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SPEECH

RACIAL GERRYMANDERING

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In April of 1993, the Supreme Court issued the decision in *Shaw v. Reno*. That decision holds:

> only that appellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme 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, and that the separation lacks sufficient justification.

Some erudite academic observers found the decision both surprising and disturbing, though I was not certain why, then or now. In fact, I made a few stops on the Federalists' tour, speaking, and in one instance debating Professor Samuel Issacharoff at the University of Texas, on the proposition that *Shaw v. Reno* was totally unremarkable and unsurprising, although in another sense one of the most profound decisions of the Court in nearly forty years. I want to rehash that briefly before going on to discuss what little, and I think it is little, although the same erudite observers may think it much, *Miller v. Johnson*, decided in 1995, adds to the *Shaw* pronouncement.

In the 1860s, this nation adopted the Fourteenth Amendment to the Constitution, specifying that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Thereafter, in a wide range of cases, conspicuously *Brown v. Board of Education* in 1954, the Court held that "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."

Otherwise put, "the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest."

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* Circuit Judge, United States Court of Appeals for the District of Columbia Circuit. Judge Sentelle delivered these remarks in a speech to the Federalist Society of the Columbus School of Law at The Catholic University of America on November 1, 1995.

This principle applies not only to legislation that contains explicit racial distinctions, but also to statutes that may be race neutral but are on their face "unexplainable on grounds other than race." As early as 1960, the Supreme Court readily applied that principle to a state's redefinition of its interior political boundaries, for example, "from a square to an uncouth twenty-eight-sided figure" in a manner designed to exclude voters from the voting unit on the basis of their race.

That is the legal landscape against which *Shaw* was decided. The factual background is that in 1992, the legislature of North Carolina redrew its congressional districts to reflect the increase in the state's house delegation from eleven to twelve. The pattern of the districts, with but two arguable exceptions, was far more geometrically uncouth than the boundaries of Tuskegee reviewed in *Gomillion*. State Senator Dennis Winner, Chairman of the state senate redistricting committee, loudly proclaimed that the districts were drawn on racial bases. He blamed the Department of Justice for forcing the legislature to do so. So the legislative record was clear that the uncouth districts were drawn for the purpose of racial gerrymandering.

Against that background of fact and law, Professor Robinson Everett, on behalf of himself, Ms. Ruth Shaw, and three other North Carolina voters, sued to enjoin the use of those districts. A three-judge court, split two-to-one with my successor on the district bench issuing the dissent, upheld the legislature's redistricting plan. Given the Supreme Court law as I recited it earlier, and the facts as the Chairman admitted them to be, it should be wholly unsurprising that the Supreme Court reversed that part of the three-judge opinion.

So much for the view that the opinion is unremarkable. Now what of my apparently contradictory description of the case as profound? That has to do with the ironic fact that a great many people found the decision surprising and remarkable and with a profound simplicity with which Justice O'Connor addresses the controversy for the Court's majority. With few preachments, and little fanfare, she spoke to a subject which I think goes deeply to the roots of what sort of civilization we are.

I suggest, and I do so with neither embarrassment nor hesitation, that the development of western civilization is the greatest historical saga in the history of humankind. The triumph of western civilization as a historic and worldwide phenomenon is unparalleled. As Dr. Richard Weaver suggested, it is the "paradigm of essences toward which mankind is more or less constantly coalescing." But its history is, of course, not without flaw. The greatest flaws in the last two centuries of western civilization have occurred when the state (and I speak now not of the thirteen

or fifty United States in one American union, but of the state in the general sense) differentiated among its citizens on the basis of the racial groups to which they belong. Chattel slavery in its last century, the Jim Crow laws in the south, the Holocaust of Nazi Germany, and the brutal apartheid regime of South Africa all occurred when the state determined to treat its citizens differently because of their perceived racial makeup.

Justice O'Connor's opinion for the majority in *Shaw v. Reno*, more than perhaps any opinion for the Court since *Brown v. Board of Education*, recognized and struck against the root of those historic flaws. As she said, "[a] reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." I commend Justice O'Connor for the moderation of her language. In fact, such a plan does not "bear[ ] an uncomfortable resemblance to political apartheid," it is nothing else *but* apartheid.

We in this country have recognized and roundly condemned the South African practice of erecting boundaries based on the race of those who live within them. The Supreme Court in *Gomillion v. Lightfoot* recognized and roundly condemned that act of the Alabama legislature in walling out voters because of their race. Justice O'Connor for the majority in *Shaw v. Reno* does the same thing.

The only new element, and it escaped me why it was remarkable, is that in *Shaw* it was white voters who complained rather than black. But I suggest that it is profoundly wrong to assume that black citizens would universally or automatically oppose the position taken by the plaintiffs and by the majority of the Supreme Court in *Shaw v. Reno*. To so assume is the very stereotypical thinking that led to the erection of the districts in the first place. The Supreme Court in other contexts has long deemed impermissible state action based on perceptions of racial stereotype. For example, in *Holland v. Illinois*, following *Batson v. Kentucky*, the Court described it as "undoubtedly true" that a "prosecutor's 'assumption that a black juror may be presumed to be partial simply because he is black . . . is impermissible' " and that "such an assumption violates the Equal Protection Clause." So while recognizing the profound importance of the Court's rejection of these assumptions in *Shaw v. Reno*, I nonetheless come out where I came in. The decision should be unremarkable.

A racial classification for political districting is state action discriminating among citizens on the basis of their race. State action discriminating among citizens on the basis of race is subject to strict scrutiny. The Court

will not permit such discriminatory state action to stand unless it is narrowly tailored to meet sufficiently compelling state interests. That principle applies even where the words of the statute are race neutral but are "unexplainable on grounds other than race." Factually, the North Carolina districts are unexplainable on any basis other than race, or at least the plaintiffs colorably so alleged. It should be totally unsurprising that the dismissal was reversed.

In upholding the sufficiency of the complaint, the Court maintained that the legislature totally abandoned traditional principles of redistricting, such as compactness, contiguity, and the preservation of the boundaries of political subdivisions. As to compactness, District 12, the later drawn of the two majority-minority districts, stretches over 160 miles in a meandering, snakelike form, with occasional branches, from Gastonia, North Carolina in the Western Piedmont where it encompasses only a few predominantly black neighborhoods. It then runs east in a narrow line the approximate width of Interstate 85 with that highway to Charlotte, where it encompasses only majority black neighborhoods; then north, again running with Interstate 85, drifting only occasionally to pick up black voters; through Winston-Salem, where it widens out to encompass predominantly black neighborhoods; closing back down again to the width of I-85, drifting off the main road occasionally to pick up a few more majority black neighborhoods until it runs up into Greensboro, where it spreads out again to pick up the majority black core of that city; back down to the width of the highway until it enters Durham County, where it picks up the predominantly black neighborhoods in Durham.

Following the meanders of the district, the legislature abandoned the principle of contiguity as thoroughly as it did the principle of compactness. Justice O'Connor's opinion noted that the district itself is contiguous only at a geometric point, but it is worse than that. The black and white map attached to the Supreme Court's opinion masks what the full color map of North Carolina I brought with me discloses.[1] That is, while District 12 itself is theoretically contiguous, it cuts the majority white District 6, the Greensboro district, into three noncontiguous segments. Also, if we examine independently Districts 1 and 3 (District 1 is the other majority black district) on a full color map, you can see that either one of those districts is not contiguous or both of them preserve contiguity only by a theoretical geometric point, as those two districts at more than one

1. *Compare* Shaw v. Reno, 125 L. Ed. 2d 511, 536A (1993) *infra* as Appendix A (reproducing a map of the North Carolina Congressional Plan) *with* Appendix B (reproducing a map of North Carolina provided by the News & Observer of Raleigh, North Carolina).

place appear to meet at X lines. In short, the legislature abandoned the contiguity principle along with compactness.

Finally, as to political subdivisions, in drawing the race-based districts, North Carolina's legislature not only ignored county lines and city limits, but by going directly to census tracts, it actually ignored precincts. Thus, even within a single polling place, voters from black neighborhoods and white neighborhoods or black and white portions of the same neighborhoods are segregated into separate congressional districts. Commission Chairman Winner, in his ironic lament of being "forced" into these districts by the Department of Justice, accused that Department of having "required . . . that we go back to 'separate but equal.'" Since most of you are too young to remember the significance of that particular phraseology, that was the defense by southern segregationists of the old pre-*Brown v. Board of Education* school districts. They were separate, but they were equal. The *Brown* Court held that being separate, they were inherently unequal. So has the present Court rightly held as to congressional districts in *Shaw v. Reno*.

Those who were (or purported to be) surprised or offended by the *Shaw v. Reno* decision took Justice O'Connor's recitation of the evidence as being the complete statement of the law. That is to say, they accused the Court of having held the district unconstitutional because it was bizarre in its shape. When I debated Professor Issacharoff and when I spoke to the Federalists at other places, I took the position that Justice O'Connor's opinion held not that the districts were unconstitutional because they were ugly, but that the redistricting plan was unconstitutional because it was racially based. The ugliness of the districts was merely evidence of the proposition that the legislative action was "unexplainable on grounds other than race."

In the *Miller* case, the Supreme Court for the first time had a chance to apply *Shaw* and tell us whether or not I was correct in that assessment. While I am not always correct in predicting what the Supreme Court will do, I was that time, perhaps because it was rather easy. In the *Miller* case, the three-judge panel reviewing a Georgia redistricting plan with the same racial motivation as North Carolina's, that is, to create majority-black districts, struck down that plan as unconstitutional. Justice Kennedy, writing for the majority in *Miller*, affirmed that decision. All the *Miller* decision adds to *Shaw* is the clarification, which I have thought unneeded, that the thrust of *Shaw* is to recognize a justiciable claim distinct from vote dilution for citizens of those states where redistricting is the result of racial classification. Justice Kennedy quoted from *Shaw*:

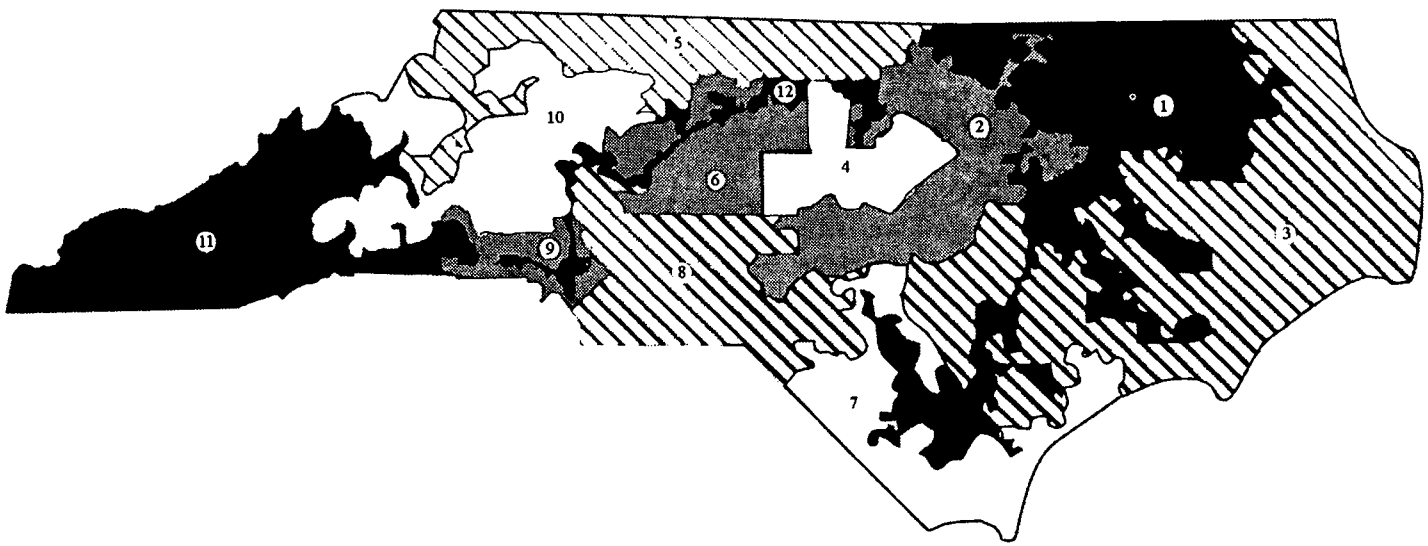
> Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters — a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.

To those who did not read or understand the words from *Shaw*, he added: "[o]ur observation in *Shaw* of the consequences of racial stereotyping was not meant to suggest that a district must be bizarre on its face before there is a constitutional violation," and

> [s]hape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.

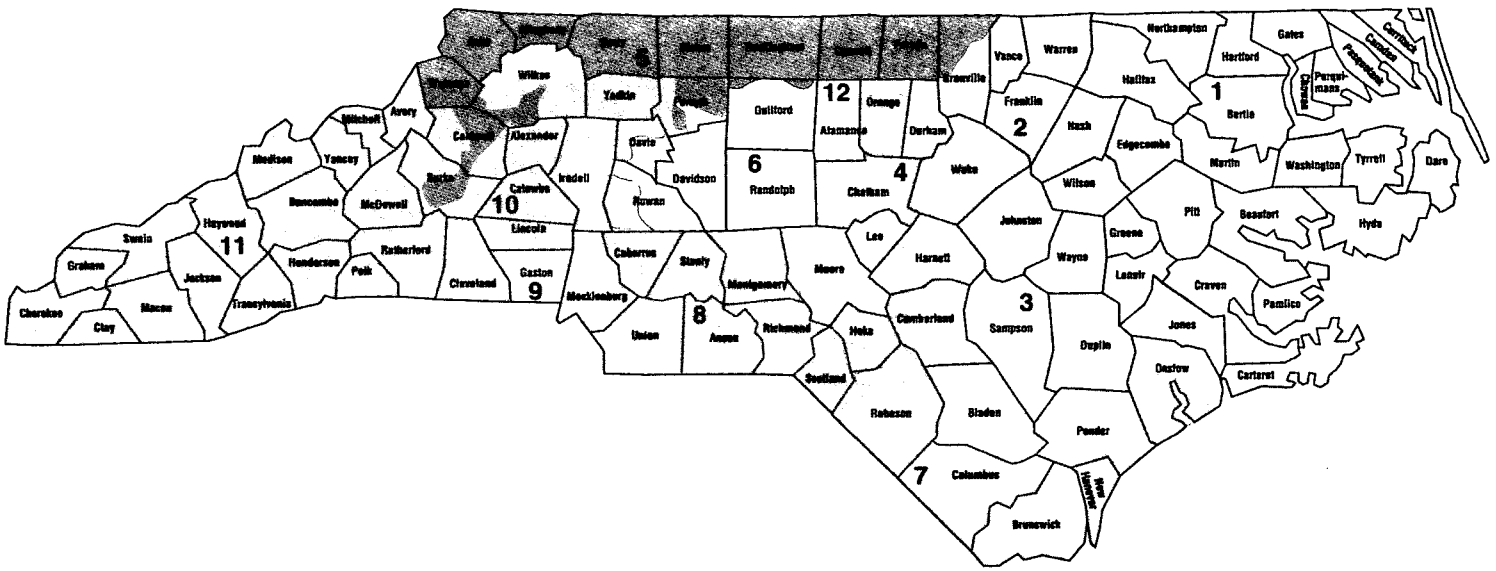
There is not much more question to be raised. Last Term, the Supreme Court not only gave us *Miller v. Johnson*, but also *Adarand Constructors, Inc. v. Pena*, which conspicuously held that a benignly derived but invidiously discriminatory program of racially based set-asides is unconstitutional. If we doubted before, we know now that the Equal Protection Clause is colorblind. We may expect that the apostles of so-called reverse discrimination will fight effective implementation of colorblind equal protection, just as did their predecessors in the old south in the days following *Brown v. Board of Education*. They are not the majority on the Supreme Court.

APPENDIX A



Source: Shaw v. Reno, 125 L. Ed. 2d 511, 536A (1993).

APPENDIX B



Map of North Carolina reprinted with permission of The News & Observer of Raleigh, North Carolina.