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COMMENT

A RETURN TO THE BASICS: Constitutional Answers to the Racial Gerrymandering Questions

I. INTRODUCTION

As we approach the dawn of a new century, we will again struggle with the problems inherent in the political processes that drive legislative reapportionment. After over thirty years of voting rights legislation and litigation, we are no more certain as to the meaning or place of congressional and judicial activism in the apportionment arena than we were at its inception. As communities become more and more integrated, policies become increasingly segregated. With this we are asked to answer an incorrigible question: Where the goal is a colorblind society, what role should race play in apportioning legislative districts?

The United States Supreme Court has been wrestling with this question since before the enactment of the Voting Rights Act of 1965¹ and continues to do so today, even after such landmark decisions as *Thornburg v. Gingles*,² *Miller v. Johnson*,³ and most recently *Shaw v. Hunt* (hereinafter *Shaw II*).⁴ After a decade of race-predominant redistricting, our Congressional, state legislative, and local voting districts remain bizarrely-shaped and racially isolated. With the 2000 census approaching, the next decade could bring about even more complex issues for the Court in redistricting legislation.

Much has been written about racially gerrymandered districts and the role of the Court, the Department of Justice, and the state legislatures. Critics on both ends of the political spectrum and everywhere in between are trying to discern in what direction the Court is headed with its electoral jurisprudence. In fact, the

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1. 42 U.S.C. § 1973 (1994).
 2. *Thornburg v. Gingles*, 478 U.S. 30 (1986).
 3. *Miller v. Johnson*, 515 U.S. 900 (1995).
 4. *Shaw v. Hunt*, 517 U.S. 899 (1996).

Court itself may well wonder.⁵ Somewhere among the “results” test,⁶ the “bizarre shape” test,⁷ the “dominant purpose” test⁸ and every other test something has been arguably forgotten: the Constitution and the purpose of representation.

This comment seeks to explain the incorrigible by returning to the basics. Starting and ending at the Constitution and a notion of what it means to be represented, this comment traces the development of redistricting jurisprudence from the Fourteenth and Fifteenth Amendments⁹ through the Voting Rights Act and finally to the Supreme Court. Most notably, this comment focuses on the effects of the redistricting quagmire on the state of North Carolina throughout the 1990’s as an exemplar of a reapportionment process attempting to pander to the political proclivities of both the Department of Justice and the Judicial branch. Reflecting on the provisions of the Constitution, the Voting Rights Act and the decisions of the Supreme Court, this comment then attempts to explain how we got to the 1997 *Shaw II*¹⁰ decision and beyond, and what this means for the future of legislative districts both at the drawing board in the committee room and at the chopping block in the courtroom.

II. THE CONSTITUTION

At the beginning of the redistricting query is the Constitution. The Fifteenth Amendment provides, “The right of citizens of the United States to vote shall not be denied or abridged by the

5. See *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899 (1996); *Miller*, 515 U.S. 900 (1995). With a 5-4 majority on most legislative apportionment decisions, even a small change in the court could effectively decide the direction of redistricting law in the 21st century.

6. *Thornburg*, 478 U.S. 30, 31 (1986). Results test: to prove a violation of section 2 of the Voting Rights Act a minority group need only show that a state voting practice results in impermissible vote dilution. To state such a claim a minority group must first satisfy three conditions; compactness, cohesiveness, and majority voting bloc.

7. *Shaw I*, 509 U.S. 630, 658 (1993). Bizarre shape test: an apportionment plan so extremely irregular on its face that it could be rationally viewed only as an effort to segregate races for the purposes of voting, without regard to traditional districting principles and without sufficiently compelling justification, is unconstitutional.

8. *Miller*, 515 U.S. 900, 915 (1995). Predominant Purpose test: an allegation that race was a legislatures’ dominant and controlling rationale in drawing district lines is sufficient to state a claim under the Equal Protection Clause.

9. U.S. CONST. amend. XIV, XV.

10. *Shaw II*, 517 U.S. 899 (1996).

United States or by any State on account of race, color, or previous condition of servitude.”¹¹ Section 2 of the Fifteenth Amendment grants to Congress the power to enforce section 1 “by appropriate legislation.”¹² The Fourteenth Amendment forbids states from making or enforcing any law which shall “deny to any person within its jurisdiction the equal protection of the laws.”¹³

The provisions of both the Fourteenth and Fifteenth Amendments have been held to be self-executing.¹⁴ Thus, the effect of the Fifteenth Amendment on state constitutions that “grant[ed] suffrage to ‘white’ males only” was automatic nullification of such provisions.¹⁵ The Fifteenth Amendment has been held to nullify “sophisticated as well as simple-minded modes of discrimination.”¹⁶ Similarly, the Fourteenth Amendment has often been relied on by the Supreme Court to overturn discriminatory voting practices based on race.¹⁷ In post-civil war America, the self-execution of the Fourteenth Amendment effectively eliminated the use of the word “white” from state constitutions and statutes conferring the right to vote upon “all white, male citizens,” therefore granting the right to black males as well.¹⁸

At the close of a racially divisive era came the promise of unity as America at last acknowledged the equality of its citizens by constitutionally enfranchising African-Americans. The Fourteenth and Fifteenth Amendments to the Constitution memorialized the country’s dedication to equality and thus began the road towards a “colorblind society.”

11. U.S. CONST. amend. XV, § 1.

12. U.S. CONST. amend. XV, § 2.

13. U.S. CONST. amend. XIV, §1 (Equal Protection Clause).

14. Daniel A. Klein, *Racial Discrimination in Voting, and Validity and Construction of Remedial Legislation-Supreme Court Cases*, 92 L. Ed. 2d 809, 811 (1988).

15. *Id.*

16. *Id.* See *Lane v. Wilson*, 307 U.S. 268 (1939).

17. *Id.* See, for example, *Nixon v. Herndon*, 273 U.S. 536, 541 (1927), where the court stated that the Fourteenth Amendment “gave citizenship and the privilege of citizenship to persons of color. . . and declar[ed] that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the law of the States, and, in regard to the colored race. . . no discrimination shall be made against them by law because of their color.”

18. *Id.* at 811-12. See *Neal v. Delaware*, 103 U.S. 370, 390 (1881) (holding that the legal effect of the adoption of the Fourteenth Amendment, and the laws passed for its enforcement, was to annul so much of existing state law as was inconsistent therewith, including provisions confining suffrage to the white race).

III. THE VOTING RIGHTS ACT OF 1965

Despite the clear language of the Constitutional Amendments, jurisdictions across the country and especially in the Southeast were still sidestepping the Congressional mandate. “[A] number of states. . . continued to circumvent the Fifteenth Amendment’s prohibition through the use of both subtle and blunt instruments, perpetuating ugly patterns of pervasive racial discrimination.”¹⁹ The most notorious examples used facially neutral but substantively discriminatory voting criteria such as “grandfather” clauses, literacy tests and poll taxes in an effort to indirectly prohibit blacks from voting.²⁰ These shrewd methods of skirting the Constitution were inadequately addressed by the Civil Rights Act of 1957²¹ before finally meeting the Voting Rights Act of 1965.²² The Voting Rights legislation was enacted by Congress as a dramatic response to a troubling situation.

The Voting Rights Act²³ displayed a Congress with a low tolerance for electoral discrimination. Through the Voting Rights Act, Congress asserted powers granted to it by the Constitution to “eliminate new and more sophisticated tactics [being] used. . . to disenfranchise black voters.”²⁴ This statute primarily accomplished three things: (1) it voided all current discriminatory rules, (2) it required areas with a history of voting discrimination to have any future rules approved before they could be implemented, and (3) it established the requirements of equal protection for voting rights.²⁵ The pertinent provisions of the statute are sections 2 and 5. While § 2 is thought to propose an ideal, § 5 was merely designed to prevent retrogression.²⁶

19. *Shaw I*, 509 U.S. at 639. (quoting Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 637 (1983)).

20. See M. Elaine Hammond, Comment, *Toward a More Colorblind Society? Congressional Redistricting After Shaw v. Hunt and Bush v. Vera*, 75 N.C. L. REV. 2151, 2154 (1997).

21. 42 U.S.C. § 1971(a)(1) (1994). The Civil Rights Act of 1957 provides that “[a]ll citizens of the United States who are otherwise qualified by law to vote at any [state or local] election. . . shall be entitled to vote at all such elections, without distinction of race, color, or previous condition of servitude.”

22. 42 U.S.C. § 1973 (1965).

23. 42 U.S.C. § 1973.

24. Klein, *supra* note 14, at 814.

25. Hammond, *supra* note 20, at 2155.

26. *Id.* at 2158 (citing *Reno v. Bossier Parish Sch. Bd.*, 117 S. Ct. 1491 (1997)) (stating that each section of the Voting Rights Act addresses different concerns).

Section 2 of the Voting Rights Act provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees . . . of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.²⁷

As originally enacted, § 2 proposed only an “intent” test. To prove a § 2 violation, a plaintiff had to prove that the intent of the state legislature was to draw district lines based on race.²⁸ However in 1982, Congress amended the Voting Rights Act to read as it now does imposing a “results” test²⁹ in lieu of the “intent” test. The “results” test requires a showing of the actual effect of a state practice, as opposed to the subjective intent of a state legislature in implementing such a practice.

Section 5 of the Voting Rights Act is a “preclearance” provision, providing for the pre-approval of any changes made to voting

See also Beer v. United States, 425 U.S. 130 (1976), where the Court defined retrogression to mean a protection from the regress of minority political status. For example, if a state had one minority district going into reapportionment then, according to section 5, it must have no less than one when reapportionment is complete. Minorities may retain or gain seats but they may not lose seats. This provision acts as a safeguard against political schemes to draw minorities out.

27. 42 U.S.C. § 1973(a)-(b) (1994) (emphasis in original).

28. *See Benjamin E. Griffith, Defense Strategies in Voting Rights Litigation After Shaw and Miller*, 28 URB. LAW. 715 (1996).

29. *See Thornburg v. Gingles*, 478 U.S. 30 (1986), where the Court examined the “results” test in applying amended section 2 to vote dilution claim involving multi-member districts and established elements a claimant must meet to show a violation of section 2 of the Voting Rights Act.

plans or practices in covered jurisdictions.³⁰ Under 42 U.S.C. § 1973(c), the Attorney General of the United States may determine that certain counties are covered jurisdictions due to their previous engagement in racial vote dilution.³¹ Being labeled such a jurisdiction requires submission of any proposed changes in voting qualifications, standards, or practices to the Attorney General for preclearance,³² or alternatively to the United States District Court for the District of Columbia seeking a declaratory judgment “that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”³³ Legislative district planning has been recognized as a “standard, practice, or procedure” within the meaning of the Voting Rights Act and as such is subject to both sections 2 and 5 of the Act.³⁴

IV. FROM THE CONSTITUTION AND VOTING RIGHTS ACT TO *SHAW*

Throughout the past thirty years, the Supreme Court has utilized the Fourteenth and Fifteenth Amendments in conjunction with the Voting Rights Act to create a framework for analysis in redistricting legislation. Beginning in 1962 with *Baker v. Carr*,³⁵ the Court recognized the justiciability of Equal Protection claims in relation to legislative districting. *Baker*, along with *Reynolds v. Sims*³⁶ in 1964 and a host of other cases, established that the right to vote could be denied by dilution of voting power as well as by an absolute prohibition on casting a vote.³⁷ The *Reynolds* Court stated that “the right of suffrage can be denied by a debase-

30. 42 U.S.C. § 1973(c).

31. See *Shaw I*, 509 U.S. at 634 (Forty of North Carolina’s on hundred counties are covered jurisdictions and must get preclearance).

32. In this process, the Attorney Generals do not *accept* proposals, rather they merely *object* to proposals—if anything at all.

33. 42 U.S.C. § 1973(c). Most states submit plans to the Attorney General as that office has developed somewhat of an expertise in this area. See Hammond, *supra* note 20, at 2157 (noting that the Bush, Shaw, and Miller states sought examination by the Attorney General).

34. See, e.g., *Allen v. Board of Supervisors*, 393 U.S. 544, 569 (1969) (The Supreme Court struck down Mississippi law changing county board of operators from district-based to at-large voting).

35. *Baker v. Carr*, 369 U.S. 186 (1962).

36. *Reynolds v. Sims*, 377 U.S. 533 (1964).

37. See Andrea Bierstein, *Millennium Approaches: The Future of the Voting Rights Act after Shaw, Degrandy, and Holder*, 46 HASTINGS L.J. 1457, 1476 (1995).

ment or dilution of the weight of a citizens vote just as effectively as by wholly prohibiting the free exercise of the franchise.”³⁸ Through this line of cases from 1962 to 1964, the Court utilized the Constitution to reprimand indirect prohibitions on voting, a job then taken on with the help of the Voting Rights Act.

The Court first interpreted § 5 of the Voting Rights Act in *Beer v. United States*,³⁹ applying it to redistricting that “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”⁴⁰ The non-retrogression provision of the Voting Rights Act⁴¹ prohibits states from implementing districting schemes that effectively reduce the number of minority representatives from the amount that the minority enjoyed prior to reapportionment.⁴² Under this “nonretrogression” principle, a proposed voting change cannot be precleared if it will lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.⁴³ This provision has become the motivating factor behind several states’ redistricting plans and the center of debate when the Court attempts to determine if a particular redistricting plan went beyond what was necessary under § 5 non-retrogression.⁴⁴

The first comprehensive interpretation of § 2, as amended, came in the 1986 *Thornburg v. Gingles* decision. In *Thornburg*, the Supreme Court held that proof of the causation or purpose of vote dilution is not required to make out a prima facie case for a § 2 violation.⁴⁵ Thus, discriminatory intent need not be demonstrated. Rather, to show that a districting scheme challenged under the Voting Rights Act has a discriminatory effect in violation of § 2, minority voters need only establish that the use of such an electoral structure operates to minimize or cancel out their ability to elect their preferred candidate, discriminatory intent

38. *Reynolds*, 377 U.S. at 555.

39. *Beer v. United States*, 425 U.S. 130 (1976).

40. *Id.*

41. 42 U.S.C. § 1973 (1994).

42. 42 U.S.C. § 1973.

43. *Beer*, 425 U.S. at 141-42.

44. See Christopher Kukla, Note, *Race-Based Legislative Gerrymandering: Have we Really Gone too Far?* 23 J. LEGIS. 119, 121 (1997).

45. *Thornburg v. Gingles*, 478 U.S. 30 (1986) (The Court held use of multi-member districts in legislative apportionment may violate the Voting Rights Act if certain criterion are met by a minority group; compactness, cohesiveness, and majority voting bloc).

need not be demonstrated.⁴⁶ To provide guidance, the *Thornburg* Court established factors which must be present to claim a particular apportionment plan resulted in voter discrimination. The following are the three preconditions necessary for minority voters to be deemed impaired by multi-member districts:

(1) *Compactness*: the minority group must be sufficiently large and geographically compact such that they constitute a majority in a single member district.

(2) *Cohesiveness*: the minority group must be politically cohesive.

(3) *Majority Voting Bloc*: the majority must vote sufficiently as a bloc so that it will usually be able to defeat the minority's preferred candidate in the absence of special circumstances, such as a minority candidate running unopposed.⁴⁷

Unless these preconditions are satisfied, the use of multi-member districts alone cannot be held to prevent the electoral success a minority group might want to achieve under a different districting scheme.⁴⁸ In 1993, the Court extended the "results" test of *Thornburg* to apply to single-member districts in *Grove v. Emison*.⁴⁹

The first recognized *racial* gerrymandering case was *United Jewish Organizations, Inc. v. Carey*.⁵⁰ This 1977 Supreme Court case held that New York's creation of majority-minority districts in compliance with § 5 of the Voting Rights Act was constitutional as it did not have the effect of canceling out white votes.⁵¹ The

46. 25 Am Jur. 2d *Elections* § 43 (1996).

47. *Thornburg*, 478 U.S. at 50-51 (1986). See also Klein, *supra* note 14, at 809. To prove racial polarization, you should introduce evidence such as: (1) statistics indicating a high degree of black support for black candidates, (2) the existence of a white bloc that normally will defeat the combined strength of minority support groups plus white "crossover" votes, (3) the presence or absence of potentially dilutive electoral devices such as majority vote requirements for primary elections or prohibitions against bullet voting, and (4) evidence that racial bloc voting has existed over a period of time and has not affected only one election.

48. Hammond, *supra* note 20, at 2160.

49. *Grove v. Emison*, 507 U.S. 25, 40 (1993).

50. *United Jewish Org., Inc. v. Carey*, 430 U.S. 144 (1977).

51. Robert A. Blake, Jr., Note, *A Step Toward a Colorblind Society: Shaw v. Reno*, 29 WAKE FOREST L. REV. 937, 951 (1994). See remarks by the Honorable Barbara-Rose Collins, Congresswoman from Michigan on the floor of the House of Representatives, 104th Congress, 1st Session, Friday, October 13, 1995 in 141 Cong. Rec. E1945 (1995). "Gerrymandering" is the process of dividing a state into civil or political divisions, but with such a geographical arrangement so as to

Court recognized *political* gerrymandering as justiciable in the 1986 *Davis v. Bandemer*⁵² decision, where it held that rigging district lines so that a given party wins, when clearly proven, is unconstitutional.⁵³ However, the effect of *Bandemer* is limited in that claims are only subject to judicial intervention when a complaining political party's influence on the political process as a whole will be "consistently degraded" by the gerrymander.⁵⁴ With the census count and thus reapportionment every ten years, the element of "consistently degraded" is but impossible to prove.

V. SO WHAT HAPPENED IN NORTH CAROLINA?

Following the 1990 census, North Carolina gained a congressional seat, increasing its delegation from eleven representatives to twelve. In 1991, the North Carolina General Assembly adopted a reapportionment plan, Chapter 601, that included one majority-black district, District 1. Because several counties are covered jurisdictions, Chapter 601 was submitted to the Attorney General, as per § 5 of the Voting Rights Act.⁵⁵ The Assistant Attorney General for Civil Rights objected to the plan because it failed "to give effect to black and Native American voting strength in the south-central and southeastern parts of the state and [it's] reasons for not creating a second majority-minority district appeared [to the Attorney General] to be 'pretextual.'"⁵⁶ Accordingly, the redistricting plan was then revised in the 1991 North Carolina Extra Session Laws, Chapter 7, to include a second majority-black district, District 12.⁵⁷ However, instead of locating it in the south-central and southeastern regions of North Carolina as recommended, District 12 was situated in the north-central or piedmont region.⁵⁸ This revised plan was granted preclearance despite the bizarre shape of both Districts 1 and 12 and the placement of the 12th District far removed from the area that the Assistant Attorney General specifically labeled as problematic.⁵⁹

assure a majority for a given political party or population in districts where the result would be otherwise, if they were divided according to obvious natural lines.

52. *Davis v. Bandemer*, 478 U.S. 109 (1986).

53. *Id.*

54. *Id.* at 113.

55. *Id.* at 113.

56. *Id.*

57. *Id.*

58. *Id.*

59. Hammond, *supra* note 20, at 2167.

The “bizarre” shapes of both Districts 1 and 12 have been criticized by pundits from across the union.⁶⁰ District 1 was described by Justice O’Connor as “hook shaped. . . centered in the northeast portion of the state, mov[ing] southward until it taper[ed] to a narrow band; then, with finger-like extensions, reach[ing] far into the southern-most part of the state near the South Carolina border.”⁶¹ North Carolina’s 1st District has also been referred to as looking like a “bug splattered on a windshield.”⁶² Worse yet, under Chapter 7, North Carolina’s District 12 was “approximately 160 miles long and, for much of its length, no wider than the I-85 corridor, wind[ing] in snakelike fashion through tobacco country, financial centers, and manufacturing areas ‘until it gobbl[ed] up enough enclaves of black neighborhoods.’”⁶³ The 12th District has often been called a stretch in which one could drive down with both car doors open and kill everyone in the district.⁶⁴

The first contest to the Chapter 7 reapportionment plan was a political gerrymandering claim brought by the North Carolina Republican Party and Republican voters under the auspices of *Davis v. Bandemer*.⁶⁵ Finding no cause of action as to the claim of political gerrymandering, the District Court for the Western District of North Carolina promptly granted the state’s motion to dismiss and the Supreme Court summarily affirmed.⁶⁶ Shortly thereafter, five North Carolina residents, all registered to vote in

60. See Richard Pildes & Richard Neimi, *Expressive Harms, ‘Bizarre Districts’, and Voting Rights: Evaluating Election District Appearances After Shaw*, 92 MICH. L. REV. 483 (1993). This definitive study on the compactness of post-1990 congressional districts placed four North Carolina Districts (1, 5, 7, and 12) among the 28 least compact districts in the nation, with the top award—least compact—going to North Carolina’s 12th District. The study noted that “almost all districts in North Carolina have perimeters that could be classified as quite, if not extremely irregular.”

61. *Shaw I*, 509 U.S. at 635.

62. Review & Outlook (Editorial): *Political Pornography-II*, WALL ST. J., Feb. 4, 1992, at A14.

63. *Shaw I*, 509 U.S. at 635-36.

64. *Id.* at 636. (Comment of state legislator as reported in Joan Biskupic, *N.C. Case to Pose Test of Racial Redistricting; White Voters Challenge Black-Majority Map*, THE WASH. POST, Apr. 20, 1993, at A4). See also Cathy Lu, *The Geography of Race in Elections: Color-Blindness and Redistricting*, 24 HUM. RTS. 6, 7 Fall (1997). According to Pamela Karlan, Professor of Law at the University of Virginia School of Law, this phrase was originally used to describe the Texas district racially gerrymandered for Phil Gramm (a white male Republican) when he was in the United States House of Representatives.

65. *Davis v. Bandemer*, 478 U.S. 109 (1986).

66. *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.), *aff’d* 506 U.S. 801 (1992).

Durham County, initiated an action based on equal protection violations suffered as a result of the Chapter 7 redistricting scheme (*Shaw I*).⁶⁷

The *Shaw I* plaintiffs filed suit against various state officials claiming that the state concentrated a majority of black voters arbitrarily without regard to traditional districting principles in order to create congressional districts along racial lines and assure the election of two black representatives.⁶⁸ The district court for the Eastern District of North Carolina dismissed the complaint, stating that the plaintiffs had failed to state an equal protection claim “because favoring minorities voters was not discriminatory in the constitutional sense and the plan [itself] did not lead to proportional underrepresentation of white voters statewide.”⁶⁹ The plaintiffs appealed directly to the Supreme Court which reversed the lower court’s *Shaw I* decision.⁷⁰

In *Shaw I*, the Supreme Court held that the allegation that North Carolina’s redistricting legislation was so extremely irregular on its face that it could rationally be viewed only as an effort to segregate race for purposes of voting without regard to traditional districting principles and without sufficiently compelling justification was sufficient to state a claim of equal protection violation upon which relief could be granted.⁷¹ In setting out the “bizarre shape” test,⁷² the Court in *Shaw I* mandated that shape alone could indicate impermissible racial considerations which are unconstitutional without a compelling state interest. The Court then instructed the district court to determine on remand if there was indeed evidence of racial gerrymandering in the drawing of the congressional districts, and if so, whether it met the Fourteenth Amendment’s mandate that “state legislation expressly distinguish[ing] among citizens on [the basis] of race. . . [must] be narrowly tailored to further a compelling [state] interest.”⁷³

On remand to the district court in *Shaw II*, the District Court for the Eastern District of North Carolina determined that race was a predominant consideration in the state’s redistricting plan,

67. *Shaw v. Barr*, 808 F. Supp. 461 (E.D.N.C. 1992), *rev’d sub nom Shaw v. Reno (Shaw I)*, 808 F. Supp. 461 (E.D.N.C. 1992).

68. *Id.*

69. *Id.*

70. *Shaw I*, 509 U.S. 630 (1993).

71. *Id.*

72. *Id.* at 647, 658. “[The Court] believes that reapportionment is one area in which appearances do matter.”

73. *Id.* at 631.

but found District 12 constitutional as it was “narrowly tailored to further the State’s compelling interests in complying with sections 2 and 5 of the Voting Rights Act.”⁷⁴ The plaintiffs then appealed again to the Supreme Court in *Shaw II*.

Between *Shaw I* and *II* the Court ruled on *Miller v. Johnson*, a Georgia case factually similar to the one in North Carolina.⁷⁵ In *Miller*, the Court clarified the *Shaw I* decision to mean that bizarreness in shape is not a threshold requirement for equal protection analysis, rather it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was a legislature’s dominant and controlling rationale in drawing district lines.⁷⁶ *Miller’s* “dominant purpose” test states that where a legislature’s dominant and controlling motive in the apportionment process is a race-based classification, the Equal Protection Clause has been violated and the plan is invalid unless there is a compelling state interest and the plan is narrowly tailored to meet that interest.⁷⁷ In *Miller*, the Court specifically noted “that a racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is constitutionally suspect.”⁷⁸

Based on the *Miller* “dominant purpose” test, the Court in *Shaw II* held that the North Carolina redistricting plan did have as its dominant purpose the consideration of race in the drawing of districts and thus a constitutional wrong had occurred.⁷⁹ The Court then addressed, under strict scrutiny,⁸⁰ whether the North Carolina General Assembly was pursuing a compelling governmental interest in the creation of District 12.⁸¹ After discussing

74. *Shaw II*, 517 U. S. at 899.

75. *Miller*, 515 U.S. 900.

76. *Id.* at 900-01.

77. *Id.* at 901.

78. *Shaw II*, 517 U.S. at 904.

79. Hammond, *supra* note 20, at 2169.

80. *See Shaw II*, 517 U.S. at 906-07. When a measure is found to affect adversely a fundamental right it will be subject to “strict scrutiny” which requires a state to establish that it has a compelling interest justifying the law and that distinctions created by the law are necessary to further some compelling governmental purpose. Here, the *Shaw II* Court said strict scrutiny will apply when race is the predominant consideration in drawing district lines such that “the legislature subordinates race-neutral districting principles. . .to racial considerations.” *Id.*

81. *Id.* at 907. District 1 was no longer at issue in *Shaw II* as the Court determined that under *United States v. Hays*, 515 U.S. 737 (1995) (also decided in the interim) there were no plaintiffs with standing to sue as to District 1; there

all three of the state's alleged "compelling interests": eradicating past and present discrimination; compliance with § 5 of the Voting Rights Act; and compliance with § 2 of the Voting Rights Act, the Court rejected each of these in turn and held the 1991 redistricting plan unconstitutional, as it was not narrowly tailored to serve a compelling state interest.⁸²

In June 1996, the process of redistricting began again in North Carolina. The House Select Committee on Congressional Redistricting was appointed and within twelve months thirteen different plans for redistricting had been proposed from committees, legislators, lay people and interest groups.⁸³ There was even a contest with a \$1,000 prize to whomever could draw a majority-black congressional district in North Carolina that could be ruled *compact* by expert judges.⁸⁴

In March 1997, the North Carolina General Assembly passed Chapter 11 of the 1997 Session Laws as the "new and improved" districting scheme.⁸⁵ This map was precleared by the Department of Justice, but because of its striking resemblance to the 1992 map, Chapter 11 did not get past the district court, which deemed that race was still a predominant factor in the apportionment process and District 12 was still non-compact.⁸⁶ The District Court for the Eastern District of North Carolina then enjoined the 1998 elections and ordered a redrawing of the redistricting map.⁸⁷ The Supreme Court denied a stay of the election injunction, forcing the North Carolina General Assembly back to the drawing board.⁸⁸ After an overhaul of the 12th Congressional District, Session Law 1998-2 was ratified and subsequently precleared and approved by the District Court.⁸⁹

were plaintiffs living in District 12, thus those plaintiffs had standing to sue, but only as to District 12.

82. *Id.*

83. *Chronology of North Carolina Apportionment* (last modified Aug. 14, 1998) <<http://www.ncga.state.nc.us/html1997/geography/html3.2/Chronology/ChronoFrames.html>>.

84. *Id.* Interestingly enough, the prize went to the lead plaintiff in a *Shaw*-type challenge to many of North Carolina's state legislative districts.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. See Wade Rawlins, *Judges OK Latest Redistricting Map*, RALEIGH NEWS and OBSERVER, June 23 1998, at A1. As to the 1998 election only, the district court reserved jurisdiction with regard to the constitutionality of District 1 under the current plan and as to District 12 should new evidence emerge.

The new 12th District drawn by the North Carolina General Assembly has a more geographic shape, fewer divided counties and towns, and fewer black voters. The plan moves almost one half of a million people into new districts and lowers the black voting age population in the 12th district from approximately 53% to 33%.⁹⁰ In the districts surrounding this 12th District, black voting age populations range from 6% to 25%.⁹¹ The 1st District, under the 1998 plan, has dropped from an approximate 53% black voting age population to 47%.⁹² The districts surrounding the 1st are now about 22% black in voting population.⁹³

VI. WHEN ALL ELSE FAILS, READ THE DIRECTIONS

It is difficult to believe we started with the goal of a "color-blind society." The rhetoric of the Supreme Court decisions of the past thirty years is not only confusing and indecisive, it is for the most part, misguided. What began as two constitutional amendments granting a group of individuals the right to vote, somewhere along the way was transformed into giving an individual group the right to elect. The Constitution did not and does not bestow upon an individual of any color, creed, race, or nationality the right to elect, only the opportunity to do so. The clear language of the Constitution provides that no citizen be denied the right to vote on account of race or color.⁹⁴ The purpose of the Fifteenth Amendment was just that; to give all citizens the right to participate in governance through the electoral process.

Despite this Constitutional mandate, throughout much of the 20th century jurisdictions across the country, especially in the Southeast, continued to ban African-Americans from voting. This brings us to the Voting Rights Act again. The Voting Rights Act has been used to justify, and even held to mandate, the creation of racially gerrymandered districts. But what is the real meaning of sections 2 and 5 of the Voting Rights Act. Do they mandate racial gerrymandering?

Section 2 of the Voting Rights Act, as amended, demands that redistricting plans provide minority voters with an equal "oppor-

90. Taylor Batten, *12th District Map Proposal Sails Through House, Heads to Senate*, CHARLOTTE OBSERVER, May 21, 1998, at 2C.

91. *District Statistics* (last modified Aug. 14, 1998) <<http://www.ncga.state.nc.us/html1997/geography/html3.2/main.html>>.

92. *Id.*

93. *Id.*

94. U.S. CONST. amend. XV, § 1.

tunity. . . to participate in the political process and elect representatives of their choice.”⁹⁵ Congress specifically rejected disproportionately low minority officeholding as the measure of discrimination.⁹⁶ Minority voters were not guaranteed their “fair share” of political offices, but only a “fair shake;” a chance to play by the electoral game’s fair rules.⁹⁷ “Section 2 promised only an electoral process that was fluid-open to racial change-not frozen.”⁹⁸ Justice Thomas, concurring in *Holder v. Hall*, noted that “as far as the [Voting Rights] Act is concerned, an ‘effective’ vote is merely one that has been cast and fairly counted.”⁹⁹ Indeed Armand Derfner, a leading civil rights attorney and key witness testifying at the 1982 Senate hearings regarding the amendments to § 2, noted that claims of vote dilution would rest on “evidence that voters of a racial-minority [were] isolated within a political system. . . ‘shut out’, i.e. denied access. . . [without] the opportunity to participate in the electoral process.”¹⁰⁰ The Voting Rights Act promises only an opportunity to participate in the political process and does not go as far as to guarantee proportional representation.¹⁰¹

The real problem lies not in applying § 2, but in applying § 5. Section 5 is no “carte blanche to engage in racial gerrymandering in the name of nonretrogression.”¹⁰² The purpose of § 5 was to assure that the past abuses of legislative powers denying certain citizens the right to vote, through subtle and prominent means, did not recur. The aim of Congress in this preclearance provision was to guard against renewed disenfranchisement; “the use of the back door once the front was locked.”¹⁰³ Contrary to the ideals of the Attorney General’s Office, § 5’s non-retrogression provision does not equate to a maximization requirement.¹⁰⁴ Rather, this

95. See Abigail Thernstrom, *Shaw v. Reno: Notes from a Political Thicket*, 1994 PUB. INT. L. REV. 35, 50.

96. *Id.* at 51.

97. *Id.*

98. *Id.*

99. *Holder v. Hall*, 512 U.S. 874, 919 (1994) (quoting *Allen v. State Bd. Of Elections*, 393 U.S. 544, 590 (1969)).

100. Thernstrom, *supra* note 98, at 52.

101. *Shaw v. Hunt*, 861 F. Supp 408, 485 (E.D.N.C. 1994) (Voorhies, J., dissenting), *rev’d*, 517 U.S. 899 (1996).

102. *Shaw I*, 509 U.S. at 655.

103. Thernstrom, *supra* note 98, at 52.

104. See for example *Shaw I*, 509 U.S. 630 (1993) and *Miller*, 515 U.S. 900 (1995). Maximization is the policy the Attorney General’s Office sought to push

provision is a stabilization requirement stabilizing historically disenfranchised individuals so that their right to vote and participate in the political process cannot be deprived.¹⁰⁵

States such as North Carolina in *Shaw* and Georgia in *Miller* are claiming compliance with the Voting Rights Act as a compelling state interest for using predominately racial considerations in redistricting apportionment.¹⁰⁶ Allegedly for fear of a lawsuit by minorities against the state under § 2 and fear of preclearance denial from the Department of Justice under § 5, states manufacture majority-minority districts. While this defense may be valid for some jurisdictions, it is difficult to believe that a minority group could raise a § 2 claim against North Carolina for failing to draw a district such as the 12th.¹⁰⁷ The same can be said of Georgia's former 11th District which ran for some 260 miles from inner-Atlanta to coastal Savannah. Furthermore, the demand by the Department of Justice of two majority-minority districts in North Carolina and three in Georgia simply went beyond the limits of the Voting Rights Act.¹⁰⁸ A reapportionment plan cannot be narrowly tailored to the goal of avoiding retrogression if a state goes beyond what is reasonably necessary to avoid non-retrogression.¹⁰⁹ But even if § 5 were read to require these additional majority-minority districts, it could hardly justify North Carolina's District 12 or Georgia's District 11, both of whose contours

throughout the 1980's and 1990's by objecting to any districting plans which did not maximize the number of majority-minority districts available in a given jurisdiction. See also *Johnson v. DeGrandy*, 114 S. Ct. 2371 (1995). The Supreme Court held that the Voting Rights Act did not require a state to maximize the number of majority-minority districts because it was physically possible to do so.

105. For example, if North Carolina had two majority-black congressional districts before the 1990 census, then North Carolina would be required to retain at least those two districts in the following reapportionment plan. The number of districts could increase, if necessary, but it could not decrease. Since North Carolina had no majority-black districts prior to the 1990 census, it was not legally required to create such a district under section 5, unless necessary under section 2.

106. *Shaw II*, 517 U.S. 899 (1996). *Miller*, 515 U.S. 900 (1995).

107. Timothy O'Rourke, *Shaw v. Reno and the Hunt for double cross-overs (The Voting Rights Act after Shaw v. Reno)*, 1995 WL 15228808.

108. *Id.* See also Ely, *supra* note 55, at 635. A study of 20,000 random computer programs run on the state of North Carolina yielded zero majority-minority districts—indicating that the minority population is dispersed such that even a random sampling finds it near impossible to fabricate a majority-minority district.

109. *Shaw I*, 509 U.S. at 655.

were consequently decided by the need to find African-American voters.¹¹⁰

“In the 1970’s, the Voting Rights Act became an instrument by which to allocate legislative seats to blacks, whites and after 1975, Hispanics.”¹¹¹ In the 1980’s, the Department of Justice took the process several steps further and proportionality became the test of fairness.¹¹² This “proverbial slippery slope”¹¹³ down which the Department of Justice continues to slide has in its wake created such monsters as North Carolina’s 12th Congressional District. Ostensibly “compelled” by the Justice Department to draw two majority-minority districts, the North Carolina legislature “threw caution to the wind, sacrificing political community, compactness, and contiguity to a mixture of demands arising from party, incumbency, and race.”¹¹⁴ The Voting Rights Act has been continually distorted and abused by state legislatures and the Department of Justice as a tool for creating whatever types of districts fit their political ends.

It is one thing to carve out a majority-minority district that encompasses a geographically compact racial or ethnic minority, indeed § 2 of the Voting Rights Act probably requires as much.¹¹⁵ It is another thing all together to create a bizarrely shaped district designed solely to bring together widely dispersed members of a minority group.¹¹⁶ Race can and always will be a legitimate factor in any decision that invokes line-drawing: the constitutional allocation of power in a pluralistic and diverse society.¹¹⁷ However, race cannot trump other legitimate, race-neutral factors such as geographical compactness, contiguity, natural boundaries, preservation of communities of interest, and respect for political subdivisions.¹¹⁸ The question then turns to whether apportionment plans, drawn in accord with these traditional districting principles, can provide adequate and effective representation for a state’s minority population.

110. Thernstrom, *supra* note 98, at 36.

111. *Id.* at 38-39.

112. *Id.* at 39.

113. *Id.*

114. O’Rourke, *supra* note 110.

115. *Id.*

116. *Id.*

117. Griffith, *supra* note 28, at 715. See *Shaw I*, 509 U.S. 630 (1993); *Shaw II*, 517 U.S. 899 (1996).

118. Griffith, *supra* note 28, at 715.

VII. WHAT DOES REPRESENTATION MEAN?

In creating North Carolina's 12th District, the pursuits of racial and partisan results were placed above the goal of fair and functional representative districts.¹¹⁹ But "race-driven districting and other boundary demarcations were not invented in North Carolina."¹²⁰ In fact, they were expressly rejected as unconstitutional by the Supreme Court in 1960.¹²¹ "But this was a time when whites drew lines to fence blacks out, which is apparently different from fencing blacks in and whites out."¹²² The "belief that decisions involving political representation must be guided by the fact of racial difference is now considered positively enlightened."¹²³ Lately, separation appears to be the hallmark of adequate representation for minority populations. "In this and other important respects, the forces of segregation have won: the law remains an instrument to separate blacks and whites."¹²⁴

So we return to the question; where the goal is a "colorblind society," what role should race play in apportioning legislative districts? In the first *Shaw* opinion, Justice O'Connor perhaps provided some insight into this inquiry when she wrote:

[W]hen racial or religious lines are drawn by the State, the multi-racial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. . . [A system that classifies citizens based on race] is a divisive force in the community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense. . . [Because] that system is at war with the democratic ideal, it should find no footing here.¹²⁵

"A reapportionment plan that includes in one district individuals who belong to the same race but who are otherwise widely

119. O'Rourke, *supra* note 110.

120. Thernstrom, *supra* note 98, at 36.

121. *Id.* See Gomillion v. Lightfoot, 364 U.S. 339 (1960).

122. Thernstrom, *supra* note 98, at 36. See also *Shaw I*, 509 U.S. at 641 ("It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymandering of the past.") (O'Connor, J.).

123. Thernstrom, *supra* note 98, at 37.

124. *Id.*

125. *Shaw I*, 509 U.S. at 648-49 (quoting Wright v. Rockefeller, 376 U.S. 52, 66-67 (1964)) (Douglas, J. dissenting). In this dissent, Justice Douglas also stated "[in these contexts] the individual is important, not his race, his creed, or his color."

separated by geographical and political boundaries, and who may have little in common within one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.”¹²⁶ Highly irregular-shaped districts are not only bad because they look bad, i.e. don’t pass the “Beauty Test”,¹²⁷ but because “they reinforce the perception that members of the same racial group, regardless of their age, education, economic status, or the community in which they live, think alike, share the same political interest, and will prefer the same candidates at the polls.”¹²⁸ Redistricting schemes, like the one adopted in North Carolina, label voters as “black” or “white” with the result that our racially divided society only becomes more so.¹²⁹

Many believe that despite these divisions there are valid reasons for separating voters along racial lines in an effort to provide effective representation. Theoretically then the question is whether all African-Americans, wherever they live and whatever their income, share the same interest?¹³⁰ Are African-Americans in effect a nation within our nation, a separate people, unrepresented except by another African-American?¹³¹ And is it thus important to draw districts that reflect their separate status?¹³² At least one African-American Congresswoman has opined that “if whites voted freely for minorities there would be no need to include race in the redistricting calculus. . . [it is] because whites. . . vote on racial lines [that] majority-minority districts are necessary to provide minorities the equal opportunity to elect representatives of their choice.”¹³³ This Congresswoman apparently feels that minorities are best represented by other minorities and since white voters are not willing to elect minority representatives, majority-minority districts are necessary to provide minorities the opportunity to elect minorities, which would assumingly be the representatives of their choice. But can a minority be effec-

126. *Id.*

127. See 141 Cong. Rec. H9585 (1995) (Congresswoman Cynthia McKinney of the 11th District of Georgia spoke on the House floor about her concern that the Court was ruling on districts according to their aesthetic value. She along with others has labeled this the “Beauty Test” for congressional districts).

128. Thernstrom, *supra* note 98, at 40-41. See also *Shaw I*, 509 U.S. at 648.

129. Thernstrom, *supra* note 98, at 43.

130. *Id.* at 45.

131. *Id.*

132. *Id.*

133. 141 Cong. Rec. H9585 (1995) (Comments of Congresswoman Cynthia McKinney of Georgia’s 11th District).

tively represented by someone not within the minority group? In contrast, could a white majority citizen be effectively represented by someone within a minority group?

The answer to these questions constitutionally turns on what it means to be represented. There are two basic theories of representation: individual and communal.¹³⁴ The individual approach to representation views the individual as the unit to be represented, while the group theory sees representation as a right afforded to the group as a whole.¹³⁵ A literal interpretation of the Constitution yields the individual approach to representation.¹³⁶ Because rights under the Constitution are granted to individuals, the only constitutionally sanctioned theory of representation is the individual one. While individuals themselves may indeed feel their representation is dependent on being a member of a group unit, this association is not recognized by the Constitution. In actuality, most people would be offended by the idea of group representation because inherent in that theory is the idea that so long as the group is the entity being represented, it is not necessary that every individual have a voice in choosing the representative.¹³⁷ If the group is adequately represented, actual individuals need not have a voice. This is antithetical to the very aim of the Bill of Rights and the American system of government as a whole which seeks to protect the rights of the individual.

For purposes of the Voting Rights Act, the Civil Rights Act and other similar statutes, the government has relied on the Constitution and its basis in individual rights to grant certain individuals liberties which under then-existing law they had not enjoyed. In order to distinguish which types of individuals a piece of legislation targets, it is necessary to "group" the individuals as a protected class, for example, according to race. The Voting Rights Act, while enforcing the right to vote for each individual, still purports to protect the larger "group" which is a minority group. However, the Voting Rights Act itself does not make any guarantees to the group, only to the individual and that guarantee is that because you are a member of a group of people who have historically been denied voting rights, the Voting Rights Act is going to

134. Bierstein, *supra* note 37, at 1473.

135. *Id.*

136. U.S. CONST. amend. XIV, XV.

137. Bierstein, *supra* note 37, at 1477. Because the group representative purportedly speaks for the group, giving all group members the right to vote is non-essential.

protect you as an individual within that group from disenfranchisement.¹³⁸

This individual-group distinction is important in the context of redistricting jurisprudence. The Constitution views us as individuals and thus gives us the right to vote individually. This is a right American citizens have regardless of membership status in any particular group. It does not mean that people don't view themselves categorically, as members of groups. This is fine, so long as the Supreme Court does not view individuals categorically as such. Unfortunately, the Supreme Court has been in the business of categorizing individuals according to group since 1969 in the *Allen v. Board of Supervisors* decision.¹³⁹

Only recently, in the line of cases including *Shaw I* and *II*, has the Supreme Court retreated from this communal view.¹⁴⁰ The redistricting plan overturned in North Carolina "was at fault because it disregarded constitutionally recognized individual rights in favor of group rights."¹⁴¹ In *Shaw I*, the Court stood for the proposition that deliberate segregation into separate districts on the basis of race violates the constitutional right to participate in a "color-blind society." The unique contribution of *Shaw I* to Equal Protection jurisprudence is that it makes racial classification in itself a personal, individualized injury.¹⁴² Thus, racial classifications are unconstitutional unless a state can show that such a classification is narrowly tailored to meet a compelling state interest. After *Shaw I*, race can no longer be the predomi-

138. If, on the other hand, the Voting Rights Act had so intended it could have merely given the right to vote wholly to "Black Americans" as a group and not as individuals.

139. *Allen v. Board of Supervisors*, 393 U.S. 544 (1969).

140. See *Shaw I*, 509 U.S. at 642. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989), the court held that distinctions based on race deny the classified citizens "their personal rights" to be treated with equal dignity and respect." However, it was not until *Shaw* that the court actually recognized that racial classification in and of itself is presumptively invalid and can be upheld only upon an extraordinary justification.

141. Robinson O. Everett, Note, *Afterword*, 72 N.C. L. REV. 761 (1994). Robinson O. Everett is a Professor of Law at Duke University. He was a plaintiff in the *Shaw* cases and argued both *Shaw I* and *II* to the Supreme Court.

142. See Robert A. Curtis, Note, *Race-Based Equal Protection Claims after Shaw v. Reno*, 44 DUKE L.J. 298 (1994). In this respect it goes beyond cases such as *Brown v. Board*, 347 U.S. 482 (1954), which recognized only that race-based classification in public education is harmful. *Shaw* acknowledges that the very fact of racial classification, without anything more, is a cognizable harm. *Shaw I*, 509 U.S. at 642.

nant factor in drawing district lines and shape alone can be a primary determinant in elevating a plan to the strict scrutiny analysis. *Shaw II* confirmed that even compliance with the Voting Rights Act cannot be a compelling state interest where an apportionment plan is bizarrely shaped and therefore not narrowly tailored to any purpose. With this, *Shaw I and II* dramatically altered the course of judicial activity in the redistricting arena.¹⁴³ States can no longer classify voters on race alone, thus representation cannot be determined primarily by race. The Supreme Court has now admonished such behavior, recognizing its constitutional invalidity.

We are left with geography, the old fashioned way of classifying voters into districts for purposes of representation. Districting has been done according to neighborhoods since the dawn of our democracy. In fact, it is the "essence of our political system."¹⁴⁴ Separating areas of the country into representative districts according to geography seems only logical. Neighbors have common interest and promoting these community interests is after all the point of representation. It is ironic that the General Assembly of North Carolina and other states are trying to pull apart electorally what people are trying to put together communally. Those areas of high segregation do not need fabricated majority-minority districts, they have their own majority-minority districts without the help of congressional artists. It is the areas of high integration where state legislatures have been trying to cut and paste minority areas in order to create a majority-minority district. This goes against the very ideals of representation and is now impermissible.

VIII. DO MINORITIES NEED THE PROTECTION OF RACIALLY-GERRYMANDERED DISTRICTS?

After all the controversy surrounding majority-minority districts, it may well be that they do more to harm a state's minority population than help it. Plans drawn to separate blacks and whites into racially identifiable constituencies can be costly for minority groups. By concentrating all minority votes into one district, the surrounding districts are "bleached" having the overall effect of strengthening several majority-white districts while only

143. Sue T. Kilgore, Comment, *Between the Devil and the Deep Blue Sea: Courts, Legislatures, and Majority-minority districts*, 46 CATH. U.L. REV. 1299 (1997).

144. Blake, *supra* note 51, at 958.

giving real substance to any one majority-black district.¹⁴⁵ The result is an increase in total white legislators at the cost of securing one minority legislator. Dividing minority votes, for example, into 35% for 2 districts (making two "influence districts") instead of combining all votes for 70% in one district (making one majority-minority district) gives the minority a voice with two legislators instead of one.

Minorities are often skeptic about white majority support in influence districts where the minorities make up less than half of the voting population. These fears, however, are somewhat misplaced. While admittedly we have miles to go before reaching the ultimate goal of a "colorblind society," the following figures should at least be encouraging. Recently, an number of African-American candidates have won election without a minority-majority. In 1989, Douglas Wilder won Virginia's Governorship. He was elected in a state that is less than 20% African American. In 1992 Illinois Senator Carol Moseley Braun was elected in a majority white state. Georgia Congressman Sanford Bishop won with less than 35% in a district that was 35% black. Congresswoman Sheila Jackson Lee and Congressman Eddie Johnson both from Texas, were elected from majority white districts. Indiana's Congresswoman Democrat Julia Carson was elected with 69% of the white vote. Oklahoma's Congressman Republican J.C. Watts was elected from an overwhelmingly white district. Mississippi Supreme Court Justices Reuben Anderson and Fred Banks were elected with substantial support from white voters in a statewide election.¹⁴⁶ In addition, the following majority white cities are among the many that have elected black mayors since 1967: Cleveland, Cincinnati, Los Angeles, Pontiac, Boulder, Detroit, Richmond, Little Rock, Philadelphia, Hartford, New York, and Charlotte.¹⁴⁷

The Congresswoman who was credited with saying that "if whites voted freely for minorities there would be no need to include race in the redistricting calculus,"¹⁴⁸ after complaining of

145. See Ely, *supra* note 55, at 618. For this reason Republicans have been allegedly in favor of such majority-minority districts because they generally have the effect of increasing the overall number of Republican representatives.

146. Benjamin E. Griffith, *Implementing the Race-Predominant Standard for State and Local Government Redistricting Plans*, 27 *STETSON L. REV.* 835, 858 (1998). See also Thernstrom, *supra* note 98, at 55.

147. Thernstrom, *supra* note 98, at 55.

148. 141 Cong. Rec. H9585 (1995) (Comments of Congresswoman Cynthia McKinney from Georgia on the House floor).

an attempted “extinction” of African-American officials, was re-elected with a solid cross-over from white voters in her 65% white district.¹⁴⁹ Congresswoman Cynthia McKinney from Georgia, upon having her 11th District redrawn after the 1995 *Miller v. Johnson*¹⁵⁰ decision stated that the Equal Protection of the 14th Amendment had been “twisted to mean” that African-Americans and other minorities may not form a numerical majority in any district unless they are geographically compact.¹⁵¹ Further, she declared that no African-American in the South had ever been elected to Congress from a majority-white district.¹⁵² The following year, in 1996, Cynthia McKinney was re-elected to Congress from a constitutionally-drafted districting scheme which placed her in a 65% white majority district.¹⁵³ Therefore, according to McKinney, there must no longer be any “need to include race in the redistricting calculus.”

IX. CONCLUSION

Somewhere among the legislative districting maps and the Supreme Court rhetoric, we, as a country, have lost sight of the point. The point is that our system of government seeks to have the most fair and effective representation for its citizens. Our Constitution has committed us to fair and effective representation and our statutes continue to reiterate such a purpose. The goal is not to see how one state legislature or another can “get around” the “predominant factor” test or the “bizarre shape” test. The goal, as it was in the beginning, is to create a “colorblind society.”

At some point, as a nation, we became confused as to how to achieve this goal. We turned to racial classifications as an attempt to ensure minority participation in the political arena. But, as Justice Harlan Fiske Stone stated so many years ago, “a government that intends to treat its citizens equally cannot distinguish between them on the basis of race. . .Not even for good ends.”¹⁵⁴

If a colorblind society is truly our goal, then the answer to the question is that race should play no role in legislative redistricting

149. Griffith, *supra* note 149, at 848.

150. *Miller*, 515 U.S. 900 (1995).

151. 141 Cong. Rec. H9585 (1995) (Comments of Congresswoman Cynthia McKinney from Georgia on the House floor).

152. *Id.*

153. Griffith, *supra* note 149, at 848.

154. Thernstrom, *supra* note 98, at 42.

as it has no redeeming social value in a society which treats its citizens primarily as individuals. We are now nine years into a census and this decade's districting quarrels are essentially over. The turn of the century affords legislatures and the Court a chance to turn its back completely on racial classifications. The mandate of the Constitution and the promise of a representative democracy are clear; it is now the duty of the Court and the state legislatures to continue on the road to a "colorblind society."

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