain, opening with the "political pornography" reference. He added that "the only way to understand what took place in North Carolina is to look at the evidence thereof," namely the map of the districts challenged,[167] a suggestion that calls to mind Justice Stewart's "I know it when I see it" test for obscenity.[168] When the solicitor general took the position that the VRA required majority-minority districts, Everett vigorously disagreed, asserting that: "there's no compulsion, no authorization to have a majority-minority district."[169] But when pressed, even Everett acknowledged that consideration of race might sometimes be warranted, acknowledging that "the Voting Rights Act could authorize race conscious corrective action" where a compact minority group is broken apart.[170]

Despite Everett's disavowal of absolute raceblindness, there can be little doubt that the justices recognized the potential implications of the case upon the VRA, as it had been interpreted and implemented. Even before the justices voted, a memo to Justice Blackmun from one of his clerks suggested that the Court's

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[164]Appellants' Brief on the Merits, Shaw v. Barr, 808 F. Supp. 461 (1992) (No. 92-357), at 18.

[165]*Id.* at 9, 31, 61; see also Oral Argument, Shaw v. Reno, 509 U.S. 630 (1993)(Apr. 20, 1993), 1993 WL 751836, at *8 ("Take the 12th district.... It snakes along Interstate I-85.... It snakes along. At some points it is no wider than I-85.").

[166]Appellants' Brief on the Merits, Shaw v. Barr (No. 92-357), at 10.

[167]Oral Argument, Shaw v. Reno, 509 U.S. 630 (1993)(Apr. 20, 1993), 1993 WL 751836, at *3.

[168]*See Conference: The Supreme Court, Racial Politics, and the Right to Vote:* Shaw v. Reno *and the Future of the Voting Rights Act*, 44 AM. U.L. REV. 1, 6 (1994)(comments of Professor Samuel Issacharoff)(noting that in both the First Amendment pornography cases and *Shaw*, "the Court is trying to identify a constitutional doctrine of 'Don't do it to excess in a way that is offensive,' without defining substantive underlying principles.").

[169]Oral Argument, Shaw v. Reno, 509 U.S. 630 (1993)(Apr. 20, 1993), 1993 WL 751836, at *53.

[170]Oral Argument, Shaw v. Reno, Apr. 20, 1993, 1993 WL 751836, at *16.

ultimate decision might be the death knell of the Voting Rights Act. On April 22, 1993, the day before the conference in *Shaw v. Reno*, one of Justice Blackmun's clerks reported on his conversations with other justices' law clerks. The clerk anticipated that there would be five votes to reverse and remand: Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, Justice Scalia, and Justice Thomas. According to the clerk's memo, the Chief Justice was especially "interested in applying *Croson*'s strict scrutiny analysis to race-conscious redistricting." It also noted that Justice O'Connor appeared to be the swing vote, but that she too was inclined to apply *Croson*'s reasoning to the case. Such a holding, Blackmun's clerk wrote, "would be a most unfortunate turn of events and would go a long way toward ruling the VRA unconstitutional."[171]

This prediction of reversal proved to be correct. In fact, there were not just five but *six* votes to reverse when the justices met in conference on April 23, 1993. Although only the justices and not even their clerks attend the conferences in which votes are taken, Justice Blackmun's notes show that, in addition to the five justices identified in his clerk's memo, Justice Souter also voted to reverse in the justices' post-argument conference, though he would later switch his vote. Only Justices White, Blackmun, and Stevens initially voted to affirm.

Justice O'Connor wrote the majority opinion for the Court. The Court's internal memoranda show only a handful of changes between the initial draft that she circulated on June 1, 1993 and the final version issued on June 28, 1993. The majority opinion makes only passing reference to the practices that had excluded blacks from democratic politics throughout most of the 20th Century. The Court noted that "[f]or much of our Nation's history, [the right to vote] sadly has been denied to many because of their race," citing practices such as literacy tests, "good character" requirements, and racial gerrymanders. But Justice O'Connor devotes no attention to North Carolina's particular history of racial exclusion, including not only measures to prevent blacks from voting but also the almost complete absence of blacks from the state legislature until the 1980s and the state's failure to send a single black to Congress from 1900 until 1992. Nor does she discuss the state's history, extending through the 1980s, of using gerrymanders to prevent the election of candidates who would appeal to black voters.[172]

Despite her earlier suggestion that appellants were "unusually needful of firm guidance," Justice O'Connor borrowed heavily from Everett's description of the

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[171]Memorandum from Bill [Dodge?], to Justice Blackmun (Apr. 22, 1993).

[172]*See* Kousser, *supra* note 7, at 247-59.

districts, emphasizing the "bizarre shape"[173] of the two majority-black districts drawn in 1992:

> The first of the two majority-black districts contained in the revised plan, District 1, is somewhat hook shaped. Centered in the northeast portion of the State, it moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southernmost part of the State near the South Carolina border. District 1 has been compared to a "Rorschach ink-blot test," and a "bug splattered on a windshield."
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> The second majority-black district, District 12, is even more unusually shaped. It is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas "until it gobbles in enough enclaves of black neighborhoods." Northbound and southbound drivers on I-85 sometimes find themselves in separate districts in one county, only to "trade" districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. One state legislator has remarked that "'if you drove down the interstate with both car doors open, you'd kill most of the people in the district.'" The district even has inspired poetry: "Ask not for whom the line is drawn; it is drawn to avoid thee." [174]

Also following Everett's brief, Justice O'Connor's analysis of the equal protection issue drew from two lines of precedent. The first is the Court's insistence on raceblindness from Justice Harlan's *Plessy* dissent through *Bakke* to *Croson*. While not holding race-conscious redistricting to be per se unconstitutional, the Court concluded that plaintiffs had stated a claim by alleging that North Carolina's plan was "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."[175] The

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[173]Shaw v. Reno, 509 U.S. 630, 655-56 (1993).

[174]*Id*. at 635-36 (citations omitted).

[175]*Id*. at 642.

second line of precedent was that in which the Court condemned voting practices intended to exclude blacks, most notably *Gomillion v. Lightfoot*, in which the City of Tuskegee's city fathers had redrawn municipal boundaries to fence out African Americans.[176] Again borrowing the loaded rhetoric from Everett's brief and argument, Justice O'Connor's opinion asserted that using race to draw districts "bears an uncomfortable resemblance to political apartheid."[177]

The obvious difference is that, while the *Gomillion* plan was designed to keep blacks out, the *Shaw* plan was designed to bring them in – more specifically, to ensure that at least some blacks in North Carolina would have the opportunity to elect a congressperson of their choice. In fact, the 1st and 12th districts were in fact very integrated, insofar as "integration" is to be judged by having roughly equal numbers of whites and blacks living in the district. Nevertheless, drawing on its raceblindness cases, the Court concluded that taking account of race to *include* blacks was no less constitutionally suspect than using race to *exclude* them. In this sense, one might say that *Shaw I* is to *Gomillion* what *Bakke* is to *Brown v. Board of Education*.[178] In both cases, the Court used an earlier decision designed to stop the exclusion of African Americans to curb practices that were designed to promote the full inclusion of African Americans – with respect to higher education in *Bakke*, and with respect to legislative representation in *Shaw*. The lesson that both these cases took from their antecedents is not that the Equal Protection Clause mandates the inclusion, but rather that the government's use of race to make decisions (whether done to include or to exclude) is inherently injurious.

The rhetoric of segregation and apartheid thus fails to capture the problem that the Court perceived to exist with North Carolina's redistricting.[179] It was not that whites and blacks were put in separate districts by the plan, nor even that the majority-minority districts were segregated – to the contrary, the challenged 12th districts were among the most integrated in the state, with a population 41.8 percent white and 56.6 percent black.[180] Rather, it was the very fact of taking race into consideration that inflicted the injury. This is best captured by the Court's assertion that what was so "pernicious" about North Carolina's plan was the "message" it sent:

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[176]*Id.* at 644-45.

[177]*Id.* at 647.

[178]347 U.S. 483 91954).

[179]See *Conference*, *supra* note 168, at 65.(criticizing the *Shaw* Court's reference to apartheid on the ground that "we are not talking about total exclusion of any population, we are talking about inclusion") (comments of Loretta King)

[180]State Appellees' Brief, *cited in* Karlan, *supra* note 162, at 282 n.168.

> When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.[181]

Subsequent commentators have referred to the theory of injury embodied in this and other phrases from *Shaw* as an "expressive" harm, a term that the Supreme Court embraced in its post-*Shaw* cases to capture the idea that the injuries caused by race-conscious districting stems from the "very meaning they convey." [182] Individuals whose race is taken into consideration in placing them within a district suffer harm simply by virtue of that fact, irrespective of whether their political influence has been strengthened or weakened by the way in which district lines have been drawn.

This conception of equality, more fully developed in later cases,[183] might be characterized an atomistic vision, in that it perceives equal protection claims to be highly individualized in terms of both victims and perpetrators. The victims are those whose race has been considered in government decisionmaking; the perpetrators are those government actors who have taken race into consideration in making decisions. From this perspective, the fundamental command of the Equal Protection Clause is that government shall not take race into account, including the race of voters placed in districts. The atomistic vision is nicely captured in Justice O'Connor's plurality opinion in *Croson*, which speaks of the "dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and

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[181] *Shaw I*, 509 U.S. at 648.

[182] Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and the Voting Rights: Evaluating Election-District Appearances after* Shaw v. Reno, 92 MICH. L. REV. 483, 507 (1993); *see also* Bush v. Vera, 517 U.S. 952, 984 (1996)(referring to "expressive harms" as the injury in redistricting cases).

[183] *See* Miller v. Johnson, 515 U.S. 900, 911 (1995)("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not 'as simply components of a racial, religious, sexual or national class.'")(quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990)(O'Connor, J., dissenting)); United States v. Hays, 515 U.S. 737, 745 (1995)(to establish standing, plaintiffs in *Shaw* cases must show "individualized harm," which requires that they live in district challenged or provide evidence that they were subjected to a racial classification).

achievement."[184] The opposing vision of equal protection may be termed *systemic*, in that it sees the object of equal protection to be the eradication of inequalities among groups, with respect to such social goods as higher education, access to public contracts, and political power. This vision places a premium on examining how historical practices have served to create material inequalities among racial groups, so as to necessitate group-based remedial action. In the early days of the Voting Rights Act, it was not necessary to choose between these two visions, since both counseled in favor of dismantling barriers to African Americans' participation. After the elimination of practices like the literacy test that were used to discriminate between individuals based on race, however, it became necessary to choose between the atomistic perspective (which would counsel in favor of raceblind redistricting) and the systemic perspective (which would necessitate race-conscious redistricting). The Justice Department selected the systemic path, refusing to preclear plans without sufficient majority-minority districts, and Congress signaled approval of this vision through the 1982 amendments to the Voting Rights Act. The *Shaw* doctrine on the other hand, suggests that this path is inconsistent with equal protection.

The Court's attraction to the atomistic theory of equal protection is epitomized by a change that Justice O'Connor made to the *Shaw v. Reno* opinion at the request of Chief Justice Rehnquist. The first two drafts of Justice O'Connor's opinion stated that: "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions and carry us further from the goal of a fully integrated society that the Fourteenth Amendment embodies ...." In a memorandum to Justice O'Connor, the Chief Justice objected to this language, stating: "The Fourteenth Amendment prohibits discrimination; it does not require integration, and I think it is a mistake to intimate that it does even as a 'goal.'"[185] Put another way, government does wrong when it distinguishes between individuals based on its race; but it has no affirmative burden to promote integration or, more broadly, substantive racial equality in politics or any other sphere. Justice O'Connor acquiesced to the Chief's suggestion, and in the final version of the opinion, the sentence read: "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; *it threatens to carry us further from the goal of a political system in which race no longer matters* – a goal that the Fourteenth and Fifteenth Amendments embody ...."[186] On this vision, the role of the federal courts is not to promote substantive equality, through integration or any other means. It is

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[184]488 U.S. at 505-06.

[185]Memorandum from the Chief Justice Rehnquist, to Justice O'Connor (June 7, 1993).

[186]509 U.S. at 657 (emphasis added).

instead only to police “discrimination” and thereby move us toward race-blindness.

At the same time, even the *Shaw I* majority recognized that the reapportionment process “differs from other types of government decisionmaking in that legislature *always* is aware of race when it draws district lines.”[187] While Justice O’Connor’s opinion largely embraces the atomistic view of racial equality, the Court’s refusal to prohibit any consideration of race in redistricting may be seen as a concession that – given the long history of taking race into consideration to weaken blacks’ influence – an absolute rule of race-blindness would have the effect of locking into place existing disparities in political power. [188]

Each of the four dissenting justices in *Shaw I* (Justices White, Blackmun, Stevens, and Souter) wrote a dissent. Missing from all of these dissents was a robust articulation of a more systemic vision racial justice. With Justice Thurgood Marshall’s departure from the Court two years before *Shaw I* was decided, the Court lost the figure who would almost certainly have offered such an articulation. In his *Croson* dissent, for example, Justice Marshall explained his disagreement with the majority’s holding that the City of Richmond’s affirmative action program:

> It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst ... The essence of the majority's position is that Richmond has failed to catalog adequate findings to prove that past discrimination has impeded minorities from joining or participating fully in Richmond's construction contracting industry. I find deep irony in second guessing Richmond's judgment on this point. As much as any municipality in the United States, Richmond knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city's disgraceful history of public and private racial discrimination.[189]

No comparable evocation of North Carolina’s history of excluding blacks from democratic politics appears in any of the four *Shaw v. Reno* dissents. Justice

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[187]*Id.* at 646.

[188]See Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2291-92 (1998)(suggesting that the Court realistically recognizes that “today’s private preferences are in part the product of the government’s prior impermissible actions” and therefore that “to ignore race in drawing district lines would perpetuate race-conscious voting practices”).

[189]*Croson*, 488 U.S. at 528-29.

White's dissent asserts that the Court glossed over the similarities to *UJO*, by focusing on the district's unusual shape, although he does gesture toward a more systemic vision of equal protection in urging that the Court's focus should be on the ability of *groups* to influence the political process.[190] In a similar vein, Justice Souter notes that legislators may have to take account of racial bloc voting in order to avoid dilution of minority voting strength.[191] Yet none of the dissenting justices tie the need for race-conscious action to the virtual exclusion of African Americans from southern electoral politics for most of the 20th Century. Also noteworthy is their failure to mention the fact that the challenged reapportionment led directly to the first blacks elected to Congress from North Carolina in over nine decades.

Although *Shaw v. Reno* represents a major victory for the atomistic view of equal protection, the majority left some wiggle room for the deliberate creation of majority-minority districts. In the last paragraph of its opinion, the Court notes the Justice Department's view that the North Carolina legislature could have created a more compact (and less oddly shaped) majority-minority district in the south-central to southeastern part of the state – that is, by adopting the plan the states' Republicans had advocated. The Court does not say whether a more compact majority-black district would have offended the Equal Protection Clause. Instead, it limits its holding to a reapportionment that is "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race," at least where the "separation lacks sufficient justification."[192] Left undetermined were two important doctrinal questions: first, how courts should go about determining the "irrational[ity]" of a district's boundaries and, second, what counts as "sufficient justification." The Court's articulation of an "analytically distinct" equal protection claim was thus not merely the end of the story of *Shaw v. Reno*, but rather the beginning of a new story – one whose conclusion has yet to be written.

***Shaw*'s Reverberations**

In the immediate aftermath of *Shaw*, voting rights advocates feared the worst. There were two major concerns about what the new type of legal claim recognized in *Shaw* might portend, one doctrinal and the other having to do with real-world consequences. The doctrinal fear was that *Shaw* was the first step toward holding the

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[190]*Shaw I*, 509 U.S. at 662-63.

[191]*Id.* at 680.

[192]*Id.* at 658.

Voting Rights Act unconstitutional, at least insofar as it mandated that race be taken into consideration in drawing districts The real-world fear was that it would significantly decrease the number of minorities elected to legislative office. But as yet, the sky has not fallen – neither of these fears have come to pass.[193] To understand why, it is necessary to trace the line of cases that followed *Shaw v. Reno*. This included no less than three additional Supreme Court opinions on North Carolina's post -1990 congressional apportionment. In each of these cases, as in *Shaw v. Reno*, the Supreme Court reversed the decision of the lower court.

Most significant in defining the legal standard for a *Shaw* claim was the Court's decision in *Miller v. Johnson*, issued before the North Carolina reapportionment returned to the Supreme Court.[194] In *Miller*, the Court considered the constitutionality of a Georgia reapportionment plan that, under pressure from the Justice Department, created three majority-black congressional districts. As in *Shaw,* the Supreme Court emphasized the state's responsibility to treat citizens as individuals rather than as members of a racial group. [195] While quoting the Almanac of American Politics' description of Georgia's Eleventh District as a "[m]onstrosity,"[196] the Court rejected the contention that a district must be "bizarre on its face" to violate the Constitution.[197] Instead, the proper question was whether race was the "predominant factor" motivating the legislature's creation of the district. While the unusual shape of a district might bear on the question, a bizarre shape was neither necessary nor sufficient to finding that race was the predominant factor. To violate equal protection, a challenged district need not be "bizarre" in shape, but race must have been the *predominant* factor in its creation. Furthermore, even if race was the predominant factor, the district could still be up held if it was narrowly tailored to serve a compelling interest.[198]

In *Miller,* the Court found that race was the predominant factor, but avoided the question whether compliance with Section 5 of the Voting Rights Act was a compelling interest under the Fourteenth Amendment test. Instead, the Court assumed that VRA compliance was a compelling interest, but found that the district

[193]See A. Leon Higginbotham, Jr. et al., Shaw v. Reno*: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1603 (1994)(raising possibility that *Shaw* would lead to "lily white" legislative representation).

[194]515 U.S. 900 (1995).

[195]*Id.* at 911.

[196]*Id.* at 909.

[197]*Id.* at 912.

[198]*Id.* at 920.

was not narrowly tailored serve this interest, since Section 5 did not require the state to "maximize" the number of majority-black districts. *Miller* thus failed to resolve the conflict between the Voting Rights Act and the Fourteenth Amendment that emerged in *Shaw v. Reno*, for the Court was less than precise in defining what either required. While articulating the "predominant factor" test, the Court was less than clear on what it meant for race to have been the predominant factor, much less how courts were supposed to probe the motivations of state legislators to determine which of the many factors taken into consideration in drawing district lines was "predominant." *Miller* was even less clear in defining the requirements of the Voting Rights Act. While holding that Section 5 of the VRA did not require the *maximization* of majority-minority districts, it left uncertain what this section *did* require.

The other redistricting cases that made their way up to the Supreme Court in the 1990s, did little to clarify either question.[199] Underlying the Court's lack of clarity on the meaning of both the Equal Protection Clause and the Voting Rights Act is a still-unresolved ambivalence about what equality demands in the area of democratic representation requires. This may most clearly be seen by tracing the Court's three subsequent decisions on North Carolina's congressional redistricting.

After the Supreme Court remand, the North Carolina plan returned to the three-judge district court. After a six-day trial, the court found that the plan did not violate the standard that the Supreme Court had articulated in *Shaw v. Reno* – and again, the district court was split two-to-one on this question.[200] All three judges agreed that the plan's lines "were deliberately drawn to produce one or more districts of a certain racial composition,"[201] thus triggering strict scrutiny. Two members of the district court (Judges Phillips and Britt) nevertheless found that plan permissible on the ground that it was narrowly tailored to further the State's compelling interest in complying with Sections 2 and 5 of the Voting Rights Act.[202] As in the first *Shaw* case, Judge Voorhees dissented, concluding that strict scrutiny was not satisfied.[203]

Again, the Supreme Court reversed. In its opinion in *Shaw v. Hunt* (*Shaw*

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[199]*See, e.g.,* Bush v. Vera, 517 U.S. 952 (1996)(holding three Texas congressional districts in violation of Fourteenth Amendment, without majority opinion); *United States v. Hays*, 515 U.S. 737 (1995)(voters who did not live in challenged congressional district lacked standing).

[200]Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994).

[201]*Id.* at 417.

[202]*Id.* at 475.

[203]*Id.* at 476-97 (Voorhees, J., dissenting).

II),[204] the same five-justice majority that had reversed in *Shaw v. Reno* concluded that the 12th District violated the Fourteenth Amendment.[205] And again, four justices dissented.[206] This time, Chief Justice Rehnquist wrote the majority opinion. The majority first found that race was the predominant factor in the drawing of this district, citing the acknowledgment in the State's preclearance submission that the legislature's "*overriding* purpose" was to comply with the Attorney General's objections by creating two majority-black districts.[207] The Court proceeded to reject the argument that the use of race in creating the 12th District was justified in order to comply with the Voting Rights Act. Without reaching the questions whether VRA compliance was a "compelling" justification, the Court found that a second majority-black district was not narrowly tailored to comply with either Section 5 or Section 2 of the VRA. As in *Miller*, the majority rejected the argument that Section 5 required the maximization of majority-minority districts; thus, it reasoned the creation of the 12th District was not required. As for Section 2, the majority focused on the fact that the district was not "geographically compact." This fact, in the majority's view, made it impossible to argue that the creation of this district was needed to comply with Section 2. The fact that there might be a geographically compact group of black voters elsewhere in the state, whose Section 2 rights would arguably be violated, did not justify the creation of a noncompact district elsewhere in the state. Put another way, the Court viewed the injury against which the VRA protects as highly individualized, emphatically rejecting the idea that the "right to an undiluted vote .... belongs to the minority as a group and not to its individual members."[208] As in *Shaw I*, the Court was more clear in defining what the VRA did *not* require than in elucidating what it did require. Nor did *Shaw II* lend much clarity to the meaning of the predominant factor test for determining whether the Fourteenth Amendment had been violated.

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[204]517 U.S. 899 (1996).

[205]Only the 12th District, and not the 1st District, was addressed in *Shaw II*. Relying on United States v. Hays, 515 U.S. 737 (1995), the Court concluded that only plaintiffs who reside in an allegedly gerrymandered district have standing to challenge that district. Because two of the plaintiffs resided in the 12th District, they had standing to challenge it. But none of the *Shaw* plaintiffs resided in the 1st District, and therefore none had standing to challenge that district. *Shaw II*, 517 U.S. at 904.

[206]By the time of *Shaw II*, Justices Ginsburg and Breyer had replaced Justices White and Blackmun. Both Ginsburg and Breyer dissented in *Shaw II*, and their predecessors had in *Shaw I.*

[207]*Id.* at 906.

[208]*Id.* at 917. For a critique of the position espoused by the *Shaw v. Hunt* majority, see Heather Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001).

By the time *Shaw II* came out in on June 13, 1996, it was too late to draw new districts for the 1996 elections. Instead, the district court instructed the North Carolina legislature to draw a new map in time for the 1998 elections. The legislature responded with yet another plan in 1997, that divided the state's congressional seats equally between the Democratic and Republican Parties, giving each party a majority within six districts. But this time, blacks did not constitute a majority of the voting age population in either the 1st or the 12th district.[209] The new 12th District "pruned the ends and fattened the middle" of its predecessor.[210] It also made the majority-black 1st district, and other surrounding districts, more compact. The three-judge district court in *Shaw* approved the new plan and dismissed the challenge to the 1992 plan as moot.[211]

After the Supreme Court's *Shaw II* opinion but before the district court's dismissal, Everett filed a new complaint in U.S. District Court for the Eastern District of Colorado, styled *Cromartie v. Hunt*.[212] This time Everett filed on behalf of three residents of the 1st District, to address the Supreme Court's conclusion that only citizens of a district may bring a racial gerrymandering claim against that district. This case was assigned to a new three-judge district court. While the *Shaw* court had consisted of two Democratic appointees and one Republican, the *Cromartie* court consisted of two Republicans (District Judges Terrence Boyle and Voorhees) and one Democrat (Circuit Judge Sam Ervin III). After the *Shaw* litigation was dismissed, Everett added four 12th District residents as co-plaintiffs in *Cromartie*, in order to challenge both the 1st and 12th Districts of the 1997 plan.[213] This time, a majority of the three-judge court granted Everett's motion for summary judgment with respect to the 12th District, but denied it as to the 1st. Judges Boyle and Voorhees concluded that race was the predominant factor in the creation of the 12th District, but found there to be a genuine issue of fact on whether race was the predominant factor in the creation of the more compact 1st District.[214] Judge Ervin

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[209]46.57% of the new 1st District's voting age population was black, and 43.36% of the new 12th District's voting age population was black. Cromartie v. Hunt, 1998 U.S. Dist. LEXIS 7767, at *37 (E.D.N.C. 1998)(Ervin, J., dissenting).

[210]North Carolina Redistricting Cases: The 1990s, available at http://www.senate.leg.state.mn.us/departments/scr/redist/redsum/NCSUM.HTM.

[211]Shaw v. Hunt, No. 92-202-CIV-5-BR, slip op. at 8 (E.D.N.C. Sept. 12, 1997).

[212]34 F. Supp. 2d 1029 (E.D.N.C. 1998).

[213]Cromartie v. Hunt, 1998 U.S. Dist. LEXIS 7767 (E.D.N.C. 1998); *see also* Cromartie v. Hunt, 133 F. Supp. 2d 407, 409 (E.D.N.C. 2000)(describing prior proceedings).

[214]*Id.* at *28, *30.

dissented, emphasizing that neither of the newly created districts was majority-black and concluding that race was not a predominant factor in the creation of either. Instead, Judge Ervin found the legislature's "predominant motives" to be the maintenance of a 6-6 division among Democratic and Republican seats, and the protection of incumbents.[215]

On January 20, 1999, the Supreme Court heard argument on the constitutionality of North Carolina's congressional reapportionment for the third time in six years. And for the third time in six years, the Court reversed the disposition of the three-judge district court.[216] This time, however, the Court was unanimous in concluding that the district court was wrong to grant plaintiffs' motion for summary judgment with respect to the 12th District. Justice Thomas' opinion for the Court in *Cromartie v. Hunt* noted that plaintiffs had introduced only "circumstantial evidence" in support of their claim that race was the predominant factor in the creation of this district.[217] While that evidence tended to support the inference of an "impermissible racial motive," summary judgment was inappropriate because there was evidence that the protection of incumbents and preservation of the 6-6 split between Republicans and Democrats was the legislature's principal goal. In other words, there was evidence to support the conclusion that politics not race was the predominant motive.[218]

On remand, the three-judge district court conducted a three-day trial, at the conclusion of which a majority concluded that the 12th District violated equal protection but that the 1st District did not. As was the case at the summary judgment stage, Judges Boyle and Voorhees were the majority. They concluded that race was the predominant motive in the creation of both the 1st and the 12th Districts, but that only the 1st was narrowly tailored to serve a compelling government interest – namely the interest in avoiding a violation of Section 2 of the VRA. Judge Thornburg (who had replaced Judge Ervin as the third judge on the panel) dissented from the majority's holding that the 12th District was unconstitutional, concluding that race was not the predominant factor in the creation of either district.[219]

The matter returned to the Supreme Court for argument on November 27,

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[215]*Id.* at *46.

[216]Hunt v. Cromartie, 526 U.S. 541 (1999).

[217]*Id.* at 547.

[218]*Id.* at 549-54. The four justices who had dissented in *Shaw II* separately concurred. *Id.* at 555-58 (Stevens, J., concurring).

[219]Cromartie v. Hunt, 133 F. Supp. 2d at 427-33 (Thornburg, J., dissenting).

2000 and, on April 18, 2001, the Court issued its opinion in *Easley v. Cromartie*.[220] For the fourth time in eight years of litigation over North Carolina's congressional districts, the Supreme Court had reversed the three-judge district court. This time, Justice O'Connor joined the four justices who had dissented in *Shaw II*, in concluding that the 12th District did not violate equal protection. The majority concluded that politics not race had been the predominant factor in the creation of the 12th District: "The evidence taken together, however, does not show ... that racial considerations predominated in the drawing of District 12's boundaries."[221] The Court reasoned that, in North Carolina, race and political behavior were closely correlated. While acknowledging that the disputed issue in the case was evidentiary, the Court declined to defer to the findings made by the district court after trial. Instead, it focused on the "demanding" burden of proof that plaintiffs face in challenging districts under *Shaw I* and its progeny.[222] Sorting through the evidence, the majority found little support for the district court's conclusion that "race not politics" was the predominant factor in the North Carolina reapportionment. Where race and political affiliation are so correlated, plaintiffs must establish "the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" *and* that "those districting alternatives would have brought about significantly greater racial balance."[223]

The *Easley* opinion brought the North Carolina litigation to an end, but it remains to be seen whether the opinion provides the last word on what is required to make out a *Shaw* claim. By imposing a heavy burden on plaintiffs seeking to show that racial considerations predominated over political ones, Justice Breyer's opinion might be seen as providing a recipe for those states seeking to defeat a *Shaw* claim: Simply argue that partisan interests and the protection of incumbency, rather than race, are the basis for the challenged plan. So long as legislators avoid acknowledging that their decisions were motivated by politics rather than race, it may be defended. This indeed seems to be the lesson that lower court judges have drawn from *Easley*, and probably goes a long way toward explaining why there have been relatively few racial gerrymandering cases brought in the wake of the post-2000

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[220] 532 U.S. 234 (2001).

[221] *Id.* at 257.

[222] *Id.* at 241.

[223] *Id.* at 255, 258.

decennial redistricting.[224]

One answer to the question of why *Shaw* did not have the dramatic doctrinal consequences that some feared is that its raceblindness mandate was unenforceable. The problem with this view is that, had it wished to do so, the Court could have imposed a much more demanding standard than the "predominant factor" test articulated in *Miller*. Specifically, it could have held *any* consideration of race to be per se impermissible, or at least subjected districts to strict scrutiny if there was any evidence that race had been considered. While legislators might still use proxies for race to accomplish the same objective, such a standard would at least have made it more difficult for them to do so.

An alternative answer is that the Court either lost its nerve or came to its senses – depending on your perspective. While *Shaw* moved toward an insistence upon raceblindness in the drawing of districts, *Easley* backs away from this insistence. With a wink and a nod, the Court has signaled that it will allow race to be considered in drawing districts – at least for now – so long as there is a colorable argument that "politics" rather than race is the real reason for the districts. Because voters' race so often correlates with political affiliation, it will be easy to sneak racial considerations into the districting process under the table. Viewed in this light, *Easley* is a much more significant decision than its fact-intensive analysis would suggest. To extend the analogy to affirmative action, *Easley* is to racial gerrymandering what *Grutter* is to affirmative action. In both cases, the Court has signaled that it means to give government some latitude to take race into account, so long as it avoids doing so in an overly heavy-handed fashion. For Robinson Everett and others who applauded *Shaw*'s move toward raceblindness, this can only be seen as a profound disappointment. For those who were worried that *Shaw* might portend the death of the Voting Rights Act, *Easley* was cause for a sigh of relief – if only a momentary one, given the changes on the Supreme Court that may well swing the pendulum back toward a greater insistence on raceblindness, in redistricting as well as affirmative action.

This doctrinal instability caused by changes on the Court becomes apparent when *Easley* is viewed alongside the Supreme Court's interpretation of the VRA in *Georgia v Ashcroft*.[225] In that case, the Court upheld a redistricting plan under Section 5, even though it reduced the number of safe minority seats. The Court rested its conclusion on the increase in the number of "influence districts," along with

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224 *See* Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 691 (2002)(noting that at least some federal judges are convinced that any district may be defended under *Easley*).

225 539 U.S. 461 (2003).

the fact that most black representatives (including Rep. John Lewis) signed off on the plan. In the Court's view, Section 5 "gives States the flexibility to choose one theory of effective representation over the other."[226] For proponents of greater minority representation, the problem with *Georgia v. Ashcroft* is that it seems to make it too easy for states to pay lip service to racial minorities in redrawing districts.[227] On the other hand, Justice Kennedy expresses concern that Georgia had paid *too much attention* to race in its redistricting, suggesting that it might be in violation of the Equal Protection Clause for having made race the "predominant factor" in drawing districts. As he puts it "considerations of race that would doom a redistricting plan under the Fourteenth Amendment ... seem to be what save it under § 5 [of the VRA]."[228] Whether or not one agrees with Justice Kennedy's position on the merits, he is correct to note the unresolved tension between the qualified race-blindness mandate of *Shaw* and the qualified race-consciousness mandate of the VRA.

While the future is anything but certain, one thing that has become clear in the years since 1993 is that the *Shaw* doctrine did not have the disastrous consequences on minority representation that some feared. A number of majority-minority districts were in fact dismantled as a result of *Shaw I* and its progeny. The Court ordered the redrawing of nine majority-minority congressional districts, and in eight of those districts the black population fell below 50 percent. But contrary to the expectations of some, all but one of the black incumbents sought reelection and all were successful.[229] As shown in the chart below, minority representation in Congress actually held steady through the 1990s and into the next decade.[230] Minority representation in the House gradually increased between the 1960s and 1980s, and then increased significantly in the early 1990s. While there was a slight decline in the late 1990s, the number of minority representatives has remained almost

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[226]*Id.* at 482.

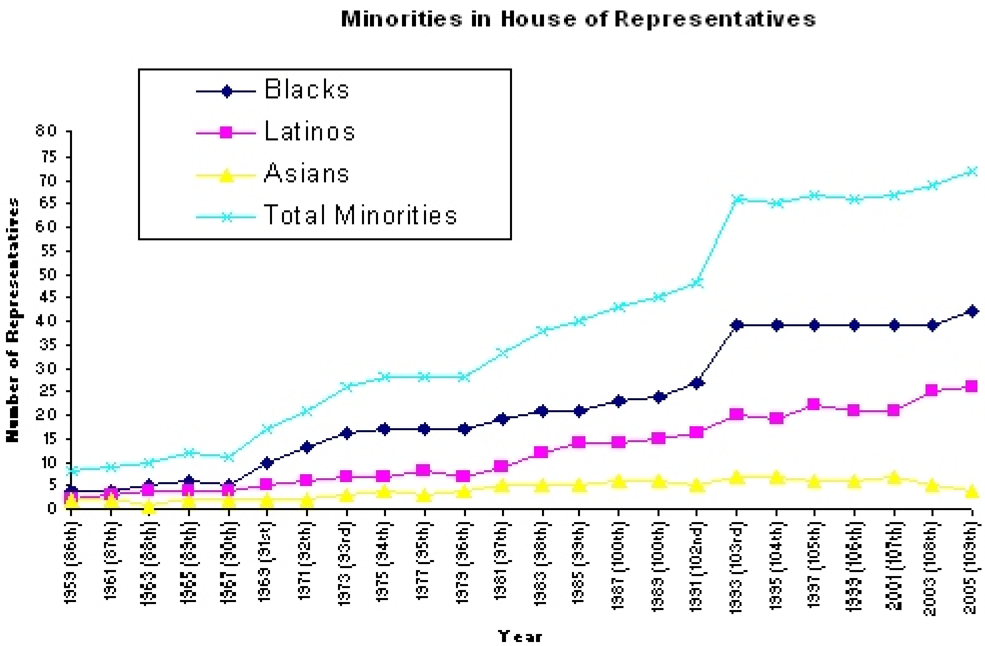
[227]As the dissent put it, the opinion threatens a "preclearance regime that defies reviewable administration." *Id.* at 496 (Souter, J., dissenting).

[228]*Id.* at 491 (Kennedy, J., concurring).

[229]Grofman, et al., *supra* note 92, at 1397-98.

[230]The information in this chart is derived from Mildred L. Amer, CRS Report for Congress, Black Members of the United States Congress: 1870-2004, at 58-59 (2004)(showing number of blacks in House serving in House through 2005); Lorraine H. Tong, CRS Report for Congress, Asian Pacific Americans in the United States Congress (2003)(showing Asian Americans serving in House through 2005); Hispanic Americans in Congress, *available at* www.loc.gov/rr/hispanic/congress/chron.html (showing Latinos elected to Congress up to 2005); Hispanic Americans 109th Congress, at http://www.house.gov/hpg.htm; African-Americans 109th Congress at http://www.house.gov/hpg.htm.

exactly what it was at the time that *Shaw I* was decided. There were 39 African Americans in the House of Representatives in 1993, the year *Shaw I* was decided. Ten years later, there were still 39 African Americans in Congress.[231] Meanwhile,



the number of Latinos is the House increased from 20 to 25 between 1993 and 2003,[232] largely as the result of increases in the Latino voting population.[233] Looking beyond Congress, the overall number of black officials continued to increase steadily during the 1990s. If there were no dramatic increases after *Shaw I*, there were also no precipitous declines.

Why did the racial gerrymandering cases not have the impact on minority representation that some feared? At least when it comes to Congress, the evidence shows that minority incumbents were able to win even when running from districts that were no longer majority-minority – so long as their party is still in the majoirty. It does not appear that this results froma decrease in racially polarized voting, or from the incumbency advantage enjoyed by black legislators.[234] Although white

[231]Amer, *supra* note 230, at 59.

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[234]Grofman, et al., *supra* note 92, at 1400.

crossover voting has increased,[235] the most important factor in determining whether a black could be elected to office appears to be whether or not they were running against a white incumbent.[236] There is no universal cut-off point above which a minority candidate is assured of election. A study of South Carolina, for example, showed that in some districts African Americans could win in districts 45 percent black, while in others a 65 percent black district might be necessary – and in jurisdictions with a white incumbent running, even this may not be enough.[237] Determining what conditions are necessary to elect minority candidates is thus a complicated question, but there is strong evidence to suggest that minority candidates may sometimes be elected from districts where minorities do not constitute a majority (much less a supermajority) of the voting age population. Still, it would be incorrect to conclude that minority representation can be preserved or strengthened without taking race into consideration. In this respect as well, then, *Shaw*'s legacy remains anything but clear.

Conclusion

Like many stories in the area of race law, the story of *Shaw v. Reno* does not have an ending. As a doctrinal matter, the Court's qualified insistence on raceblindness in the redistricting process was softened in subsequent cases; yet its vision may yet be realized through the Court's weakening of the Voting Rights Act. The good news for voting rights advocates is that, in the decade following *Shaw I*, the Voting Rights Act was not held unconstitutional. Even the most ideologically conservative justices on the Supreme Court have shown little appetite for invalidating the Act.[238] And despite the Court's limitations on the creation of majority-minority

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[235]Pildes, *supra* note 15, at 1530 (noting that "one-third of white voters regularly vote for black candidates" in southern congressional elections")(citing Grofman, et al., *supra* note 92, at 1399-1400).

[236]Grofman, et al., *supra* note 92, at 1400-03

[237]*Id.* at 1423.

[238]Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721,741 (2003) (Scalia, J., dissenting)(citing the VRA as an example of legislation that the Court has found to be within Congress' enforcement power, and contrasting the Family Medical Leave Act as an expansion beyond the legitimate scope of congressional power); *id.* at 744, 756-57 (Kennedy, J., dissenting, joined by Scalia and Thomas, JJ.)(citing VRA's literacy test ban as an appropriate exercise of congressional enforcement power); *see also* Tennessee v. Lane, 541 U.S. 509, 554, 562 (2004)(Scalia, J., dissenting)(asserting that Title II of the Americans with Disabilities Act of 1990 goes beyond Congress' enforcement power, while suggesting that Congress has more "expansive" power when it comes to enforcement of guarantees against racial discrimination).

districts, African American representation held steady and Latino representation increased throughout the 1990s and into the new century. To the extent that there really was a counterrevolution in voting rights, it has not prevailed. The second reconstruction has not yet met the same fate as the first.

The bad news for voting rights advocates is that it is too early to know whether the improvements in minority representation that have resulted from aggressive enforcement of the Voting Rights Act will last. To be sure, the Voting Rights Act has not been held unconstitutional; nor has it been rendered a toothless tiger by the Supreme Court decisions that followed. But its teeth have been dulled, not only through the equal protection cases that followed *Shaw I* but also through the Court's interpretation of the Voting Rights Act in cases such as *Georgia v. Ashcroft*.[239] Although social science research provides some encouraging evidence that some white voters are more willing to vote for minority candidates than they once were,[240] it is not clear that the increases in minority representation that occurred in the 1980s and 1990s will be sustained.

The uncertain status of *Shaw v. Reno*'s legacy is compounded by two major developments in the middle of the first decade of the 21st Century. One is the debate over key provisions of the Voting Rights Act that expire in 2007, including the provision that requires certain jurisdictions – mostly states and counties in the South – to "preclear" changes to their elections process before they go into effect. If this provision of the Act is renewed, its constitutionality will surely be litigated and will likely wind up before the Supreme Court. The other development is the changing composition of the Court, marked by the death of Chief Justice Rehnquist and the retirement of Justice O'Connor, the swing vote in the *Shaw* and the key voting rights cases that followed it. For those seeking to soothsay, these developments further cloud the crystal ball. But if the Roberts Court remains as ambivalent in its conception meaningful representation as the late Rehnquist Court, the story of *Shaw v. Reno* will remain incomplete, and the decision's legacy the subject of vigorous contestation.

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[239]539 U.S. 461 (2003); *see also* see also Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 340 (2000)(holding that Section 5's "purpose" prong applies only to changes that have a retrogressive purpose); Reno v. Bossier Parish Sch. Dist., 520 U.S. 471 (1997)(preclearance under Section 5 may not be denied simply because a change would violate Section 2 of the VRA).

[240]Keech & Sistrom, *supra* note 11, at 174.