

1-15-1995

## The Death of the Voting Rights Act or an Exercise in Geometry?-- Shaw v. Reno Provides More Questions Than Answers

Michael J. Moffatt

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Election Law Commons](#), and the [Fourteenth Amendment Commons](#)

### Recommended Citation

Michael J. Moffatt *The Death of the Voting Rights Act or an Exercise in Geometry?--Shaw v. Reno Provides More Questions Than Answers*, 22 Pepp. L. Rev. Iss. 2 (1995)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol22/iss2/7>

This Note is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact [bailey.berry@pepperdine.edu](mailto:bailey.berry@pepperdine.edu).

# The Death of the Voting Rights Act or an Exercise in Geometry?—*Shaw v. Reno* Provides More Questions Than Answers

*Minority voting rights jurisprudence, like other Fourteenth Amendment jurisprudence, is torn between two competing moral imperatives: the need to protect the weak against the strong and the few against the many, and the claim that, absent extraordinary circumstances, and perhaps not even then, the law must be color-blind.*<sup>1</sup>

## I. INTRODUCTION

The dilemma over minority voting rights has provided many commentators and social scientists with a fertile source of discussion,<sup>2</sup> and the debate recently reached our nation's highest court in the case of *Shaw v. Reno*.<sup>3</sup> In *Shaw*, the Supreme Court decided whether a state may intentionally use race as a predominant factor in creating a congressional voting district.<sup>4</sup> The plaintiffs in *Shaw* alleged that the unusual shape of North Carolina's twelfth congressional district constituted a deliberate attempt to segregate voters on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>5</sup> The state contended that the district complied with the Voting Rights Act and lacked the necessary invidious intent of an Equal Protection violation.<sup>6</sup> At stake was legislation that enabled the voters of North Carolina to elect its first Afri-

---

1. Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing?"*, 14 CARDOZO L. REV. 1237, 1276 (1993).

2. See generally Kathryn Abrams, *'Raising Politics Up': Minority Political Participation and Section 2 of The Voting Rights Act*, 63 N.Y.U. L. REV. 449 (1988); ABIGAIL THERNSTROM, *WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* (1987); Alan Howard & Bruce Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615 (1983).

3. 113 S. Ct. 2816 (1993).

4. See *infra* notes 23-48 and accompanying text.

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

6. Supplemental Brief for Appellee at 5, *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (No. 92-357).

can-American representative to Congress since the Civil War.<sup>7</sup> In a decision that may eventually change the way states create congressional districts, a sharply divided Supreme Court rejected<sup>8</sup> North Carolina's "affirmative" districting plan in order to further its goal of a "colorblind electoral process."<sup>9</sup> In recognizing a new cause of action for voters under the Fourteenth Amendment, the Court held that a state reapportionment plan that is "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race" must be narrowly tailored to satisfy a compelling state interest.<sup>10</sup>

Writing for a five justice majority, Justice O'Connor focused on the bizarre shape of the newly formed twelfth district<sup>11</sup> and the social evils of allegedly benign racial classifications.<sup>12</sup> The twelfth district's unusual shape directly resulted from the General Assembly's attempt to comply with the Voting Rights Act.<sup>13</sup> The Act bars election schemes that result in the abridgement of the right to vote on the basis of race.<sup>14</sup> The deci-

---

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

8. *Id.* The Court did not hold that the conscious use of race in creating North Carolina's new 12th congressional district was per se unconstitutional. Rather, the Court held that the intentional use of race subjected the district to strict scrutiny. *Id.* at 2832. However, the Court's interpretation of "narrowly tailored" and its conclusion that compliance with the Voting Rights Act is insufficient justification to qualify as a "compelling state interest" effectively precludes its use.

9. *Id.* at 2824. The expression that the Constitution is "colorblind" originated in Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

10. *Shaw*, 113 S. Ct. at 2832. Although the use of strict scrutiny applies to other forms of racial classifications, the Court previously distinguished voting practices from non-voting practices. *See id.* at 2845 (Souter, J., dissenting) ("Until today, the Court has analyzed equal protection claims involving race in electoral districting differently from equal protection claims involving other forms of governmental conduct.").

11. The Court described North Carolina's 12th district as "snake-like." *Id.* at 2821. Another commentator stated that the district "resembles a very slender worm with unsightly bulges." Grofman, *supra* note 1, at 1257. The Court used the district's unusual shape to distinguish the case from an earlier case with almost identical facts. *See infra* notes 294-97 and accompanying text.

12. *Shaw*, 113 S. Ct. at 2827. Justice O'Connor identified three evils of allegedly benign racial classifications. First, "when a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Id.* Second, benign racial classifications 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 interests, and will prefer the same candidates at the polls." *Id.* Finally, the majority states that "by perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract." *Id.*

13. *Id.* at 2819.

14. Voting Rights Act of 1965, 45 U.S.C. § 1973(b) (1988). Section 5 of the Act

sion in *Shaw* suddenly raises serious questions regarding the viability of the Act as well as a state's ability to foster minority representation through affirmative districting.<sup>15</sup> By subjecting North Carolina's majority-minority district to strict scrutiny, and by characterizing it as a possible violation of the Equal Protection Clause, the Court may have foreclosed the intentional creation of majority-minority "safe" districts.<sup>16</sup>

This Note examines the Supreme Court's decision in *Shaw v. Reno* in light of previous Equal Protection Clause decisions as well as previous minority voting rights decisions.<sup>17</sup> Section II details the facts of *Shaw*

---

prohibits states such as North Carolina, previously found to have abridged minority voting rights, from instituting changes in their voting practices that would "lead to a retrogression" in the voting strength of racial minorities. *Beer v. United States*, 425 U.S. 130, 141 (1976). Since North Carolina's initial redistricting failed to satisfy the non-retrogression principle in the United States Attorney General's Opinion, the North Carolina General Assembly created a majority-minority district with a 57% minority population at the expense of traditional districting principles. See *infra* notes 23-38 and accompanying text.

15. The Court stated that "the Equal Protection Clause demands strict scrutiny of all racial classifications." *Shaw*, 113 S. Ct. at 2830.

16. A "safe" district refers to a district drawn to include a supermajority of minority voters. See Howard & Howard, *supra* note 2, at 1615 ("A safe district is a district in which a large majority of the residents shares a certain politically significant characteristic or interest, thereby making it likely that the district will elect a representative with the same characteristic or interest."). The benchmark for a supermajority according to many courts is a 65% minority population. See Alexander A. Yanos, Note, *Reconciling the Right to Vote with the Voting Rights Act*, 92 COLUM. L. REV. 1810, 1831 (1992) ("Courts and the Department of Justice have agreed in most cases that sixty-five percent of the district's voting population constitutes [a safe] majority."). But see Jack Quinn et al., *Congressional Redistricting in the 1990s: The Impact of the 1982 Amendments to the Voting Rights Act*, 1 GEO. MASON U. CIV. RTS. L.J. 207, 241 (1990) (stating that the 65% figure is not a requirement, as has been misconstrued by "widespread belief"). The purpose of a safe district is to provide a minority group with the ability to control the results of an election. See Howard M. Shapiro, Note, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 YALE L.J. 189, 200-01 (1984). Safe districts frequently remedy situations where discrimination stunts minority participation in the political process.

The arguments articulated by the majority in *Shaw* logically would apply to the creation of a "safe district." Justice O'Connor wrote 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." *Shaw*, 113 S. Ct. at 2827. However, Justice O'Connor explicitly reserved the question of whether safe districts are always subject to strict scrutiny. *Id.* at 2828.

17. *Id.* at 2816.

leading up to the decision.<sup>18</sup> Section III examines the history of both minority voting legislation and cases involving racial classifications for activities other than voting.<sup>19</sup> Section IV analyzes *Shaw's* majority opinion as well as the four dissenting opinions.<sup>20</sup> Section V discusses the potential impact of the decision on future redistricting plans as well as current districts that may be in violation of the Court's holding.<sup>21</sup> Section VI concludes that while North Carolina's twelfth district should have been struck down as an improper use of political power to effectuate political protectionism, a compactness standard for congressional districts would achieve the same goals as the majority set out in *Shaw* and could eliminate the inevitable confusion surrounding the use of race in creating future districts.<sup>22</sup> Furthermore, the Court's failure to recognize the need for racial classifications in extraordinary circumstances to combat longstanding discrimination carries the ideal of the "colorblind Constitution" to a naive and harmful conclusion.

## II. FACTS OF THE CASE

Prior to the 1990 redistricting, only one of North Carolina's eleven congressional districts contained an African-American majority of voting age citizens.<sup>23</sup> Due to an increase in the general population as reflected in the 1990 Census, North Carolina became eligible for an additional seat in the United States House of Representatives.<sup>24</sup> The additional seat forced the state to redraw its eleven congressional districts to create a twelfth.<sup>25</sup> Since North Carolina was "covered" under section five of the Voting Rights Act,<sup>26</sup> the United States Attorney General required the State to submit its redistricting plan for preclearance.<sup>27</sup>

The North Carolina General Assembly approved a redistricting plan that created a twelfth district and submitted it to the Attorney General.<sup>28</sup> The plan left intact the existing majority-minority district (district one),

---

18. See *infra* notes 23-48 and accompanying text.

19. See *infra* notes 49-196 and accompanying text.

20. See *infra* notes 197-350 and accompanying text.

21. See *infra* notes 352-74 and accompanying text.

22. See *infra* notes 375-89 and accompanying text.

23. *Shaw v. Reno*, 113 S. Ct. 2816, 2820 (1993). The voting population of North Carolina is approximately 78% white, 20% black, 1% Native American and 1% Asian.  
*Id.*

24. *Id.* at 2819.

25. *Shaw v. Barr*, 808 F. Supp. 461, 463 (E.D.N.C. 1992).

26. *Shaw*, 113 S. Ct. at 2820. Those states or counties "covered" under § 5 must submit changes in their voting practices to the Attorney General for approval before implementing any new plan. See 42 U.S.C. § 1973(c) (1993).

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

28. *Id.*

but the new twelfth district contained a white majority.<sup>29</sup> The Attorney General, acting within the power of section five of the Act, rejected the new plan because it failed to give appropriate attention to increasing the minority voting strength in the southeastern region of the state.<sup>30</sup> The Attorney General underscored the importance of creating a second majority-minority district in North Carolina.<sup>31</sup>

In response to the Attorney General's rejection of the original redistricting plan, the North Carolina General Assembly enacted another plan, the redistricting legislation at issue in *Shaw*.<sup>32</sup> This time, the General Assembly drew the twelfth district in such a manner that it possessed a majority of African American citizens, giving North Carolina its second majority-minority district.<sup>33</sup> However, because it failed to concentrate the African-American population into a compact geographic area, the district took on a contorted and bizarre shape.<sup>34</sup> Located along a thin strip of land, some 160 miles long, the new district snaked diagonally across North Carolina from Durham to Gastonia.<sup>35</sup> At times, the district was no wider than the local interstate highway.<sup>36</sup> The unusual configuration of the twelfth district divided many precincts, counties and towns in North Carolina among two or even three congressional districts.<sup>37</sup> Furthermore, the twelfth district could not even be considered contiguous since at one point another district actually bisected it.<sup>38</sup>

The first attack on the new district unsuccessfully alleged that the twelfth district represented an unconstitutional *political* gerrymander.<sup>39</sup> After a federal district court denied this challenge,<sup>40</sup> five plaintiffs initiat-

---

29. *Id.* This would have given whites a majority in 11 of the 12 congressional districts, or 92%, while African-Americans formed the majority in only 1 of 12 districts, or 8%. *Id.*

30. *Id.*

31. *Id.* See also State Appellee's Brief at 9, *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (No. 92-357).

32. *Pope v. Blue*, 809 F. Supp. 392, 394 (W.D.N.C.), *aff'd*, 113 S. Ct. 30 (1992).

33. *Shaw*, 113 S. Ct. at 2820. The 12th district had an African-American population of 57%. See State Appellees' Brief at 24a, *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (No. 92-357).

34. T. Alexander Aleinikoff & Samuel Issacharoff, *Race And Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 591 (1993).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.), *aff'd*, 113 S. Ct. 30 (1992).

40. *Id.* at 399.

ed the suit in *Shaw*. The plaintiffs resided in the area affected by the new district.<sup>41</sup> Prior to the redistricting, the plaintiffs were registered voters in the second district.<sup>42</sup> The new plan placed two in the twelfth district and three in the second.<sup>43</sup> The plaintiffs alleged that North Carolina's revised plan violated the Fourteenth Amendment by deliberately creating two districts, each with a majority of black voters.<sup>44</sup> The plan disregarded other traditional districting principles such as compactness, contiguousness, geographical boundaries and political subdivisions.<sup>45</sup> Relying on the Supreme Court's ruling in *United Jewish Organizations v. Carey*,<sup>46</sup> a divided three-judge district court dismissed the plaintiffs' complaint.<sup>47</sup> The United States Supreme Court subsequently granted certiorari.<sup>48</sup>

### III. BACKGROUND

The confrontation in *Shaw* arises out of the conflict between two important concepts in American jurisprudence: the right to vote and the dangers associated with governmental classifications based on race. To evaluate the Court's decision in the context of these two concepts, the background section has been divided into two subsections. The first subsection explores the Court's historic decisions concerning minority voting legislation from the enactment of the Fourteenth Amendment to cases interpreting the 1982 amendments to the Voting Rights Act.<sup>49</sup> The second subsection reviews the Court's decisions on the application of the Equal Protection Clause to non-voting matters where states have classified citizens on the basis of race.<sup>50</sup>

#### A. History of Minority Voting

States have historically abridged minority voting rights in several ways. First, states directly prevented minorities from participating in the voting

---

41. *Shaw v. Reno*, 113 S. Ct. 2816, 2821 (1993).

42. *Shaw v. Barr*, 808 F. Supp. 461, 464 (E.D.N.C. 1992), *rev'd*, *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

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

44. *Id.*

45. *Id.*

46. 430 U.S. 144 (1977). See *infra* notes 294-97 and accompanying text for a discussion on the lower court and the dissent's reliance on *United Jewish Organizations*.

47. *Shaw v. Barr*, 808 F. Supp. 461, 470-73 (E.D.N.C. 1992).

48. *Shaw v. Barr*, 113 S. Ct. 653 (1992).

49. See *infra* notes 51-156 and accompanying text.

50. See *infra* notes 157-96 and accompanying text.

process by way of literacy tests, poll taxes and grandfather clauses.<sup>51</sup> States enacted these measures to deny suffrage to minorities while leaving the white vote predominantly unaffected.<sup>52</sup> Secondly, states prevented minorities from exercising political power by targeting the effectiveness of the minority vote. The Court referred to state practices that purposely reduced minority voting strength through apparently neutral legislation as "vote dilution."<sup>53</sup>

### 1. Early Fourteenth and Fifteenth Amendment Decisions

The origin of minority voting rights can be traced to two constitutional amendments.<sup>54</sup> After the Civil War, Congress passed the Fourteenth Amendment which conferred citizenship on all persons born or naturalized in the United States.<sup>55</sup> In addition, the amendment reduced a state's representation in Congress to the extent that the state denied "to any of its male inhabitants . . . the right to vote."<sup>56</sup> Congress' intent was to coerce the southern states into extending suffrage to blacks by threatening a reduction in their Congressional representation.<sup>57</sup> The amendment did

51. See *infra* notes 72-81 and accompanying text.

52. See Emma Coleman Jordan, *Taking Voting Rights Seriously: Rediscovering The Fifteenth Amendment*, 64 NEB. L. REV. 389, 402 (1985) (describing the states' enactments of grandfather clauses, vote fraud, understand and explain tests, and white primaries as attempts to disenfranchise black voters); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 303 (1966) (discussing tests "specifically designed to prevent negroes from voting while permitting white persons to vote").

53. See Quinn et al., *supra* note 16, at 241. Vote dilution can take many forms. The three most common include packing, cracking, and stacking:

(i) "packing" refers to placing more minority members in a district than are necessary to elect a representative of their choice, thereby wasting those excess votes; (ii) "cracking" or (splitting) is the division of a minority constituency among two or more districts so that its ability to elect a representative in any district is impaired; and (iii) "stacking" refers to the practice of placing a minority community in a large multi-member district so that the minority voters, who would be able to elect a representative in a single-member district, are submerged within the larger pool of majority voters.

*Id.* at 209.

54. Robert Bryson Carter, *Mere Voting: Presley v. Etowah County Commission and the Voting Rights Act of 1965*, 71 N.C. L. REV. 569, 569 (1993) (noting that the 13th, 14th and 15th Amendments are the origin of minority voting rights).

55. U.S. CONST. amend. XIV, § 1.

56. U.S. CONST. amend. XIV, § 2.

57. See Carter, *supra* note 54, at 569.



not, however, explicitly give blacks the right to vote.<sup>58</sup> Instead, it gave states the *option* of giving blacks suffrage or having their power in Congress reduced.<sup>59</sup> The amendment's omission of an unqualified voting right for blacks was a necessary compromise to ensure its passage in Congress.<sup>60</sup>

In 1870, black suffrage gained explicit constitutional protection with the passage of the Fifteenth Amendment.<sup>61</sup> The amendment signaled an important turning point in increasing black participation in the political process.<sup>62</sup> White-dominated state legislatures, however, responded by creating impediments designed to undermine black voting efforts.<sup>63</sup> The Supreme Court compounded the problem by giving the Fifteenth Amendment a narrow interpretation, as illustrated in the 1876 case of *United States v. Reese*.<sup>64</sup> In *Reese*, the federal government brought charges against Kentucky election inspectors who refused to count the vote of a black citizen.<sup>65</sup> The Supreme Court refused to uphold the indictments on the basis that Congress neglected to enact a specific statutory scheme to implement the Fifteenth Amendment.<sup>66</sup> More damaging, however, was the Court's pronouncement that "[t]he Fifteenth Amendment does not confer the right of suffrage upon anyone."<sup>67</sup> Instead, the Court found that the Fifteenth Amendment only protects citizens from a denial of their right to vote when such a denial can be shown to a reasonable certainty to be racially motivated.<sup>68</sup> After *Reese*, southern states

---

58. *Id.* at 569.

59. *See id.* ("Although [the Fourteenth Amendment] punished states' denial of black suffrage, it implicitly affirmed the right to such a denial as long as states were willing to pay the price in representation."); *see also* Emma C. Jordan, *The Future of the Fifteenth Amendment*, 28 *How. L.J.* 541, 547 (1985) (stating that prior to the ratification of the Fourteenth Amendment, three-fourths of the states would have barred black citizens from voting).

60. Carter, *supra* note 54, at 570.

61. U.S. CONST. amend. XV. Section 1 reads: "The 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." *Id.* § 1.

62. *See* Carter, *supra* note 54, at 572 (explaining that after passage of the amendment, about two-thirds of eligible black males casted ballots in the South).

63. Such impediments included poll taxes, literary tests and property requirements. For example, at the 1895 South Carolina Constitutional Convention, Senator Ben Tillman commented on a proposed literacy test: "[T]he only thing we can do as patriots and as statesmen is to take from (the 'ignorant blacks') every ballot that we can under the laws of our national government." *South Carolina v. Katzenbach*, 383 U.S. 301, 310-11 n.9 (1966) (citations omitted).

64. 92 U.S. 214 (1876).

65. *Id.* at 224 (Clifford, J., dissenting).

66. *Id.* at 221 ("Congress has not as yet provided by appropriate legislation for the punishment of the offense charged in the indictment.").

67. *Id.* at 217.

68. *Id.*

initiated a campaign to disenfranchise black voters using devices such as literacy tests, gerrymandering, intimidation and voting fraud.<sup>69</sup> The retreat from the ideals of the post-civil war era continued for the remainder of the nineteenth century and eradicated practically all of the progress achieved by the Fourteenth and Fifteenth Amendments.<sup>70</sup>

## 2. Early Twentieth Century Decisions

After the turn of the century, the Supreme Court turned its attention toward the state-created impediments which effectively disenfranchised black voters.<sup>71</sup> In 1915, the Court in *Guinn v. United States*<sup>72</sup> considered an amendment to the Oklahoma Constitution which required voters to pass a literacy test as a prerequisite to voting.<sup>73</sup> The amendment also included a provision exempting all citizens eligible to vote on January 1, 1866, and all lineal descendants of those persons from the examination requirement.<sup>74</sup> The Court held that this "grandfather clause" comprised an unconstitutional attempt to circumvent the Fifteenth Amendment.<sup>75</sup>

The same day, the Court in *Myers v. Anderson* also held a similar Maryland statute to be unconstitutional.<sup>76</sup> The Maryland statute defined three categories under which a citizen could qualify to vote.<sup>77</sup> The third category required the citizen either to have been eligible to vote prior to January 1, 1868, or be a descendent of a citizen eligible to vote on that

69. See Carter, *supra* note 54, at 571.

70. *Id.*

71. See Adam J. Chill, *The Fourteenth and Fifteenth Amendments with Respect to the Voting Franchise: A Constitutional Quandary*, 25 COLUM. J.L. & SOC. PROBS. 645, 650. See generally Jordan, *supra* note 52.

72. 238 U.S. 347 (1915).

73. *Id.* at 357 ("No person shall be registered as an elector of this State or be allowed to vote in any election herein, unless he be able to read and write any section of the constitution of the State of Oklahoma.")

74. *Id.* at 356.

75. *Id.* at 365. The Court further stated:

[T]he provision, recurring to the conditions existing before the Fifteenth Amendment was adopted and the continuance of which the Fifteenth Amendment prohibited, proposed by in substance and effect lifting those conditions over to a period of time after the Amendment, to make them the basis of the right to suffrage conferred in direct and positive disregard of the Fifteenth Amendment.

*Id.*

76. *Myers v. Anderson*, 238 U.S. 368 (1915).

77. *Id.* at 377.

date.<sup>78</sup> In finding these state actions unconstitutional, the Court characterized both the Oklahoma and the Maryland grandfather clauses as impermissible attempts to restore voting conditions as they existed prior to the passage of the Fifteenth Amendment.<sup>79</sup>

In later decisions, the Court continued to use the Fifteenth Amendment to eliminate state-imposed barriers to minority suffrage. In 1939, the Court in *Lane v. Wilson*<sup>80</sup> used the Fifteenth Amendment to strike down the use of onerous voting registration requirements where white voters were excluded by virtue of a "grandfather clause."<sup>81</sup> A frequently quoted passage from the Court's decision evidenced its philosophy regarding the protection of minority voting rights: "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination."<sup>82</sup>

Similarly, in *Smith v. Allwright*,<sup>83</sup> the Court held that the Texas Democratic Party violated the Fifteenth Amendment by permitting only whites to vote in primary elections.<sup>84</sup> *Allwright* was the last in a series of cases involving attempts by the Texas Democratic party to exclude blacks from voting in election primaries.<sup>85</sup> As the Court began to expand

---

78. *Id.* at 368.

79. *Id.* at 380 ("[T]he [grandfather clause] is void because it amounts to a mere denial of the operative effect of the Fifteenth Amendment, and . . . proceeds to re-create and reestablish a condition which the Amendment prohibits.")

80. 307 U.S. 268 (1939).

81. *Id.* at 275-76. The statute which exempted white voters referred back to the Oklahoma constitutional amendment struck down by the Court in *Guinn. Id.* at 276.

82. *Id.* at 275.

83. 321 U.S. 649 (1944).

84. *Id.* at 661-62 ("[T]he right to vote in such a primary . . . , like the right to vote in a general election, is a right secured by the Constitution. By the terms of the Fifteenth Amendment that right may not be abridged by any State on account of race.") (citations omitted).

85. Initially, it was thought that primary elections were beyond the protection of the Constitution. See, e.g., *Nixon v. Herndon*, 273 U.S. 536, 539 (1927) (arguing that "a nominating primary is purely a political matter" and outside the courts' powers). However, in *Nixon*, the Court held a Texas statute excluding blacks from voting in the primaries was unconstitutional. *Id.* at 540-41. Justice Holmes, writing for the majority, rejected the district court's finding that the case involved a non-justiciable political question. *Id.* at 540. Texas responded by placing the power of membership in the Democratic party in the hands of the party's executive committee, which once again excluded blacks from the primaries. See *Jordan*, *supra* note 52, at 401 n.57. Again, the Court found the exclusion unconstitutional in that the committee was held to be an agent of the state. See *Nixon v. Condon*, 286 U.S. 73, 88 (1932). When the Democratic Party excluded blacks the following election, the exclusion was upheld on the ground that it was no longer state action. See *Grove v. Townsend*, 295 U.S. 45, 53 (1935). The Court in *Allwright* overruled *Grove* and recognized a state's responsibility to eliminate discrimination at all stages of the political process. *Allwright*, 321 U.S. at 666. "[T]he place of the primary in the electoral scheme makes clear that

the concept of the right to vote beyond the mere pulling of a lever, it subsequently struck down other "whites-only" primaries,<sup>86</sup> along with impediments such as "understand and explain" requirements.<sup>87</sup> The Fifteenth Amendment became a tool for remedying the injustices that had taken place in the South, and the next barrier to fall was the racial gerrymander.

*Gomillion v. Lightfoot*<sup>88</sup> involved a challenge to state legislation which appeared race-neutral on its face, but kept black citizens from exercising their right to vote. In 1957, the Alabama legislature passed an act which redrew the city limits of Tuskegee from the shape of a square to that of an irregular twenty-eight sided figure.<sup>89</sup> As a result, nearly all of the black citizens were removed from the city.<sup>90</sup> African-Americans who had been citizens of Tuskegee prior to the redistricting challenged the law, claiming that the legislation illegally deprived them of the benefits of their residency status.<sup>91</sup> The Court held, under a Fifteenth Amendment analysis, that the redistricting unconstitutionally deprived the black residents of their municipal vote.<sup>92</sup>

In his concurrence, Justice Whittaker noted that he would have decided the case under the Equal Protection Clause of the Fourteenth Amendment.<sup>93</sup> The remainder of the *Gomillion* Court showed reluctance to apply the Fourteenth Amendment to this racial gerrymander.<sup>94</sup> This be-

state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State." *Id.* at 660.

86. See *Terry v. Adams*, 345 U.S. 461 (1953).

87. See *Davis v. Schnell*, 81 F. Supp. 872, 878 (S.D. Ala.) (finding unconstitutional a provision in the Alabama Constitution that all voters be able to "understand and explain" any article of the U.S. Constitution), *aff'd*, 336 U.S. 933 (1949).

88. 364 U.S. 339 (1960).

89. *Id.* at 341.

90. *Id.* at 340.

91. *Id.* at 341.

92. *Id.* at 345 ("[T]he Fifteenth Amendment . . . forbids a State from passing any law which deprives a citizen of his vote because of his race.").

93. *Id.* at 349 (Whittaker, J., concurring). Both Justice O'Connor's majority opinion in *Shaw*, *Shaw v. Reno*, 113 S. Ct. 2816, 2823 (1993), and Justice White's dissent, *id.* at 2838-39 (White, J., dissenting), recognized the similarities between *Shaw* and *Gomillion*. Both cases involved the use of racial gerrymanders. Although the cases differ by their justifications, the action taken by Alabama and North Carolina legislatures were exactly the same. *Id.* at 2816; *Gomillion*, 364 U.S. at 339. However, one gerrymander fenced out blacks and one fenced in blacks. The *Shaw* majority relied on the 14th Amendment while the *Gomillion* Court decided the case on 15th Amendment principles.

94. *Id.* at 342. Conversely, the court in *Shaw* invalidated the gerrymander on

havior can be attributed to the Court's decision in *Colegrove v. Green*.<sup>96</sup> The *Colegrove* court held that issues of vote dilution were political questions<sup>90</sup> and therefore not justiciable.<sup>97</sup> Two years after the Court decided *Gomillion*, it overruled its decision in *Colegrove* and opened the door to the modern era of voting rights jurisprudence.<sup>98</sup>

### 3. *Baker, Reynolds*, and The Voting Rights Act

In 1962, the Court faced another vote dilution case in *Baker v. Carr*.<sup>99</sup> *Baker* concerned an equal protection claim alleging that the Tennessee's districting plan created substantial disparities in the number of voters per district.<sup>100</sup> The political question doctrine, as defined in *Colegrove*, removed this type of case from the Court's jurisdiction.<sup>101</sup> In *Baker*, however, the Court held that reapportionment cases were justiciable under the Equal Protection Clause since they affected an individual right

---

Fourteenth Amendment grounds. *Shaw*, 113 S. Ct. at 2826.

95. 328 U.S. 549 (1946). *Colegrove* involved residents of an Illinois county who challenged the population disparities of three Congressional voting districts. *Id.* at 550. The Court upheld the district court ruling that the plaintiff's cause of action was not justiciable. *Id.* at 556. Writing for the majority, Justice Frankfurter stated:

We are of opinion that the appellants ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about 'jurisdiction.' It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.

*Id.* at 552.

96. Political questions often involve disputes, typically between different branches of government, that courts find inappropriate for judicial review. See Kevin R. Puvalowski, *Immune From Review?: Threshold Issues in Section 1983 Challenges to the Delegate Selection Procedures of National Political Parties*, 62 *FORDHAM L. REV.* 409, 413-14 (1993). The standards by which political questions are judged were enunciated by the Court in *Baker v. Carr*, 369 U.S. 186 (1962). See *infra* notes 99-105 and accompanying text.

97. *Colegrove*, 328 U.S. at 552. See Chill, *supra* note 71, at 651 n.32.

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

99. *Id.*

100. *Id.* at 187-88.

101. The political question doctrine considered certain issues to be best decided by the executive and legislative branches. Among these issues was the reapportionment of state and federal districts, which the Court in *Colegrove* held to be a political question and, therefore, not to be decided by the judicial branch. See Eric J. Stockman, *Constitutional Gerrymandering: Fonsara v. Reapportionment Commission*, 25 *CONN. L. REV.* 1227, 1230 (1993) ("[R]edistricting, which inherently involved the intimate workings of the political process, was to be left within the domain of the legislative branches of the states.").

and fell outside previously defined political question categories.<sup>102</sup> Justice Brennan's opinion held that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question."<sup>103</sup> The *Baker* decision "heralded a new era in constitutional jurisprudence."<sup>104</sup> Furthermore, it has been referred to as one of the most important Supreme Court decisions in the twentieth century because it permitted the federal courts to oversee previously non-justiciable state voting practices.<sup>105</sup>

Soon after the Court decided *Baker*, it applied the *Baker* reasoning in a similar vote dilution case. In *Reynolds v. Sims*,<sup>106</sup> the Court discussed the concept of vote dilution<sup>107</sup> and brought the Fourteenth Amendment into the arena of minority voting rights.<sup>108</sup> In *Reynolds*, the voters from an Alabama county challenged the state's apportionment of congressional districts due to wide disparities in the number of voters in some districts.<sup>109</sup> The plaintiffs argued that a voter in District X with ten times as many voters as District Y has only one-tenth the voting power of a voter in District Y.<sup>110</sup> The Court recognized this inequity and held that districting schemes that created districts of disproportionate populations violated the Equal Protection clause of the Fourteenth Amendment.<sup>111</sup> The Court stated:

How can one person be given twice or ten times the voting power of another person in a state-wide election merely because he lives in a rural area . . . ? Once the geographical unit for which a representative is to be chosen is designated, all

102. *Baker*, 369 U.S. at 226.

103. *Id.* at 209.

104. Stockman, *supra* note 101, at 1230.

105. See Yanos, *supra* note 16, at 1815 (stating that the importance of the *Baker* decision was only equaled by *Brown v. Board of Education*, 349 U.S. 294 (1954)).

106. 377 U.S. 533 (1964).

107. The term "vote dilution" was taken from the *Reynolds* decision, in which the Court proclaimed 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.* at 555.

108. See David L. Eades, Comment, *Section 2 Of The Voting Rights Act: An Approach To The Results Test*, 39 VAND. L. REV. 139, 142 (1986).

109. *Reynolds*, 377 U.S. at 540.

110. *Id.* at 562-63.

111. *Id.* The Court recognized the imbalance as a contradiction to a democratic government. *Id.* at 563-64. See also *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964) ("To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People,' a principle tenaciously fought for and established at the Constitutional Convention.").

who participate in the election are to have an equal vote . . . . This is required by the Equal protection Clause of the Fourteenth Amendment.<sup>112</sup>

The Court's holding that the Equal Protection Clause requires each vote to weigh the same<sup>113</sup> is now referred to as the "one person, one vote" doctrine.<sup>114</sup> The doctrine applies easily to districting cases and clearly embodies one of the most important principles in American voting rights.<sup>115</sup>

As a response to the civil rights movement of the 1960s, Congress passed the Voting Rights Act of 1965.<sup>116</sup> The Act increased minority political strength and facilitated the implementation of the amendments' goals by eliminating the need for case-by-case litigation.<sup>117</sup> Essentially a codification of the Fifteenth Amendment, the Voting Rights Act prohibited state action that resulted in the denial or abridgment of the right to vote on the basis of race.<sup>118</sup> In states where a violation of the Act has occurred, a common procedural remedy is to create a "safe district."<sup>119</sup>

---

112. *Reynolds*, 377 U.S. at 557-58 (quoting *Gray v. Sanders*, 372 U.S. 368, 379 (1963)).

113. *Id.* at 568 ("The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.").

114. See also *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) ("[T]hat Representatives be chosen 'by the People of the several States' means that as nearly as is practicable, one man's vote . . . is to be worth as much as another's.").

115. See Jim R. Karpiak, *Voting Rights and the Role of the Federal Government: The Rehnquist Court's Mixed Messages in Minority Vote Dilution Cases*, 27 U.S.F. L. REV. 627, 632 (1993) ("One person, one vote' became a bedrock of voting rights jurisprudence.").

116. Pub. L. No. 89-110, 79 Stat. 437. Twenty-nine years after its enactment, the Voting Rights Act remains a prevalent and important body of legislation. More than one third of the states are covered under § 5 of the Act, which requires the covered jurisdictions to submit any changes in their electoral system to the Department of Justice for pre-clearance. *Id.* at 483-84.

117. *United Jewish Org. v. Carey*, 430 U.S. 144, 156 (1977). Discussing the legislative history of the Act, the Court stated: "It is also plain, however, that after 'repeatedly try[ing] to cope with the problem by facilitating case-by-case litigation against voting discrimination,' . . . Congress became dissatisfied with this approach. . . ." *Id.* (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966)).

118. 42 U.S.C. § 1973(b) (1988). Section 2 of the Voting Rights Act provides:

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 set forth in section 1973b(f)(2) of this title. . . .

*Id.*

119. See *Yanos*, *supra* note 16, at 1822 ("Safe districting is the remedy most often prescribed by courts in minority vote dilution cases where a violation of the Voting Rights Act has been found."); see also *Howard & Howard*, *supra* note 2, at 1615-16 ("Safe districts for minorities have been commonly created in jurisdictions seeking to

The Act's capacity to increase the participation of black citizens in the voting process proved to be an immediate success.<sup>120</sup> The Act employed a "series of stringent measures, including the use of federal registrars and election observers, the abolition of literacy tests nationwide and the invalidation of restrictive registration policies generally."<sup>121</sup> The increase in black voter participation, however, was once again followed by state legislative schemes developed to minimize the impact of the increase of black votes.<sup>122</sup>

The southern states, in addition to their attempts to circumvent the Act, also attacked the Act directly on constitutional grounds. The Act received its first constitutional challenge in *South Carolina v. Katzenbach*,<sup>123</sup> in which South Carolina<sup>124</sup> argued that Congress had exceeded its power and encroached on its rights under the Tenth Amendment.<sup>125</sup> *Katzenbach* involved, *inter alia*, a challenge to section five of the Act, its mechanism for enforcement.<sup>126</sup> Section five requires counties or states "covered"<sup>127</sup> under the section to clear all new voting regulations with the federal government before enacting them.<sup>128</sup> The

have their electoral schemes approved by the Justice Department and courts under the relatively narrow § 5 of the Act.").

120. See Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 6 (1991).

121. *Id.*

122. See *id.* ("The courts soon recognized that even when black citizens were added to the rolls and voted, they were often still unable to elect the candidates of their choice: The states, in direct response to the appearance of black voters, adopted election schemes that aggregated voters' preferences in ways that minimized the impact of black votes.").

123. 383 U.S. 301 (1966).

124. Virginia, Louisiana, Alabama, Mississippi and Georgia filed *amicus curiae* briefs on behalf of the plaintiff, South Carolina. *Id.* at 305-06.

125. *Id.* at 323 ("These provisions of the Voting Rights Act of 1965 are challenged on the fundamental ground that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution.").

126. *Id.* at 323 (alleging that § 5 infringes on Article III of the Constitution because the review of voting rules direct the district court to issue advisory opinions).

127. Covered jurisdictions are those

which (1) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 percentum of the citizens of voting-age were registered on November 1, 1972 or less than 50 percentum of such persons voted in the Presidential election of November 1972.

42 U.S.C. § 1973b(b) (1988).

128. 42 U.S.C. § 1973(c) (1994).



Court rejected South Carolina's challenge and held the Act constitutional, stating that Congress "may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."<sup>129</sup>

Following *Katzenbach*, the Court again interpreted the scope of section five in *Beer v. United States*.<sup>130</sup> The *Beer* Court placed the first significant limitation on the Act.<sup>131</sup> In *Beer*, the city of New Orleans sought preclearance of a reapportionment plan designed to increase black voting strength.<sup>132</sup> The United States Attorney General, acting under the provision of section five, refused to preclear the city's new plan because it was discriminatory and, despite its improvements over the previous plan, still diluted black voting strength.<sup>133</sup> The city challenged the application of the Act, denying the dilution of minority voting strength *compared to the previous voting practice* and argued that the Attorney General had applied the wrong standard.<sup>134</sup> The Court responded by defining the nonretrogression doctrine, which declared that changes in voting practices should be compared to the previously replaced practices rather than subjecting them to an absolute evaluation.<sup>135</sup>

Vote dilution does not lend itself to qualitative measurement, and during this period the Court struggled to craft a standard by which to evaluate it. In *City of Mobile v. Bolden*,<sup>136</sup> the Court adopted a standard in its plurality opinion whereby only *purposeful and invidious acts* of state voting discrimination were actionable under the Voting Rights Act.<sup>137</sup> Justice Stewart, writing for the plurality, held that a plaintiff "must prove that the disputed plan was 'conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination.'"<sup>138</sup> The Court borrowed the standard from its Fourteenth Amendment "suspect classes" cases, where

---

129. *Katzenbach*, 383 U.S. at 324.

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

131. See Carter, *supra* note 54, at 584. The holding is a limitation on the Act because a new practice that is slightly less discriminatory than the previous practice satisfies the non-retrogression principle and therefore does not fall within the Act. *Id.* at 584-85. This is contrary to Congress' "apparent intention that the Act receive liberal interpretation. . . ." *Id.* at 584.

132. *Beer*, 425 U.S. at 135-36.

133. *Id.* at 136.

134. *Id.* at 133-34.

135. *Id.* at 141 ("[T]he standard [under §5] can only be satisfied by determining . . . whether [minority voting ability] is *augmented, diminished, or not affected* by the change affecting voting.") (citations omitted).

136. 446 U.S. 55 (1980). *Bolden* addressed a challenge by black voters to an at-large system of electing city officials. *Id.* at 58. The plaintiffs sought to change the system to single-member districts, which would have presumably enabled the black contingency to elect an official of their choosing. *Id.* *Bolden* represents a paradigmatic vote dilution case because it impacts the voting procedure but not the right to vote itself.

137. *Id.* at 66-67.

138. *Id.* at 66 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149-50 (1971)).

courts could grant relief under the Equal Protection Clause only after showing the defendant's intent to discriminate on the basis of race.<sup>139</sup>

Responding to the Court's decision in *Bolden*, Congress amended the Voting Rights Act in 1982 to change the intent standard as defined under *City of Mobile* to a "results" standard.<sup>140</sup> However, the amendment did not define the results test, stating only:

[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 abridgment of the right of any citizen of the United States to vote on account of race or color . . . .<sup>141</sup>

Congress created the amendment to "restore the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in *Bolden*."<sup>142</sup> The amendment also included a new qualifying clause, known as the "Dole Compromise," which denied any group the right to proportional representation.<sup>143</sup>

The amendment's inclusion of the clause disclaiming any right to proportional representation resulted in confusion for lower courts, which had to determine when vote dilution occurred using a "totality of the circumstances"<sup>144</sup> test.<sup>145</sup> Confusion resulted because plaintiffs trying to

139. See *Washington v. Davis*, 426 U.S. 229, 239 (1976). *Washington* involved an employment discrimination suit brought by black applicants for police department jobs. *Id.* at 232-33. The plaintiffs attempted to show discriminatory action by comparing the disproportionately low number of black officers to the black population as a whole. *Id.* at 235. The Court held that a showing of disproportionate impact is not sufficient; a plaintiff must show intent. *Id.* at 239-42.

140. See Grofman, *supra* note 1, at 1241 n.14. "In amending section 2 of the Voting Rights Act, Congress was reacting to the decision in *City of Mobile*. The specific motivation behind the amended language . . . was to allow plaintiffs to establish a statutory violation by showing discriminatory effect without proving any kind of discriminatory purpose." *Id.*

141. 42 U.S.C. § 1973(a) (1982).

142. S. Rep. No. 417, 97th Cong., 2d Sess. 15 (1982).

143. The new section provided:

A violation of subsection (a) . . . is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens . . . 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 . . . . 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.

42 U.S.C. § 1973(b) (1994).

144. The "totality of circumstances" test was articulated in *White v. Regester*, 412

establish the requisite discrimination would inevitably attempt to show that their "group" remained unable to elect candidates in proportion to their numbers. However, since the Dole compromise excluded the right to proportional representation, a plaintiff could not rely on disproportional representation.<sup>146</sup> The confusion regarding the standard for establishing a violation of the Voting Rights Act continued until 1986, when the Supreme Court announced a new test for determining vote dilution.<sup>147</sup>

Shortly after Congress amended the Voting Rights Act in 1982, the Supreme Court interpreted the meaning of the new standard for vote dilution. *Thornburg v. Gingles*<sup>148</sup> involved a challenge to a North Carolina districting plan that created six multi-member districts and one single-member district, all containing a white majority.<sup>149</sup> The plaintiffs advocated an alternate plan which put forth one single-member district in which blacks comprised a majority of the voting population.<sup>150</sup> The Court used this opportunity to attempt to establish a workable test for determining when state action violates the Voting Rights Act.<sup>151</sup>

The *Gingles* decision announced a three-prong test for vote dilution: (1) the minority population must be sufficiently large and geographically compact enough to constitute a majority in a single-member district; (2) minority voters must be "politically cohesive;" and (3) the majority must vote as a bloc to defeat minority-preferred candidates.<sup>152</sup> While an im-

---

U.S. 755, 769 (1973), and was the standard for determining a vote dilution claim prior to the Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Karpiaak, *supra* note 115, at 637.

145. See *id.* at 636 ("[T]he amendment included portentous qualifying language which would ultimately spawn confusion.").

146. See *id.*

147. See *id.* at 637-39 (noting that the *Gingles* test was an attempt to provide a "workable test" and met with limited success).

148. 478 U.S. 30 (1986).

149. A multi-member district is one in which each voter casts a ballot for every office in the election. Karlan, *supra* note 120, at 7 n.23. For example, the election of U.S. Senators creates a multi-member district of each state because a voter casts a ballot for both senators. *Id.* Conversely, a single member district elects only one official to office. *Id.* A multi-member district was often used to dilute minority voting strength, and the plaintiffs in *Gingles* brought this very charge. *Gingles*, 478 U.S. at 35. The reasoning is as follows: Assume a population of 60% whites and 40% minorities, and that voting follows racial lines (bloc voting). In a multi-member district with 10 offices to be filled, whites could elect all 10 offices because whites constitute a majority of all votes cast for each office. However, if 10 single member districts are drawn, minorities could expect to constitute a majority in four of the 10 districts (40%) and consequently elect four representatives.

150. *Id.* at 35-38.

151. *Id.* at 50-51.

152. *Id.* See generally Quinn et al., *supra* note 16.

provement on the results standard given by the 1982 amendment, the *Gingles* test has been criticized for failing to adequately guide lower courts as to when vote dilution claims may be filed.<sup>153</sup> Consequently, these courts turn to the proportional standard test despite the provisions of the Dole Compromise.<sup>154</sup>

*Gingles* embodied the Court's last major interpretation of the Voting Rights Act. The Court has not balked at the use of racial classifications when incorporated into judicial remedies.<sup>155</sup> However, another aspect of this principle stands separate and apart from the voting rights issue: the emergence of the Equal Protection Clause in the Court's analysis regarding the affirmative use of race to categorize citizens in non-voting matters.<sup>156</sup>

### B. Discrimination and Racial Classifications

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>157</sup> Courts have not held this provision to guarantee that all laws must treat every person the same. In practical effect, certain laws require that classifications be made that disproportionately burden some individuals while benefiting others.<sup>158</sup> The question then becomes, "when can a state properly classify citizens on the basis of race?"

The Court's original interpretation of the Equal Protection Clause was a narrow one. In the *Slaughter-House Cases*,<sup>159</sup> the Court stated, "[W]e doubt very much whether any action of a State not directed by way of

153. *Garza v. County of Los Angeles*, 918 F.2d 763, 770-71 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

154. *See id.*; *United States v. Dallas County Comm'n*, 850 F.2d 1433, 1434-35 (11th Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989); *Terrazas v. Slagle*, 789 F. Supp. 828, 833 (W.D. Tex. 1991); *Jeffers v. Clinton*, 730 F. Supp. 196, 198 (E.D. Ark. 1989); *see also Yanos, supra* note 16, at 1828 ("[L]ower federal courts have consistently used a proportional standard in subsequent Section 2 cases despite the provisions of the Dole Compromise.").

155. *See, e.g., United Jewish Org. v. Carey*, 430 U.S. 144 (1977) (permitting the creation of a majority-minority district to remedy previous violations of the Voting Rights Act).

156. *See infra* notes 157-96 and accompanying text.

157. U.S. CONST. amend. XIV, § 2.

158. For example, income tax laws apply differently to citizens of different income levels. Similarly, wage and hour laws do not apply to persons in certain occupations.

159. 83 U.S. 36 (1872).

discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."<sup>160</sup> In *Strauder v. West Virginia*,<sup>161</sup> the Court invalidated a statute that limited jury duty to whites only.<sup>162</sup> In referring to the Equal Protection Clause, the Court stated that "all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color."<sup>163</sup>

### 1. Classifications Disadvantaging Minorities

As early as 1915, the Court recognized that a state action may involve the impermissible use of race even though it appears race-neutral on its face.<sup>164</sup> In *Yick Wo v. Hopkins*,<sup>165</sup> the Court found a violation of the Equal Protection Clause even though there was no mention of race in the statute in question.<sup>166</sup> The case involved a San Francisco ordinance which declared unlawful the operation of a laundry business in a wooden building without a permit.<sup>167</sup> The plaintiff, a man of Chinese ancestry who was denied a permit, challenged the ordinance on constitutional grounds since the board of supervisors had denied two hundred permits to ethnic Chinese residents while granting them to eighty non-Chinese applicants.<sup>168</sup> The plaintiff claimed that while the statute was not unconstitutional on its face, its application constituted a violation of the Equal Protection Clause.<sup>169</sup> The Court held:

Though the law itself [is] fair on its face and impartial in appearance . . . if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.<sup>170</sup>

---

160. *Id.* at 81.

161. 100 U.S. 303 (1879).

162. *Id.* at 310-12.

163. *Id.* at 307.

164. *See Myers v. Anderson*, 238 U.S. 368 (1915).

165. 118 U.S. 356 (1886).

166. *Id.* at 373-74.

167. *Id.* at 357.

168. *Id.* at 374.

169. *Id.* at 369.

170. *Id.* at 373-74. The Court in *Shaw* cited the *Yick Wo* case for the proposition that in some rare cases, race-neutral action on its face may conceal a racial agenda. *Shaw v. Reno*, 113 S. Ct. 2816, 2825 (1993) ("[C]lassification that is ostensibly neutral but is an obvious pretext for racial discrimination.").

In 1954, the Court decided *Brown v. Board of Education*,<sup>171</sup> which struck down state-imposed racial segregation in public schools because it violated the Equal Protection Clause.<sup>172</sup> The Court rejected the "separate but equal" doctrine in *Brown* and held that the segregation of school children on the basis of race deprives minority children of equal educational opportunities.<sup>173</sup> The *Brown* decision was subsequently applied to other public facilities such as public beaches,<sup>174</sup> public transportation,<sup>175</sup> and theaters.<sup>176</sup>

In 1976, the Court addressed the requirement of discriminatory intent in *Washington v. Davis*.<sup>177</sup> In *Washington*, black police applicants alleged that the recruiting procedures of the District of Columbia Metropolitan Police Department unconstitutionally discriminated on the basis of race.<sup>178</sup> The complaint focused on a written personnel test that purportedly excluded a disproportionately high number of black applicants and bore no relation to job performance.<sup>179</sup> In reversing the appellate court's holding that the disproportionate impact comprised a constitutional violation,<sup>180</sup> the Court declared that "standing alone, [disproportionate impact] does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny."<sup>181</sup> The Court reasoned that, "[T]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."<sup>182</sup> The *Washington* decision stood for the important principle that a plaintiff challenging legislation that is not discriminatory on its face cannot rely solely on a showing of a disproportional burden on a particular minority group.<sup>183</sup>

---

171. 347 U.S. 483 (1954).

172. *Id.* at 495 ("[P]laintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

173. *Id.*

174. *See* *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955).

175. *See* *Gayle v. Browder*, 352 U.S. 903 (1956) (enjoining racial segregation of city buses).

176. *See* *Schiro v. Bynum*, 375 U.S. 395 (1964).

177. 426 U.S. 229 (1976).

178. *Id.*

179. *Id.*

180. *Id.* at 237.

181. *Id.*

182. *Id.* at 237-39.

183. *Accord* *Village of Arlington Heights v. Metropolitan Hous. Dev.*, 429 U.S. 252, 265-66 (1977) (stating that "official action will not be held unconstitutional solely

## 2. Classifications Benefitting Minorities

Not all of the cases alleging improper racial classifications involve discrimination against the race identified. In the famous *Bakke* decision,<sup>184</sup> a white applicant challenged the admissions policy of a medical school that allocated a percentage of its openings to minorities under the Equal Protection Clause.<sup>185</sup> In an extremely divided panel, Justice Powell, delivering the Court's opinion, evidenced an unwillingness to distinguish between classifications that burdened minorities and classifications that benefitted them.<sup>186</sup> Powell stated: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial scrutiny."<sup>187</sup> However, Justices Brennan, Marshall, White and Blackmun concurred only in the judgment, declaring that "the central meaning of today's opinions [is that] [g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice."<sup>188</sup>

When the Court returned to the issue of affirmative action in 1989, it viewed race-conscious state action much more suspiciously. In *City of Richmond v. Croson*,<sup>189</sup> the Court held that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification,"<sup>190</sup> and that the appropriate standard of review was strict scrutiny.<sup>191</sup> Justice O'Connor, writing for the *Croson* majority, offered two rationales for the use of strict scrutiny. First, she argued that the determination of whether a classification was truly "benign or remedial" and not the product of local racial politics could only be achieved by applying strict scrutiny.<sup>192</sup> Second, Justice O'Connor indicated that race-consciousness is, in and of itself, pernicious, as it impedes society's natural progression toward race

---

because it results in disproportionate impact").

184. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

185. *Id.* at 277. The plaintiff demonstrated that he had both a higher grade point average and a higher MCAT score than other applicants who were admitted under the "special (minority) admissions" program. *Id.*

186. *Id.* at 290.

187. *Id.*

188. *Id.* at 325.

189. 488 U.S. 469 (1989). *Croson* involved Richmond's plan to require its prime contractors to subcontract at least 30% of their construction contracts to minority businesses. *Id.* at 477.

190. *Id.* at 494.

191. *Id.* at 493. The portion of Justice O'Connor's opinion indicating the appropriate standard of review was joined by Chief Justice Rehnquist and Justices White and Kennedy. In addition, Justice Scalia agreed that strict scrutiny must be applied to all governmental racial classifications. *Id.* at 520 (Scalia, J., concurring).

192. *Id.* at 493.

neutrality and color blindness.<sup>193</sup> *Croson* was an important decision in so far as it delineated the bright line on racial classifications for affirmative purposes: The use of race to classify citizens requires strict scrutiny regardless of the justification.

Summarizing the Court's treatment of racial classifications, it appears that the Court now views race as a suspect classification and, when implemented by a state, such legislation must be narrowly tailored to serve a compelling state interest.<sup>194</sup> The Court currently remains unwilling to distinguish between classifications that benefit minorities and those which burden them, applying strict scrutiny to both cases.<sup>195</sup> Finally, a plaintiff bringing an Equal Protection claim to challenge facially race-neutral legislation must do more than establish its disparate impact on different races.<sup>196</sup>

#### IV. ANALYSIS OF THE COURT'S OPINION

##### A. Justice O'Connor's Majority Opinion

###### 1. Introduction

The Court decided *Shaw* by the barest of margins, with Justice O'Connor's majority opinion gathering only four other votes.<sup>197</sup> Although there were no concurring opinions, Justices White,<sup>198</sup> Blackmun,<sup>199</sup> Stevens,<sup>200</sup> and Souter<sup>201</sup> each wrote a separate dissenting opinion. The majority concluded that racially apportioned Congressional districts<sup>202</sup>

193. *Id.* at 492-98.

194. *See* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74, 279-80 (1986).

195. *Id.* at 273 ("[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to discrimination.")

196. *See supra* notes 177-83 and accompanying text.

197. *Shaw v. Reno*, 113 S. Ct. 2816 (1993). Justice O'Connor was joined by the Chief Justice and Justices Kennedy, Thomas, and Scalia. *Id.*

198. *Id.* at 2834 (White, J., dissenting).

199. *Id.* at 2843 (Blackmun, J., dissenting).

200. *Id.* (Stevens, J., dissenting).

201. *Id.* at 2845 (Souter, J., dissenting).

202. The majority's opinion focuses on the unusual shape of the 12th district, and specifically leaves open the question of whether "the intentional creation of . . . [racially determined] districts, without more' always gives rise to an equal protection claim." *Id.* at 2828 (citations omitted). In limiting its holding to a district "so irratio-



must withstand strict scrutiny, even if such apportionment constitutes a response to the Congressional mandates of the Voting Rights Act.<sup>203</sup> The decision reflects a major departure from the Court's stance regarding previous state responses to the Voting Rights Act<sup>204</sup> and leaves many commentators wondering about the Act's future.<sup>205</sup>

The decision permitted five white North Carolina voters to challenge the state's creation of a majority-minority district as a violation of the

---

nal on its face that it can be understood only as an effort to segregate voters . . . because of their race," *id.* at 2832, the Court implied that an important distinction could be drawn between the use of race to create odd-shaped districts and the use of race to create compact, contiguous districts. See Alienikoff & Issacharoff, *supra* note 34, at 610. "[A] bizarrely shaped district bespeaks a willful manipulation of the districting system to force an electoral outcome upon a disinclined electorate. . . . A 'natural' compact district sends no such message, even if it has been defined to create a majority-minority district." *Id.*

203. *Shaw*, 113 S. Ct. at 2832. The Voting Rights Act requires that any changes to the voting practices of a state covered under § 5 must not work to dilute minority voting strength. 42 U.S.C. § 1973(c) (1981 & Supp. 1994). Accordingly, § 5 barred North Carolina from implementing any change resulting in a relative decrease in minority voting strength. See *Beer v. United States*, 425 U.S. 130, 141 (1976). Because § 5 covers 40 of North Carolina's 100 counties, the Act required the legislature to draw the new 12th district in such a way that a black representative would possess a likely chance of being elected or risk violating the Act's nonretrogression provision. See Alienikoff and Issacharoff, *supra* note 34, at 591 n.13 ("In its objection letter to the state, the Department of Justice identified the failure to create a second majority-black congressional district as the grounds for its failure to preclear . . . . [Therefore,] the state was obligated to meet the terms of the objections set forth by the Department of Justice."). Speaking on behalf of the Lawyers Committee for Civil Rights Under Law, attorney Frank Parker stated: "This puts states into a bind, a Catch-22. . . . If states fail to elect more minorities, they will violate the Voting Rights Act . . . [but] if they use racial criteria to draw boundaries, they may violate the Constitution." David Savage, *High Court Rules Against 'Racial Gerrymandering'*, L.A. TIMES, June 29, 1993, at A1.

204. See *United Jewish Org. v. Carey*, 430 U.S. 144, 161 (1977) ("[T]he Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5."); see also Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1420-21 (1991). "Because entrenched discrimination in the covered jurisdictions persisted, and continues to persist, . . . the United States Supreme Court has consistently interpreted section 5 to give it 'the broadest possible scope.'" *Id.* (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

205. See Dick Lehr, *High Court Backs Off Race-Based Preferences*, BOSTON GLOBE, July 11, 1993, § 3, at 1 (quoting Harvard law professor Laurence Tribe in noting that the *Shaw* decision indicates the Court "is moving away from the Voting Rights Act, even casting a constitutional cloud over it"); Stuart Taylor Jr., *Making a Mess Instead of a Rule for Racial Gerrymanders*, THE RECORDER, July 13, 1993, at 6 ("If the Court were to carry its logic to the point of requiring 'color-blind' districting, it would cripple the abilities of Congress, the states and the courts to protect black voters' rights to the equal representation promised by the Voting Rights Act.").

Equal Protection Clause.<sup>206</sup> Prior to *Shaw*, the Court required that a challenge to state voting practices demonstrate that either the governmental body unfairly prevented an individual from casting a ballot,<sup>207</sup> or that the practice effectively diluted the strength of the group to which the complaining voter belonged.<sup>208</sup> In *Shaw*, however, the Court recognized a new cause of action by allowing a voter to challenge a reapportionment statute by merely alleging that race constituted a predominant factor in the creation of an electoral district.<sup>209</sup> While the full effect of the *Shaw* decision remains to be seen, at a minimum it clearly impacts a state's ability to comply with the Voting Rights Act.<sup>210</sup> It also limits a state's ability to remedy historic discriminatory voting practices.<sup>211</sup> In the more extreme case, this decision could effectively eviscerate the Voting Rights Act and prevent future state action designed to remedy discrimination against minority voters.<sup>212</sup>

---

206. *Shaw*, 113 S. Ct. at 2831-32. The Court concluded that legislation that distinguishes citizens on the basis of race, even when intended to remedy prior voting discrimination, shall be subject to strict scrutiny. *Id.*

207. For example, the use of literacy tests as a prerequisite to voting was held by the Court to be unconstitutional. *Guinn v. United States*, 238 U.S. 347, 367 (1915). Similarly, the Court has struck down poll taxes and other impediments to voting. See *supra* notes 63-92 and accompanying text.

208. See *United Jewish*, 430 U.S. at 165 (holding that New York's reapportionment plan "did not minimize or unfairly cancel out white voting strength").

209. *Shaw*, 113 S. Ct. at 2832 ("[A]ppellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina [districting scheme] can be understood only as an effort to segregate voters . . . because of their race . . .").

210. See Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 485 (1993) (discussing the conflicting directives of the *Shaw* decision and the Voting Rights Act).

211. *Id.*

212. The Voting Rights Act is important for its ability to remedy state voting practices that abridge or dilute minority voting strength. Such remedial measures necessarily require the use of classifications to rectify previous discriminatory practices. *Shaw*, 113 S. Ct. at 2835 (White, J., dissenting) ("[E]xtirpating such [racial] considerations from the redistricting process is unrealistic. . . ."); see also Pildes & Niemi, *supra* note 210, at 486 (the Voting Rights Act "not only permits, but requires policymakers, in certain specific circumstances, to be race conscious when they draw electoral district lines"). If the Court's decision holds that the use of racial discrimination in this manner is a violation of the Equal Protection Clause, thereby eliminating its remedial value, the Act amounts to nothing more than a diagnosis without a cure.

## 2. What Injury is Being Protected Against?

The new cause of action recognized by the *Shaw* majority is somewhat of a paradox. In adopting this cause of action, the majority opinion relied exclusively on the Equal Protection Clause of the Fourteenth Amendment and rejected any Fifteenth Amendment vote dilution arguments.<sup>213</sup> The paradox lies in the fact that the new cause of action exclusively reflects a voter's remedy, yet the harm stands independent of any injury attributable to voting.<sup>214</sup> The essence of the plaintiffs' claim was that the Constitution, and specifically the Fourteenth Amendment, guaranteed them the "right to participate in a 'colorblind' electoral process."<sup>215</sup> Future plaintiffs pleading this new cause of action need not show that a state's districting plan would reduce a group's voting strength, or even that the districting would likely have any effect on the election results.<sup>216</sup> The plaintiff need only show that the electoral process was tainted by district lines drawn along racial boundaries without sufficient justification.<sup>217</sup>

---

213. *Shaw*, 113 S. Ct. at 2828. "Classifying citizens by race, as we have said, . . . threatens special harms that are not present in our vote-dilution cases. It therefore warrants different analysis." *Id.* But see *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). *Gomillion* involved a geometrically square municipal district which was redrawn into a 28-sided figure in order to exclude black communities on the city's perimeter, thereby preserving a white majority. *Id.* at 340-41. The Court held that the racially based gerrymander violated the 15th Amendment, but did not address the 14th Amendment argument. *Id.* at 345.

Justice White's dissent in *Shaw* unnecessarily focuses on the plaintiff's vote dilution claim even though this claim was expressly denounced by the majority. See *infra* notes 291-97 and accompanying text.

214. *Shaw*, 113 S. Ct. at 2832. The injury, the majority claims, is one to society. *Id.* "Racial classifications of any sort pose the risk of lasting harm to our society . . . . Racial gerrymandering . . . threatens to carry us further from the goal of a political system in which race no longer matters." *Id.*

215. *Id.* at 2824. The Equal Protection Clause reads: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1. The Court has recognized that while Congress may address the effects of racial discrimination, states will only be permitted to address the same effects by adhering to the constraints of the 14th Amendment. *City of Richmond v. Croson*, 488 U.S. 469, 490 (1989).

That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit constraint on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions.

*Id.*

216. See *Shaw*, 113 S. Ct. at 2816.

217. *Id.* at 2832. The majority's opinion suggests that compliance with the Voting

In upholding the plaintiffs' claim, the Court has apparently extended the *Croson*<sup>218</sup> decision to the field of voting rights cases.<sup>219</sup> By eliminating the vote dilution argument from the calculation, the majority's opinion appears considerably weakened when the consequences of the decision are weighed against the injury sought to be prevented.<sup>220</sup> In striving

---

Rights Act alone will not satisfy the "sufficient justification" necessary to withstand strict scrutiny. *Id.* at 2831. "[W]e do not read *Beer* or any of our other § 5 cases to give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression." *Id.* (discussing *Beer v. United States*, 425 U.S. 130 (1976)).

218. See *supra* notes 189-93 and accompanying text.

219. There are many unanswered questions involving the scope of the *Shaw* decision. These questions will persist until the Court defines the limitations on this vague cause of action. However, the Court's decision seemingly applied the holding in *Croson* to districting applications. See *Alienikoff & Issacharoff, supra* note 34, at 644 ("*Croson* exhibits extreme unfriendliness to race-conscious measures, rejecting common-sense readings of the historical and social context of the city's action and insisting upon a burdensome level of proof of prior discrimination."). The *Croson* majority stated: "While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia." *City of Richmond v. Croson*, 488 U.S. 469, 499 (1989). The *Shaw* majority has signalled North Carolina and other states that even the presence of previous racial discrimination is not a satisfactory justification for the conscious use of race in creating congressional districts. *Shaw*, 113 S. Ct. at 2831-32. Although recognizing a state's "interest in eradicating the effects of past racial discrimination," the Court noted that a state "must [nevertheless] have a 'strong basis in evidence for [concluding] that remedial action is necessary.'" *Id.* (quoting *Croson*, 488 U.S. at 500).

220. While voting practices may infringe on both individual and group interests, most commentators agree that once complete access to the voting process has been achieved, group rights become the main concern. See *Guinier, supra* note 204, at 1423 n.36 ("Because the political process comprehends more than the ballot box and the formal right to enter the polling place, nonrepresentation for any group of voters is the evil to be eradicated."). The injury cannot be assumed to be to the individuals themselves, who have not been denied the right to cast a ballot and have it counted. See *Shapiro, supra* note 16, at 198 ("[B]oth legislative and judicial history suggest that [the Voting Rights Act] creates group rights reaching far beyond the rights of individuals to register and to vote."). *But see Reynolds v. Simms*, 377 U.S. 533, 561 (1964) (Chief Justice Warren stated that voting rights, like other rights derived from the Equal Protection Clause, are "individual and personal in nature"). Nor are voters of any group entitled to have their candidate elected. See *Sanford Levinson, Commentary: Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257, 270 (1985) ("Courts have insisted up to now that the Constitution does not guarantee proportional representation."); *Shaw*, 113 S. Ct. at 2846 (Souter, J., dissenting) (explaining that "one's constitutional rights are not violated merely because the candidate one supports loses the elec-

to protect the plaintiffs' right to participate in a colorblind electoral process, a right that is somewhat dubious despite its idealistic goals,<sup>221</sup> the Court brought into question the use of districting as a remedy to violations of the Voting Rights Act.<sup>222</sup>

Despite Justice O'Connor's repeated warnings of the evils of racial classifications, the cause of action recognized by the majority is likely to be used in the future for political gain.<sup>223</sup> When viewed in this light, the majority's decision could contravene vital civil rights legislation that one commentator described as "the most successful . . . of the century,"<sup>224</sup> by allowing individual voters to bring this cause of action and complain of an injury to society. Ironically, the majority's decision may impede, rather than further, society's goal of a colorblind political system.<sup>225</sup>

---

tion"). In *Shaw*, the injury cannot be considered a group right because the majority rejected the vote dilution argument, that being an injury to a group rather than an individual. *Id.* at 2824. Furthermore, the white plaintiffs cannot claim that they as a race suffer a social stigma from the classification. See *United Jewish Org. v. Carey*, 430 U.S. 144, 165 (1977) (finding New York's plan "represented no racial slur or stigma with respect to whites or any other race"). The "injury" complained of by the plaintiffs in *Shaw* is neither an individual injury nor a group injury, but rather an injury to society in general. See *Alienikoff & Issacharoff, supra* note 34, at 514 (noting that the injury in *Shaw*, an inability to participate in a colorblind electoral process, is shared by the public in general).

221. The Court acknowledges that a state legislature "always is aware of race when it draws district lines." *Shaw*, 113 S. Ct. at 2826. This principle renders the majority's decision all the more curious when one considers North Carolina's record concerning the success of African-American Congressional candidates. Prior to the redistricting, North Carolina had not elected an African-American representative to Congress since the Reconstruction. See Joan Biskupic, *Court Lets Whites Challenge 'Bizarre' Redistricting Plans; States Must Show 'Compelling' Reason in Aiding Minorities*, WASH. POST, June 29, 1993, at A1.

222. Although the majority explicitly left open the question of whether the use of majority-minority districts will necessarily result in a violation of the 14th Amendment, *Shaw*, 113 S. Ct. at 2828, the Court reiterated that "a racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Id.* at 2825 (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (emphasis added)).

223. The majority's recognition of a cause of action based on the use of race in drawing congressional districts can now be asserted by a losing political faction in an odd-shaped district. If the faction can show that race was a primary consideration in the creation of the district, which is the case for many of the majority-minority districts around the country, then the district must satisfy strict scrutiny analysis or be redrawn. See *Shaw*, 113 S. Ct. at 2816.

224. Grofman, *supra* note 1, at 1247.

225. There are many commentators who contend that the election of minority leaders is the only way to gain acceptance of white majority voters. See, e.g., Abrams, *supra* note 2, at 503 ("The election of minority representatives is a crucial first step toward a nondiscriminatory political process."); see also Shapiro, *supra* note 16, at 204. "While the costs imposed by affirmatively gerrymandered districts are real and nontrivial, they pale in comparison with the alternative: nothing less than a society

The majority's argument focuses squarely on the evils of racial classifications. The majority correctly notes that racial classifications pose significant dangers to a society based on the equality of man.<sup>225</sup> Drawing districts along racial boundaries reinforces racial stereotypes, perpetuates racial bloc voting<sup>227</sup> and violates the American political principle of geographical representation.<sup>228</sup> Furthermore, as the majority points out, racial districting signals elected officials that they need only represent the racial group that elected them rather than their entire constituency.<sup>229</sup> As an enlightened society, we must view the goal of a colorblind society as an essential destination, and the decision in *Shaw* as a step toward that goal.

The problem with the majority's decision in *Shaw* is its failure to recognize the need for race-based classifications to remedy past discriminatory practices.<sup>230</sup> Previously in *Croson*<sup>231</sup> and *Metro Broadcasting*,<sup>232</sup> the Court acceded to this very contention, but the majority in *Shaw* con-

where political power is perpetually stratified along racial lines." *Id.* "[The assumption] that without safe districting, racial polarization will subside—is untenable. The refusal to redress the continuing subordination of blacks in American politics is more likely to increase conflict." *Id.* at 204 n.93.

226. *Shaw*, 113 S. Ct. at 2832 ("Racial classifications of any sort pose the risk of lasting harm to society. . . . Racial classifications with respect to voting carry particular dangers.").

227. *Id.* at 2827.

228. See Grofman, *supra* note 1, at 1262-63. The author emphasizes that common sense geographical boundaries are essential to effective representation. *Id.* Furthermore, a consequence of ill-defined districts is a difficulty in dislodging incumbents. *Id.* See generally Howard & Howard, *supra* note 2. The authors argue that the use of race in an attempt to predetermine the results of an election "pollutes" the integrity of the electoral process by giving one group an advantage over other groups. *Id.* at 1619.

229. *Shaw*, 113 S. Ct. at 2827.

230. It is the author's contention that the use of race to eradicate the harms of prior racial discrimination is a sufficient justification to pass the strict scrutiny test. Although the Court previously suggested that remedying these harms is a compelling state interest, see *infra* notes 246-48 and accompanying text, the Court in *Shaw* ignores this argument.

231. *City of Richmond v. Croson*, 488 U.S. 469, 491-93 (1989). "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Id.* at 493.

232. *Metro Broadcasting v. Federal Communications Comm'n*, 497 U.S. 547, 601 (1990) (Stevens, J., concurring) ("Today the Court firmly rejects the proposition that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong.").

spicuously fails to address this possibility.<sup>233</sup> The Court's failure to address the issue is problematic since it creates uncertainty and will undoubtedly produce more litigation.<sup>234</sup>

### 3. Previous Treatment of Racial Gerrymanders

The majority in *Shaw* went to great lengths in order to establish that North Carolina's reapportionment plan, while race-neutral on its face, was "so irrational . . . that it [could] be understood only as an effort to segregate voters into separate voting districts because of their race. . . ."<sup>235</sup> However, the Court's efforts to frame the plan as race-based was completely unnecessary because the appellees freely conceded the plan involved racial classifications.<sup>236</sup> Once the majority determined that North Carolina's plan did in fact constitute a racial classification, it then turned to the Court's previous treatment of state districting along racial lines.

In establishing the race-based nature of North Carolina's plan, the majority first emphasized that it constituted a racial gerrymander<sup>237</sup> similar to the one struck down by the Court in *Gomillion*.<sup>238</sup> However, while on the surface North Carolina's plan resembles the Tuskegee gerrymander in *Gomillion*, there are two important distinctions between them. First, *Gomillion* was a vote dilution case decided by the Court on Fifteenth Amendment grounds. In contrast, the *Shaw* majority expressly

---

233. *Shaw*, 113 S. Ct. at 2831-32. While as a method the majority acknowledges that the court has allowed racial classifications to eradicate "the effects of past racial discrimination," the majority neither acknowledges the presence of past discrimination nor does it give any indication that it will approve of such measures in the future. *Id.*

234. See Alienikoff & Issacharoff, *supra* note 34, at 643 (suggesting that *Shaw* may "have inaugurated a decennial plague of litigation challenging the reapportionment plans of states caught between a race-conscious, group-based Voting Rights Act and the individualistic, near colorblind ideology of *Croson*").

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

236. Appellees' Supplemental Brief at 2, *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (No. 92-357) (characterizing North Carolina's creation of the majority-minority districts as "deliberate").

237. *Shaw*, 113 S. Ct. at 2824 ("It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past."). "Gerrymandering" is the "process of dividing a state . . . with such a geographical arrangement as to accomplish an ulterior or unlawful purpose as, for instance, to secure a majority for a given political party in districts where the result could be otherwise if they were divided according to obvious natural lines." BLACK'S LAW DICTIONARY 687 (6th ed. 1990).

238. *Shaw*, 113 S. Ct. at 2826-27. The Court describes the district in *Gomillion* as an example of a districting plan which is "so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race." *Id.*

rejected any vote dilution arguments,<sup>239</sup> holding that the type of districting at issue "require[s] careful scrutiny under the Equal Protection Clause."<sup>240</sup>

Second, there is a critical distinction between the purposes underlying the district lines in *Gomillion* and the North Carolina plan. The Court in *Gomillion* found the City of Tuskegee's systematic removal of "all save four or five of its 400 negro voters" to constitute an attempt to deprive the excluded blacks of the benefits of residency.<sup>241</sup> On the other hand, North Carolina's redistricting reflected a response to the Voting Rights Act<sup>242</sup> and 120 years of complete exclusion of elected black representatives.<sup>243</sup> The Court's decision to put the North Carolina plan in the same category as the Tuskegee district clearly stands contrary to Congress' intent in enacting the Voting Rights Act<sup>244</sup> and cannot be squared with other recent decisions on this issue.<sup>245</sup>

#### 4. Previous Treatment of Racial Classifications

Justice O'Connor's opinion next focused on the evils of racial classifications and the Court's previous treatment of racial classification under Fourteenth Amendment analysis. Echoing the justifications for strict scrutiny that she wrote in *Richmond v. J.A. Croson Co.*,<sup>246</sup> Justice O'Connor once again declared that strict scrutiny is necessary to determine whether a racial classification is "benign."<sup>247</sup> Since few, if any, ap-

239. See *supra* notes 213-17 and accompanying text.

240. *Shaw*, 113 S. Ct. at 2826 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 348 (1960) (Whittaker, J., concurring)). It is curious that Justice O'Connor cites *Gomillion* to support her Equal Protection contention because only one justice in *Gomillion* decided the case on 14th Amendment grounds. *Gomillion*, 364 U.S. at 349. (Whittaker, J., concurring).

241. *Id.* at 341.

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

243. *Id.* at 2831-32.

244. See *Abrams*, *supra* note 2, at 520 ("The approach that most courts currently favor [to violations of the Voting Rights Act] creates one or more supermajority 'safe' districts, in which minority group members comprise at least sixty-five percent of the population. This arrangement falls within a category of race conscious remedies that the framers of the Voting Rights Act explicitly anticipated.")

245. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (stating that "the central purpose of the Equal Protection Clause of the 14th Amendment is prevention of official conduct discriminating on the basis of race").

246. 488 U.S. 469 (1989).

247. *Shaw*, 113 S. Ct. at 2830 ("[T]he very reason that the Equal Protection Clause demands strict scrutiny of all racial classifications is because without it, a court can-



plications of racial classifications will survive strict scrutiny as the Court has applied it,<sup>248</sup> the majority essentially eliminated the use of racial classifications for any purpose.

Detailing the insidious nature of racial classifications, the majority relied on language from *Hirabayashi v. United States*:<sup>249</sup>

Classifications of citizens solely on the basis of race 'are by their nature odious to a free people whose institutions are founded upon the doctrine of equality.' . . . Accordingly, we have held that the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest.<sup>250</sup>

An important distinction can be drawn between the racial-classification cases cited by the Court and the North Carolina redistricting. In *Hirabayashi v. United States*,<sup>251</sup> *Loving v. Virginia*,<sup>252</sup> and *Brown v. Board of Education*,<sup>253</sup> the racial classifications at issue contained a corresponding denial of a privilege or right. Citizens, depending on their

---

not determine whether or not the discrimination truly is benign.”).

248. See *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (stating that “we concluded that such programs should not be subjected to conventional ‘strict scrutiny’—scrutiny that is strict in theory, but fatal in fact”); see also *Alienikoff & Issacharoff*, *supra* note 34, at 592 (explaining that government decisions based on racial classifications demand “extraordinary justification—a burden few such decisions were expected to, or could meet”).

249. 320 U.S. 81 (1943).

250. *Shaw*, 113 S. Ct. at 2824-25 (quoting *Hirabayashi*, 320 U.S. at 100).

251. 320 U.S. 81 (1943). Concerning the state-imposed 8 p.m. curfew of citizens of Japanese ancestry, the Court denounced racial classifications in general, but upheld the application at bar because of the exigencies associated with a state of war. *Id.* at 100, 102.

252. 388 U.S. 1, 11 (1967) (holding that states may not prohibit interracial marriages because such prohibitions violate the Equal Protection Clause).

253. 347 U.S. 483 (1955). *Brown* was a class action challenging the racial segregation of school children. *Id.* at 487-88. *Brown* bears the closest resemblance to *Shaw* in that citizens (here children) were not denied a right, but merely identified for purposes of being placed in one school rather than another. *Id.* at 493 (“[P]hysical facilities and other ‘tangible’ factors [were] equal.”). However, *Brown* can be distinguished from *Shaw* in that each member of a race was not only identified but also segregated. *Id.* at 494. The stigma associated with the state’s classification was present for all of society to witness. *Id.* (stating that “the policy of separating the races is usually interpreted as denoting the inferiority of the negro group”). The state in *Shaw* made no *uniform* assignment, but instead made the racial classification for “counting purposes” only. See *infra* note 255; see also *Shaw*, 113 S. Ct. at 2849 n.9 (Souter, J., dissenting). In *Shaw*, Justice Souter noted:

[I]t seems utterly implausible to me to presume . . . that North Carolina’s creation of this strangely-shaped majority-minority district “generates” within the white plaintiffs here anything comparable to “a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”

*Id.* (quoting *Brown*, 347 U.S. at 494).

heritage, were either prohibited from participating in an activity or singled out and treated separately on the basis of race.<sup>254</sup>

In *Shaw*, North Carolina has classified voters on the basis of race to serve a "counting" function only.<sup>255</sup> This districting neither affords nor abridges any rights, and each voter may cast his or her vote in full accordance with Constitutionally protected rights.<sup>256</sup> Furthermore, the classification is transparent to society in that no social stigma can be associated with the classification.<sup>257</sup> The absence of an identifiable stigma associated with the districting process distinguishes *Shaw* with the other racial classification cases identified by the majority. When considered in this light, the requirement of strict scrutiny in this case should be replaced by a greater deference to state legislatures.<sup>258</sup>

##### 5. Why do Appearances Matter?

The most enigmatic aspect of the majority's opinion is the extent to

254. See, e.g., *Hirabayashi*, 320 U.S. at 83 (explaining that American citizens of Japanese ancestry living in a military area were confined to their residences between 8 p.m. and 6 a.m.); *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (discussing bans on interracial marriages); *Brown*, 347 U.S. at 487-88 (discussing segregation of African-American school children).

255. In order to meet what it considers to be an appropriate percentage of African-American voters in its 12 districts, North Carolina classifies its voters on the basis of race in order to "count" them. The classification is transparent to the individual voters, who register and vote for the candidate of their choice as though no classification had occurred. See *Shaw*, 113 S. Ct. at 2816.

256. Justice Souter raises this distinction by arguing that a separate Equal Protection analysis should exist for voting and non-voting cases. *Shaw*, 113 S. Ct. at 2846 (Souter, J., dissenting).

A second distinction between districting and most other governmental decisions in which race has figured is that those other decisions using racial criteria characteristically occur in circumstances in which the use of race to the advantage of one person is necessarily at the obvious expense of a member of a different race . . . . In districting, by contrast, the mere placement of an individual in one district instead of another denies no one a right or benefit provided to others.

*Id.*

257. *Shaw*, 113 S. Ct. at 2826 ("A reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses."); see also *id.* at 2849 n.9 (Souter, J., dissenting) (stating that "the complaint nowhere alleges any type of stigmatic harm").

258. The requisite showing of a discriminatory history that would mandate such classifications is also necessary.

which the Court is willing to extend the principle of a colorblind electoral process and the consequences of its action. At one end of the spectrum, North Carolina's twelfth district may be so irregular that it renders the decision an anomaly, lacking any practical significance.<sup>259</sup> At the other end, the decision may sound the death knell for the creation of majority-minority districts.<sup>260</sup> Recognizing the quandary that states would be left in without further guidance, the majority appears to have provided a "backdoor" through which states could accomplish the results intended by the North Carolina legislature without violating a voter's Fourteenth Amendment right.<sup>261</sup>

The Court warns that when it comes to reapportionment, "appearances do matter."<sup>262</sup> In the context of the Court's opinion, it appears that in order for a plaintiff to bring a successful claim under this new cause of action, a state must disregard "traditional districting principles such as compactness, contiguity, and respect for political subdivisions."<sup>263</sup> It may be inferred from the Court's language and its choice to distinguish,<sup>264</sup> rather than overrule *United Jewish Organizations*, that a state may accomplish its intended result as long as it maintains traditional districting principles.<sup>265</sup>

---

259. *Id.* at 2848 (Souter, J., dissenting) ("The shape of the district at issue in this case is indeed so bizarre that few other examples are ever likely to carry the unequivocal implication of impermissible use of race that the Court finds here."). Indeed, the majority ignored North Carolina's other majority-minority district, the first district, which the majority described as "somewhat hook shaped," resembling "a bug splattered on a windshield," and similar in appearance to a "Rorschach ink-blot test." *Id.* at 2820.

260. Clearly, the use of safe districts will soon be a thing of the past if the majority actually applies the holding in *Croson*, that prohibits all uses of racial classifications without proper justification, especially if neither compliance with the Voting Rights Act nor remedying prior racial discrimination provides proper justification. See *Generally City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

261. See Alienikoff & Issacharoff, *supra* note 34, at 646 n.243 (noting that compact districts could be immunized from constitutional requirements because with compact districts, "there are simply too many other variables that states may legitimately take into account, such as geography and political boundaries, in drawing districts").

262. *Shaw*, 113 S. Ct. at 2827.

263. The majority does not concede that even if a state adheres to these principles, it will be exempt from a claim of racial gerrymandering. *Id.* at 2827. The majority states that the traditional districting principles are merely "objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Id.*

264. *Id.* at 2829 (stating that "UJO's framework simply does not apply where, as here, a reapportionment plan is alleged to be so irrational on its face that it immediately offends principles of racial equality").

265. See *id.* at 2826.

[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district

While both the majority and the dissents agree that the Constitution does not require a districting plan to exhibit characteristics such as compactness and contiguity,<sup>266</sup> their absence can produce a far more tangible injury to voters than the majority ultimately recognizes. A district where boundaries are drawn in such a way that its residents cannot identify a distinct geographical rationale, deprives its residents of the type of district that the American political system is meant to provide.<sup>267</sup> The use of cognizable districts facilitates the activities essential to electoral success, such as campaigning, mobilizing and forming alliances.<sup>268</sup> Therefore, when state legislatures ignore the principles of sound districting in order to implement political agendas, the harm done to the residents of the affected districts greatly outweighs the harm caused by the racial "counting" that occurred in *Shaw*.<sup>269</sup>

While the Court emphasized that no constitutional standard requiring a district to be compact or contiguous exists, the Court previously required other plaintiffs to make a showing of geographical compactness to bring a voting district complaint.<sup>270</sup> In *Thornburg v. Gingles*,<sup>271</sup> the Court

---

lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions.

*Id.*

266. The majority states that "these criteria are important not because they are constitutionally required—they are not . . . ." *Id.* at 2827. Justice White's dissenting opinion states that "while district irregularities may provide strong indicia of a potential gerrymander, . . . they have no bearing on whether the plan ultimately is found to violate the Constitution." *Id.* at 2841 (White, J., dissenting). Justice Stevens' dissenting opinion also argues that there is no constitutional requirement of compactness or contiguity. *Id.* at 2843 (Stevens, J., dissenting).

267. See Grofman, *supra* note 1, at 1263 (noting that "permitting the construction of districts, whose boundaries are simply not definable in commonsense terms, vitiates the principle that representatives are to be elected from geographically defined districts and vitiates the advantages of such districts as the basis of electoral choice").

268. *Id.* at 1262. The "cognizability principle" distinguishes districts created by disregarding natural boundaries, local subunit boundaries (such as cities and townships), and political subdivisions from districts that are ill-compact because they employ natural boundaries or use sparsely populated cities as district boundaries. The latter districts still provide its constituents with cognizability and thus, it is argued, do not detract from their purpose. *Id.* at 1263.

269. North Carolina's 12th district should have been rejected on the basis of improper districting, rather than using the district's odd shape as evidence to condemn the district on racial classification grounds.

270. *Grove v. Emison*, 113 S. Ct. 1075, 1084 (1993) ("[T]he 'geographically compact majority' and 'minority political cohesion' showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-

adopted as its first threshold requirement for establishing a violation of the Voting Rights Act a requirement that the minority group show it is geographically compact.<sup>272</sup> In *United Jewish Organizations v. Carey*,<sup>273</sup> the Court also held that a state could apportion districts to remedy minority vote dilution provided the state employ "sound districting principles such as compactness and population equality".<sup>274</sup> Furthermore, as many as twenty-five states have districting requirements relating to compactness.<sup>275</sup>

While more difficult to quantify analytically than the principle of "one person, one vote," the notion of compactness remains simple enough to be understood by laypersons. Recent developments provide techniques for evaluating the relative compactness of districts and removes the inconsistency and ad hoc manner in which compactness standards are currently evaluated.<sup>276</sup> Under a compactness analysis, the appearance of especially egregious districts like that of North Carolina's could clearly be subject to invalidation. A compactness requirement would send a message that districts must adhere to principles other than race without impugning the Voting Rights Act.

## 6. Political Protectionism as a Factor

In addition to the compactness rationale, there was another justification the Court could have used to reject the North Carolina reapportionment plan without impairing the range of remedies available to cure Voting Rights Act violations. The democratically-controlled North Carolina legislature rejected the recommendation submitted by the Attorney General to create a second majority-minority district in the state's southeastern region.<sup>277</sup> Instead, the legislature created the twelfth district with the goal of pitting republican candidates against each other to avoid the loss of an incumbent democratic representative.<sup>278</sup> In other words,

---

member district."); *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) (stating that a "minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district").

271. 478 U.S. 30 (1986).

272. *Id.* at 50.

273. 430 U.S. 144 (1977).

274. *Id.* at 168.

275. See Pildes & Niemi, *supra* note 210, at 528.

276. *Id.* at 536 ("Recent developments in both theory and technology now make it possible to evaluate district 'appearances' in a systematic and consistent way.").

277. *Id.* at 490.

278. See *Shaw v. Reno*, 113 S. Ct. 2816, 2842 n.10 (1993) (White, J., dissenting) ("[North Carolina's] decision not to create the more compact southern majority-minority district that was suggested . . . was more likely a result of partisan considerations."); see also Grofman, *supra* note 1, at 1252-53 ("[T]he final Democratic plan

the creation of North Carolina's twelfth district was the product of political protectionism, and as such cannot justify the divergence from ordinary districting considerations.<sup>279</sup> Under these circumstances, the Court correctly attacked North Carolina's districting plan.<sup>280</sup> Unfortunately, the Court focused on the use of race rather than the impropriety of creating "bizarre" districts to ensure political protectionism.

Although the majority's opinion surprised many scholars, the Court's

---

carefully crafted the bizarre configuration of the two black majority House districts so as to avoid negative consequences - such as pairings - for the white Democratic incumbents.").

279. See *Davis v. Bandemer*, 478 U.S. 109, 184 (1986) (Powell, J., concurring in part and dissenting in part) (stating that a political gerrymander's "reliance on 'one person, one vote' does not sufficiently explain or justify the discrimination the plan inflicted on Democratic voters as a group").

280. The Court addressed the issue of political gerrymandering in *Davis*. *Davis* involved a suit brought by Indiana democrats who complained the use of political gerrymanders diluted their votes. *Id.* at 115. In the Marian and Allen county 1982 elections, Democratic candidates received 46.6% of the votes, but only three of the 21 democratic candidates were elected. *Id.* A plurality of Justices concluded that "equal protection violations [occur] only where a history of disproportionate results appeared in conjunction with strong indicia of lack of political power and the denial of fair representation." *Id.* at 139. While *Davis* appears to reject the proposition that the *Shaw* majority could have invalidated the North Carolina district on political gerrymandering grounds, unlike *Shaw*, the *Davis* case included no allegation of ill-compact districts. The combination of districts that are created by political parties in power to achieve political gains and that violate traditional districting principles appears to be a distinct case. The majority's argument that creating a district for the sole purpose of electing a representative from a particular race is "altogether antithetical to our system of representative democracy," *Shaw*, 113 S. Ct. at 2827, can easily be applied to the case of a political party candidate, especially when the political party protects its own interests. At least one Justice would apparently subscribe to this theory. *Id.* at 2844 (Stevens, J., dissenting) ("I believe that the Equal Protection Clause is violated when the State creates the kind of uncouth district boundaries seen in *Karcher v. Daggett*, *Gomillion v. Lightfoot*, and this case, for the sole purpose of making it more difficult for members of a minority group to win an election."); see also *Karcher v. Daggett*, 462 U.S. 725, 748 (1983) (Stevens, J., concurring) (claiming that gerrymandering violates the Equal Protection Clause only when the districting plan serves "no purpose other than to favor one segment—whether racial, ethnic, religious, economic or political—that may occupy a position of strength at a particular point in time, or disadvantage a politically weak segment of the community") (emphasis added). See generally David P. Van Knapp, Annotation, *Diluting Effect of Minorities' Votes by Adoption of Particular Election Plan, or Gerrymandering of Election District, as Violation of Equal Protection Clause of Federal Constitution*, 27 A.L.R. FED. 29 (1993) (discussing federal cases pertaining to the effect of gerrymandering on minorities).

decision stands consistent with a line of racial classification cases outside the sphere of voting. Beginning with *Bakke* and continuing through *Croson* and *Metro Broadcasting*, state action designed to remedy the social evils of past discrimination has gradually fallen from the Court's favor.<sup>281</sup> While the majority furthers an admirable goal of a colorblind government, it naively believes that racial prejudice can be systematically eliminated by simply wishing it so. While it remains to be seen whether *Shaw* is the beginning of the end for the Voting Rights Act, the current Court<sup>282</sup> will clearly look unfavorably towards a claim that any race-based classification is benign.

### B. Justice White's Dissenting Opinion

Justice White's dissent, joined by Justices Blackmun and Stevens,<sup>283</sup> initially focused on previously recognized constitutional claims brought by voter-plaintiffs.<sup>284</sup> Finding no previous claims to justify the majority's holding, Justice White strongly objected to the majority's recognition of a new cause of action.<sup>285</sup>

Justice White's analysis seemed to ignore the fact that the cause of action in *Shaw* did not previously exist, and consequently fell outside any existing "rights."<sup>286</sup> Furthermore, while the plaintiffs brought their claim as voters, the new cause of action originates from non-voting principles and remains only tangentially related to the act of voting.<sup>287</sup> The

---

281. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (holding racial quotas for college admissions are subject to strict scrutiny); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986). In striking down a policy of preferential treatment of minorities concerning layoffs, the court in *Wygant* noted that "public employers, including public schools, also must act in accordance with a 'core purpose of the Fourteenth Amendment' which is to 'do away with all governmentally imposed discriminations based on race.'" *Id.* (citations omitted).

282. The Chief Justice, as well as Justices O'Connor, Kennedy, Scalia, and Thomas, form a block that has consistently rejected the use of racial classifications to achieve a political end.

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

284. *Id.* (White, J., dissenting). "We have held that only two types of state voting practices could give rise to a constitutional claim." *Id.* (White, J., dissenting). The two types of practices identified by Justice White are those that result in the "direct and outright deprivation of the right to vote" and those that have the intent or effect of "unduly diminishing" the political strength of a group. *Id.* (White, J., dissenting).

285. *Id.* at 2838. Since neither individual nor group rights are asserted by the majority to be violated, Justice White's dissent concludes that "it is irrefutable that appellants in this proceeding likewise have failed to state a claim." *Id.* at 2837 (White, J., dissenting).

286. Justice White argues "[t]here is no support for this distinction in *UJO*, and no authority in the cases relied on by the Court either." *Id.* at 2838 (White, J., dissenting). This only tends to support the majority's assertion that the cause of action is new. See *id.* at 2828.

287. The right to participate in a "colorblind" electoral process, while focusing on

thrust of the majority's argument centers on the premise that each person has the right to participate in a colorblind election process that is no different from the right to participate in a colorblind housing market or a colorblind job market.<sup>288</sup> The dissent nevertheless engages in a lengthy analysis of the vote dilution argument.<sup>289</sup>

Perhaps Justice White's true worry involved the potential use of this new cause of action for attacking districts to obtain a more favorable political climate.<sup>290</sup> The majority, however, never addressed this possibility. As a result, the majority opinion and Justice White's dissenting opinion attacked points in the other's argument while never directly addressing their fundamentals. The dissent correctly notes that the white voters in *Shaw* cannot make out a vote dilution claim based on the Court's recent cases.<sup>291</sup> However, the point of this argument is negligible, as the majority expressly discarded vote dilution as a premise not raised by the appellants.<sup>292</sup> Likewise, while the majority correctly points out that race classifications are subject to strict scrutiny under recent Equal Protection Clause cases,<sup>293</sup> the failure to raise the possibility of

the act of voting itself, is more an indictment on the use of race as a classification. See *id.* at 2827. The Court stated that "[i]f our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury" *Id.* (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991)).

288. *Shaw*, 113 S. Ct. at 2815. Justice O'Connor cites *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), and *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), for the proposition that the 14th Amendment requires states to satisfy strict scrutiny in order to justify distinguishing citizens on the basis of race. *Shaw*, 113 S. Ct. at 2825. *Wygant* was a case involving racial classifications in the job market. See *supra* note 281. *Arlington Hts.* involved claims that municipal rezoning discriminated against racial minorities in violation of the 14th Amendment. *Arlington Hts.*, 429 U.S. at 254.

289. *Shaw*, 113 S. Ct. at 2836 (White, J., dissenting). For Justice White "[t]he issue is whether the classification based on race discriminates against *anyone* by denying equal access to the political process." *Id.*

290. See *Alienikoff & Issacharoff, supra* note 34, at 604 (stating that voting-rights cases "involve large numbers of interested parties who can be expected to exploit any uncertainty in the law").

291. *Shaw*, 113 S. Ct. at 2845 (Souter, J., dissenting) (stating, "Today, the Court recognizes a new cause of action").

292. *Id.* at 2824. The Court noted that the appellants "did not claim that the General Assembly's reapportionment plan unconstitutionally 'diluted' white voting strength . . . ." *Id.*

293. See *City of Richmond v. Croson*, 488 U.S. 469, 493 (1989) (stating that strict scrutiny is necessary in evaluating race-based measures in order to "smoke out" illegitimate uses of race).



potential abuse of this new cause of action tends to diminish the opinion's persuasiveness.

Justice White contends in Part I of his dissent that a vote dilution claim is insupportable based on the Court's previous decisions,<sup>294</sup> relying mainly on *United Jewish Organizations v. Carey* (*UJO*).<sup>295</sup> While the facts of *UJO* are in most respects similar to the present case, the majority clearly identified two important distinctions. First, as Justice O'Connor points out in *UJO*, New York's plan satisfied the Voting Rights Act in creating a majority-minority district according to "traditional districting principles."<sup>296</sup> The *Shaw* majority opinion distinguished the two cases, pointing out that the North Carolina plan was "on its face . . . so highly irregular that it rationally could be understood only as an effort to segregate others by race."<sup>297</sup>

The second distinction is that the plaintiff's cause of action in *Shaw* was different than the plaintiffs' cause of action in *UJO*, which was predicated on vote dilution. While the plaintiffs in *UJO* suffered essentially the same injury as the plaintiffs in *Shaw*, they would not have been successful in bringing the same cause of action.<sup>298</sup> Because the majority created a new cause of action that the plaintiffs in *UJO* were barred from bringing, the dissents' reliance on *UJO* is unconvincing.

The dissent also raised a point that is often misunderstood and needs further elaboration. While attacking the plaintiffs' claim, Justice White raised the following argument: "[T]hough they might be dissatisfied at the prospect of casting a vote for a losing candidate—a lot shared by many, including a disproportionate number of minority voters—surely they

---

294. *Shaw*, 113 S. Ct. at 2836 (White, J., dissenting). For Justice White, "the issue is whether the classification based on race discriminates against anyone by denying equal access to the political process." *Id.*

295. 430 U.S. 144 (1977). *UJO* involved a claim brought by members of New York's Hasidic Jewish community. *Id.* at 152. The plaintiffs argued that New York's reapportionment plan split the Hasidic community, which had previously comprised a whole district, and thereby diluted the voting strength of the Jewish community in order to satisfy § 5 of the Voting Rights Act. *Id.* at 152-53. The New York plan created a majority-minority district consisting of 65% non-white (black and Puerto Ricans) by reassigning part of the Hasidic community to an adjacent district. *Id.* at 152. A plurality of Justices held that New York's districting plan did not violate either the 14th or 15th Amendments. *Id.* at 167. The opinion went on to state that while it was irrefutable that New York deliberately used race to create the district, "its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment nor any abridgment of the right to vote on account of race within the meaning of the Fifteenth Amendment." *Id.* at 165.

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

297. *Id.*

298. *Id.* (expressly stating that the facts in *UJO* would not support the cause of action recognized in *Shaw*).

cannot complain of discriminatory treatment."<sup>299</sup> Undeniably, every district contains many discreet majorities and minorities, be they race, political affiliation, social status, or religious affiliation.<sup>300</sup> Acknowledging this contention, it follows that, in a winner-take-all election, a given minority group bears a distinct disadvantage and will in all probability lose the election to its majority opponent.<sup>301</sup> The minority voter may faithfully cast his ballot in election after election and never manage to elect a candidate of his or her own choosing. Although the voter may feel wronged by the system, merely losing an election has never given rise to a constitutional claim.<sup>302</sup> The problem arises when a political body, such as a state legislature, attempts to "rig" the results of an election to achieve a satisfactory political end. This was the intent in *Gomillion* and many "safe" districts were created with this intent as well.<sup>303</sup>

A safe district is one that is drawn to allow a certain group or minority enough of a majority to ensure their ability to elect the representative of their choice.<sup>304</sup> Courts have used safe districts to remedy violations of section two of the Voting Rights Act and to satisfy the nonretrogression requirements of section five.<sup>305</sup> Where racial bloc voting takes place, as it arguably does in North Carolina,<sup>306</sup> safe districts offer the only proven

299. *Id.* at 2838 (White, J., dissenting).

300. It is impossible to configure a district to maintain equal numbers of every characteristic. First of all, there are not equal numbers of each group, and second, it would be logistically impossible to create an equal distribution even if every group had equal numbers.

301. Of course, this is a simplified assumption that does not take into consideration the effectiveness of campaigning or crossover voting and is merely illustrative.

302. *See Whitcomb v. Chavis*, 403 U.S. 124, 154-55 (1971) ("The mere fact that one interest group or another concerned with the outcome of [the district's] elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where . . . there is no indication that this segment of the population is being denied access to the political system.").

303. *See Howard & Howard, supra* note 2, at 1663 (stating that "safe districts violate the goal of political equality by intentionally manipulating the political system to give one group an unequal chance to influence the system's results").

304. *See Yanos, supra* note 16, at 1813 (defining the term "safe district").

305. *Id.* at 1830 ("The courts, redistricting commissions and the Department of Justice have all chosen 'safe' districting within a single-member-district system as the preferred remedy for implementing proportional representation under section 2 of the Voting Rights Act."); *see also Garza v. County of Los Angeles*, 918 F.2d 763, 776 (9th Cir. 1990) ("The deliberate construction of minority controlled voting districts is exactly what the Voting Rights Act authorizes."), *cert. denied*, 498 U.S. 1028 (1991).

306. The parties in *Shaw* dispute the presence of pervasive racial bloc voting, but

method for allowing minority voters to elect a representative of their own choosing.<sup>307</sup>

Conflicting ideas exist, however, concerning what the exact purpose of a safe district should be. Most courts and commentators have assumed that safe districts are intended to *guarantee* minority voters a victory at the voting booth.<sup>308</sup> However, no set of circumstances can justify state action designed to predetermine an election result.

When a government allocates such an advantage to one group in an election, those who cast ballots in the disadvantaged group suffer a greater harm than merely losing the election. Essentially, their votes are taken from them. In a system of government that holds the right to vote more valuable than all others, even the remedial function of overcoming the evils of social prejudice cannot justify this result.<sup>309</sup>

More appropriately, "safe" districts should be viewed as a means of creating a district in which members of the disadvantaged group are grouped together to overcome biases or offset the effects of past discrimination.<sup>310</sup> As one commentator wrote, "the ideal supermajority level is that at which a minority-supported candidate's defeat could not be attributable to his or her race or the race of his or her supporters."<sup>311</sup> In other words, states should be able to use racial classifications and to create districts where such minorities comprise a majority of the voting population if the area has been demonstrated to be antagonistic towards minority voting rights.<sup>312</sup> However, the idea that a district is safe in the

---

North Carolina's inability to elect one African-American representative from a population that is comprised of 20% African-American for over 100 years prior to the 1990 redistricting speaks for itself. *Shaw*, 113 S. Ct. at 2843 (Blackmun, J., dissenting).

307. See Shapiro, *supra* note 16, at 200 ("In a racially polarized polity . . . , a racial minority will be able to elect representatives only if it constitutes a controlling majority in certain districts. Where blacks are a numerical minority, racial bloc voting means that blacks must back either a white-supported candidate or a loser.")

308. See Abrams, *supra* note 2, at 470 ("[C]ourts have encouraged the use of 'supermajority' districts, with at least sixty-five percent minority population, to compensate for such disadvantages and virtually assure minority voters the opportunity to elect the representative of their choice."); see also Yanos, *supra* note 16, at 1831-32 (stating that "safe districting proponents argue that it does not lead to proportional representation, but rather 'proportional opportunity'").

309. See Howard & Howard, *supra* note 2, at 1655 (stating that "safe districting under the Voting Rights Act denies all those not holding views that correlate with the favored characteristic the kind of equal political opportunity they would have had in [a neutral] political system").

310. See Guinier, *supra* note 204, at 1502 (explaining that remedies could be fashioned "in order to provide blacks with the level of political power they would have enjoyed but for discrimination").

311. Shapiro, *supra* note 16, at 201-02.

312. *Accord Croson*, 488 U.S. at 536 (Marshall, J., dissenting) (eradicating the effects of past racial discrimination is a "compelling" interest).

sense that states act to ensure the outcome of elections, leads to a situation where voting becomes "pointless" for everyone.<sup>313</sup>

In a properly created "safe" district, the population of the disadvantaged group should exceed the advantaged only to the extent necessary to overcome racial barriers and discrimination. This results in an election in which any group can influence the results, but stops short of ensuring victory for a particular minority.<sup>314</sup> While creating this type of district is admittedly more difficult than one that guarantees an election result, maintaining the integrity of the electoral process justifies any additional effort.

Part II of Justice White's dissent is aimed at a loose thread in the fabric of the majority's analysis: the requirement of irregularly shaped boundaries.<sup>315</sup> The reason that the plaintiffs in *UJO* could not have successfully brought the cause of action recognized by *Shaw* was that the majority-minority district in *UJO* was compact.<sup>316</sup> Irregularity is a necessary requirement of the new cause of action, not because it is an element of the injury identified (inability to participate in a colorblind electoral process), but because the alternative would create chaos. If plaintiffs could challenge compact as well as ill-compact districts under the majority's new cause of action, virtually every district in the United States could be challenged because, as the majority admits, "legislature always is aware of race when it draws district lines."<sup>317</sup>

The requirement of compactness then becomes an administrative requirement as opposed to a substantive requirement. Justice White's dissent is critical of this distinction. In exposing the weakness, Justice

313. Dana R. Carstarphen, *The Single Transferable Vote: Achieving the Goals of Section 2 Without Sacrificing the Integration Ideal*, 9 YALE L. & POL'Y REV. 405, 417 n.65 (1991).

314. See *City of Mobile v. Bolden*, 446 U.S. 55, 123 (1980) (Marshall, J., dissenting) (noting that attempting to artificially create proportional representation "would create the risk that some groups would receive an undeserved windfall of political influence").

315. *Shaw*, 113 S. Ct. at 2841. "[T]he majority's explanation of its holding is related to its simultaneous discomfort and fascination with irregularly shaped districts . . . . By focusing on looks rather than impact, the majority 'immediately casts attention in the wrong direction - toward superficialities of shape and size, rather than toward the political realities of district composition.'" *Id.* (quoting R. DIXON, *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 459 (1968)).

316. The majority stated that the facts in *UJO* would not have supported the allegation that "the plan, on its face, was so highly irregular that it rationally could be understood only as an effort to segregate voters by race." *Shaw*, 113 S. Ct. at 2829.

317. *Id.* at 2826.

White asserts in his dissent: "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, at least so far as the Constitution is concerned and absent any evidence of differential racial impact."<sup>318</sup>

It was unfortunate that the majority did not see fit to expand on the irregularity element of this new claim. The point made by Justice White in his dissent was valid, and one that the majority would have had difficulty rebutting had it addressed the issue in its opinion.<sup>319</sup> The prerequisite that a district be irregularly shaped appears to be a necessary, but ambiguous, administrative requirement of the majority's new cause of action. The majority appears undaunted, however, by any such ambiguity.<sup>320</sup>

Part III of Justice White's dissent contends that, given the majority's new cause of action and the corresponding application of strict scrutiny to the North Carolina redistricting plan, the facts would support the dismissal of the plaintiff's claim because the classification would satisfy strict scrutiny.<sup>321</sup> This assertion cannot be reconciled with the facts of the case. Strict scrutiny requires that the state action be narrowly tailored to satisfy a compelling state interest.<sup>322</sup> Assuming *arguendo* that compliance with the Voting Rights Act constitutes a compelling state interest, the Court's decision to remand the case to the District Court is appropriate because there is evidence that North Carolina could have drawn less-obscure districts.<sup>323</sup> Such a finding would dispel the notion that North Carolina's plan was "narrowly tailored."

While Justice White's dissent raised some inconsistencies in the ma-

---

318. *Id.* at 2841.

319. While focusing on the unusual shape of the 12th district, the majority never explained why such a district is more harmful than a district which is compact. Commentators, however, have speculated that the bizarre shape of districts "are inherently divisive, calling attention to differences that have poisoned American society in the past and that threaten to poison American society in the future." Alienikoff & Issacharoff, *supra* note 34, at 613. The authors argue that shifting compact districts in an effort to create majority-minority districts is "quite different from distorting the 'natural' shape of electoral districts to capture minority communities dispersed across the state." *Id.* at 617.

320. See Alienikoff & Issacharoff, *supra* note 34, at 620 ("If Shaw is to have meaning as a working definition of permissible boundaries in redistricting, its ambiguous commands must be given some operational content.")

321. *Shaw*, 113 S. Ct. at 2842 (White, J., dissenting).

322. *United States v. Paradise*, 480 U.S. 149, 166-67 (1987).

323. See Grofman, *supra* note 1, at 1257. Grofman states that in both North Carolina's 12th district and Dallas' 30th congressional district, "neither district can be fully justified in terms of voting rights concerns since alternative configurations exist that are less grotesque and that do less violence to neighborhoods, communities of interest, and political subunit boundaries." *Id.*

majority opinion, it failed to address and attack the new cause of action on its face. Instead, Justice White preferred to treat the plaintiff's claim as a vote dilution action and devoted a large portion of his argument to attacking this fictional claim.<sup>324</sup> In this respect, the dissent put forth an ineffective and unpersuasive argument.

### C. Justice Blackmun's Dissenting Opinion

Justice Blackmun joined Justice White's dissent. His separate, one paragraph dissent was written to serve a single purpose: to draw attention to the irony of the Court's action. Justice Blackmun states:

[I]t is particularly ironic that the case in which today's majority chooses to abandon settled law and to recognize for the first time this 'analytically distinct' constitutional claim, . . . is a challenge by white voters to the plan under which North Carolina has sent black representatives to Congress for the first time since Reconstruction.<sup>325</sup>

Justice Blackmun's observation is a powerful reminder of how prevalent and potent racial discrimination can be once it is entrenched within a society. His assertion also comprises the most powerful and persuasive argument for maintaining the viability of the Voting Rights Act and reconsidering the majority's new cause of action.

### D. Justice Stevens' Dissenting Opinion

Justice Stevens, also joining Justice White's dissent, offers a three part inquiry into whether the plaintiffs raise a valid constitutional claim.<sup>326</sup> Question one inquires whether the Constitution requires states to adhere to principles of compactness and contiguity when drawing electoral districts.<sup>327</sup> Both the majority and the dissents unanimously answer this question in the negative.<sup>328</sup> While Justice Stevens and Justice White rec-

---

324. See *supra* notes 268-76 and accompanying text.

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

326. *Id.* at 2843 (Stevens, J., dissenting).

327. *Id.* (Stevens, J., dissenting).

328. *Id.* at 2827 ("We emphasize that these criteria [compactness, contiguity, and respect for political subdivisions] are important not because they are constitutionally required—they are not."); see also *id.* at 2841 (White, J., dissenting) (noting that "[district irregularities] have no bearing on whether the plan ultimately is found to violate the Constitution"); *id.* at 2834 (Stevens, J., dissenting) ("There is no independent constitutional requirement of compactness or contiguity."); *id.* at 2849 (Souter, J., dissenting) ("[W]e have held that such principles [of compactness and contiguity] are not constitutionally required.")

ognized the apparent inconsistency in the majority's argument, the likely explanation is that the majority's new cause of action does not rely upon the shape of an offending district to cause the injury. Instead, it merely limits the number of claims that could be brought to those that exhibit unusual configurations.<sup>329</sup> This subtle distinction was either ignored or dismissed by both Justice Stevens' and Justice White's dissent.

The second inquiry made by Justice Stevens concerns whether the Equal Protection Clause prevents a state from drawing district boundaries to aid identifiable groups in electing the representative of their choice.<sup>330</sup> In answering this second question, Justice Stevens looked to the purpose of the Fourteenth Amendment and concluded that a violation occurs when a majority legislates an advantage upon itself (as the city of Tuskegee did in *Gomillion*), but no violation occurs when a majority legislates to aid an underrepresented minority group achieve success at the polls.<sup>331</sup> Justice Stevens' approach is a sensible one, and one that this Note would adopt as the proper approach, provided that the aid given to the underrepresented group is reserved for remedial applications and does not reach the level of effectively "fixing" the election results.

The majority predictably counters Justice Stevens' second response with the anti-affirmative action language from *Croson*: "[E]qual protection analysis 'is not dependent on the race of those burdened or benefited by a particular classification.'"<sup>332</sup> The flaw in this reasoning is that classifications made to aid an underrepresented minority group are different from classifications made to augment the power of those already in control, and the majority errs in merging the two into the same wrong.<sup>333</sup> The majority's rhetoric about the evils of racial classifications and the stigma it creates simply cannot justify its conclusion in this case.

---

329. See *supra* notes 259-69 and accompanying text.

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

331. *Id.* (Stevens, J., dissenting). Justice Stevens stated:

The difference between constitutional and unconstitutional gerrymanders has nothing to do with whether they are based on assumptions about the groups they affect, but whether their purpose is to enhance the power of the group in control of the districting process at the expense of any minority group, and thereby to strengthen the unequal distribution of electoral power.

*Id.* (Stevens, J., dissenting)

332. *Id.* at 2829 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989)).

333. Justice Stevens stated that "[t]he duty to govern impartially is abused when a group with power over the electoral process defines electoral boundaries solely to enhance its own political strength at the expense of any weaker group." *Id.* at 2844 (Stevens, J., dissenting). Justice Stevens further stated that the duty to govern "is not violated when the majority acts to facilitate the election of a member of a group that lacks such power." *Id.* (Stevens, J., dissenting).

Justice Stevens final inquiry asks whether redistricting to benefit a minority group that would otherwise be permissible should be impermissible because the group is defined by race.<sup>334</sup> Justice Stevens stated:

If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history in the United States gave birth to the Equal Protection Clause.<sup>335</sup>

Justice Stevens describes any contrary conclusion as “perverse,”<sup>336</sup> and the irony of his point is clear. Despite its emotional appeal, Justice Stevens’ final point ignores the majority’s most persuasive argument: racial classifications are odious to our society because they serve to segregate our society into factions rather than unite it.<sup>337</sup> None of the other characteristics of Justice Stevens’ list operate with anywhere near the same potential to divide our society. Finally, Justice Stevens’ quotation would lead one to believe that the Equal Protection Clause was written to protect legislation benefiting the African-American race, rather than eliminating legislation that discriminated against the African-American race.<sup>338</sup> Given the Court’s interpretation of the Clause in *Bakke*, *Croson*, and *Shaw*, “equal” does not mean fair, “equal” merely means colorblind.

#### *E. Justice Souter’s Dissenting Opinion*

Justice Souter’s dissenting opinion is the only one of the four dissenting opinions that addresses the majority’s argument by contesting its new cause of action rather than making a vote dilution argument.<sup>339</sup> Justice Souter takes exception with the majority’s deviation from previous districting cases, that had, prior to *Shaw*, remained distinct from other Equal Protection analysis.<sup>340</sup> “Until today, the Court has analyzed equal protection claims involving race in electoral districting differently from equal protection claims involving other forms of governmental con-

---

334. *Id.* (Stevens, J., dissenting).

335. *Id.* at 2844-45 (Stevens, J., dissenting).

336. *Id.* at 2845 (Stevens, J., dissenting).

337. *Id.* at 2824-25 (Stevens, J., dissenting).

338. See *supra* note 149 and accompanying text.

339. *Shaw*, 113 S. Ct. at 2848 (Souter, J., dissenting). “The Court . . . does not purport to disturb the law of vote dilution in any way. . . . Instead, the Court creates a new ‘analytically distinct’ . . . cause of action. . . .” *Id.* (Souter, J., dissenting).

340. *Id.* at 2845 (Souter, J., dissenting).



duct.<sup>341</sup> Justice Souter claimed that the justifications for the distinction involved two separate considerations and that these considerations were still valid.<sup>342</sup>

First, unlike other forms of government activity, electoral districting always calls for some decisions to be made regarding race in a constituency.<sup>343</sup> As the other Justices have emphasized, where racial bloc voting occurs, governments will attempt to combat the effect in order to avoid dilution of minority voting strength. Second, other non-voting classifications that use race as an identifying characteristic involve a corresponding benefit to one group at the expense of another.<sup>344</sup> Districting, on the other hand, merely positions voters in one district instead of another without a corresponding benefit or burden to anyone.<sup>345</sup>

Because of the absence of burden or benefit in classifying voters on the basis of race, Justice Souter argues that a more relaxed level of scrutiny is appropriate for districting analysis.<sup>346</sup> By identifying impermissible uses of race and their corresponding effects, he argues that the need for strict scrutiny in cases that do not meet these criteria is unnecessary.<sup>347</sup> "Under this approach, in the absence of an allegation of [dilution], there is no need for further scrutiny because a gerrymandering claim cannot be proven without the element of harm."<sup>348</sup>

Justice Souter insists that the two distinct Equal Protection Clause analyses are viable and should remain separate.<sup>349</sup> While this idea lacks the symmetry and simplicity of the majority's incorporation of the districting equal protection analysis into the traditional Equal Protection

---

341. *Id.* (Souter, J., dissenting).

342. *Id.* at 2845-46 (Souter, J., dissenting).

343. *Id.* at 2826. Justice White in his dissent explained: "Because extirpating such considerations from the districting process is unrealistic, the Court has not invalidated all plans that consciously use race. . . ." *Id.* at 2835 (White, J., dissenting).

344. *Id.* at 2846 (Souter, J., dissenting). As examples of this assertion, Justice Souter cites *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1988) (allocating government contracts to minorities necessarily removes those contracts from non-minority competitors) and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283-83 (1986) (race used to supplant seniority for laying off teachers).

345. *Shaw*, 113 S. Ct. at 2846 (Souter, J., dissenting) ("In redistricting, . . . the mere placement of an individual in one district instead of another denies no one a right or benefit provided to others.")

346. *Id.* at 2847-48 (Souter, J., dissenting).

347. *Id.* (Souter, J., dissenting).

348. *Id.* (Souter, J., dissenting). Of course, the new cause of action recognized by the majority invalidates Justice Souter's logic, right or wrong. Currently, a plaintiff does not need to establish harm to bring a claim, just the presence of impermissible racial classifications. *Id.* at 2828.

349. *Id.* at 2848 (Souter, J., dissenting) ("There is thus no theoretical inconsistency in having two distinct approaches to equal protection analysis, one for cases of electoral districting and one for most other types of state governmental decisions.")

Clause analysis, it is more reasonable and more just. The majority's decision will just inspire methods to mask racial considerations rather than create discussion and compromise in this area.<sup>350</sup> By forcing such decisions behind closed doors, the majority does not create a colorblind society, it merely creates a blind one.

## V. IMPACT OF THE COURT'S DECISION

### A. *The Meaning of Shaw v. Reno*

Due to the ambiguous nature of the Court's decision, *Shaw* will likely require other judicial interpretations. This ambiguity stems from several unanswered questions from the majority's opinion. First, there are questions as to whether the shape of North Carolina's twelfth district is in fact the root of the plaintiff's claim or whether race-conscious districting is the problem.<sup>351</sup> Next, courts must decide how "bizarre" a district must be before the elements of this cause of action are met.<sup>352</sup> In addition, courts must determine which state interests are "compelling" and which measures are "narrowly tailored" to satisfy the test of strict scrutiny.<sup>353</sup>

---

350. See Pildes & Niemi, *supra* note 210, at 578-79. This article asserted that:

[I]n post-*Shaw* litigation challenging certain black-dominated congressional districts in Louisiana, the Justice Department has filed a brief arguing that 'where a compact majority-minority district could be drawn, but the state chooses to draw the district in a different, less compact way to protect an incumbent or to give partisan advantage to one political party, the state will be able to explain the odd shape of the district on considerations other than race.'

*Id.*

351. There are statements in the Court's opinion in *Shaw* that support either interpretation. Compare *Shaw*, 113 S. Ct. at 2824 ("What appellants object to is redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting.") (emphasis added), and *id.* at 2827 (explaining that "reapportionment is one area in which appearances do matter") (emphasis added) with *id.* at 2832 ("race-based districting by our state legislatures demands close judicial scrutiny"), and *id.* at 2830 ("[T]he 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.'") (emphasis added).

352. See Pildes & Niemi, *supra* note 210, at 484 ("defining the values and purposes that might translate this impulse [to correct bizarre districts] into an articulate, justifiable set of legal principles is no easy task").

353. See Aleinikoff & Issacharoff, *supra* note 34, at 646. "It is not obvious what a 'prima facie' standard would look like [after *Shaw*] in the voting-rights cases." *Id.* Aleinikoff & Issacharoff also state that "[t]he Court could apply strict scrutiny but still

As for the possible significance of *Shaw*, three general possibilities will be presented here. First, due to the uniqueness of North Carolina's twelfth district, the facts of *Shaw* may render it an obscure and unimportant case.<sup>354</sup> Second, *Shaw* may be the first shot fired in the Court's effort to phase out the Voting Right Act.<sup>355</sup> Finally, *Shaw* may be important for a narrow set of cases whose facts, while not exactly like those of *Shaw*, are similar enough to give the Court's decision a more influential role.<sup>356</sup>

### 1. *Shaw* as an Anomaly

Several of the Justices, as well as commentators, suggested that North Carolina's twelfth district is so unusually shaped that districts similarly situated will be a very rare occurrence.<sup>357</sup> Indeed, the decision in *Shaw* literally requires, as an element of its new cause of action, that the challenged district's shape have *no other explanation* other than racial segregation of voters.<sup>358</sup> Although few districts will so clearly fall into this category as the North Carolina district,<sup>359</sup> courts have already begun applying the holding in *Shaw* to districting cases.<sup>360</sup> The decision is therefore likely to inspire a great deal of litigation to determine the boundaries of the Court's decision.<sup>361</sup> While future districts will be forewarned of *Shaw's* command, "Thou shall not gerrymander," majority-minority dis-

---

validate run-of-the-mill districting plans if it could identify a new, rather easily established, compelling state interest for the use of race in state districting decisions. For instance, state actors could cite the 'diversity' interest articulated by Justice Powell in *Bakke*." *Id.* at 608.

354. See *infra* notes 358-63 and accompanying text.

355. See *infra* notes 364-68 and accompanying text.

356. See *infra* notes 369-75 and accompanying text.

357. See, e.g., *Shaw*, 113 S. Ct. at 2848 (Souter, J., dissenting). The court stated:

[I]t may be that the terms for pleading this cause of action will be met so rarely that this case will wind up an aberration. The shape of the district at issue in this case is indeed so bizarre that few other examples are every likely to carry the unequivocal implication of impermissible use of race that the Court finds here.

*Id.*; see also Grofman, *supra* note 1, at 1263 ("I view the 12th Congressional District in North Carolina as a particularly unusual (and virtually unique) case.").

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

359. In fact, North Carolina's 12th district had the distinction of being labeled the "least compact congressional district in the country." Pildes & Niemi, *supra* note 210, at 587.

360. See *Jeffers v. Tucker*, 847 F. Supp. 655, 662 (E.D. Ark. 1994) ("While they are nowhere nearly so unusual in shape as the I-85 district at issue in *Shaw*, the Senate districts are anything but compact.").

361. See David Savage, *High Court Rules Against 'Racial Gerrymandering' Law*, L.A. TIMES, June 29, 1993, at A1 ("Experts in voting-rights law said the ruling is likely to trigger lawsuits nationwide that challenge 'majority-minority' districts.").

tricts that were drawn after the 1990 Census are also in danger of being challenged.<sup>362</sup> Given the current disposition of the Court towards racial classifications, however, it is unlikely that *Shaw* will be a forgotten case in the near future.

## 2. The Beginning of the End of the Voting Rights Act

Understandably, proponents of the Voting Rights Act are nervously awaiting the scope of the decision in *Shaw* to unfold.<sup>363</sup> If *Shaw* may be interpreted as having incorporated voting practices and principles into the equal protection analysis of non-voting cases such as *City of Richmond v. J.A. Croson Co.*,<sup>364</sup> the availability of remedies for violations of the Voting Rights Act may be severely restricted.<sup>365</sup> Racial classifications

362. One source estimates that nationwide, 26 majority-minority districts have been created since the 1990 Census. Lynne Duke, *Advocates Say Justices Muddy Voting Rights*, THE WASH. POST, June 30, 1993, at A8.

363. Courts have already interpreted *Shaw's* holding as a bar to creating voting districts using race. See *Hines v. Mayor of Ahooskie*, 998 F.2d 1266, 1274 (4th Cir. 1993) (citing *Shaw*, the court held that "a legislature may not devise a districting plan solely for the purpose of segregating citizens into separate voting districts on the basis of race without sufficient justification"); *Houston v. Lafayette County*, 841 F. Supp. 751, 765 (N.D. Miss. 1993) (citing *Shaw*, the court declared: "By no means was the [Voting Rights Act] enacted to ensure the success of black or other minority candidates by carving the political terrain into irregularly and artificially shaped designs and patterns that result in the deliberate creation of safe majority minority districts reserved exclusively for minority candidates to represent"). But see *Marylanders For Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1053 (D. Md. 1994) (stating that "although a state can—and at times must—place great weight on race when redistricting, it may not do so to the exclusion of all traditional nonracial districting principles"). Alienikoff & Issacharoff, *supra* note 34, at 639, stated:

If the Court seems to have neglected the implications of its reasoning, it may be because it had different game in sight: the Voting Rights Act itself. *Shaw* fairly invites a constitutional reexamination of section 2 of the Act. Should any court decide that the broad remedial purposes of the Act compel districting akin to North Carolina's, . . . the question will be directly put whether such a justification is sufficient, under strict scrutiny analysis, to justify the overt use of race as the dispositive factor in the districting decision.

*Id.*

364. 488 U.S. 469 (1989).

365. Because the usual remedy to a Voting Rights Act violation is to create a safe district, and because creating a safe district by definition employs racial classifications, eliminating this remedy would present legislators with few other effective alternatives. See *Abrams*, *supra* note 2, at 520 (describing safe districts as the "approach

are an essential element to cure violations for obvious reasons. If remedies are eliminated, the Act becomes a useless tool.<sup>366</sup> While a point may come where the Voting Rights Act is no longer needed to protect and ensure minority representation, that time has not yet arrived.<sup>367</sup>

### 3. *Shaw* as a Messenger to Future District-makers

The most probable reading of *Shaw* is that the Supreme Court is heading the country towards a race-neutral society and flagrant uses of race will no longer be tolerated. The Court, however, will probably continue to permit the use of race as one factor among many.<sup>368</sup> This interpretation is a logical assumption from the text of the opinion. First, if the Court had intended to completely eliminate all use of race from congressional districting, it could have clearly stated so in the opinion.<sup>369</sup> Instead, the Court leaves "open" the question of whether the creation of majority-minority districts will always give rise to the cause of action announced in the decision.<sup>370</sup> This assumption is supported by the special attention given by the majority to the unusual shape of the North Carolina district.<sup>371</sup> Certainly, as Justice White notes, a district drawn on

---

that most courts currently favor" and identifying the process as "within a category of race conscious remedies that the framers of the Voting Rights Act explicitly anticipated").

366. It is difficult to hypothesize an effective remedial measure to a proven vote dilution claim that does not use racial classifications of any kind.

367. See Grofman, *supra* note 1, at 1260-61 (stating that he does "not believe that the Act is, on balance, neither no longer needed nor actually counterproductive for minorities").

368. See *Bakke*, 438 U.S. at 265. In *Bakke*, the Court allowed the university to consider the "diversity" interest in selecting applicants for its medical school, while prohibiting the allocation of a percentage of openings to minority applicants. *Id.* at 320.

369. What *Shaw* does *not* say is the most convincing evidence that all racial considerations have not been removed from districting decisions. The North Carolina plan is obviously the result of race-conscious districting, and the state defendants concede as much in their brief. State Appellee's Supplemental Brief at 6, *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (No. 92-357) (arguing that race-conscious redistricting does not violate the Voting Rights Act). If the Court's intent was to eliminate all forms of racial classifications, it could easily have said so without relying on the bizarre shape of the district. Hence, there is a strong argument that the Court's intention was to eliminate obvious racial classifications while retaining the use of classifications as a factor to be considered along with other factors. See Allenikoff & Issacharoff, *supra* note 34, at 608-10.

370. *Shaw*, 113 S. Ct. at 2828 ("[W]e express no view as to whether 'the intentional creation of majority-minority districts, without more' always gives rise to an equal protection claim.").

371. This assertion is also supported by the fact that the Court distinguished, rather than overruled, *United Jewish Organizations v. Reno*. *Shaw*, 113 S. Ct. at 2829-30. *UJO* was clearly an example of a district which was drawn using racial classifications to accomplish a race oriented result. *Id.* at 2839 (White, J., dissenting) ("Nor was it ever

race-based grounds "does not become more injurious . . . simply by virtue of being snake-like, at least so far as the Constitution is concerned."<sup>372</sup>

Another point suggesting that *Shaw* may not totally foreclose the use of race from future districting plans is the majority's choice to create a new cause of action and remand the case rather than striking down the district itself.<sup>373</sup> The state action was admittedly a conscious use of race, and the Court could have applied strict scrutiny itself to strike down the legislation. The Court's willingness to remand the case intimates that it is not yet willing to take a hard line stance on the elimination of all race-based districting.<sup>374</sup>

## VI. CONCLUSION

The right of an individual to cast a ballot for the representative of his or her choice is vital to the theory of government that this nation has adopted. The Court has held that the right to vote is "[u]ndoubtedly . . . a fundamental matter in a free and democratic society."<sup>375</sup> This right has been held to be paramount to all other rights in its importance to a democratic society.<sup>376</sup> All other rights are derived from the ability to be represented in one's government.<sup>377</sup> While the right to vote is of vital importance to all citizens, this right is especially critical for those groups who wield little political power and for those who are perpetually under-represented in the government. Unfortunately, these are the very same groups who have historically been denied an equal opportunity to cast their ballots due to discriminatory practices.<sup>378</sup>

---

in doubt that 'the state deliberately used race in a purposeful manner.')

(quoting *United Jewish Org. v. Carey*, 430 U.S. 144, 165).

372. *Id.* at 2841 (White, J., dissenting).

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

374. This also opens up the possibility for an expansive interpretation of "narrowly tailored" and "compelling state interest" in the voting rights application. *Id.*

375. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

376. *See, e.g., Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). In *Wesberry*, the Court stated: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Id.*

377. *See Reynolds*, 377 U.S. at 562 (stating that "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights").

378. *See Thornburg v. Gingles*, 478 U.S. 30, 69-70 (1986) (assuming that "the extent

The Supreme Court's decision in *Shaw v. Reno* is flawed in three respects. First, the Court failed to acknowledge that, under certain exceptional circumstances, discriminatory voting practices can only be remedied by the type of legislation prohibited by the Court's decision.<sup>379</sup> North Carolina, for example, has a history of maintaining practices which have had the effect of abridging minority voting rights, as evidenced by its "covered" classification under section five of the Voting Rights Act.<sup>380</sup> A rule requiring a colorblind electoral process would cripple a state legislature's ability to protect minority representation when racial bloc voting occurs. Without such legislation, North Carolina, for example, has produced a dismal record for electing minority representation.<sup>381</sup>

Second, the Court's decision gives state lawmakers and lower courts little guidance in determining when a district is so irregularly shaped as to subject the state to a similar claim. The majority states that "reapportionment is one area in which appearances do matter,"<sup>382</sup> but applying this vague, subjective standard will certainly result in confusion and litigation. Finally, the Court's decision limits a state's ability to comply with the Voting Rights Act and will lead to conflict and even greater confusion since compliance with the Act can only be achieved by violating the holding in *Shaw*.<sup>383</sup>

---

to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process' . . . is a factor which may be probative of unequal opportunity to participate in the political process and to elect representatives")(citations omitted).

379. See Shapiro, *supra* note 16, at 201. "The courts have repeatedly held that the lower levels of minority registration and turnout are attributable to past discrimination. Consequently, minority control of districts requires a 'supermajority' - more than a simple population majority." *Id.*; see also Chill, *supra* note 71, at 673 (stating that the "elimination of discrimination against the voting rights of minorities is the highest constitutional imperative and . . . affirmative racial gerrymandering to achieve this goal is legally compelled").

380. See *supra* note 127.

381. Even though the population of North Carolina is approximately 20% African-American, prior to 1992, no African-American had ever been elected to Congress from North Carolina. See Brief for Appellant at 17 n.17, *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (No. 92-357).

382. *Shaw*, 113 S. Ct. at 2827.

383. The situation in *Shaw* is a perfect example. North Carolina has an African-American population of approximately 20%. *Id.* at 220. Of the 11 districts (prior to redistricting), only one congressional representative was African-American, or 9%. For this reason, the Justice Department, acting through the Attorney General, rejected North Carolina's original redistricting plan and required that North Carolina create a majority-minority district with the 12th district. Herein lies the dilemma: If North Carolina does not create a district comprised of a majority of African-Americans, it will violate the nonretrogression principle of § 5 of the Voting Rights Act, as interpreted by the Supreme Court in *Beer v. United States*, 425 U.S. 130 (1976), because the

The Court would be better served if a compactness standard was developed by which districts could be judged.<sup>384</sup> Districts which significantly differed from this standard would be presumed invalid absent a showing of necessity.<sup>385</sup> A compactness standard would also ensure easily identifiable districts that facilitate other voting activities such as campaigning and organization. While the application of such standards would not eliminate the possibility for districting along racial lines, compact districts would alleviate some of the social harms identified by the Court in *Shaw*.<sup>386</sup>

Second, the Court should explicitly recognize the use of racial classifications in the remedial setting. Racial classifications should be limited to cases where discrimination has led to a long-term negative effect on minority opportunity. Such classifications should be designed to overcome the prejudicial effect, but stop short of providing groups with fixed results.

Finally, this Note advocates Justice Stevens' view that the use of gerrymanders to achieve political protectionism violates the Equal Protection Clause to the same extent as a racial gerrymander.<sup>387</sup> The shape of North Carolina's twelfth district is allegedly the consequence of such protectionism by the democratically-controlled General Assembly.<sup>388</sup> This assertion, if true, ostensibly presents a more valid reason for dis-

---

percentage of African-American representatives would drop from 9% to 8% (1 out of 12). On the other hand, if North Carolina intentionally created a majority-minority district, it violates the Court's mandate in *Shaw* that race cannot be used as the primary tool for shaping districts. *Id.* at 2825. The conflict between the holding in *Shaw* and the need for classifications based on race to remedy Voting Rights Act violations has already been addressed by at least one court. See *Jeffers v. Tucker*, 847 F. Supp. 655, 670 (E.D. Ark. 1994) (describing the situation as a "catch 22").

384. See *Pildes & Niemi, supra* note 210, at 587 (arguing that "quantitative measures of compactness provide the most secure starting points for defining 'bizarre' districts").

385. *Shaw*, 113 S. Ct. at 2825. The standard could account for natural boundaries as well as political subdivisions, thereby reducing the likelihood that districts have been gerrymandered for political gain.

386. Compact districts are less likely to send a message to elected officials that their primary obligation is to serve that part of their constituency for which their district was intentionally created. *Shaw*, 113 S. Ct. at 2827. Likewise, the majority's fear that racial gerrymandering "may balkanize us into competing racial factions" is eliminated where districts are created by adhering to fundamental districting principles. *Id.* at 2832.

387. See *supra* note 332.

388. See *supra* notes 277-80 and accompanying text.



qualifying the district than the use of race to aid a disadvantaged political group. Therefore, the Court should have announced a principle for invalidating "uncouth" districts where political protectionism is the cause, and it should have passed on the racial classification issue.

Viewing the two concepts at issue here (minority voting jurisprudence and governmental race-based classifications) as parallel and independent analyses, the *Shaw* decision is both surprising and predictable. The Court's decisions since the enactment of the Voting Rights Act have generally favored the protection of minority voting rights. The Court applies a broad interpretation of the Act in order to give effect to the intent of Congress as well as the Act's plain language.

On the other hand, the line of cases involving state action, that draws classifications of its citizens on the basis of race have been struck down frequently by the Court in the last two decades.<sup>389</sup> The importance of the *Shaw* decision is that it indicates the Court is no longer willing to treat these concepts as two parallel entities, but rather two lines that are rapidly converging. Future legislators must now heed *Shaw's* warning: overt racial classifications in the voting arena will be treated with the same suspicion as state action pertaining to non-voting matters.

MICHAEL J. MOFFATT

---

389. See *supra* notes 157-83 and accompanying text.