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Constitutional Law - Equal Protection - Voting Rights Act of 1965 - Racial Redistricting and Gerrymandering - Election Discrimination

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Recent Decisions

CONSTITUTIONAL LAW—EQUAL PROTECTION—VOTING RIGHTS ACT OF 1965—RACIAL REDISTRICTING AND GERRYMANDERING—ELECTION DISCRIMINATION —The Supreme Court of the United States held that the allegation that a North Carolina General Assembly redistricting scheme was so irrational on its face that it could only be understood as an effort to segregate voters into separate voting districts because of their race without sufficient justification, was adequate to state a claim for which relief may be granted under the Equal Protection Clause of the Fourteenth Amendment.

Shaw v. Reno, 113 S. Ct. 2816 (1993).

As a result of the census taken in 1990, the state of North Carolina ("State") became entitled to a twelfth seat in the United States House of Representatives.[1] In order to fill that vacancy, the North Carolina General Assembly drew a reapportionment plan that included one majority-minority district.[2] Because the plan affected counties that were covered by section 5 of the Voting Rights Act of 1965 ("Voting Rights Act" or "Act"),[3] the Assembly submit-

1. Shaw v. Reno, 113 S. Ct. 2816, 2819 (1993).

2. *Shaw*, 113 S. Ct. at 2819. A "majority-minority" district is a district specifically created to contain a significant minority voting population.

3. The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 439 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)), at section 5, regulates the alteration of voting qualifications and procedures. It requires that if a jurisdiction is going to change the "standard, practice, or procedure with respect to voting" through a redistricting plan it must first get federal authorization. In order to clear the proposed plan, the state must either get a judgment from the United States District Court for the District of Colombia declaring that the proposed change "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" or it can get preclearance from the Attorney General. 42 U.S.C. § 1973c (1988). The jurisdictions subject to the preclearance of the Attorney General or the District Court for the District of Colombia are referred to as "covered jurisdictions" under section 4 (b) of the Voting Rights Act, as amended, 42 U.S.C. § 1973b(b) (1988). Upon enactment of section 4 (b), the covered juris-

ted the plan to the Attorney General of the United States.[4] The Attorney General, acting through the Assistant Attorney General for the Civil Rights Division, objected to the proposed redistricting and argued that the plan could have created a second majority-minority district "to give effect to black and Native American voting strength in the area" by using boundary lines "no more irregular that those found elsewhere in the proposed plan."[5] The State had the choice to challenge the Attorney General's assessment in the U.S. District Court for the District of Colombia; however, it chose not to, and revised its plan in accordance with the Attorney General's recommendations.[6] The altered redistricting plan created unique shapes for the new districts.[7]

The Attorney General did not object to the revised redistricting, but many citizens of North Carolina did.[8] The Republican party through individual voters brought suit in federal district court alleging that under the Supreme Court decision in *Davis v. Bandemer*,[9] the redistricting plan constituted an unconstitutional political gerrymander.[10] The claim was dismissed by the district court and the United States Supreme Court summarily affirmed.[11]

The appellants in the instant case then filed suit in the United States District Court for the Eastern District of North Carolina.[12] The appellants in this case were five residents of Durham County,

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dictions were: Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia and 40 counties in North Carolina (one of which was the county that requested preclearance in this case). 30 FED. REG. 9897 (1965).

4. *Shaw*, 113 S. Ct. at 2820.

5. Federal Appellees' Brief at 10a-11a, *Shaw*, 113 S. Ct. 2816 (No. 92-357).

6. *Shaw*, 113 S. Ct. at 2819-20.

7. *Id.* at 2821. The Court described the new district as winding "snake-like . . . through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighborhoods.' " *Id.* (quoting Shaw v. Barr, 808 F. Supp. 461, 476-77 (E.D.N.C. 1992)). The Court also noted that "[o]f the 10 counties through which District 12 passes, five are cut into three different districts; even towns are divided." *Id.* at 2821.

8. *Id.*

9. 478 U.S. 109 (1986).

10. *Shaw*, 113 S. Ct. at 2821. See notes 185-191 and accompanying text for holding of Davis v. Bandemer, 478 U.S. 109 (1986). The term "gerrymandering" originated in 1812, when a Massachusetts districting plan designed to enhance Democratic voting strength at the expense of the Federalists resulted in a tortured district which someone suggested resembled a salamander. Note, Chavis v. Whitcomb: *Apportionment, Gerrymandering and Black Voting Rights*, 24 RUTGERS L. REV. 521, 524 n.13 (1970). The districting scheme was then christened a "gerrymander" after Governor Elbridge Gerry, who signed the plan into law. *Id.*

11. *Shaw*, 113 S. Ct. at 2821 (citing Pope v. Blue, 113 S. Ct. 30 (1992)).

12. *Shaw*, 113 S. Ct. at 2821.

North Carolina ("Appellants"),[13] who claimed that the redistricting had created an unconstitutional racial gerrymander.[14] Appellants brought action against the Governor of North Carolina, the Lieutenant Governor, the Secretary of State of North Carolina, the Speaker of the North Carolina House of Representatives, and the members of the North Carolina State Board of Elections ("State Appellees"), together with the Attorney General of the United States and the Assistant Attorney General for the Civil Rights Division ("Federal Appellees").[15]

Appellants argued that the revised reapportionment plan violated the Fourteenth Amendment of the United States Constitution.[16] They also contended that in North Carolina's attempt to make two majority African-American districts, the Assembly arbitrarily concentrated African-American voters without regard to "compactness, contiguousness, geographical boundaries or political subdivisions," and claimed that this was in violation of the Constitution.[17] Appellants asked for an injunction against the State Appellees and sought similar relief against the Federal Appellees.[18]

The district court granted the Federal Appellees' motion to dismiss on the grounds that it lacked subject matter jurisdiction under section 14(b) of the Voting Rights Act.[19] The court then dismissed the claim against the State Appellees, determining that it found no support under Article I, Sections 2 and 4 of the Constitution or the Fourteenth Amendment, to prohibit the race-based redistricting.[20] The district court also noted that it disagreed with the Appellants' contention that all race-based redistricting was per se unconstitutional, and chose to follow the reasoning of the

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13. *Id.* Two of the Appellants voted in the questioned twelfth district and three voted in the unquestioned second district. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* Section 1 of the Fourteenth Amendment states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

17. *Shaw*, 113 S. Ct. at 2821.

18. *Id.* Appellants also argued that the Federal Appellees had misconstrued the Voting Rights Act or that the Act itself was unconstitutional. *Id.* at 2821.

19. *Id.* at 2821-22. Section 14(b) of the Voting Rights Act states that "[n]o court other than the District Court for the District of Colombia or a court of appeals in any proceeding under section 9 shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 . . . ." 42 U.S.C. § 1973l (1982).

20. *Shaw*, 113 S. Ct. at 2822.

United States Supreme Court in *United Jewish Organization of Williamsburgh, Inc. v. Carey*, which held that the white voters, as a group, could not effectively claim that they were being "fenced out" of the voting process nor that their voting strength was being reduced.[21] Appellants subsequently appealed the district court's decision and the Supreme Court noted probable jurisdiction.[22] The issue addressed by the Supreme Court was whether the district court erred in dismissing Appellants' complaint for failure to state a claim upon which relief may be granted[23] when Appellants alleged that a reapportionment plan, which created two uniquely shaped majority-minority districts on the basis of race, was in violation of the Equal Protection Clause of the United States Constitution.[24]

Justice O'Connor, writing for the majority,[25] began with a brief historical study of how citizens of the United States have been denied the right to vote because of their race.[26] She recalled that although the Fifteenth Amendment to the United States Constitution was ratified in 1870, racial voting discrimination still continued in the states.[27] This discrimination often took many forms and practices, such as literacy tests, grandfather clauses, and racial gerrymandering.[28] It also led to severe discrepancies at the

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21. *Id.* See notes 167-172 and accompanying text for discussion of United Jewish Organization of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

22. *Shaw*, 113 S. Ct. at 2822 (citing Shaw v. Barr, 113 S. Ct. 653 (1992)).

23. *See* FED. R. CIV. P. 12(b)(6).

24. *Shaw*, 113 S. Ct. at 2823-24. The issue that the Supreme Court asked the parties and amicus to brief was quite different from the issue discussed in the case. The brief issue was:

> Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes the 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.

Federal Appellees' Brief at 3, *Shaw*, 113 S. Ct. 2816 (No. 92-357).

25. Joining Justice O'Connor in the majority opinion were Chief Justice Rehnquist, and Justices Scalia, Kennedy and Thomas. *Shaw*, 113 S. Ct. at 2819.

26. *Id.* at 2822.

27. *Id.* at 2822-23. Section 1 of the Fifteenth Amendment states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

28. *Shaw*, 113 S. Ct. at 2823 (quoting Davis v. Bandemer, 478 U.S. 109, 164 (1986)). *Davis* involved the " 'deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes.' " *Id.* The Court also quoted from Gomillion v. Lightfoot, 364 U.S. 339 (1960), where the state of Alabama realigned one of its voting districts " 'from a square to an uncouth twenty eight sided figure' " so as to ban African-American voters from being inside a voting district. *Shaw*, 113 S. Ct. at 2823 (quoting Gomillion v. Lightfoot, 364 U.S.

polls between African-American and white voters.[29] Justice O'Connor urged that it was for this reason that the Voting Rights Act of 1965 was enacted.[30] The Act, however, still did not solve the problem of illegal banning of racial minorities from the voting booths.[31] New and different racial gerrymandering kept the number of African-Americans in certain districts down, so as to leave them with no voting strength.[32] This led Congress to amend the Voting Rights Act in 1982 and add the provision that if a redistricting causes a reduction in the voting strength of a minority, it is forbidden, notwithstanding the legislature's purpose.[33]

After this broad background, the majority began its discussion of the case with the common assertion that the central purpose of the Fourteenth Amendment of the Constitution was to preclude states from deliberately discriminating against individuals on a racial basis.[34] Furthermore, if a law categorizes citizens exclusively by race, it is prohibited.[35] This forbiddance is immediate, regardless of the purpose of the enactment.[36] Justice O'Connor argued that racial classification of citizens is at the center of racial tension and is against the grain of a free society.[37] Thus, state enactments that divided citizens by race are to be strictly construed in light of the Fourteenth Amendment to further the governmental interest in

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339, 340 (1960)).

29. *Shaw*, 113 S. Ct. at 2823 (citing South Carolina v. Katzenbach, 383 U.S. 301, 313 (1966)). In *Katzenbach*, the Court recognized that in some states, registered African-American voters numbered 50% less than registered white voters. *Id.*

30. *Shaw*, 113 S. Ct. at 2823.

31. *Id.* at 2823.

32. *Shaw*, 113 S. Ct. at 2823 (citing Allen v. State Board of Elections, 393 U.S. 544, 569 (1969)). In *Allen*, the Supreme Court noted that by reducing a race's voting strength in a district, the members of the race were being discriminated against under the Fourteenth Amendment; thus, " 'the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.' " *Shaw*, 113 S. Ct. at 2823 (citing *Allen*, 393 U.S. at 569).

33. *Shaw*, 113 S. Ct. at 2823 (citing 42 U.S.C. § 1973 (1988)).

34. *Shaw*, 113 S. Ct. at 2824.

35. *Id.*

36. *Shaw*, 113 S. Ct. at 2824 (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979)). In *Feeney*, the Supreme Court stated that "[a] racial classification, regardless of the proported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Feeney*, 442 U.S. at 272.

37. *Shaw*, 113 S. Ct. at 2824 (citing Hirabayashi v. United States, 320 U.S. 81, 100 (1943)). In *Hirabayashi*, the Court stated that classifications of citizens solely by race " 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' " *Shaw*, 113 S. Ct. at 2824 (citing *Hirabayashi*, 320 U.S. at 100). The Court followed this reference by stating that racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw*, 113 S. Ct. at 2824.

equality.[38] The majority then contended that this strict construction applies to both explicit racial enactments and "rare"[39] statutes that can not be explained except on racial grounds.[40]

After confirming that strict scrutiny is to be applied to both explicit racial enactments and "rare" statutes, the next issue addressed was whether the Fourteenth Amendment mandated that redistricting legislation that appeared to be race-neutral, but was so bizarre on its face, required the same close scrutiny as other racially-based enactments.[41] After studying previous decisions that dealt with unexplainable redistricting, Justice O'Connor concluded that redistricting lines specifically created to separate voters by race require "careful scrutiny" under the Fourteenth Amendment, regardless of the intention of the legislature.[42] Justice O'Connor then stated that further precedent extended the same notion to congressional redistricting.[43]

Although redistricting for no other quantifiable reason than race has been shown to be in violation of the Fourteenth Amendment, the majority acknowledged that because legislatures are aware of many demographic variables that affect how people vote, it has become more difficult to decide and prove that the sole reason for drawing certain district lines is race.[44] However, the Court was not persuaded by the argument that because of the many variables and the difficulty in proving that there was a racial gerrymander, redistricting should not be held to strict scrutiny under the Fourteenth

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38. *Id.* at 2825.

39. *Id.* The Court explained that "rare" statutes are ones that are race-neutral on their faces, but are " 'unexplainable on grounds other than race.' " *Id.* (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

40. *Shaw*, 113 S. Ct. at 2825.

41. *Id.*

42. *Id.* at 2826. The court studied two cases: first, Guinn v. United States, 238 U.S. 347 (1915), which held that the use of a "grandfather clause" applicable to individuals and their descendants entitled to vote on a certain date, could not be explained by any reason but to prohibit races from voting under the Fifteenth Amendment; therefore, it was invalid. *Guinn*, 238 U.S. at 357. See notes 110-115 and accompanying text for discussion of *Guinn*. Second, Gomillion v. Lightfoot, 364 U.S. 339 (1960), where the state of Alabama realigned one of its voting districts "from a square to an uncouth twenty eight sided figure" so as to ban African-American voters from being inside a voting district. *Gomillion*, 364 U.S. at 340. See notes 117-121 and accompanying text for discussion of *Gomillion*. Both of these cases were decided by determining whether the practice violated the Fifteenth Amendment. However, Justice O'Connor argued that these practices would have also been in violation of the Equal Protection Clause of the Fourteenth Amendment. *Shaw*, 113 S. Ct. at 2825-26.

43. *Shaw*, 113 S. Ct. at 2826 (citing Wright v. Rockefeller, 376 U.S. 52 (1964)). See notes 122-126 and accompanying text for discussion of *Wright*.

44. *Shaw*, 113 S. Ct. at 2826.

Amendment like any other racial enactment.[45]

Justice O'Connor, writing for the majority of the Court, then suggested, to the contrary, that in some cases, proving that lines were drawn for no reason but to separate races would not be difficult.[46] She argued that if a district line were drawn so irregularly so as to ignore the "traditional redistricting principles such as compactness, contiguity and respect for political subdivisions" the plain appearance of the district may be conclusive evidence.[47]

The majority of the Court then proposed that to create a district in which the only shared characteristic was race further prolonged erroneous stereotypes and racial tension.[48] It decided that redistricting on the basis of race affects how elected representatives will treat their constituents, and threatens a representative government.[49] Thus, the Court concluded that if a plaintiff alleges that a redistricting plan altered districts for no justifiable reason, and can only be explained as an attempt to separate races, the plaintiff has stated a claim under the Equal Protection Clause.[50] The majority then stated that it was offering no opinion as to whether the deliberate creation of majority-minority districts gives rise to a claim under the Fourteenth Amendment, nor did it decide how a redistricting plan that can be adequately justified may be challenged as racially discriminatory.[51] The Court asserted only that based on the unique nature of this case, Appellants had stated a claim upon which relief may be granted.[52]

The majority then took the opportunity to face the challenges of the dissenters.[53] The first argument addressed was whether this situation was different from any other type of gerrymandering.[54]

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45. *Id.*

46. *Id.*

47. *Id.* at 2827.

48. *Id.* Justice O'Connor went as far as to suggest that "[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." *Id.*

49. *Shaw*, 113 S. Ct. at 2827. The majority stated that "[w]hen 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 the members of that group, rather than their constituency as a whole." *Id.*

50. *Id.* at 2828.

51. *Id.*

52. *Id.*

53. *Id.* at 2828-32. The dissenters were Justices White, Blackmun, Stevens and Souter. *Id.* at 2819.

54. *Shaw*, 113 S. Ct. at 2828.

Justice O'Connor, again speaking for the majority, stated that this situation was distinguishable from other types of gerrymandering because racial classifications of any kind create a special harm that requires distinct treatment.[55]

The next argument confronted was that if a minority's voting strength was not being diluted by the redistricting, the gerrymandering was not offensive to the Constitution regardless of whether it was based upon race.[56] The Court disagreed with this contention by reinforcing its belief that to begin the practice of separating districts on the basis of race was harmful to race relations and created problems for elected representatives.[57]

Next, the majority opposed the dissenters in their belief that all gerrymanders, including political and racial ones, should be similarly treated.[58] The Court argued that none of the previous Supreme Court decisions had suggested that racial and political gerrymanders should be treated with identical scrutiny under the Equal Protection Clause.[59]

The Court then objected to the contention by the dissenters that racial gerrymandering creates no constitutional problems if the redistricting is done to favor a selected minority.[60] The majority argued that the same type of scrutiny applies regardless of the benefit or burden to a particular race.[61]

The Supreme Court then distinguished this situation from *United Jewish Organizations*.[62] Justice O'Connor argued that the "highly fractured" decision in *United Jewish Organizations* dealt with a voting group claiming that its vote was being diluted through reapportionment, not a case where a group claimed that the redistricting was so irrational that it could only be explained on the basis of segregating races.[63]

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Shaw*, 113 S. Ct. at 2829.

60. *Id.*

61. *Id.* The Court quoted Powers v. Ohio, 111 S. Ct. 1364 (1991), in which it stated that " '[i]t is axiomatic that racial classifications do not become legitimate on the assumptions that all persons suffer them in equal degree.' " *Shaw*, 113 S. Ct. at 2829 (quoting Powers v. Ohio, 111 S. Ct. at 1370).

62. *Shaw*, 113 S. Ct. at 2829 (citing United Jewish Organizations v. Carey, 430 U.S. 144 (1977)). See notes 167-172 and accompanying text for discussion of *United Jewish Organizations*.

63. *Shaw*, 113 S. Ct. at 2829. Justice O'Connor further concluded that the *United Jewish Organizations* decision did not affect the precedential value of the decisions by the

Justice O'Connor then faced the contention of the dissenters that reapportionment on grounds of race is a common political consideration because of the similarities in voting practices by races, and if legislatures take race into account, racial reapportionment is necessary to comply with the Voting Rights Act.[64] She answered this claim by stating that stereotypical assumptions based on race are not to be presumed, and although this reapportionment may have had good intentions, there is no reason to treat racial gerrymandering with any less constitutional scrutiny than other racial enactments.[65]

Next, the majority discussed the scrutiny to be applied on remand and the potential state interest arguments by the Appellees.[66] Justice O'Connor contended that if the Appellees chose to argue on remand that they were abiding by the section 5 "non-retrogression" principle[67] and the redistricting was found by the court to comply with that principle, this still would not relieve the reapportionment plan from being strictly construed as unconstitutional.[68] She asserted that section 5 of the Voting Rights Act does not give jurisdictions "carte blanche" to practice racial reappor-

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Supreme Court in *Gomillion* or *Wright*. *Id.* at 2830. She argued that "nothing in the decision precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification." *Id.* at 2830.

64. *Id.*

65. *Id.* Justice O'Connor disagreed with Justice Souter's view that some racial gerrymandering can be considered "benign." *Id.* at 2830. She argued that "the very reason that the Equal Protection Clause demands strict scrutiny of all racial classifications is because without it, a court cannot determine whether or not the discrimination truly is 'benign'." *Id.*

66. *Id.* at 2830.

67. Section 5 of the Voting Rights Act states:

> Whenever a State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . such State or subdivision may institute an action . . . for 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*. . . .

42 U.S.C. § 1973c (1988) (emphasis added). See note 68 for the Court's interpretation of the "non-retrogression principle" of section 5 in Beer v. United States, 425 U.S. 130 (1976).

68. *Shaw*, 113 S. Ct. at 2830-31 (quoting Beer v. United States, 425 U.S. 130, 141 (1976)). In *Beer*, the Court interpreted the "non-retrogression" principle to mean that a "proposed voting change cannot be pre-cleared if it will lead to 'a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Id.* at 2830. Also in *Beer*, the Court held that "a reapportionment plan that created one majority-minority district where none existed before passed muster under § 5 because it improved the position of racial minorities." *Shaw*, 113 S. Ct. at 2830 (citing Beer v. United States, 425 U.S. 130, 141-42 (1976)).

tionment and claim non-retrogression.[69]

The majority then recognized that three significant issues, not developed in the court below, remained open on remand.[70] First, whether the North Carolina plan was necessary to prevent the dilution of African-American votes which would be in violation of section 2 of the Voting Rights Act.[71] Appellants countered that section 2 would not have been violated because of the dispersed African-American population, and if it was in violation of section 2, then that provision is unconstitutional.[72] Second, whether the state interest in aiding the representation of minorities in government and negating the influence of past racial discrimination was stronger than compliance with the interests of the Voting Rights Act.[73] Third, whether the Appellees' contention that this type of redistricting was the only means of achieving racial balance in the government, and combating racial discrimination in North Carolina has merit.[74]

Finally, the majority articulated that the specific holding of *Shaw* was:

> [T]hat 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 the their race, and that the separation lacks sufficient justification.[75]

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69. *Shaw*, 113 S. Ct. at 2831.

70. *Id.* at 2831-32.

71. *Id.* at 2831. Section 2 of the Voting Rights Act states that "[n]o 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 abridgement of the right of any citizen . . . to vote on account of race or color . . . ." 42 U.S.C. § 1973 (1982). The Supreme Court suggested that this argument was based on the conclusion of the Court in Thornburg v. Gingles, 478 U.S. 30 (1986), where a three-part test was designed for those members of a racial minority group to invoke section 2. These tests included that "the minority group 'is sufficiently large and geographically compact to constitute a majority in a single-member district,' that the minority group is 'politically cohesive,' and that 'the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' " *Shaw*, 113 S. Ct. at 2831 (quoting Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986)). See notes 178-184 and accompanying text for discussion of *Thornburg*.

72. *Shaw*, 113 S. Ct. at 2831.

73. *Id.* Justice O'Connor suggested that if the State Appellees were going to make this argument then the state must have a " 'strong basis in evidence for [concluding] that remedial action is necessary.' " *Id.* at 2832 (quoting Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 277 (1986)).

74. *Shaw*, 113 S. Ct. at 2832.

75. *Id.* Justice O'Connor, however, specified that the Court expressed no view as to whether the Appellant could challenge the second minority-majority district on the basis of

In the first dissent, Justice White argued that this case falls under the decision made by the Court in *United Jewish Organizations*, and is not distinctive as the majority suggested.[76] He contended that the majority misinterpreted the decision in *United Jewish Organizations* to be one solely based on vote dilution.[77] However, he argued that merely because this case dealt with the irregular drawing of district lines does not make it different from other race-conscious redistricting.[78] He asserted that the members of the white majorities in either case could not contend that they had been restricted or unfairly fenced out of the voting process by the establishment of a majority-minority district.[79] Therefore, the Appellants had not stated a claim for relief under the Fourteenth Amendment.[80] Justice White then asserted that because the parties in this case had not shown an outright exclusion of their right to vote, or an unconstitutional practice that limited the strength of their political group, they had not exhibited the required injury to sustain relief.[81] The dissent believed that Appellants had shown no injury because of the political nature of the redistricting process.[82] He argued that legislators were aware of racial divisions in the population as well as being aware of divisions by sex, ethnic group or age.[83] Thus, if the judiciary were to get involved with every redistricting plan to ascertain its intent, this would be an "unmanageable intrusion."[84] Also, Justice White noted that if a group claimed that it had been excluded from the political process, it would have to show more injury than the loss of an election.[85]

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the Fourteenth Amendment, or whether the Appellants stated a claim upon which relief can be granted under any other constitutional provision. *Id.* at 2832.

76. *Id.* at 2834 (White, J., dissenting). Joining Justice White in his dissenting opinion were Justices Blackmun and Stevens. *Id.*

77. *Id.* at 2838.

78. *Id.*

79. *Shaw*, 113 S. Ct. at 2834 (White, J., dissenting).

80. *Id.*

81. *Id.* Justice White stated that the second requirement mandates "that members of the political or racial group demonstrate that the challenged action have the intent and effect of unduly diminishing their influence on the political process." *Id.*

82. *Id.*

83. *Id.* at 2834-35. In support of its claim, the dissent quoted from *Beer*, in which the Supreme Court stated that " '[t]hese lawmakers are quite aware that the districts they create will have a white or a black majority; and with each new district comes the unavoidable choice as to the racial composition of the district.' " *Id.* at 2835 (quoting Beer v. United States, 425 U.S. 130, 144 (1976)).

84. *Shaw*, 113 S. Ct. at 2835 (White, J., dissenting).

85. *Id.* The dissent insisted that a claim must show that the " 'political processes . . . were not equally open to participation by the group in question—that its members had less

Justice White then suggested that in order to demonstrate suitable injury to invoke an equal protection claim, the Appellants must show that their influence in the process had dwindled and they were at a severe disadvantage to participate.[86] He also suggested, as Justice O'Connor did, that whether the racial classification is "benign" or "malicious" was not at issue, instead, the issue was whether race-based classification denied any citizens equal opportunity to the polls, thereby discriminating against them.[87] In this case, Justice White argued, Appellants had not shown any discriminatory effect that impaired their participation in the political process.[88]

Justice White then maintained that the majority's fixation with the irregular shaping of the lines was no need to establish a new cause of action.[89] He disagreed with Justice O'Connor's suggestion that bizarre lines, upon sight, were an indication of racial gerrymandering.[90] He asserted that discrimination can happen even if the lines of the districts were drawn neatly and orderly.[91] Also, he argued that it was the burden of the plaintiff, when challenging redistricting lines, to exhibit that the gerrymandering was designed to, and in fact did, hurt an identifiable group's ability to participate in the electoral system.[92] He suggested that the majority's

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opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.' " *Id.* (quoting White v. Regester, 412 U.S. 755, 766 (1973)). Justice White also taunted, "it is not mere suffering at the polls but discrimination in the polity with which the Constitution is concerned." *Shaw*, 113 S. Ct. at 2835 (White, J., dissenting).

86. *Id.* at 2836. Quoting himself in *Davis*, Justice White argued that " 'an equal protection violation may be found only where the electoral system *substantially disadvantages certain voters in their opportunity to influence the political process effectively.*' " *Id.* (quoting *Davis*, 478 U.S. at 133).

87. *Shaw*, 113 S. Ct. at 2836 (White, J., dissenting).

88. *Id.* at 2838. Justice White compounded this point by arguing that "[w]hites constitute roughly 76 percent of the total population and 79 percent of the voting age population in North Carolina . . . under the State's plan, they still constitute a voting majority in 10 (or 83 percent) of the 12 congressional districts." *Id.*

89. *Id.* at 2840.

90. *Id.* at 2841. He stated:

> But while district irregularities may provide strong indicia of a potential gerrymander, they do no more than that. In particular, they have no bearing on whether the plan ultimately is found to violate the Constitution. Given two districts drawn on similar, race-based grounds, the one does not become more injurious than the other simply by virtue of being snake-like . . . .

Id.

91. *Id.* He stated that "[i]t is shortsighted as well, for a regularly shaped district can just as effectively effectuate racially discriminatory gerrymandering as an odd-shaped one." *Id.*

92. *Shaw*, 113 S. Ct. at 2840 (White, J., dissenting).

analysis placed an undue burden on the state to refute the claim of using race as one of the many factors involved in drawing district lines.[93] Justice White contended that redistricting plans, like the one presented by North Carolina, which make an effort to ensure that there is minority representation in government, would be hindered by the borderline examination approach of the majority.[94]

Finally, Justice White argued that the strict standard that the majority put forth would become unmanageable in balancing the other state interests that are involved in redistricting.[95] Also, the "narrow tailoring" standard would create difficulty in states that follow the "non-retrogression" principle because they would be left with little room to change the district without violating the standard.[96]

In the second dissent, Justice Blackmun agreed with Justice White that in order to have a redistricting claim that violates the Equal Protection Clause, the plan must unduly minimize an identifiable group's voting strength or deny its members equal access to the voting process.[97] Justice Blackmun also noted that it was ironic that this new constitutional claim was granted to white voters who were challenging a plan that elected an African-American representative for the first time since the Reconstruction.[98]

In the third dissent, Justice Stevens argued that the purpose of the North Carolina Legislature was known, and since it was to benefit an underrepresented group, there was no violation of the Equal Protection Clause.[99] Although bizarre shaping of districts may be evidence of wrongdoing, he argued that there is no constitutional requirement that districts be drawn in compact shapes.[100] Also, in this case, the intent of the North Carolina Assembly, to enhance the African-American vote, was known; therefore, the use of the district's shape to decide intent was immaterial.[101] Justice Stevens acknowledged that to gerrymander and restrict some groups from

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93. *Id.*

94. *Id.* at 2841.

95. *Id.* at 2842. Justice White suggested that states will have difficulty deciding if it is "more 'narrowly tailored' to create an irregular majority-minority district as opposed to one that is compact but harms other State interests such as incumbency protection or the representation of rural interests." *Id.*

96. *Id.*

97. *Shaw*, 113 S. Ct. at 2843 (Blackmun, J., dissenting).

98. *Id.*

99. *Id.* at 2843-44 (Stevens, J., dissenting).

100. *Id.* at 2843.

101. *Id.* at 2844.

equal access is a violation of the Equal Protection Clause.[102] However, there is no violation if the redistricting was done by the majority in order to promote the involvement and equality of an underrepresented minority.[103]

Lastly, Justice Stevens disagreed with the majority's assertion that any redistricting on the basis of race is harmful.[104] He argued that if it is permissible to draw political lines based on the many other factors that are involved, such as religion or ethnic background, then it is allowable to draw lines to help enhance the political power of an underrepresented racial minority.[105]

In the final dissent, Justice Souter disagreed with the majority's use of a new cause of action and the establishment of a new standard solely on the basis of bizarrely shaped district lines.[106] In Justice Souter's opinion, cases that can effectively claim this new cause of action will place a burden on the state to justify a state interest in the consideration of race in redistricting, and show that this use of race is narrowly tailored to the state interest.[107] He argued that the majority did not justify why a situation of bizarre lines should be treated differently than any other redistricting cases, where the plaintiff must either show harm by being intentionally excluded or prove a total lack of state interest in the area.[108] Thus, Justice Souter agreed with Justice White that, without a showing of explicit deprivation of the right to vote or an unconstitutional practice that hindered their strength as a political group, Appellants had not exhibited any injury and therefore, had no claim upon which relief could be granted.[109]

The history of racial gerrymandering has evolved from the outright deprivation of minority voting to more creative and subtle ways of limiting and diluting the minority voting power. In 1915, in *Guinn v. United States*,[110] the Supreme Court faced the issue of

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102. *Shaw*, 113 S. Ct. at 2844 (Stevens, J., dissenting).

103. *Id.* He stated:

> That duty, however, is not violated when the majority acts to facilitate the election of a member of a group that lacks such power because it remains underrepresented in the state legislature—whether the group is defined by political affiliation, by common economic interests, or by religious, ethnic, or racial characteristics.

Id.

104. *Id.*

105. *Id.* at 2844-45.

106. *Shaw*, 113 S. Ct. at 2848 (Souter, J., dissenting).

107. *Id.*

108. *Id.*

109. *Id.* at 2849.

110. 238 U.S. 347 (1915).

whether a grandfather clause,[111] which was amended to the Oklahoma Constitution in 1910 and could not be called discriminatory on its face, was in violation of the Fifteenth Amendment of the Constitution.[112] The majority of the Court opined that the self-executing power of the Fifteenth Amendment can render an enactment void, even though there were no express words of exclusion on the basis of race, color or previous condition of servitude.[113] The *Guinn* Court asserted that the grandfather clause could not be interpreted in any other way than an attempt to circumvent the Fifteenth Amendment.[114] Thus, the Court concluded that a state statute that appeared to be race neutral, but established a standard for suffrage predating the Fifteenth Amendment, was void.[115]

After the Court struck down express statutes that discriminated on the basis of race and many statutes that disguised an invidious intent,[116] like the one in *Guinn*, the next step was to recognize that gerrymandering was being used to exclude and dilute the minority vote. In *Gomillion v. Lightfoot*,[117] the Supreme Court addressed

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111. Article III, section 1 of the Oklahoma Constitution required that to be eligible to vote, the voter must be able to read and write sections of the Oklahoma Constitution. However, the grandfather clause granted suffrage to anyone who had been eligible to vote on or before 1866, notwithstanding an inability to meet the requirements of article III, section 1. *Guinn*, 238 U.S. at 357. See note 112 for the text of the grandfather clause.

112. *Guinn*, 238 U.S. at 361. Article III, section 1 of the Oklahoma Constitution stated:

> [B]ut no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government . . . and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution.

Id. at 357 (quoting OKLA. CONST. art. III, § 1).

113. *Guinn*, 238 U.S. at 364.

114. *Id.* at 365. The amendment set the date of demarcation at January 1, 1866. *Id.* at 364. The Fifteenth Amendment, which was enacted in 1870, states in section 1 that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

115. *Guinn*, 238 U.S. at 367.

116. *See* Nixon v. Herndon, 273 U.S. 536 (1927) (Supreme Court invalidated a Texas statute that provided "in no event shall a Negro be eligible to participate in a Democratic party primary election held in the state of Texas"); Smith v. Allwright, 321 U.S. 649 (1944) (Supreme Court declared unconstitutional a resolution of the state Democratic party under which only white citizens who were qualified to vote were eligible to membership in the party); Anderson v. Martin, 375 U.S. 399 (1964) (Supreme Court invalidated a state requirement that the race of any candidate for public office be indicated in parenthesis on all ballots); Louisiana v. United States, 380 U.S. 145 (1965) (Supreme Court held invalid, on its face and as applied, a state statute under which every applicant seeking to register to vote was required to be able to "understand" and "give a reasonable interpretation" of any section of the state or federal constitution).

117. 364 U.S. 339 (1960).

the issue of whether plaintiffs who challenged an Alabama state statute, which redefined district lines to create an "uncouth twenty-eight-sided figure" for the purpose of excluding African-Americans from the city and removing their municipal vote, had stated a claim upon which relief could be granted.[118] The Court asserted that the plaintiffs had stated a claim for relief because the municipality could not justify the function of such disturbed lines and the complaint, if true, could prove that the municipality's act was discriminatory.[119] It also contended that states do not have the unrestricted power to create a twenty-eight sided district that removed 400 African-American voters from the city and failed to remove a single white voter, thereby, circumventing a federally protected right.[120] Therefore, the *Gomillion* Court asserted, if petitioners allege that an enactment deprived them of their constitutional right to vote because they have been "fenced out" by the legislature through redistricting, they have stated a claim upon which relief may be granted under the Fourteenth and Fifteenth Amendments.[121]

Four years later, in *Wright v. Rockefeller*,[122] the Supreme Court faced the issue of whether a New York congressional apportionment statute, in which one district was drawn with 86.3% African-Americans and Puerto Ricans (District 18), and another district was drawn with 5.1% of the same groups (District 17), separated eligible voters by race and place of origin, and therefore, violated the Fifteenth Amendment.[123] The majority of the Court stated that although the plaintiff's evidence could lead to an inference of racial considerations, the opposition's evidence was more persuasive that the lines were not drawn on racial grounds.[124] Therefore, the Supreme Court decided that because the plaintiff's evidence was not sufficient enough to establish a per se prima facie case of discrimination, the claim should have been dismissed.[125] The evi-

118. *Gomillion*, 364 U.S. at 340-41.

119. *Id.* at 342.

120. *Id.* at 341. In this case, the state of Alabama argued that it had the unrestricted power to draw the district lines as it chose, and the state interest in drawing the lines should be free from judicial review. *Id.* at 342. The Court disagreed by stating that "[w]hen a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." *Id.* at 347.

121. *Id.* at 341.

122. 376 U.S. 52 (1964).

123. *Wright*, 376 U.S. at 56.

124. *Id.* at 57.

125. *Id.*

dence that the *Wright* Court believed overcame the plaintiff's assertions was the justices' impression that the population concentration made it difficult to equalize the strength of the voters by race in the questioned districts.[126]

Also in 1964, in *Reynolds v. Sims*,[127] the Supreme Court decided whether an existing Alabama redistricting plan which, through the passage of time, had resulted in serious population variances between districts, violated the Fourteenth Amendment.[128] The Court affirmed the Federal District Court for the Middle District of Alabama, and held that under the Equal Protection Clause, both houses of a state legislature were to be apportioned on a population basis.[129] The majority of the Court determined that the dilution of one's vote is as significant a violation of a voter's rights as an outright restriction.[130] Also, the Supreme Court noted that some deviations in population will be constitutionally permissible; however, there must be a rational state policy to support such variance.[131] Thus, the Court warned that any dilution grounded under the domain of state interest will not evade the constitutional mandate to ensure the right to vote for all citizens.[132]

In order to combat the voting discrimination that was still occurring in the states in the 1960s, Congress passed the Voting Rights Act of 1965.[133] Two cases, *South Carolina v. Katzenbach*[134] and

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126. *Id.* at 57-58. In Justice Douglas' dissent, which the majority in *Shaw* seemed to revive, he argued that racial gerrymandering in this case was a deliberate effort to exclude as many African-Americans and Puerto Ricans out of the Seventeenth District. *Id.* at 60-61 (Douglas, J., dissenting). He stated that "the fact that Negro political leaders find advantage in this nearly solid Negro and Puerto Rican district is irrelevant to our problem. . . . Racial boroughs are also at war with democratic standards." *Id.* at 62. Arguing that the government had no business to use race to draw district lines, Justice Douglas also noted that "[t]he principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on." *Id.* at 66.

127. 377 U.S. 533 (1964).

128. *Reynolds*, 377 U.S. at 545-50. The population variations involved in this case, included 35 districts, which voted for a 35-member state senate, which varied in population from 15,417 to 634,864, and a 106-member state house of representatives whose population-per-representative variance was from 6,731 to 104,767. *Id.*

129. *Id.* at 568.

130. *Id.* at 555. Chief Justice Warren stated that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.*

131. *Id.* at 584.

132. *Id.* at 566.

133. The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 439 (1965). Section 1 of the Voting Rights Act of 1965 stated "[a]n Act [t]o enforce the fifteenth amendment to the Constitution of the United States, and for other purposes." South Carolina v. Katzen-

Allen v. State Board of Elections,[135] gave the Supreme Court the opportunity to verify the constitutionality of the Act. In *Katzenbach*, the issue before the Court was whether the Voting Rights Act was invalid because it exceeded Congressional power by intruding on an area reserved to the states.[136] The majority of the Court dismissed South Carolina's complaint and stated that the sections of the Act that were before the Court were an appropriate means for Congress to carry out its constitutional responsibility and were not in conflict with any provision of the Constitution.[137] The Supreme Court asserted that enactment of the Fifteenth Amendment encompassed the power of Congress to take "appropriate" steps to assure that the voting discrimination still occurring in the states was prohibited.[138] Thus, the aim to eliminate voting discrimination, through the Voting Rights Act, was a proper exercise of Congressional authority.[139]

In *Allen*, the Supreme Court faced two separate cases relating to section 5 of the Voting Rights Act and whether various state voting enactments were covered by the Act.[140] In the first case, the Court vacated the judgment of the District Court for the Southern District of Mississippi, which had determined that three statutory voting amendments were not covered by section 5.[141] In the second case, the Supreme Court reversed the decision of the District Court for the Eastern District of Virginia, which had also decided that a bulletin issued by the Board of Elections that outlined a

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bach, 383 U.S. 301, 337 (1966). Section 2 states that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color . . . ." 42 U.S.C. § 1973 (1988). In interpreting the Act, the Court in Allen v. State Board of Elections, 393 U.S. 544 (1969), asserted that "the Voting Rights 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." Allen v. State Bd. of Elections, 393 U.S. at 565.

134. 383 U.S. 301 (1966).

135. 393 U.S. 544 (1969).

136. *Katzenbach*, 383 U.S. at 323. South Carolina also claimed that "the coverage formula prescribed in § 4 (a)-(d) violates the principle of the equality of the States, denies due process . . . and by barring judicial review . . . constitutes a forbidden bill of attainder, and impairs the separation of powers by adjudicating guilt through legislation." *Id.*

137. *Id.* at 308.

138. *Id.*

139. *Id.*

140. Allen v. State Bd. of Elections, 393 U.S. 544, 548 (1969).

141. *Allen*, 393 U.S. at 550. The Mississippi voting amendments: (1) changed county supervisor voting from district to at-large; (2) changed the county superintendent to an appointed position; and, (3) increased the requirements for independent candidates. *Id.* at 550-51.

new write-in voting procedure did not violate section 5 of the Voting Rights Act.[142]

The majority of the *Allen* Court stated that the lower court's narrow construction of section 5 was not consistent with the purpose of the Act.[143] It contended that to effectuate the intention of the Act, it must be broadly interpreted.[144] Thus, in order to protect voters from a state that was attempting to use an enactment to circumvent section 5, the Court ruled that if a state provision alters an election law in a covered jurisdiction in even a "minor way," it falls under section 5 of the Voting Rights Act and the state must obtain federal approval before its implementation.[145]

After upholding the constitutionality of the Voting Rights Act, the Supreme Court focused on who could be discriminated against through redistricting, and what burden of proof must be maintained. In *Gaffney v. Cummings*,[146] the Court faced the issue of whether the United States District Court for the District of Connecticut erred in deciding that a Connecticut state legislative apportionment plan, which was heavily influenced by the attempt to protect a political party's strength, was in violation of the Fourteenth Amendment.[147] The Supreme Court reversed the district court's decision and stated that although the plan attempted to draw district lines in accordance with party strengths, it did not violate the Equal Protection Clause.[148] Although it was evident that party considerations impacted the defining of the districts, the Court asserted that this did not mean that any political consideration violated the Fourteenth Amendment.[149] Therefore, it decided that to require all redistricting be done without political considerations, or be invalidated, is irrational because political considerations are "inseparable" from reapportionment of districts.[150] Along with this conclusion, the *Gaffney* Court noted that although the Fourteenth Amendment was not violated in this case, redistricting plans that equalize population can still be found to be in violation of the Constitution.[151] Therefore, the Court concluded

142. *Id.* at 552.
143. *Id.* at 565.
144. *Id.*
145. *Id.* at 566.
146. 412 U.S. 735 (1973).
147. *Gaffney*, 412 U.S. at 735-36.
148. *Id.* at 752.
149. *Id.*
150. *Id.* at 752-53.
151. *Id.* at 751.

that a statute which "fences out" a racial group so as to dilute its voting strength or invidiously rob the group members of their pre-existing right to vote would not be upheld under the Constitution.[152] However, the Supreme Court contended that if a state attempted to use race to distribute and enhance the voting strength or the representation of elected minority members, then the judiciary should not intervene.[153]

After deciding that a redistricting statute that would otherwise be acceptable may be unconstitutional under the Fourteenth Amendment, the Court next decided whether the use of multi-member districts could be held invalid, and what was the necessary burden of proof to challenge one. In *White v. Regester*,[154] the issue before the Court was whether the United States District Court for the Western District of Texas erred in deciding that a reapportionment plan for the Texas House of Representatives violated the Fourteenth Amendment by diluting African-American and Mexican-American votes through multi-member districts.[155] The majority of the Court affirmed the district court on this issue[156] and determined that in this case, African-American voters were not given equal opportunity to participate in the voting process.[157] The Court also affirmed the district court's decision that Mexican-Americans, who had suffered from a history of discrimination and exclusion, had been invidiously barred from "effective participation in political life" through the enactment of multi-member districts.[158] Thus, the Supreme Court concluded that the plaintiffs had successfully satisfied their burden by showing that members of

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152. *Gaffney*, 412 U.S. at 751.

153. *Id.* at 754. The majority of the Court noted:

> But neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.

Id.

154. 412 U.S. 755 (1973).

155. *Regester*, 412 U.S. at 756. The reapportionment plan for the Texas House of Representatives provided for 150 representatives to be selected from 79 single member and 11 multi-member districts. *Id.* at 761. The total variation between the largest and the smallest district was 9.9%. *Id.*

156. *Id.* at 767. The other issue in this case was whether the district court erred in finding that population variations among districts was enough to exhibit invidious discrimination under the Fourteenth Amendment. *Id.* at 763-64. The Court found this ruling in error and reversed. *Id.*

157. *Id.* at 767.

158. *Id.* at 767-69.

their racial group had less of an opportunity than did other district residents to participate in the political process and to elect legislators of their choice.[159] Finally, the Court reaffirmed its position that neither multi-member districts nor a combination of multi-member and single-member districts were per se unconstitutional.[160]

After deciding that multi-member districts could be held invalid by a showing of discriminatory purpose or effect, the Supreme Court of the United States then addressed whether the shifting of identifiable minority populations, in order to qualify under the Voting Rights Act, was unconstitutional. In *Beer v. United States*,[161] the Court faced the issue of whether the United States District Court for the District of Colombia erred in ruling that a New Orleans redistricting plan for the city council, which created an African-American population majority in two districts and an African-American voting majority in one district, was in violation of section 5 of the Voting Rights Act.[162] The majority of the Court vacated the decision of the district court and decided that the purpose of section 5 was to insure that a voting procedure change would not be made if it would lead to the "retrogression" of a racial minority group's position with respect to its effective exercise in the electoral process.[163] Thus, in this case, since the position of the minorities was enhanced and not diluted or abridged, the plan was not in violation of section 5.[164] The *Beer* Court also noted that cases of vote dilution were to be tested by an equal protection standard; therefore, they were subject to a balance of competing interests (both governmental and private).[165] Furthermore, in order to be held valid, the dilution must rationally relate to a permissible governmental interest.[166]

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159. *Id.* at 766 (citing the test laid down by the Supreme Court in Whitcomb v. Chavis, 403 U.S. 124, 149-50 (1971)).

160. *Regester*, 412 U.S. at 765.

161. 425 U.S. 130 (1976).

162. *Beer*, 425 U.S. at 139.

163. *Id.* at 141.

164. *Id.*

165. *Id.* at 140-41.

166. *Id.* Justice White dissented and stated that section 5 could have been better served by an apportionment plan that would have possibly elected three African-American city councilmen. *Id.* at 144 (White, J., dissenting). He acknowledged that this would lead to race conscious redistricting, but contended that "[a]pplying Section 5 in this way would at times require the drawing of district lines based on race; but, Congress has this power where deliberate discrimination at the polls . . . have effectively foreclosed Negroes from enjoying a modicum of fair representation." *Id.* at 145.

One year later, in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*,[167] the issue before the Court was whether the United States Court of Appeals for the Second Circuit erred in deciding that a New York reapportionment plan, which distributed the non-white population in order to create "substantial non-white majorities" in certain districts, but in effect split the Hasidic community between two districts, was not a dilution of the Hasidic Jew vote in violation of the Fourteenth and Fifteenth Amendments.[168] Justice White, writing for a fractured plurality, affirmed the court of appeals' decision and disagreed with the appellant's argument that the creation of majority-minority districts was unconstitutional because New York reapportioned along racial lines.[169] Justice White pointed out that neither the Fourteenth nor Fifteenth Amendment required that race not be a factor in redistricting.[170] He also asserted that in this case, the Hasidic Jews, as whites, could not argue that they were "fenced out" of the political process nor could they show that the white voting strength was dwindled because of the reapportionment plan.[171] Therefore, the Court held that it was permissible under the Constitution to use "sound districting principles" to create majority-minority districts, so as to afford fair representation to minorities that had been historically barred from election.[172]

Three years later, in 1980, and again nine years later, in 1986, the Supreme Court of the United States focused on the issue of whether at-large district elections would also be held unconstitutional. In *Mobile v. Bolden*,[173] the Court faced the issue of whether

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167. 430 U.S. 144 (1977).

168. *United Jewish Orgs.*, 430 U.S. at 153-54.

169. *Id.* at 161.

170. *Id.* The district court dismissed the Hasidic Jews' complaint arguing that the "petitioners enjoyed no constitutional right in reapportionment to separate community recognition." *Id.* at 153. The court of appeals agreed with this contention and went on to address the Hasidic Jews under the label of "white voters." *Id.* at 154. The Supreme Court did not comment on the nature of the group's special recognition, but only noted that the district court's holding of no separate community right was not challenged. *Id.*

171. *Id.* at 165. Justice White stated:

> [A]s long as whites in King's County, as a group, were provided with fair representation, we cannot conclude that there was cognizable discrimination against whites or an abridgement of their right to vote on the grounds of race. Furthermore, the individual voter in the district with a nonwhite majority has no constitutional complaint merely because his candidate has lost out at the polls and his district is represented by a person for whom he did not vote.

Id. at 166.

172. *Id.* at 168.

173. 446 U.S. 55 (1980).

the United States Court of Appeals for the Fifth Circuit erred in deciding that Mobile, Alabama's practice of electing commissioners at-large from a majority vote diluted the voting strength of African-American citizens in violation of the Fourteenth and Fifteenth Amendments.[174] Justice Stewart, writing for a plurality, reversed the court of appeals' judgment, and determined that Mobile's at-large system could not be found to be unconstitutional under the Fifteenth Amendment where African-Americans "registered and voted without hinderance."[175] He asserted that in order to claim that an at-large system violated the Voting Rights Act or the Fourteenth and Fifteenth Amendments, the plaintiff would have the burden of showing that the at-large scheme "represents purposeful discrimination against Negro voters."[176] Thus, the Court in this case reversed the court of appeals' decision that the Fourteenth Amendment was violated, stating that the plaintiffs had not been able to show that the at-large voting plan was purposely discriminatory.[177]

In *Thornburg v. Gingles*,[178] the issue before the Supreme Court was whether the United States District Court for the Eastern District of North Carolina erred in holding that a North Carolina state legislative redistricting plan, which used single and multi-member districts to impair the voting power of African-American citizens, violated the Fourteenth and Fifteenth Amendments and section 2 of the Voting Rights Act.[179] A majority of the Court, with respect to all the districts involved but one, affirmed the district court's decision and argued that multi-member districts usually will not be held to impede the power of minority voters, so as to violate section 2 of the Voting Rights Act, unless the minority group can satisfy a three-part test.[180] First, the minority group must show that it is sufficiently large and geographically compact so as to be a majority in a single-member district.[181] Second, the

174. *Bolden*, 446 U.S. at 58.

175. *Id.* at 65.

176. *Id.* at 74.

177. *Id.* at 73-74. After this case was decided, Congress responded to the decision by amending the Voting Rights Act to make clear that a violation could be proven by exhibiting a discriminatory effect alone, and the test to be used was the "results test" discussed in White v. Regester. *See* 42 U.S.C. § 1973c (1988).

178. 478 U.S. 30 (1986).

179. *Thornburg*, 478 U.S. at 34-35.

180. *Id.* at 49-51.

181. *Id.* at 50.

minority group must exhibit political cohesiveness.[182] Third, the minority group must show that the white majority votes as a bloc, thereby usually defeating the minority candidate.[183] The Supreme Court also noted that multi-member districts are not per se violative of the Voting Rights Act, and the burden is on the plaintiff to demonstrate that "under the totality of the circumstances" its access to the voting process has been limited.[184]

After deciding that at-large voting schemes may minimize voting strength of minorities, but are not per se violative of minority voter rights, the Supreme Court then addressed the relationship between political and racial gerrymandering. In *Davis v. Bandemer*,[185] the issue was whether the United States District Court for the Southern District of Indiana erred in deciding that an Indiana state legislature reapportionment plan that diluted the votes of Indiana Democrats was unconstitutional under the Fourteenth Amendment.[186] Justice White, writing for a plurality of the Court, reversed the decision and contended that the fact that the Democrats had lost the election and their chances of winning had lessened did not equate to a violation of the Equal Protection Clause.[187] Justice White asserted that in order to have an unconstitutional vote dilution, the party claiming the violation must show that the electoral system's arrangement will "consistently degrade" a group of voters' influence on the political process.[188] Thus, the Court decided that the district court erred in relying on the results of one election to decide that any interference with a voter's right

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182. *Id.* at 51.

183. *Id.*

184. *Thornburg*, 478 U.S. at 46-48. The Court also set out other factors that would have a bearing on the challenging of a multi-member district. *Id.* at 48. The most important of these factors, according to the majority, were the "extent to which minority group members have been elected to public office in the jurisdiction" and the "extent to which voting in the election of the state or political subdivision is racially polarized." *Id.* at 48 n.15. It also noted that similar factors such as the "lingering effects of past discrimination" and the "use of electoral devices which enhance the dilutive effects of multi-member districts when substantial white bloc voting exists" are supportive but not essential to a challenge of a multi-member district. *Id.*

185. 478 U.S. 109 (1986).

186. *Bandemer*, 478 U.S. at 113. After an election under the challenged plan, Democratic candidates for the state house received 51.9% of the popular vote but only 43 were elected. *Id.* at 115. In the Senate, the Democrats received 53.1% of the popular vote and 13 of 25 were elected. *Id.* In Marion and Allen Counties (which were both divided into multi-member districts) the Democratic candidates drew 46.6% of the vote, but were elected to only 3 of the 21 house seats. *Id.*

187. *Id.* at 132.

188. *Id.*

to elect a representative of his or her choice was in violation of the Fourteenth Amendment.[189] Therefore, without a showing of the effective denial of a voter's right to influence the political process, the Democratic party could claim no violation.[190] Finally, Justice White noted that, even if there were no population deviation among districts, a claim of both political or racial gerrymandering is justiciable under the Fourteenth Amendment.[191]

Four months prior to the decision in *Shaw*, the Supreme Court decided whether single-member districts could also violate minority voting rights. In *Voinovich v. Quilter*,[192] the issue was whether an Ohio reapportionment plan, which packed a majority of minority voters into two districts thereby limiting their potential influence in other districts, was in violation of section 2 of the Voting Rights Act.[193] A unanimous Supreme Court stated that majority-minority districts do not violate section 2 because the Voting Rights Act does not prohibit particular types of districts.[194] The Court determined that it was not necessary that section 2 be violated before a majority-minority district can be designed, and section 2 should only apply to the consequences of redistricting.[195] The majority decided that in order for a plaintiff to succeed on a section 2 vote dilution claim, it must show that under the totality of the circumstances the strength of its voting effect has been diminished.[196] Also, the Supreme Court extended the three-part test of *Gingles* to apply to single-member, as well as multi-member, districts.[197] Thus, the court reversed and required that a ruling on the consequences of the racial redistricting plan be made before a majority-minority district can be found to be in violation of section 2 of the Voting Rights Act.[198]

In order to analyze the Supreme Court's decision in *Shaw v. Reno*, it is essential to begin with exactly what the majority purported to decide and expressed that it did not decide. Justice O'Connor was particularly careful in specifying that the holding of *Shaw* was that Appellants had stated a claim under the Equal Pro-

189. *Id.* at 133-35.
190. *Id.* at 133.
191. *Bandemer*, 478 U.S. at 124-26.
192. 113 S. Ct. 1149 (1993).
193. *Voinovich*, 113 S. Ct. at 1154-55.
194. *Id.* at 1156.
195. *Id.*
196. *Id.* at 1157.
197. *Id.*
198. *Voinovich*, 113 S. Ct. at 1156.

tection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it could be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacked sufficient justification.[199] Along with this conclusion, Justice O'Connor also clarified what the Court had not decided in this decision.[200] She stated that the Court expressed "no view" as to whether Appellants could have challenged such a district under the Fourteenth Amendment or whether Appellants' complaint stated a claim under any other constitutional provisions.[201] This intentional restriction on the holding of *Shaw* may limit the decision's legal effect because of the unique factual setting and the difficulty in successfully pleading this new cause of action; or, as Justice Souter suggested, the cause of action may be so rare that it may "wind up an aberration."[202] However, Justice O'Connor's statement is important because it exemplifies how the Court misunderstood the true issue of the case.

To analyze the true issue in this case, it is important to reiterate what relief Appellants asked for, and what the Supreme Court granted. Appellants had not argued that their vote had been diluted, nor had they contended that redistricting on the basis of race is always unconstitutional; instead, they claimed that the lines in North Carolina were drawn so irregularly that it could only be seen as an unjustified effort to segregate races for voting purposes.[203] Therefore, Appellants asserted that this redistricting should be given strict scrutiny under the Fourteenth Amendment because it was a classification based on race.[204] As was stated previously, the Court then used strict scrutiny review and awarded a cause of action based on oddly-drawn lines.[205]

The first point to be clarified in this analysis is to question why Appellants' claim of irregular redistricting lines was so significant to the Court that the awardance of a new cause of action was necessary. In its opinion, the Court reviewed its previous decisions rendered in *Gomillion*,[206] *Guinn*,[207] and *Wright*[208] to demonstrate

199. *Shaw*, 113 S. Ct. at 2832.
200. *Id.*
201. *Id.*
202. *Id.* at 2848 (Souter, J., dissenting).
203. *Id.* at 2824.
204. *Shaw*, 113 S. Ct. at 2825.
205. *Id.* at 2832.
206. See notes 117-121 and accompanying text for discussion of Gomillion v. Lightfoot, 364 U.S. 339 (1960).

that redistricting plans will be struck down if the lines are drawn so uniquely so as to conceal an attempt to reduce a race's voting power, regardless of whether the redistricting was invalid on its face.[209] Thus, in all the cases mentioned by the Court, the redistricting lines were used to infer an invidious intent to discriminate by the legislature. However, in *Shaw*, the intent of the legislature was made public.[210] The North Carolina Assembly expressly acknowledged that it classified citizens by race to create two majority-minority districts (at the recommendation of the Attorney General) and attempted to obtain more African-American representation in the government.[211] Thus, if the intent was known, of what importance was it that the lines were drawn irregularly? The Court failed to understand that this question was not the same as the ones in the past. The issue was not whether a court could derive a discriminatory intent from viewing the lines; instead, the issue was whether a public policy of assuring more minority representation in government by redistricting on the basis of race was in conflict with the Equal Protection Clause. Thus, by needlessly fixating on the lines, the majority did not even require Appellants to either show that their vote had been diluted or on a more basic Fourteenth Amendment challenge, to show that as a group, their voting power had been diminished. It could be inferred that, without focusing on the irregular nature of the lines, the Court would not have been able to strenuously distinguish this case from *United Jewish Organizations*,[212] which denied a cause of action to Hasidic Jews because they could not show that they were "fenced out" of the voting process or that their voting strength was reduced.

After the creation of this new cause of action, the next step for the Court was to decide what standard should apply.[213] Here, the Court asserted that if a claim is brought stating that lines were so irregularly drawn so as to segregate races for voting purposes, a

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207. See notes 110-115 and accompanying text for discussion of Guinn v. United States, 238 U.S. 347 (1915).

208. See notes 122-126 and accompanying text for discussion of Wright v. Rockefeller, 376 U.S. 52 (1964).

209. *Shaw*, 113 S. Ct. at 2825-26.

210. *Id.* at 2838.

211. *Id. See* State Appellee's Brief at 13-14, *Shaw*, 113 S. Ct. 2816 (No. 92-357).

212. See notes 167-172 and accompanying text for discussion of United Jewish Organizations v. Carey, 430 U.S. 144 (1977).

213. *Shaw*, 113 S. Ct. at 2832.

court is to apply a "narrowly tailored" standard.[214] Therefore, in *Shaw*, the remanded issue became "whether the North Carolina plan is narrowly tailored to further a compelling governmental interest."[215] This new standard will have two deleterious effects in the area of voting rights and redistricting.

First, the Court shifted the burden of proof to the state to exhibit that the use of race in redistricting was narrowly tailored to a compelling governmental interest. In *Shaw*, North Carolina argued that its interest in the creation of the districts in question was the required preclearance and authorization of the Attorney General, and its desire to combat a long history of racial discrimination in the state's voting practices.[216] The Court failed to address whether it believed these interests to be "compelling;" however, it suggested that states have a limited obligation to address the past wrongs of racial discrimination beyond what is required under the Voting Rights Act.[217] Additionally, if a state does go beyond what is required by the Act, it still must "employ sound districting principles."[218] Thus, the *Shaw* Court placed the burden on the states to defend a questioned redistricting before the plaintiffs had even shown that they have been discriminated against. The interests suggested by the state of North Carolina are irrelevant until the Appellants had shown that they had been wrongfully excluded from the voting process. This shifting of the burden places a legislature, that is attempting to enhance diversity in government, on the defensive before a wrong has even been properly alleged.

Second, the Court, through the "narrow tailoring" test, has left in doubt the proper use of the non-retrogression principle of section 5 of the Voting Rights Act and whether a state will be able to

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214. *Id.*

215. *Id.*

216. *Id.* at 2830-31.

217. *Id* at 2832. In addressing the claim of the State Appellees that majority-minority districts were the most effective way to combat a history of racial discrimination regardless of the Voting Rights Act, Justice O'Connor noted:

> [O]nly three Justices in *UJO* were prepared to say that States have a significant interest in minimizing the consequences of racial bloc voting apart from the requirements of the Voting Rights Act. And those three Justices specifically concluded that race-based redistricting, as a response to racially polarized voting, is constitutionally permissible only when the State "employ[s] sound districting principles" and only when the affected racial group's "residential patterns afford the opportunity of creating districts in which they will be the majority."

Id.

218. *Shaw*, 113 S. Ct. at 2832.

comply.[219] The Court in *Beer* decided that a voting procedure change may not be made if it would lead to the "retrogression" of a racial minority's position with respect to its effective exercise in the electoral process.[220] However, in *Shaw*, the Supreme Court warned "[a] reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was necessary to avoid retrogression."[221] Thus, a state that believed that a minority's voting power was being diluted and a change was necessary is to redistrict and then contend that the redistricting was not done on the basis of race. This seems irrational, and the Court offers little suggestion in this area; however, it again takes the time to reinforce its position, that even to avoid a minority losing voting power, the state must again use sound redistricting principles.[222] In *Shaw*, the Court established a very odd balancing test between the state's interest in drawing lines on the basis of race to avoid dilution of a minority's voting power, and the Court's interest in sound redistricting principles and neatly drawn lines.[223] Mistakenly asserting that discrimination can only happen with irregular lines, this balancing test leaves states in a gray area on whether compliance with section 5 is a strong state interest at all.

In addition to misconstruing what the true issue of the case was, and analyzing the new standard and its future effect, the Court also avoided the inevitable discussion of whether the majority-minority district violated the Fourteenth Amendment. The failure of

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219. See note 3 for section 5 of the Voting Rights Act.

220. *Beer*, 425 U.S. at 141.

221. *Shaw*, 113 S. Ct. at 2832.

222. *Id.*

223. The application of this unique balancing test by federal courts in recent decisions exhibits the difficulty that states will have in satisfying the "narrowly tailored" standard and how the shifting of the burden of proof has placed the states in the position of defending the reapportionment before sufficient injury to a recognizable voting group has been properly established. *See* Hays v. Louisiana, No. 92-CV-1522, 1993 U.S. Dist. LEXIS 18775 (D. La. Dec. 28, 1993). In *Hays*, a Louisiana congressional redistricting plan, which gave the state two African-American congressmen for the first time since the Reconstruction, was challenged in the United States District Court for the Western District of Louisiana, Shreveport Division. The district court held that the redistricting plan violated equal protection, and interpreted the *Shaw* balancing test by stating, "this case poses the question, 'Does a state have the right to create a racial majority-minority congressional district by racial gerrymandering?" In simplest form, the answer—largely supplied by [*Shaw*] . . . is "Yes, but only if the state does it right.' " *Hays*, No. 92-CV-1522, 1993 U.S. Dist. LEXIS at *2. The district court further concluded that the congressional district in question, and the redistricting plan in general, were not narrowly tailored to further a compelling governmental interest; therefore, the redistricting plan violated the voters' right to equal protection. *Id.*

the Court to resolve this issue leads this author to conclude that it is not the specific holding of *Shaw* that will be important, but, instead, the Court's different treatment of this case from any other redistricting case, while insisting that it was treating it the same. In *Shaw*, the decision represented an instance where civil rights laws were being used to protect those who vote in the majority, not in the minority. Thus, the importance of *Shaw* is that it clearly depicts how the Court views race and its impact on society and representative government. It is this aspect of the case that will have the greatest impact on future decisions because it exemplifies how the Court's thinking has not evolved since the 1960s on the issue of race, and therefore, it has not comprehended that the civil rights decisions of the past are now being perverted by the majority to retain power.

In order to bolster this contention, it is important to begin with an inspection of how the Court addressed race separation and stereotypes. The majority discussed at great length the proposition that any distinctions or laws based on race are "odious to a free people" and that the situation in North Carolina parallelled "apartheid."[224] It asserted that if the action in North Carolina were allowed to stand it would only perpetuate racial stereotypes and in the long run, would threaten to "undermine our system of representative democracy by signalling to elected officials that they represent a particular racial group rather than their constituency as a whole."[225] Consequently, the Court suggested that if there was a majority-minority district and a minority representative was elected, he or she would only represent the minority interests.[226] This was because "[minority representatives] are more likely to believe that their primary obligation is to represent only members of that group."[227]

After speaking at length about the removal of stereotypes, the statement by the majority suggests that perhaps the Court should heed its own advice. With all due respect and deference to the Court, the majority misconstrued the difference between voting patterns and ideology. Just because a certain race, religion or income group votes for the same party, does not connote that its beliefs are identical. The Court implied that the representatives from a majority-minority district have the identical ideas on issues as

224. *Shaw*, 113 S. Ct. at 2827.
225. *Id.* at 2828.
226. *Id.*
227. *Id.* at 2827.

the entire minority does; thus, they can only represent that minority. However, it failed to understand that although many identifiable groups vote alike, the individual members do not think alike.

This suggestion may be rooted in a more stereotypical notion of race. This is the notion that if a candidate of your race is not elected, then you are not being represented. In a sense, this is saying that if an African-American candidate is elected in a majority-minority district, that person will only represent African-Americans, or have the perception that this is his or her only duty. On the other side, this is saying that if a white male is elected, that person can only represent white males, and if you happen to be Hispanic or female, you are not being represented. Not only does the majority's suggestion disregard the possibility that whites may vote for a minority candidate in a majority-minority district, but it also ignores the possibility that voters may, in some elections, choose the issues a candidate represents over the candidate's race and a non-minority candidate could win an election in a majority-minority district.

This author does not state nor imply that the Court believes that candidates of a certain race can only represent other members of his or her race. For in that instance, every election would entail the inclusion and exclusion of members of the population. However, if the Court suggests that majority-minority districts and the public policy of a state to enhance the representation of minority members in the legislature prolongs stereotypes, it is strongly recommended that the Court not promulgate any stereotypes of its own.

After analyzing *Shaw v. Reno* with respect to the way that races and stereotypes are treated and viewed by the Court, this author is led to the conclusion that perhaps judicial activism in the area of discrimination has become too intrusive. The North Carolina Assembly decided that the United States Congressional Representatives from North Carolina were not a true embodiment of the population of the state, and in order to remedy that problem, it drew lines on the basis of race to better enhance minority representation. The Court then stepped in and, using the civil rights mantle of the past, decided that the use of race in any instance cannot be beneficial. But it failed to even deliberate on what Justice Stevens puts forth as ironic: that the development of Fourteenth Amendment jurisprudence involved minorities being denied power, and in *Shaw*, the group that alleged that its voting power had been diminished was a group of white voters using the civil rights decisions of

the past to retain majority power. It is the suggestion of this author that although discrimination is still prevalent in America, the courts are not the only branch fighting against it. Thus, the ultimate effect of the *Shaw* decision is that it may serve as notice to the Supreme Court that if it continues to misunderstand the concept that racial voting patterns do not connote identical racial ideology, then it will not be able to recognize that the majority has begun to pervert past civil rights decisions to entrench majority position. Perhaps the North Carolina Assembly and the Attorney General of the United States have already identified this possibility, and have taken steps to combat it. Possibly the Supreme Court's best decision in *Shaw* would have been not to get involved at all.

There is an old phrase regarding stereotypes stating that "labels are for jars" and perhaps labelling of districts by race is what the Supreme Court feared would be the future, had it affirmed the district court in *Shaw*. However, the Court misunderstood that labelling races according to voting patterns is not the same as telling members of certain races that they are all identical. By arranging voting districts on the basis of race, North Carolina did not assure a victory for a minority candidate, nor did it exclude a single white voter from the voting process. It attempted to diversify the United States House of Representatives, and the Court failed to realize that this is this type of effort that will truly assure a representative democracy.

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