The Long and Winding Road: Redistricting in Light of Shaw v. Reno

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THE LONG AND WINDING ROAD: REDISTRICTING IN LIGHT OF Shaw v. Reno

INTRODUCTION

The county manager takes a deep breath and removes the latest census figures from his desk drawer. He turns on the computer and begins to input the census data into the specialized program containing the geographical contours of his county, including township lines and neighborhood descriptions. The program also contains instructions designed to bring any districts into compliance with the Voting Rights Act of 1965 (hereinafter "the VRA"). The VRA covers his county, along with forty other counties in North Carolina. Under the VRA, the United States Attorney General must preapprove (pre-clear) the redistricting plan for the election of county commissioners, as well as any other electoral changes, prior to the plan's implementation.

The census figures trouble the county manager because they indicate that forty-five percent of the county's citizens are members of a minority group, and the enclaves of minority voters are widely dispersed throughout the county. Because the measure of discriminatory dilution is no longer whether a discriminatory motive exists in the minds of the redistricting body but solely whether a discriminatory impact is felt by a protected minority

2. Section Five of the VRA establishes the criteria for determining which jurisdictions are covered by the Act. The covered jurisdictions are listed in 28 C.F.R. § 51 (1991).
group, he must be especially careful not to dilute minority voting strength, which would ensure disapproval by the Attorney General. While adding line after line of computer code to his program, the county manager must also address "one man, one vote" considerations which require voting districts to be roughly equal in size.

Only after negotiating all the population and vote dilution obstacles will he face the most formidable hurdle; approval of the redistricting plan by the county commissioners. The county commissioners are a contentious bunch who can find true agreement on only one subject, their desire to retain their status as community leaders. They also happen to be his collective boss.

As the deadline for completion of the redistricting project approaches, the county manager completes his input of census data, silently cursing his recent drive to encourage growth in the county which necessitated these districting changes. As the computer begins digesting its diet of raw numbers, the county attorney walks in the door. The county manager, already relieved that modern technology is attacking this complex redistricting problem, jauntily greets him. The smile on the county manager's face disappears as the attorney explains the latest Supreme Court decision on the subject, Shaw v. Reno. His confidence is replaced with confusion.

The purpose of this note is to analyze the impact and scope of the United States Supreme Court's landmark decision in Shaw v. Reno. This Note will attempt to recommend guidelines which will enable local government officials to negotiate the narrow and winding path between the standards of the VRA and the ambiguous restrictions set by the Court's decision.

THE CASE

In the 1991 session, the North Carolina General Assembly approved a redistricting plan based on the results of the 1990 census, resulting in twelve congressional districts. Due to North Carolina's dramatic increase in population during the 1980's, the plan added another district to the eleven districts already in existence. The plan included one majority-minority district in the

7. Id. at 2819.
8. Id. at 2820.
minority voting rights. The Attorney General then submitted his program, containing "one vote" districts, to the United States Attorney General for pre-clearance.

The Assistant United States Attorney General for Civil Rights, acting on behalf of the Attorney General, formally objected to the plan, asserting that the General Assembly could have created a second majority-minority district in the south-central to southeastern part of the state. In response to the failure of the redistricting plan to receive preapproval, the General Assembly revised the plan to create a second majority-minority district.

The General Assembly reconfigured the First Congressional District, primarily located in northeastern North Carolina, and created the Twelfth Congressional District in the industrial/urban Piedmont stretching along the I-85 corridor from east of Durham to Gastonia. Descriptions of Districts One and Twelve have been numerous and none have been particularly flattering.

The plan was subjected to immediate legal attack on several fronts. In Pope v. Blue, the Republican party of North Carolina launched the first assault, objecting to the plan as an unconstitutional "political gerrymander." Under the analysis developed in Davis v. Bandemer, a federal three-judge district court decided in Shaw v. Reno, 113 S. Ct. 2816, 2820 (1993). The result has been described as "serpentine," Shaw, 808 F. Supp. 461, 475 (E.D.N.C. 1992) (Voorhees, C.J., concurring in part and dissenting in part) and "snake-like," Shaw, 113 S. Ct. at 2820. The plan was subjected to immediate legal attack on several fronts. In Pope v. Blue, the Republican party of North Carolina launched the first assault, objecting to the plan as an unconstitutional "political gerrymander." Under the analysis developed in Davis v. Bandemer, a federal three-judge district court dis-

9. Id.
10. Id. at 2818.
11. Id.
12. Id. (citing 1991 N.C. Extra Sess. Laws, Chap. 7 (1991)).
13. See map infra at app.

District Twelve is the more objectionable of the two districts. As it meanders along the I-85 corridor, District Twelve expands to swallow up predominantly minority precincts from Durham to Gastonia. Shaw, 113 S. Ct. at 2820. The result has been described as "serpentine," Shaw, 808 F. Supp. at 476 (Voorhees, C.J., concurring in part and dissenting in part) and "snake-like," Shaw, 113 S. Ct. at 2820. See map infra at app.

16. Id. at 395.
missed this suit for failure to state a claim for which relief could be granted.\textsuperscript{18}

\textit{Davis} established a two-prong test for determining whether a complaint is sufficient to allege an unconstitutional “political gerrymander.”\textsuperscript{19} The first prong requires an allegation of “intentional discrimination against an identifiable political group.”\textsuperscript{20} The district court found this element present in the multiple allegations that a Democratic-controlled legislature made the redistricting plan.\textsuperscript{21}

The claim failed, however, on the issue of “an actual discriminatory effect on [the identifiable political] group,” the second prong of the \textit{Davis} test.\textsuperscript{22} The complaint did not allege that the Republican Party had been removed from the political process entirely.\textsuperscript{23} The Supreme Court summarily affirmed this decision.\textsuperscript{24}

Private residents of Durham also made an attack on the redistricting plan in \textit{Shaw v. Barr}.\textsuperscript{25} Because the plan split Durham County into two congressional districts, the plaintiffs claimed the plan constituted an unconstitutional “racial gerrymander” under the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{26} In a 2-to-1 decision, another federal three-judge district court dismissed this action, like \textit{Pope}, on a 12(b)(6) motion for failure to state a claim.\textsuperscript{27}

Districts Two and Twelve met with no objections from the United States Attorney General’s office.\textsuperscript{28} The action of the Attorney General in preapproving the General Assembly’s revised redistricting plan was challenged in \textit{Shaw} as well, but the district court dismissed the claim which asked for an injunction to prevent

\begin{itemize}
  \item \textit{Pope}, 809 F. Supp. at 397.
  \item \textit{Davis}, 478 U.S at 127.
  \item \textit{Id}.
  \item \textit{Pope}, 809 F. Supp. at 396.
  \item \textit{Id}.
  \item \textit{Id}. at 397.
  \item \textit{Id}. at 469.
  \item \textit{Id}. at 473. The majority opinion of the district court relied upon Supreme Court precedent in United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977). \textit{Shaw}, 808 F.Supp. at 470. For a discussion of this case, see infra text accompanying notes 80-104. Chief Judge Richard Voorhees concurred with most of the majority opinion but dissented on the crucial issue of whether a cause of action had been asserted under the Equal Protection Clause of the Fourteenth Amendment. \textit{Id}. at 480.
  \item \textit{Shaw}, 808 F. Supp. at 467.
\end{itemize}
enforcement of the VRA by the Attorney General. The rationale used by the lower court in dismissing the claim against the Attorney General, left undisturbed by the Supreme Court, was a lack of subject matter jurisdiction. All three district court judges agreed Section 14(b) of the VRA vested exclusive jurisdiction over claims against the Attorney General’s office in the District Court for the District of Columbia. This provision applies regardless of the plaintiffs’ attempt to construe his action as an effort to secure a declaratory judgment rather than an attack on Section Five enforcement.

Two of the judges further determined dismissal appropriate because the action against the Attorney General involved a challenge to the discretionary power given the Attorney General under Section Five of the VRA. This type of action also failed to state a claim because such a challenge is not subject to judicial review.

The Supreme Court noted jurisdiction over the Equal Protection issue. The Court reversed the district court’s decision; the complaint stated a claim under the Equal Protection Clause by alleging the redistricting scheme was so irrational on its face that it could only be understood as an effort to segregate voters on the basis of race.

BACKGROUND

A. The Voting Rights Act of 1965

The VRA is the legislative mechanism which gave actual enfranchisement to minority voters and brought to fruition the ideals originally expressed in the post-Civil War amendments to

29. Id. at 466.
30. Id. (citing Morris v. Gresette, 432 U.S. 491 (1977)).
31. Id. The Voting Rights Act of 1965, § 14(b), 42 U.S.C. 19731(b) (1988), states: “[N]o court other than the District Court for the District of Columbia ... shall have jurisdiction to issue any ... restraining order or temporary or permanent injunction against the execution or enforcement of [Section 5 of the VRA] or any action of any Federal officer or employee pursuant thereto.” Id.
32. Shaw, 808 F. Supp. at 466.
33. Id. at 467.
34. Id. (citing Morris, 432 U.S. at 506).
35. The Fourth Circuit Court of Appeals did not review the decision as the VRA provides direct appeal to the Supreme Court. 42 U.S.C. § 1971(3)(g) (1988).
the Constitution.\textsuperscript{38} The Act prescribed strong medicine to remedy the "insidious and pervasive evil which had been perpetuated . . . through unremitting and ingenious defiance of the Constitution" by white majorities in the South.\textsuperscript{39}

The teeth of the VRA originally resided solely in Section Five.\textsuperscript{40} Section Five requires that any jurisdiction covered by the VRA\textsuperscript{41} which adopts new voting "practice[s] or procedure[s]" to have the new procedure preapproved as nondiscriminatory.\textsuperscript{42} The jurisdiction may obtain this preapproval, prior to implementation, either by a declaratory judgment of the District Court for the District of Columbia or by administrative approval ("pre-clearance") of the Attorney General.\textsuperscript{43} The Supreme Court upheld this drastic provision as constitutional in \textit{South Carolina v. Katzenbach}.\textsuperscript{44}

Following \textit{Katzenbach}, the majority of litigation surrounding the VRA has focused on the appropriate standard of review in determining whether a new voting "practice or procedure" violates the VRA.\textsuperscript{45} The standard applied by the District Court for the District of Columbia or the United States Attorney General in determin-

\textsuperscript{38} See U.S. Const. amends. XIV and XV.

\textsuperscript{39} South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966) (upholding the constitutionality of the VRA).

\textsuperscript{40} 79 Stat. 439 (codified as amended in 42 U.S.C. § 1973c (1988)).

\textsuperscript{41} Covered jurisdictions are defined in 42 U.S.C. § 1973b(b) (1988), as those jurisdictions which had in place any voting test and in which less than fifty percent of the voting age population was registered to vote (or had actually voted in the 1972 presidential election) as of November 1, 1972. See 28 C.F.R. § 51 (1991), for the complete list of covered jurisdictions as determined by the Justice Department; see also Robert Bryson Carter, \textit{Note, Mere Voting: Etowah County Commission and the Voting Rights Act of 1965}, 71 N.C. L. Rev. 569, 572 n.38 (1993).


\textsuperscript{43} \textit{Id.} at § 1973c. The statute further requires that the declaratory judgment be made by a three-judge panel and that "any appeal shall lie to the Supreme Court." \textit{Id.} There has been a substantial amount of litigation on the question of which changes constitute a "practice or procedure" under the VRA. Because redistricting clearly falls into this category, the controversy is beyond the scope of this note. For a discussion of this issue, see Carter, supra note 41.

\textsuperscript{44} 383 U.S. 301 (1966). The Court allowed the apparent violation of the Tenth Amendment because "[t]he gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power." \textit{Id.} at 325.

\textsuperscript{45} \textit{See}, e.g., Presley v. Etowah County Comm'n, 112 S. Ct. 820 (1992); Beer v. United States, 425 U.S. 130 (1976); Allen v. State Board of Elections, 393 U.S. 544 (1969); see also Carter, supra note 41.
mining whether a state voting change is discriminatory under Section Five is whether the state action is "non-retrogressive."\(^4^6\)

In 1982, Congress amended the VRA.\(^4^7\) The most prominent amended feature is the expansion of Section Two to all states, not just those covered by Section Five.\(^4^8\) Originally, Section Two provided that no state could make changes to voting practices or procedures with discriminatory intent as inferred from the "totality of the circumstances."\(^4^9\) With the amendment, the standard for judging a violation of the Act under Section Two became one of "discriminatory effect" rather than "discriminatory intent."\(^5^0\)

Thornburg v. Gingles\(^5^1\) established Section Two's prohibited discriminatory effect as vote dilution, the impairment of the "ability of a protected class to elect its candidate of choice on an equal basis with other voters."\(^5^2\) The Thornburg test for determining if vote dilution has occurred consists of three elements: 1) "that [the protected class] is sufficiently large and geographically compact to constitute a majority in a single-member district"; 2) "that it is politically cohesive" and 3) "that the white majority votes sufficient amount of votes in the district to defeat the protected majority."

\(^{46}\) Beer, 425 U.S. at 141. Under Beer, a state may not gain preclearance under Section Five if the change in voting procedure will result in "a retrogression in the position of racial minorities with respect to their effective exercise of the right to vote." Id. "Retrogression" is defined in WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1549 (2d ed. 1983), as "the act of going backward." In the context of voting rights, retrogression connotes a reversal of progress on voting equality by reduction in the participation of minorities in the electoral process.


\(^{49}\) White v. Regester, 412 U.S. 755, 769 (1973); \textit{see also} Rogers v. Lodge, 458 U.S. 613 (1982). The specific language in the original Section Two was that "[n]o voting qualification . . . shall be imposed by any State . . . to deny or abridge the right of any citizen . . . to vote on account of race." Grofman, supra note 48, at 1239 n.6 (emphasis added). The test under the original Section Two was located at 42 U.S.C. § 1973(b).


\(^{51}\) 478 U.S. 30 (1986).
ciently as a bloc to enable it ... usually to defeat the minority's preferred candidate.53

Thus the VRA requires states, including North Carolina, who are covered by Section Five, to comply both with Section Five, by preclearing any change in voting procedures and meeting the standard of "non-retrogression", and Section Two, by satisfying the Thornburg vote dilution test. However, compliance with all the Sections of the VRA is not sufficient to immunize a voting procedure from challenge, as independent constitutional challenges may exist under the Fourteenth and Fifteenth Amendments.54

B. Constitutional Challenges to Legislative Districting

1. Gomillion v. Lightfoot

In Gomillion v. Lightfoot,55 black voters in Tuskegee, Alabama alleged the state of Alabama discriminated against them in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and denied them the right to vote in contravention of the Fifteenth Amendment.56 This discrimination occurred in 1957 when the Alabama Legislature passed Local Act 140, redrawing the boundaries of the municipality of Tuskegee.57

Local Act 140 altered Tuskegee's boundaries "from a square to an uncouth twenty-eight-sided figure."58 Justice Frankfurter, writing for the Court, found this reconfiguration to exclude all but "four or five of its 400" black voters while excluding none of the white voters.59 The only rational conclusion which could be

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53. Thornburg, 478 U.S. at 50-51. Explaining application of this test to single-member districts, Justice Scalia reasons that a "geographically compact minority," "minority political cohesion," and "majority bloc voting" must be established or there "neither has been a wrong nor can [there] be a remedy," Growe v. Emison, 113 S. Ct. 1075, 1091 (1993) (quoting Thornburg, 478 U.S. at 50-51); see also Voinovich v. Quilter, 113 S. Ct. 1149 (1993).

54. See 42 U.S.C. § 1973c (providing that pre-clearance or declaratory judgment does not bar subsequent suit); Allen v. Board of Elections, 393 U.S. 544, 549 (1969) ("private parties may enjoin the enforcement of the new enactment ... in traditional suits attacking its constitutionality"). A direct attack on the constitutionality of the voting procedure, as opposed to an attack under the VRA, was the basis of the suit in Shaw v. Reno. See supra note 26 and accompanying text.


56. Id. at 340.

57. Id.

58. Id.

59. Id. at 341.
reached was that Local Act 140 was solely designed for “fencing-out” black voters from the city of Tuskegee, thereby depriving them of their municipal vote.60

In response to the plaintiffs' allegations, the state asserted that Supreme Court precedent established that municipal power was unlimited regarding its boundaries.61 Therefore, the Court could not overrule Local Act 140.62 Justice Frankfurter answered that “[l]egislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution.”63 The Court found that Local Act 140 violated the Fifteenth Amendment without mentioning the alleged Fourteenth Amendment violations.64

In a concurring opinion, however, Justice Whittaker determined Local Act 140 was a violation, not of the Fifteenth Amendment, but of the Equal Protection Clause of the Fourteenth Amendment.65 He found troubling the fact the right to vote had not actually been taken away but merely shifted to a new political subdivision.66 In his opinion, the violation was that described in Brown v. Board of Education67 and Cooper v. Aaron,68 an “unlawful segregation.”69 The rationale and grounds for Justice Whittaker's concurrence proved to be more persuasive than the rationale of the majority opinion. Subsequent cases evaluated alleged racial gerrymanders primarily under the Equal Protection Clause.70

60. Id.
61. Id.
62. Id. at 343. The state relied upon Hunter v. Pittsburgh, 207 U.S. 161 (1907) (holding that the unlimited power of a municipality to consolidate with another city did not give rise to Due Process violations with regard to tax increases resulting from the merger). Id.
63. Gomillion, 364 U.S. at 344-45. “It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an ‘unconstitutional condition.’” Id. at 346.
64. Id. at 347.
65. Id. at 349 (Whittaker, J., concurring).
66. Id.
68. 358 U.S. 1 (1958).
69. Gomillion, 364 U.S. at 349 (Whittaker, J., concurring).
70. See infra notes 71-104 and accompanying text. Though violations of the Fourteenth Amendment constitute the primary grounds for redistricting challenges since Gomillion, plaintiffs still allege Fifteenth Amendment violations (as well as a plethora of other violations under the VRA) which are generally ignored by the Court. See, e.g., United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977); Wright v. Rockefeller, 376 U.S. 52 (1964).
2. Wright v. Rockefeller

Challenges to congressional redistricting plans were first addressed in Wright v. Rockefeller.\(^7\) In 1961, New York reapportioned the congressional districts on Manhattan Island to create one majority non-white district and three majority white districts.\(^7\) Minority voters objected to the districting plan; they contended the lines drawn by the New York Legislature were motivated by considerations of race in segregating an area with a high percentage of non-white voters into three districts.\(^7\) This configuration gave minority voters a majority in only one district and created one overwhelmingly white district.\(^7\)

The majority opinion, written by Justice Black, recognized the possibility that the congressional district lines had been drawn for racial reasons but accepted the three-judge district court's assessment of the plaintiffs' failure to meet their burden of proof.\(^7\) Implicitly, the decision reflects congressional districts drawn along racial lines present a constitutionally suspect action.\(^7\)

Unlike the majority opinion, Justice Douglas' dissent did not concern the failure to meet the burden of proof.\(^7\) Instead, he found the "zigzag, tortuous lines" drawn to create the majority white district were only explainable "in racial terms."\(^7\) Based on the character of the district lines and other facts determined by the district court, he concluded the districting plan segregated Manhattan racially and "[r]acial segregation that is state-sponsored should be nullified whatever may have been intended."\(^7\)

From the standpoint of precedent, Wright is important because it recognized that state action regarding federal congressional districts is susceptible to a challenge alleging the unconstitutional segregation of voters by race. From the standpoint of legal theory, Justice Douglas' eloquent dissent forms the foundation for Shaw v. Reno.

72. Id. at 53. The non-white majority districts consisted of black voters and voters of Puerto Rican origin. Id. at 54.
73. Id. at 54.
74. Id.
75. Id. at 58.
77. Wright, 376 U.S. at 59 (Douglas, J., dissenting).
78. Id.
79. Id. at 61. The most salient fact in Justice Douglas' factual determination of segregation was that white voters constituted 94.9% in the majority white districts—indicating a near total segregation. See id. at 59.
plans were first New York reapportionment Isand to create a majority white district plan; they con- Legislature were ing an area with a e districts. This n only one district 74 ack, recognized the had been drawn for district court's assess­ burden of proof.75 l districts drawn spect action.76 as' dissent did not oof.77 Instead, he reate the majority ems.78 Based on icts determined by g plan segregated that is state-spon­ een intended.79 'ight is important 1g federal congres­ ging the unconsti­ the standpoint of forms the founda­

3. United Jewish Orgs. of Williamsburgh, Inc. v. Carey

United Jewish Orgs. of Williamsburgh, Inc. v. Carey,80 [hereinafter "UJO"] was the first case to address whether "the use of racial criteria ... in [an] attempt to comply with Section Five of the [VRA] and to secure the approval of the Attorney General violated the Fourteenth or Fifteenth Amendment."81 The collision between the extreme remedy of the VRA and the Constitution gave rise to a "highly fractured decision."82 The VRA explicitly requires consideration of the effect of a voting procedure change on racial minority groups.83 Yet, the Fourteenth and Fifteenth Amendments forbid differentiation on account of race.84

Section Five of the VRA covered King's County in New York.85 The Attorney General rejected the initial reapportionment plan for this county because New York failed to show the plan did not abridge the right to vote on account of race.86 The New York legislature adopted a revised reapportionment plan which addressed the Attorney General's concerns.87 In the effort to obtain approval from the Attorney General, the plan effectively divided a community of Hasidic Jews into two districts.88 Subsequently, the Attorney General approved the plan.89 The community of Hasidic Jews challenged the revised plan.90 Their complaint alleged the value of their votes was diluted solely for the purpose of achieving a

81. Id. at 147.
83. See supra notes 41-53 and accompanying text.
85. See supra notes 41-42 and accompanying text for a discussion of what "coverage" by the VRA entails.
86. UJO, 430 U.S. at 150. See supra notes 38-54 and accompanying text for a discussion of the requirements of the VRA.
87. UJO, 430 U.S. at 150-51.
88. Id.
89. Id. at 151-52.
90. Id. at 152.
racial quota of sixty-five percent non-white population in a disputed New York Assembly district. 91

The plurality opinion, written by Justice White, 92 reached several conclusions based on Supreme Court precedent. Relying on two prior VRA cases, Beer v. United States 93 and City of Richmond v. United States, 94 the Justice determined the implementation of quotas is not per se unconstitutional and the Fourteenth and Fifteenth Amendments do not mandate a per se rule against using race as a factor in redistricting. 95 Because the plaintiffs did not show New York did any more than required by Section Five under the guidelines of Beer, the plurality found the plaintiffs could not challenge the application of quotas in this case. 96 Justice White completed his analysis by maintaining that the plaintiffs suffered no constitutionally cognizable injury because New York's plan did not represent a "slur or stigma with respect to whites." 97 An intentional reduction of white voting power is proper in order to recognize minority voting power under the remedial authority of the VRA. 98

91. Id. The 1974 plan counted as minority districts only those which had sixty-five percent or higher non-white population. Id. The New York Legislature believed a sixty-five percent figure was the minimum population figure allowed by the Justice Department. Id.

92. Justice White was joined in full only by Justice Stevens. Id. at 147.

93. 425 U.S. 130 (1976). This case upheld the "nonretrogression" principle which required that minority voting strength be enhanced in order to satisfy Section Five of the Voting Rights Act. See supra note 46 and accompanying text.

94. 422 U.S. 358 (1975) (upholding the creation of minority districts which "fairly [reflect] the strength of the Negro community").

95. UJO, 430 U.S. at 161. Justice White specifically stated: "[I]mplicit in Beer and City of Richmond, then, is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure its reapportionment plan complies with Section Five." Id. Justices Brennan and Blackmun concurred in this assessment. Id. at 168-69.

96. Id. at 162-63.

97. Id. at 165-66. Justice White based his thinking on political gerrymandering cases which held that no injury occurs merely because a voter's candidate loses an election. Id. at 166; see also, Whitcomb v. Chavis, 403 U.S. 124, 153-60 (1971). Justice Rehnquist was the only concurring justice with this portion of the plurality opinion. UJO, 430 U.S. at 147.

98. UJO, 430 U.S. at 168. Justice White continued: "[W]e think it [constitutionally] permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently

http://scholarship.law.campbell.edu/clr/vol16/iss3/3
Justice Brennan was content to leave the "thorny question" answered by the last assertion in Justice White's opinion for another day but concurred in the result. Justice Stewart concurred separately by finding no violation of the Fourteenth or Fifteenth Amendments because there was no discriminatory purpose or effect on the part of the New York Legislature.

Only Chief Justice Burger dissented from the judgment. He asserted that racial quotas are per se unconstitutional under the rule established in Gomillion. He further concluded the plurality opinion misconstrued both the VRA and the holding in Beer. In his opinion, the decision "moves us one step farther away from a truly homogenous society."

Summation of the Court's decision in UJO is difficult in the extreme. The only clear principle is the use of racial considerations is acceptable as an effort to comply with the VRA. The constitutionally tolerable limits of this use of race were left undefined until Shaw v. Reno.

ANALYSIS

A. Justice O'Connor's Majority Opinion

The binding precedent created by the majority decision in Shaw establishes the constitutionally tolerable limits to the broad scope of the VRA. The holding provides:

numerous and whose residential patterns afford the opportunity of creating districts in which they will be the majority." Id. (emphasis added). The emphasized language plays a large role in the majority decision in Shaw v. Reno, 113 S. Ct. 2816 (1993).

99. UJO, 430 U.S. at 171. Justice Brennan was particularly concerned with the fact that the Court appeared to endorse a racial classification scheme under the misguided, unwise, and unconstitutional notion of benign discrimination. Id. at 174-75. He concurred with the result, however, because the VRA, implemented by the Attorney General on districts which had previously operated under discriminatory voting procedures, "substantially minimizes the objections to preferential treatment" of minority voters. Id. at 175. Justice Stewart joined Justice Brennan's opinion but filed his own opinion as well. Id. at 168.

100. Id. at 179. Justice Powell joined Justice Stewart's opinion which relied solely on the fact the plan did not undervalue the votes of white voters in King's County as a whole. Id. at 180.

101. Id. at 180.

102. Id. at 181; see also supra text accompanying notes 55-70.

103. UJO, 430 U.S. at 183; see also supra notes 45-46 and accompanying text.

104. UJO, 430 U.S. at 187.
A plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.\textsuperscript{105}

In simpler terms, Shaw stands for the proposition that traditional Equal Protection Clause analysis will apply even when reapportionment plans have been preapproved under the VRA, if those plans appear to segregate voters along racial lines.\textsuperscript{106}

1. The Gateway to Strict Scrutiny

Justice O'Connor carefully limited the holding to redistricting plans which "rationally can be viewed only as an effort to segregate the races for the purposes of voting."\textsuperscript{107} In her view, the claim put forth by those challenging the redistricting plan was analytically distinct from prior "vote dilution" decisions.\textsuperscript{108} Most importantly, this claim was analytically distinct from that made in UJO, the case relied upon by the district court below in granting summary judgment.\textsuperscript{109} Here, North Carolina’s redistricting plan was constitutionally suspect because the new districts were shaped in such a grotesque fashion to raise the eyebrows of the Court as being potentially "unexplainable on grounds other than race."\textsuperscript{110}

Illogical appearance of the legislative districts created by a challenged reapportionment plan is the threshold requirement plaintiffs must meet in order to reach the fertile field of "strict scrutiny." Once the plaintiff establishes the plan can only be explainable as racial segregation, the State must show a "compelling interest" and a "narrowly tailored" statute.\textsuperscript{111}

\textsuperscript{105} Shaw v. Reno, 113 S. Ct. 2816, 2828 (1993).
\textsuperscript{106} Id. "State legislation that expressly distinguishes among citizens because of their race [must] be narrowly tailored to further a compelling governmental interest." Id. at 2824. In analysis under the Equal Protection Clause, it is well established that use of racial classification gives rise to "strict scrutiny." See, e.g., Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
\textsuperscript{107} Id. at 2824.
\textsuperscript{108} Id. at 2829.
\textsuperscript{109} Id.
\textsuperscript{110} Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977); see also Shaw, 113 S. Ct. at 2825.
\textsuperscript{111} Shaw, 113 S. Ct. at 2832.
The rationale for this requirement lies in the pre-VRA cases of *Gomillion* and *Wright*. Justice O'Connor found *Gomillion* established that district lines which were "obviously drawn for the purpose of separating voters by race" demanded strict scrutiny regardless of the underlying motivation. She further found *Wright* to stand for the proposition that where voters of the same race reside in close proximity, the motivations of compactness, contiguity, and respect for political subdivisions would be adequate to explain the districts on grounds other than race.

Clouding the issue is the Supreme Court’s acknowledgement that not all race-conscious decisionmaking is unconstitutional. Apparently, the question becomes one of degree rather than a brightline rule that race conscious decisionmaking in the realm of redistricting is per se unconstitutional. The greater the influence of race in the state decisionmaking process, the more likely the chance that impermissible racial stereotyping will occur and the more likely that representatives will view themselves as representatives of one race rather than representatives for all the voters in their district.

The Court gives little or no guidance as to what constitutes a district which is "explainable only in terms of race." They prefer, instead, to imply only that they will know it when they see it. Under the facts of this case, an allegation of racial motivation combined with a map is sufficient to raise the issue, and, upon remand, North Carolina has the task of explaining the district in

112. See supra text accompanying notes 55-79.
113. *Shaw*, 113 S.Ct. at 2825.
114. *Id.* at 2826.
115. *Id.* at 2824.
116. *Id.* at 2827.
non-racial terms. Any attempt to justify creation of the offensive congressional districts in other than racial terms will likely fall on deaf ears on remand; in a strikingly similar case arising in Louisiana and delayed pending the outcome of Shaw, the district court flatly rejected all proffered justifications by the state as obviously pretextual.

2. Strict Scrutiny Applied

Once the State fails to explain a redistricting scheme in non-racial terms, the State must show a “compelling state interest” in the creation of majority-minority districts. Noting a redistricting plan which is approved under Section Five of the VRA may still be held unconstitutional, Justice O'Connor agreed that compliance with Section Five constituted a “compelling state interest.”

The Court also recognized the state could have a “compelling state interest” in complying with Section Two of the VRA. Outside of the VRA, the State could assert a “compelling state interest” in eradicating the effects of past racial discrimination. In Shaw, none of these “compelling state interests” were developed in the district court, therefore, the questions are to be investigated on remand.

The Court gave no specific guidelines regarding sufficiency of these potentially compelling interests. Justice O'Connor's discussion of the facts in Shaw raises more issues and answers less questions. Judging from the tenor of her opinion, the Court will strictly scrutinize challenged redistricting schemes, especially

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120. Id. at 2832. In this regard, North Carolina has primarily two options. The first is to redraw the legislative districts, thereby mooting the question. The second will be to argue that the district is an attempt to create a predominantly urban district and thus was not solely a race-based plan.
122. Shaw, 113 S. Ct. at 2830.
123. See supra note 54 and accompanying text.
124. Id. at 2830. But see Hays, 1993 U.S. Dist. 18775, at *52 (assuming without deciding that compliance with Section Five is a compelling state interest but expressing doubts on the matter).
125. Shaw, 113 S. Ct. at 2831; For an explanation of Section Two, see supra notes 48-50 and accompanying text.
127. 113 S. Ct. at 2831.
with regards to compliance with either Section Two or Section Five of the VRA.\textsuperscript{126}

Even if a compelling state interest exists, the plan could only be upheld if it was "narrowly tailored" to achieve that permissible interest.\textsuperscript{129} Under this prong of the strict scrutiny test, the state must show it did no more than was necessary to prevent "non-retrogression."\textsuperscript{130}

B. Dissenting Opinions

1. Justice White’s Dissent

Justice White, raising the most pressing question left unanswered by the majority opinion writes, "[S]imply stated: the appellants have not presented a cognizable claim, because they have not alleged a cognizable injury."\textsuperscript{131} The plaintiffs must allege either deprivation outright of the right to vote or reduction in a political or racial group’s influence on the political process.\textsuperscript{132} His rationale is that it is not possible to extricate political and racial considerations from the redistricting process.\textsuperscript{133} Therefore, a clear injury must occur before the courts enter the byzantine world of legislative redistricting.\textsuperscript{134} Justice O’Connor failed to address this "cognizable injury" question.

Justice White also objects strenuously to the majority utilizing bizarrely shaped districts as the criterion for applying strict scrutiny because strangely shaped legislative districts are not, in and of themselves, clearly indicative of unconstitutional racial

\begin{thebibliography}{9}
\bibitem{128} See, e.g., Shaw, 113 S. Ct. at 2824-32; see also Hays, 1993 U.S. Dist. LEXIS 18775, at *52-64.
\bibitem{129} Shaw, 113 S. Ct. at 2831.
\bibitem{130} Id. Because North Carolina had no majority-minority congressional districts prior to the redistricting and two afterwards, it was implied the General Assembly went far beyond the requirements of "non-retrogression."\textsuperscript{Id.} Id. Id. see also Hays, 1993 U.S. Dist. LEXIS 18775, at *56. For a discussion of "non-retrogression," see supra note 46 and accompanying text.
\bibitem{131} Shaw, 113 S. Ct. at 2834 (White, J., dissenting).
\bibitem{133} See id. at 2834-35.
\bibitem{134} Id. Indeed, it has been suggested that even judicial decisions on the matter of redistricting are infused with partisan political concerns. Grofman, supra note 48, at 1249-56. These concerns center upon a predominantly Republican bench and previously Republican Department of Justice showing great favor to minority voting rights. Id.
\end{thebibliography}
gerrymandering. His theory relies on the assertion that the Constitution is concerned with the effects of racial segregation and not merely the unsightly appearance of such segregation. The majority's discussion of the effects of "political apartheid" as being an impermissible form of racial stereotyping which thereby brings about unconstitutional effects is very persuasive in answer to Justice White's argument.

2. Justice Stevens' Dissent

Justice Stevens' dissent focuses on his assertion that a violation of the Equal Protection Clause may occur when a group in power uses this power solely to enhance its political strength. His theory applies to all types of group classifications including racial, political, and ethnic. According to the majority opinion, Justice Steven's approach is fatally flawed because racial classifications, by the language of the Fourteenth and Fifteenth Amendments, are subject to a higher level of scrutiny under the Constitution and are suspect regardless of which race is benefitted.

3. Justice Souter's Dissent

Justice Souter's dissent is based upon the same principles as Justice White's dissent, namely that injury in the form of vote dilution must be shown before a redistricting plan may be ruled unconstitutional. According to Justice Souter's theory, by drawing district lines to favor minority voters, majority voters have had no constitutional rights infringed upon because their opportunities to participate in the process have not been diminished. Because there is no infringement of a constitutional right due to gerrymandering, these challenges should be considered in a category distinct from traditional Equal Protection analysis and subject to a lesser degree of scrutiny than strict.

135. Shaw, 113 S. Ct. at 2840. "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." Id. at 2841.
136. See id. at 2827.
137. Id. at 2844.
138. Id.
139. Id. at 2829.
140. Id. at 2846.
141. Id.
142. Id. at 2846-48.
Justice O'Connor answers this attack by responding that racial classifications which separate voters into racial blocs create "special harms that are not present in our vote dilution cases," such as enhancing racial stereotypes and encouraging elected officials to represent only one race rather than all their constituents. 143 These "harms" necessitate a stricter scrutiny of the purpose and means used by the State. 144

4. Net Result of the Dissenting Opinions

In analyzing most Supreme Court decisions, it is helpful to interpret the dissenting opinions which try to modify or moderate the impact of the majority opinion. However, this approach is unhelpful in Shaw because each of the dissenters objects forcefully to the main tenet of the majority opinion — a constitutional claim arises from egregious drawing of district lines which are explainable only by reference to race.

Even so, Justice O'Connor's failure to address the suggestions of Justices White and Souter that no cognizable injury occurred may signal a limitation on the holding. This limitation arguably is the districts must be so incredibly bizarre (e.g. North Carolina's Twelfth District) to draw the absolutely unavoidable conclusion that impermissible racial stereotyping occurred. 145

C. Recommendations for Local Redistricting Officials

The substantial impact of Shaw is already beginning to appear. In a case decided just seventeen days after the Shaw opinion, the Fourth Circuit Court of Appeals used the decision to reject a racially motivated town council plan in Hines v. Mayor of Ahoskie. 146 In Hines, the court of appeals upheld the district court in rejecting an alternative redistricting plan for the town of Ahoskie, North Carolina. 147 The original plan provided for two black majority town council districts and two white majority town council districts with a fifth council member elected at-large. 148 This plan had received pre-clearance from the Attorney General under Section Five of the VRA but was objected to by black townpeople who contended that an alternative plan with three majority

143. Id. at 2828.
144. Id.
145. See, e.g., id. at 2848 (Souter, J., dissenting).
147. Id. at *2.
148. Id. at *4.
black districts and two majority white districts should be created. The town has 50.5% black population but only 45.6% black voting-age population. The district court found that creation of three majority black districts would overrepresent the black population but that based on past voting patterns the at-large district would effectively overrepresent the white population. The district court solved the dilemma by eliminating the at-large district leaving only four town council districts.

The court of appeals, after reinstating the original plan, upheld the district court's rejection of the three black district alternative plan by asserting Shaw stood for the proposition that when the only motivation for a districting plan is racial and no sufficient justification exists, the plan violates the equal protection rights of white voters. Though this is probably too broad a reading of the holding in Shaw, it is indicative of the rapid and violent impact of the case. As Hines indicates, the Shaw decision will have a bearing on districting for local elections which is immediate and drastic.

First Recommendation: Continued Compliance

It is important for local officials to ensure compliance with the VRA as applied to their particular counties. Forty counties in

149. Id.
150. Id. at *2.
151. Id. at *7.
152. Id. at *7-9.
153. Id. at *23.
154. See, e.g., Peter Applebome, N.C. Case Stirs Up Other Legal Challenges to Redistricting, The News and Observer (Raleigh, N.C.), Feb. 27, 1994, at 19A. This article focuses on the veritable explosion of redistricting litigation following Shaw. Id. The primary focus of the redistricting challenges is congressional districts but local election districts, especially in hotly contested political regions, are also among the targets. Id.
155. The effect will be long-lasting as well. The majority opinion, written by Justice O'Connor, was joined by Chief Justice Rehnquist, Justice Scalia, Justice Kennedy, and Justice Thomas. Shaw v. Reno, 113 S. Ct. 2816, 2819 (1993). The core of the majority, therefore, consists of relatively young Justices who, in all probability, will influence the Court for a long time.

The dissenters, in contrast, consist of Justice White (submitting this opinion on his last day on the Court), Justice Blackmun (who recently announced his retirement), Justice Stevens (age 73), and Justice Souter (the only dissenter appointed later than 1975 and under 70 years old).

It is not yet possible to assess the impact that the appointment of Justice Ruth Bader Ginsburg will have on the principles established in Shaw.
North Carolina must comply with Section Five of the VRA. The principle of "non-retrogression" still applies in those counties; therefore, minority voters must not lose electoral strength under any new districting plan.

Section Two of the VRA applies to all counties. It is necessary, therefore, to satisfy the Thornburg v. Gingles test for vote dilution as well. The requirement of continued compliance results in there being no shortcut around the Shaw holding by creating completely at-large or multi-member districts.

**Recommendation: Traditional Redistricting Principles**

The specific holding in Shaw applying strict scrutiny to voting districts will come into play only if the districts drawn can be explained solely in racial terms. Use of the traditional districting principles of contiguity, compactness, and respect for political subdivisions will, more likely than not, remove the districting plan from the suspect category.

As much as possible, town, township, and precinct boundaries should be honored. Within towns, neighborhood subdivisions should be split only if absolutely necessary. Any failure to use traditional districting tools must have a sufficient, non-racial, justification or be narrowly tailored to achieve a compelling interest.

**Third Recommendation: Reduce Political Influence**

It is apparently contrary to the basic laws of the political world to have redistricting conducted solely on a non-partisan basis, but the Shaw decision indirectly encourages it. It would be naive to assert that most judicial redistricting battles are fought for the purely altruistic reason of racial equality. They are fought because an interest group senses an opportunity to improve its position vis-a-vis its opponent. Twisting the VRA into serving purely political ends has turned out to be child's play.

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156. See supra note 41.
157. See supra note 46 and accompanying text for a discussion of "non-retrogression."
158. See supra note 48 and accompanying text.
159. See supra notes 51-54 and accompanying text.
160. See supra notes 105-22 and accompanying text.
161. This is not to suggest that town officials should play "hide the ball" with the reasoning for districting decisions but that the justification behind every line drawn should be considered.
unstated, implications arise from Shaw that there are constitutional limits to political gameplaying.162

A reduction of political pressure to protect incumbents or “pair” political enemies would make the walk between the VRA strictures and the rules established in Shaw immeasurably easier. Because political considerations have little to do with the constitutionally-approved redistricting tools of contiguity, compactness, and community of interest, their removal will increase reliance on these traditional tools and on the VRA requirements alone.164 In turn, this will reduce the chances of creating a district which is so ridiculous that it can only be explained as racially motivated.

Unrealistic though it may be, the best solution appears for a redistricting commission or committee to be established with membership equally divided among all political groups with a deciding member chosen by a coin flip or lottery. The commission will be charged only with establishing procedures and districts for elections. For those counties where “non-partisan” elections are held, interest groups still develop and should be accounted for in organizing the commission.165 The deciding member could be “chosen” on the same schedule as elections are held to ensure that no single political group unfairly retains control for too long.

Also, to reduce political pressures, the county should engage an outside redistricting consultant who is provided only with “legitimate” data, such as population, township lines, neighborhoods. Then, the consultant can develop the ideal model plan which, most likely, will be free from outside political pressure. This method has been approved of in recent cases.166


163. “Pairing” is the process of placing two incumbents of the opposing party in the same district thereby reducing the number of incumbents from the opposing party. Grofman, supra note 48 at 1251.

164. See, e.g., Joseph Neff and Rob Christiansen, Insider Tells of the Politics Behind Districts, The News and Observer (Raleigh, N.C.), March 31, 1994, at 1A. The political influence on North Carolina’s challenged redistricting plan is illustrated by a list of the instructions given to the chief mapmaker for the General Assembly; none of them are related to race. Id. at 16A.

165. In actuality, there is probably no such thing as a truly “non-partisan” election. The political animal generally travels in a pack.

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166. See R. D. McKeller, The

difficulties and advantages of computer-modeling in reducing political influence
on redistricting).