When Appearance Matters: Reapportionment Under the Voting Rights Act and Shaw v. Reno

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I. INTRODUCTION

In announcing its opinion in Shaw v. Reno, the Supreme Court of the United States introduced a new hurdle into the realm of well-settled jurisprudence regarding reapportionment. A majority of five justices created an "analytically distinct claim," enabling them to conclude that appellants, white voters in North Carolina, had stated a claim under the Equal Protection Clause of the Fourteenth Amendment. The lack of jurisprudential authority for the majority opinion and the intentional ambiguity in its language result from what the four dissenting justices accurately term an abandonment of the Court’s prior precedent concerning reapportionment.

In the arena of voting rights, there have traditionally been only two types of claims recognized as arising under the Constitution: total exclusion from the electoral process and vote dilution. Shaw creates an amorphous third category by holding that voters have stated a claim if a districting plan "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, without regard for traditional districting principles and without sufficient compelling justification." If the above claim cannot be contradicted on remand, the state has the burden of proving that the redistricting plan is narrowly tailored to meet a compelling state interest. However, the Court gives little guidance as to how a state might satisfy this burden.

While recognizing that race is always taken into account when creating new districts—especially when the Voting Rights Act of 1965 is implicated—the Court is placing a limit on how states may design a plan to comply with the Act. The Supreme Court is limiting the extent to which traditional districting principles, such as compactness, contiguity, and communities of interest, can be sacrificed to comply with the Voting Rights Act, or to satisfy other legitimate state interests, such as incumbency protection and partisan politics.

Taking race into account is not a new phenomenon in constructing districts. It is difficult to conceive of a redistricting plan, drawn to remedy an objection entered by the Attorney General as violating the Voting Rights Act, that fails to use race as a factor—if not the sole factor—in designing the new district. As Justice Brennan stated, "It would be naive to suppose that racial considerations do not enter into apportionment decisions."
Shaw v. Reno attempts to remove race as the dominant factor in redistricting and to increase the influence of what the majority calls traditional districting principles. The problem with the majority opinion is it attempts to do this without reaching the ultimate question—the constitutionality of the Voting Rights Act. The majority insists that traditional districting principles such as compactness be taken into account even at the expense of racial considerations. However, the majority fails to reconcile how a remedial response to a violation of the Voting Rights Act, which in all practicality must use race to remedy the violation, may at the same time be constitutional under the reasoning of Shaw.

This casenote will illustrate how this double standard has left courts and states caught between the will of Congress, the Voting Rights Act, and the will of the Court, Shaw v. Reno. Part II will analyze the history of the Voting Rights Act. Part III describes the background of Shaw, while Part IV illustrates the divergence that Shaw creates in the jurisprudence and the majority’s underlying rationale for its decision. Lastly, Part V explores the situation that Shaw creates for states, and specifically the constitutionality of Louisiana’s Fourth Congressional District, the subject of Hays v. Louisiana.6

II. THE VOTING RIGHTS ACT OF 1965

A. History of the Act8

The Voting Rights Act of 1965 (hereinafter the Act) was enacted as a specific statutory provision, in addition to the constitutional provisions of the Fourteenth and Fifteenth Amendments, to protect the fundamental right to vote announced by the Court in Reynolds v. Sims.9 Litigation of voting rights claims on a case-by-case basis under the Civil Rights Acts of 1957, 1960, and 1964 attempted to remedy unconstitutional voting practices but had only negligible success, resulted in only piecemeal gains, was costly and time consuming, and was thwarted by the development of new voting practices abridging or denying the minority right to vote.10 Congress responded with a blanket legislative
prohibition against discriminatory practices. The Act provided for administrative relief and shifted responsibility from the courts to the Department of Justice.

B. Section 2 of the Voting Rights Act

Section 2 of the Act, as amended in 1982, forbids the application of any "voting qualification or prerequisite to voting or standard, practice, or procedure

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation
(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement 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, as provided in subsection (b) of this section.
(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(as amended by Pub. L. No. 97-205, § 3, 96 Stat. 134 (1982)).

12. The 1982 amendment, Pub. L. No. 97-205, § 3, 96 Stat. 134 (1982), changed the burden of proof that plaintiffs must satisfy in order to establish a violation of Section 2. The old Section 2 provided that: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973 (1976) (emphasis added).

This language was interpreted by the Supreme Court to require that plaintiffs prove the challenged voting practice was intentionally discriminatory or "conceived or operated as [a] purposeful device[es]" for discrimination. Mobile v. Bolden, 446 U.S. 55, 66, 100 S. Ct. 1490, 1499 (1980) (quoting Whitcomb v. Chavis, 403 U.S. 124, 149, 91 S. Ct. 1858, 1872 (1971)).


... which results in a denial or abridgement of the right... to vote on account of race or color"\textsuperscript{13} or because of membership in a "language minority group."\textsuperscript{14} A violation is established if members of any of the above groups "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."\textsuperscript{15} The extent of any of a violation remedy is expressly limited by Congress: "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."\textsuperscript{16}

C. \textit{Section 5 of the Voting Rights Act}\textsuperscript{17}

Section 5 was intended to "eradicat[e] the continuing effects of past discrimination" in covered jurisdictions and to "insure that old devices for
The enactment of Section 5 was an "uncommon exercise" of legislative authority, but was necessary to effectively combat racial discrimination, which could not be done with Section 2 alone. The legislative history of Section 5 reveals its purpose:

Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. . . . Congress therefore decided, as the Supreme Court held it could, "to shift the advantage of time and inertia from the perpetrators of the evil to its victim," by "freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory."20

Section 5 applies only to "covered jurisdictions." A "covered jurisdiction" is one in which Section 4(b) of the Act11 applies because of a systematic exclusion of minorities from the electoral process.22

of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. (enacted by Pub. L. No. 89-110, Title I, § 5, 79 Stat. 439 (1965)).


(b) The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.
22. See supra note 17 for text of Section 5 (codified at 42 U.S.C. § 1973c) incorporating
Section 5 acts as a preventive measure. For example, when a covered jurisdiction enacts a new or revised “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting,” it must obtain approval before implementation of the plan either by instituting an action in the United States District Court for the District of Columbia for a declaratory judgment or by seeking approval of the Attorney General. States generally choose the latter method because it is less costly and less time consuming. The standard of proof for either of the above procedures is that “such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”

Under Section 5, new or revised reapportionment plans must be approved by one of the methods discussed above. An “effect” of a new or revised reapportionment plan that would prohibit its implementation is defined as one that “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” This standard is commonly called the principle of “nonretrogression.” This standard ensures only what its label (nonretrogression) ordinarily means, that the protected group will not experience a decrease in its effect on the electoral franchise. The principle guarantees maintenance of the status quo, not an increase in voting power.

Shaw v. Reno is inextricably related to the Voting Rights Act. In Shaw, the redistricting plan challenged by voters resulted from North Carolina’s attempt to comply with the Act. The Court’s resolution of Shaw creates a tension between the mandates of the Act as perceived by the state and the mandates of the Constitution as perceived by the Court.

III. BACKGROUND OF SHAW V. RENO

A. The Facts

As a result of population increases reflected in the 1990 Decennial Census, the General Assembly of North Carolina reapportioned the state’s congressional districts, gaining an additional seat in the process. The original redistricting plan, enacted on July 9, 1991, created a twelfth district (the First District), that had a
majority of black persons of voting age and registered to vote. This “majority-minority” district was centered in the northeastern part of the state.\textsuperscript{28}

The General Assembly submitted the redistricting plan to the Attorney General for preclearance in accordance with 42 U.S.C. § 1973c (Section 5). Forty of North Carolina’s one-hundred counties are considered “covered jurisdictions,” a fact which places them under Section 5 of the Act.

The Attorney General entered a formal objection to the proposed plan on the ground that “the proposed configuration of the district boundary lines in the south-central to southeastern part of the state appeared to minimize minority voting strength given the significant minority population in this area of the state.”\textsuperscript{29} More specifically, the Attorney General asserted that the General Assembly “chose not to give effect to black and Native-American voting strength in this area, even though it seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration in this part of the state.”\textsuperscript{30} Further, with regard to the one majority-minority district created in the proposed redistricting plan, it was noted that

\begin{quote}
[...]he unusually convoluted shape of that district does not appear to have been necessary to create a majority black district and, indeed, at least one alternative configuration was available that would have been more compact. Nonetheless, we have concluded that the irregular configuration of that district did not have the purpose or effect of minimizing minority voting strength in that region.\textsuperscript{31}
\end{quote}

In response to the Attorney General’s objection, the General Assembly enacted the redistricting plan that is the subject matter of Shaw v. Reno on January 24, 1992.\textsuperscript{32} The revised plan created a second majority-minority district, the Twelfth District, not in the south-central to southeastern part of the state as suggested, but in the north-central region along Interstate 85.

The shapes of the two majority-minority districts contained in the revised plan gave rise to the claim in Shaw and to some very imaginative and colorful descriptions in judicial opinions and commentaries. District One was described as “a bug splattered on a windshield”\textsuperscript{33} and a “Rorschach ink-blot test.”\textsuperscript{34} The majority in Shaw described it as “hook shaped... with finger-like extensions.”\textsuperscript{35}

\begin{footnotesize}
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\item\textsuperscript{28} Shaw v. Barr, 808 F. Supp. 461, 463 (E.D.N.C. 1992).
\item\textsuperscript{29} Id. (quoting Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, to Tiare B. Smiley, Special Deputy Attorney General, State of North Carolina (Dec. 18, 1991)).
\item\textsuperscript{30} Id.
\item\textsuperscript{31} Id. at 463 n.2. This is the standard for preclearance under Section 5 of the Voting Rights Act. See 42 U.S.C. § 1973c (1981).
\item\textsuperscript{32} See infra Appendix A for a diagram of the North Carolina plan.
\item\textsuperscript{33} Political Pornography-Il, Wall St. J., Feb. 4, 1992, at A14.
\item\textsuperscript{34} Shaw v. Barr, 808 F. Supp. 461, 476 (E.D.N.C. 1992) (Voorhees, C.J., dissenting in part).
\item\textsuperscript{35} Shaw v. Reno, 113 S. Ct. 2816, 2820 (1993).
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District Twelve is an even better example of what has been termed “computer-generated pornography.”\(^{36}\) It is approximately 160 miles long and “slinks down the Interstate Highway 85 corridor until it gobbles in enough enclaves of black neighborhoods.”\(^{37}\) Most attention has been drawn to the manner in which the new district follows the path of an interstate highway. According to the Shaw majority, “[N]orthbound and southbound drivers on I-85 sometimes find themselves in separate districts in one county, only to ‘trade’ districts when they enter the next county.”\(^{38}\) As one state legislator commented, “‘If you drove down the interstate with both car doors open, you’d kill most of the people in the district.’”\(^{39}\)

### B. The District Court Decision

White voters originally brought a 42 U.S.C. § 1983 claim against various federal and state officials challenging the congressional redistricting plan for North Carolina.\(^{40}\) Their claim alleged that the state created an unconstitutional racial gerrymander. Specifically, the claims alleged that the federal defendants had either misinterpreted 42 U.S.C. § 1973(b), as amended, and consequently applied it unconstitutionally; or, if correctly interpreted, “had applied a facially unconstitutional provision of the Act to accomplish an unconstitutional end.”\(^{41}\) The alleged unconstitutional end for either of the above theories is “the intentional concentration of majority populations of black voters in districts that are in no way related to considerations of compactness, {contiguity}, or jurisdictional communities of interest.”\(^{42}\)

These claims were dismissed by the lower court on two grounds. First, the court dismissed for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).\(^{43}\) Section 14(b) of the Voting Rights Act confers exclusive original jurisdiction of a claim such as plaintiffs’ upon the District Court for the District of Columbia.\(^{44}\) The court stated as additional grounds for dismissal failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).\(^{45}\) As interpreted by the Supreme Court in Morris v. Gressette,\(^{46}\) preclearance decisions made by the Attorney General under Section

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38. Shaw, 113 S. Ct. at 2821.
41. Id. at 465.
42. Id.
43. Id. at 467.
5 of the Voting Rights Act are discretionary and are not subject to judicial review in any court. The court concluded that the voters were, in effect, seeking judicial review of discretionary decisions of the Attorney General; therefore, they failed to state a cognizable claim for relief.

The allegation against the state defendants was essentially that “the General Assembly of North Carolina acted unconstitutionally in deliberately creating two congressional districts in which black persons constitute majorities of the overall voting-age and registered-voter populations.” The above allegation can be broken down into two claims. First, the plaintiffs claimed that “any state legislative redistricting driven by considerations of race—whatever the race, whatever the specific purpose, whatever the specific effect—is unconstitutional” and “to the extent the Voting Rights Act authorizes any race-conscious legislative redistricting, the Act is facially unconstitutional.” Second, the plaintiffs alleged that to the extent the redistricting plan attempts to provide for proportional representation of minority races in Congress and fails to observe “considerations of contiguity, compactness, and communities of interest,” the plan constitutes an unconstitutional application of the Voting Rights Act.

The voters’ allegations enumerated above are based on statutory (Voting Rights Act) as well as constitutional provisions. The constitutional provisions on which the complaint is based are: the Equal Protection Clause of the Fourteenth Amendment; the Fifteenth Amendment; the Privileges and Immunities Clause of the Fourteenth Amendment; Article I, Section 2; and Article I, Section 4. The court promptly dispensed with the latter three claims and limited its analysis to the Equal Protection Clause, into which the Fifteenth Amendment claim was subsumed.

Two important factors that the court appropriately took special note of were: first, plaintiffs are white voters; and second, it is not disputed that race was taken into account in designing the redistricting plan at issue.

47. Shaw, 808 F. Supp. at 467.
48. Id. at 468 (emphasis in original).
49. Id. at 468.
50. The district court disposed of plaintiffs’ claims based on the Privileges and Immunities Clause of the Fourteenth Amendment, U.S. Const. art. I, §§ 2, 4, as either not applicable to plaintiffs’ claim or not affording plaintiffs the relief they sought. Shaw, 808 F. Supp. at 468-69.
51. One may ask why this is not a Fifteenth Amendment case. In Shaw v. Barr, the Fifteenth Amendment challenge was considered together with the Equal Protection claim. In both racial gerrymandering claims and vote dilution claims, the analysis is the same. The analysis is whether “state action . . . invidiously discriminates against the voting rights of some of the states’ citizens on account of their race.” Shaw, 808 F. Supp. at 469-70 n.7. See, e.g., Rogers v. Lodge, 458 U.S. 613, 621, 102 S. Ct. 3272, 3277 (1982) (stating that a showing of racially motivated discrimination is required in an equal protection vote dilution claim); Whitcomb v. Chavis, 403 U.S. 124, 149, 91 S. Ct. 1858, 1872 (1971) (proof that districts were “conceived or operated as purposeful devices” to further discrimination is required to establish violation of the equal protection clause). See also Mobile v. Bolden, 446 U.S. 55, 62, 100 S. Ct. 1490, 1497 (1980) (plurality opinion) (facially race-neutral state action violates Fifteenth Amendment only if motivated by a discriminatory purpose).
52. Shaw, 808 F. Supp. at 470.
In rejecting the plaintiffs' first claim that race-conscious redistricting is per se unconstitutional, the court applied the leading case in the area of redistricting that is directly on point with Shaw: United Jewish Organizations of Williamsburgh, Inc. v. Carey. The plaintiffs' second contention was twofold. First, the state cannot do any more than is required by the Voting Rights Act. The basis of this allegation is that compliance with the Voting Rights Act did not require the creation of two majority-minority districts. Second, the minority voters for whom these districts were drawn must prove entitlement to the districts. The plaintiffs allege that a minority group is entitled to a district in which they constitute the majority only if, among other factors, a compact district can be created. The district court, however, did not rest its decision on the issue of compactness or on the limit of the state's remedial power under the Voting Rights Act. Instead, it emphasized that the white voters could not prove "that the redistricting plan was adopted with the purpose and effect of discriminating against white voters such as plaintiffs on account of their race." Specifically, the plaintiffs could not prove that the redistricting plan had the purpose and would have the effect of minimizing minority voting strength in the region.

In a separate opinion, Chief District Judge Voorhees concurred in the result reached on the unconstitutional per se issue and that United Jewish Organizations disposed of this issue. However, Judge Voorhees stated that there are limits to what United Jewish Organizations authorizes. He described these limits as: "[T]ime-honored, constitutional concepts of districting, such as contiguity, compactness, communities of interest, residential patterns, and population equality." Judge Voorhees' conclusion anticipated the majority's theme in Shaw v. Reno: "Moreover, it could hardly have been the intent of Congress to permit elevation of the racial criterion to the point of exclusion of all other factors of constitutional dimension, such as contiguity, compactness, and communities of interest, which bear on the rights of these Plaintiffs."

55. The compactness precondition to a violation of Section 2 is from the Supreme Court's opinion in Thornburg v. Gingles, 478 U.S. 30, 50-51 nn. 16-17, 106 S. Ct. 2752, 2766-67 nn. 16-17 (1986). As Justice Marshall explained:
   The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. Id. at 50 n.17, 106 S. Ct. at 2766 n.17.
56. Shaw, 808 F. Supp. at 472. See United Jewish Orgs. of Williamsburgh, Inc., 430 U.S. at 165-68, 97 S. Ct. at 1009-12 (plurality opinion); id. at 179-80, 97 S. Ct. at 1016-17 (Stewart, J., concurring).
57. Shaw, 808 F. Supp at 476 (Voorhees, J., dissenting in part).
58. Id. at 480 (footnote omitted).
On appeal to the Supreme Court of the United States, the white voters alleged that North Carolina’s redistricting plan constitutes an unconstitutional racial gerrymander. The question presented was whether appellants had stated a cognizable claim. The Court answered yes, reversing the district court and holding that the appellants had stated a claim upon which relief could be granted under the Equal Protection Clause.

In the history of Voting Rights litigation, never has a complaint such as the one presented by the North Carolina voters been held to state a cognizable claim, until Shaw. How the Court analyzed the allegations to reach such a conclusion is worthy of keen scrutiny.

IV. ANALYSIS OF SHAW V. RENO

A. The Nature of the Claim

The specific nature of the appellants’ claim is essential to an understanding of Shaw v. Reno. Appellants claim neither that they are excluded from participation in the electoral process, nor that the redistricting plan dilutes the voting strength of white voters. Quite simply, appellants claim that “the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a ‘color-blind’ electoral process.”

By so classifying their claim, appellants attempt to take this case out of the redistricting arena, which has always been treated as a sui generis category in the context of racial classifications, requiring a showing of discriminatory purpose and effect (absent which, no claim could be stated), and treat it as an ordinary race case which must withstand strict scrutiny, eliminating the need to prove discriminatory purpose or effect. Redistricting cases, although admittedly the result of a racial classification, were exempt from strict scrutiny before Shaw because the reapportionment process under the Voting Rights Act necessitates the use of racial criteria.

59. In an action challenging a redistricting plan, any appeal is directly to the Supreme Court of the United States: there is no appellate level review. See 42 U.S.C. § 1973c (1988) (“and any appeal shall lie to the Supreme Court.”).


61. Id. at 2824 (1993).


63. 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 that its reapportionment plan complies with § 5. That proposition must be rejected and § 5 held unconstitutional to that extent if we are to accept petitioners’ view that racial criteria
Appellants use the appearance of the new districts as the basis for their claim. They object to "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, without regard for traditional districting principles and without sufficiently compelling justification." 64

B. The Majority Opinion

The majority places a limit on how states may redistrict—whether cloaked in terms of remedying a violation of the Voting Rights Act or otherwise. How the Court finds authority for placing limits on what states may do to remedy a violation of the Voting Rights Act is both an exercise of imagination and ambiguity. The majority begins its analysis of "relevant" authority with the following: "Appellants contend that redistricting legislation that is so bizarre on its face that it is ‘unexplainable on grounds other than race,’ demands the same close scrutiny that we give other state laws that classify citizens by race. Our voting rights precedents support that conclusion." 65 First, it is unnecessary for the majority to analyze whether the district can be explained on grounds other than race for the purpose of determining that the district was drawn with race in mind. All parties concede that race was taken into account in constructing the plan. Second and most importantly, the "voting rights precedents" that the majority refers to as supporting its conclusion are distinguishable. The principal cases relied on are Guinn v. United States, 66 Gomillion v. Lightfoot, 67 Wright v. Rockefeller, 68 and, ironically, United Jewish Organizations of Williamsburgh, Inc. v. Carey.

1. The Court’s Authority

Although Guinn and Gomillion were Fifteenth Amendment cases and Shaw is a Fourteenth Amendment case, this alone is not enough to distinguish them. The lower court in Shaw v. Barr specifically concluded that the Equal Protection Clause of the Fourteenth Amendment provides greater protection than the
Fifteenth Amendment and, therefore, disposed of the two claims under a single analysis. Further, in *Gomillion*, Justice Whittaker stated that “the decision should be rested not on the Fifteenth Amendment, but rather on the Equal Protection Clause of the Fourteenth Amendment.” The Supreme Court has frequently affirmed the correctness of Justice Whittaker’s view.

*Guinn* is distinguishable as a total exclusion case. The statute in question imposed a literacy requirement but contained a “grandfather clause” applicable to individuals and their lineal descendants entitled to vote “on or prior to January 1, 1866.” The effect of the statute was to exclude voters—especially blacks—from the voting process. The appellants in *Shaw* have not been so excluded.

Like *Guinn*, *Gomillion* is also a pre-Voting Rights Act case and a total exclusion case. *Gomillion* concerned a statute that changed the municipal boundaries of the City of Tuskegee, Alabama from a square to a twenty-eight-sided figure with the effect of eliminating from the city all but “four or five of its 400 Negro voters while not removing a single white voter or resident.” The Court specifically recognized that the intent of the legislature was to deprive black citizens of the right to vote with the incidental result of changing the city’s boundaries.

The majority in *Shaw* particularly draws its support from a concurring opinion in *Gomillion* by Justice Whittaker. Justice Whittaker disagreed with resting the Court’s decision on the Fifteenth Amendment, but instead maintained that the decision should be based on the Equal Protection Clause of the Fourteenth Amendment because the “State’s purpose... of ‘fencing Negro citizens out of’ Division A and into Division B is an unlawful segregation of races of citizens.” Thus, Justice Whittaker argued racial segregation alone is sufficient to constitute a cognizable claim.

*Wright v. Rockefeller* is also distinguishable from *Shaw* because the plan in question in *Wright* did not result from attempted compliance with the Act. However, *Wright* is in line with the majority’s treatment of *Shaw* as a typical

70. *Gomillion*, 364 U.S. at 349, 81 S. Ct. at 131 (Whittaker, J., concurring).
74. *Id.* at 347, 81 S. Ct. at 130.
75. Justice Whittaker defines the right to vote as “the same right to vote as is enjoyed by all others within the same election precinct, ward or other political division.” *Id.* at 349, 81 S. Ct. at 131. Thus, if according to the new municipal boundaries certain citizens are placed outside of the precinct, they have no right to vote that can be denied or abridged and therefore, no right protected by the Fifteenth Amendment. This is the case even if the redistricting plan was drawn “by the State for the purpose of placing a racial group of citizens in Division B rather than A.” *Id.*, 81 S. Ct. at 131 This same principle would deny appellants in *Shaw* of a Fifteenth Amendment claim.
race case. The issue to be decided in Wright was whether the appellants sustained their burden of proving that the State’s redistricting plan “segregate[d] eligible voters by race and place of origin in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and in violation of the Fifteenth Amendment.” Like Shaw, Wright was not an exclusion case, nor did the plaintiffs allege vote dilution. The Court rejected the appellants’ claim in Wright because they failed to prove that the “New York Act was the product of a state contrivance to segregate on the basis of race or place of origin.”

Because minorities who were claiming overrepresentation in one district and underrepresentation in three other districts were located in one area of the county that was being reapportioned, therefore, making it difficult geographically to distribute minorities among several districts, the Court concluded that appellants had not proven intent to segregate along racial lines. As the lower court stated, the location of the minority group “made it difficult, even assuming it to be permissible, to fix districts so as to have anything like an equal division of these voters among the districts.” The majority in Shaw has since answered this question of whether it would be permissible to construct districts in a manner that would give minorities voting strength in several districts by overlooking compact locations of these minority groups. The answer is no.

The dissent in Wright forms the basis of the majority’s argument. The two main premises of the dissent are: first, neighborhoods cannot be disregarded in the drawing of electoral districts; and, second, segregating voters along racial lines promotes polarized voting. These premises are essentially what the Court implicitly concludes are the discriminatory purpose and effect, respectively, of the redistricting plan in Shaw.

Justice Goldberg’s dissent in Wright clearly states that no discriminatory effect is needed when there is racial segregation: “Given this settled principle that state-sanctioned racial segregation is unconstitutional per se, a showing of serious under-representation or other specific harm to individual complainants is irrelevant.” Given the Shaw majority’s reliance on the dissent in Wright, the above quoted language could indicate that although the Court in Shaw intimated that discriminatory purpose and effect were present, they might not be necessary to state a claim. Indeed, this seems to be the logical conclusion of Shaw because if districting plans that use race as a factor must satisfy strict scrutiny, questions of purpose and effect are irrelevant. What is obvious, however, is that if the Court requires a showing of effect in order to state a claim, it will be analyzed on a less rigorous standard under Shaw than was required previously in voting

77. Id. at 56, 84 S. Ct. at 605.
78. Id. at 58, 84 S. Ct. at 606.
79. Id. at 57, 84 S. Ct. at 606 (footnote omitted).
80. Id. at 59, 67, 84 S. Ct. at 607, 611 (Douglas, J., dissenting).
81. Id. at 69, 84 S. Ct. at 612 (Goldberg, J., dissenting).
cases. To state a cause of action, all the plaintiffs need to show by way of harm (effect) is that a standard based on race was used.82

The plaintiffs in *Gomillion* and *Wright* alleged that voters had been segregated on the basis of race. Before the Voting Rights Act, this run-of-the-mill race case might have stated a cause of action. But the Voting Rights Act necessitates the use of race as a factor in reapportionment. Otherwise, the Act is useless and must be declared unconstitutional. Therefore, the majority is accurate in its reliance on *Gomillion* and *Wright* as race cases, but the majority should nevertheless distinguish *Shaw* from these cases because the challenged reapportionment plan in *Shaw* is a result of compliance with the Act, unlike the plans challenged in *Gomillion* and *Wright*. The Court's reliance on *Gomillion* and *Wright* and its misused reliance of the case most directly on point, *United Jewish Organizations*, are unsound.

The majority argues that classifications based on race perpetuate actions taken by many to disenfranchise and stigmatize voters because of their race. But this is precisely why Congress enacted the Voting Rights Act—because states were still attempting to use practices such as those in *Gomillion* and *Wright* to block minority voters out of the process. The Voting Rights Act envisions using race as a factor to remedy the effects of such practices. At the same time, the Voting Rights Act does not authorize injury to majority voters in the process. If a majority voter has been injured in the redistricting process, he would have a remedy under the Equal Protection Clause. Absent any injury, he does not state a cognizable claim.

The claim in *Shaw* presents an antinomy between two equally valid principles: one, that racial classifications are inherently suspect and require strict scrutiny and; two, that remedial devices such as the Voting Rights Act that require racial classifications are necessary to ensure equal minority participation in the electoral process. The majority’s idealism has caused it to resolve this seemingly unresolvable conflict without regard to practical realities.

The Voting Rights Act was enacted to provide a statutory framework for resolving cases such as *Wright*. After “repeatedly try[ing] to cope with the problem by facilitating case-by-case litigation against voting discrimination,”83 Congress became dissatisfied with the approach of finding instances of unconstitutional discrimination and imposing various remedies in specific situations.84 Thus, Congress enacted the Voting Rights Act to provide a prophylactic measure against voting discrimination. *Shaw* diminishes, if not alleviates, the significance of the Act for cases such as *Wright*.

The majority in *Wright* concluded that the plaintiffs did not prove that the state made a racial classification because the minority group’s geographic

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82. *Id.*, 84 S. Ct. at 612-13.
location was another possible justification for the plan. The Voting Rights Act was designed to put racial consideration above geographic consideration if necessary to give minorities voting power. The majority in Shaw took issue with giving minority voting power priority over traditional districting principles. The principle authority cited by the Court for this proposition was United Jewish Organizations.

2. The Role of United Jewish Organizations

Plaintiffs in United Jewish Organizations were members of a Hasidic Jewish community who were split into two districts as a result of New York’s revised redistricting plan. The challenged plan was a revision of New York’s original plan in response to the Attorney General’s objection under Section 5.85 Plaintiffs alleged that the revised plan would dilute their voting strength in violation of the Fourteenth and Fifteenth Amendments.86 The Court in Shaw distinguishes United Jewish Organizations on the grounds that plaintiffs in United Jewish Organizations “did not allege 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.”87 Thus, the distinction is simply that appearances do matter.

The plurality opinion in United Jewish Organizations is labeled by the majority in Shaw as “highly fractured.”88 However, seven of the eight Justices deciding United Jewish Organizations concluded that the use of racial criteria in redistricting is not unconstitutional per se. Four Justices determined that compliance with Section 5 of the Act is a sufficient justification for using race in drawing district lines.89 Three Justices held that the redistricting plan was constitutional “[w]hether or not the plan was authorized by or was in compliance with [ ] the Voting Rights Act” as long as the plan did not minimize or cancel out the voting strength of any group.90 Two Justices thought the plaintiffs’ claim must fail as it failed to allege either a discriminatory purpose or effect.91

Chief Justice Burger filed a dissenting opinion on the grounds that plaintiffs should be allowed to adduce additional facts and the claim should not be dismissed at the pleading stage. Given the lack of evidence, Chief Justice Burger did not determine whether using racial criteria is permissible if done to comply with the remedial provisions of the Voting Rights Act. However, his opinion suggests that the state’s action might be justified if it was “related” to or

88. Id.
89. United Jewish Orgs. of Williamsburgh, Inc., 430 U.S. at 155-65, 97 S. Ct. at 1004-09 (this portion of the opinion was joined by Justices White, Brennan, Blackmun, and Stevens).
90. Id. at 165, 97 S. Ct. at 1009 (this portion of the opinion was joined by Justices White, Stevens, and Rehnquist).
91. Id. at 180, 97 S. Ct. at 1016-17 (Stewart, J., concurring).
“necessary . . . to fulfilling the State’s obligation under the Voting Rights Act.”

The majority in Shaw places great emphasis on the following closing paragraph from United Jewish Organizations concerning compactness:

[W]e think it also 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 numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority.

The above paragraph contains the only reference to compactness in the entire United Jewish Organizations opinion, in which only three Justices joined. The Justices would place this limitation on states when they are not acting under the purview of the Voting Rights Act. In other words, this limitation would not be applicable to states acting under the constraints of the Act, such as North Carolina in Shaw.

3. Satisfying the Test

More perplexing than the authority for the majority opinion are the “guidelines” on how states may satisfy the compelling interest test, assuming on remand that the state is unable to contradict allegations of racial gerrymandering. Although the Court does not explicitly address whether compliance with the Voting Rights Act would constitute a compelling interest, given the facts of this case it would be anomalous for the Court to say that it would. However, the Court intimates that it would draw the line between what the Voting Rights Act requires and what it permits.

Finally, the Court addresses whether avoiding dilution of black voting strength in violation of Section 2 of the Act or eradicating the effects of past racial discrimination would constitute a compelling interest. The Court does not develop either of the above issues. Nevertheless, the Court explicitly requires a factual foundation of vote dilution or past racial discrimination to constitute a compelling interest.

A successful vote dilution challenge under Section 2 to a single member district requires proof of three threshold conditions: “that the minority group is sufficiently large and geographically compact to constitute a majority in a single member district; that the minority group is politically cohesive; and that the

92. Id. at 183, 97 S. Ct. at 1019 (Burger, C.J., dissenting).
94. Id. at 2830.
95. Id. at 2831-32.
white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."

To fashion a compelling state interest in eradicating the effects of past racial discrimination the State must have a "'strong basis in evidence for its conclusion that remedial action was necessary." The majority in Shaw would likely refer to the opinion in United Jewish Organizations, in which only three Justices stated that states have an interest in correcting the consequences of racial bloc voting apart from the requirements of the Voting Rights Act, to conclude that remedying past racial discrimination would not constitute a compelling state interest. The opinion that discusses states' interests apart from compliance with the Voting Rights Act is arguably the opinion that requires compactness. Therefore, since compliance with the Voting Rights Act is unlikely to constitute a compelling state interest, and since the other two alternatives require a showing that the minority group is geographically compact, absent a showing of compactness, the state will not prevail.

4. Shaw's Diversion from the Jurisprudence

Well-settled jurisprudence under the Voting Rights Act prior to Shaw illustrates that it is difficult to find an unconstitutional plan that is drawn in response to a violation of the Voting Rights Act. Absent total exclusion from the electoral process or vote dilution, no discriminatory purpose or effect constitutes a violation of the Fourteenth Amendment. Discriminatory purpose in the voting rights area is a difficult proof problem because distilling legislative

96. Id. at 2831 (quoting Thornburg v. Gingles, 478 U.S. 30, 50-51, 106 S. Ct. 2752, 2766-67 (1986)). Thornburg dealt with multimember districts. These conditions were applied to single-member districts in two recent cases. See Growe v. Emison, 113 S. Ct. 1075, 1084 (1993); Voinovich v. Quilter, 113 S. Ct. 1149, 1157 (1993).


99. The majority opinion contains some language that impliedly suggests that North Carolina, by disguising the plan as a remedy to a violation of the Voting Rights Act, is actually furthering racial discrimination. The majority remarks that "[i]t is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past." Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993). What the majority suggests is that it considers this redistricting plan to be on a par with that created by the Redeemers in Mississippi during Reconstruction. The "Mississippi Redeemers concentrated the bulk of the black population in a 'shoestring' Congressional district running the length of the Mississippi River, leaving five others with white majorities." Eric Foner, Reconstruction: America's Unfinished Revolution 1863-1877 at 590 (1988).

100. The only two categories, prior to Shaw, in which constitutional violations have been found in the voting rights arena are total exclusion from the voting process, see, e.g., Guinn v. United States, 238 U.S. 347, 35 S. Ct. 926 (1915) (deprivation of right to vote by means of literacy test), and vote dilution, see, e.g., Mobile v. Bolden, 446 U.S. 55, 100 S. Ct. 1490 (1980) (voting practice adversely affects strength of various groups). Shaw adds an amorphous third category.
intent is an arduous task (assuming that it even exists). The requirement of proving discriminatory purpose was specifically removed from Section 2 of the Voting Rights Act by the 1982 Amendments. Given the recognized difficulty of finding discriminatory purpose and the absence of traditional discriminatory effect in Shaw, (total exclusion or vote dilution) the majority grounds the plaintiffs’ claim on the *aesthetically* unpleasing nature of the district.

Whether the majority in Shaw abandons the requirement of discriminatory purpose and effect is questionable. On the one hand, the plaintiffs did not allege vote dilution. The majority clearly states that the plaintiffs have stated a cause of action that is entirely distinct from a vote dilution case. Shaw is simply a race case and this “analytically distinct claim” does not require a showing of discriminatory purpose or effect.

On the other hand, the Court implies that the required elements of purpose and effect are satisfied without having been plead. The discriminatory purpose is found in the shape of the district itself. The Court justifies its finding of purpose by stating that: “No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute.”

The effect is stated by the majority as: “It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.” The Court recognizes that racial stigmatism and undermining representative democracy is not the kind of harm traditionally required in vote dilution cases. Therefore, the Court is either implicitly recognizing racial stigmatism and undermining representative democracy as a cognizable harm, or it is dispensing with this requirement. Which of the above is the correct answer is left to the imagination of the reader.

The majority unjustifiably removed the barriers to plaintiffs’ challenges under the Voting Rights Act (that is, the requirement of discriminatory purpose and effect) by creating a new cause of action that, on the face of the opinion, is easily satisfied. The dissenters condemned the majority for its abandonment of prior precedent and lack of authority for its holding.

C. The Dissenting Opinions

Each dissenter in Shaw objects to the creation of this “analytically distinct claim.” Historically, the only two types of voting cases in which courts have determined that plaintiffs have stated a cognizable claim are those in which one’s

102. Given the context of redistricting—politics and government—this argument has some merit. It is not implausible to say that voters are less likely to trust something that is distorted and suspicious than something that is compact and traditional.
103. Shaw, 113 S. Ct. at 2824.
104. Id. at 2828.
105. Id. at 2830.
right to vote is denied or diluted. The dissent characterizes this case as a vote dilution claim which necessitates evidence of discriminatory purpose and effect—because of the nature of the redistricting process—to state a claim. What is specifically required is evidence that "the political processes . . . were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." The majority recognizes that proving discriminatory purpose and effect is not an easy task; but this severe burden was "adopted for sound reasons." Accordingly, that one's candidate loses at the polls in a given election is not sufficient to constitute discriminatory effect. That one's candidate will lose is simply in the nature of the political process. The dissent concludes that the "threshold requirement" of discriminatory effect is absent given that white voters constitute seventy-six percent of the total population and seventy-nine percent of the voting age population in North Carolina; yet they constitute a majority in eighty-three percent of the congressional districts. According to the dissent, discriminatory purpose is precluded because North Carolina was attempting to comply with the Voting Rights Act. Furthermore, if the state must satisfy strict scrutiny, compliance with the Act constitutes a compelling state interest. 

The dissent raises an interesting problem with satisfying the majority's requirement of strict scrutiny. Strict scrutiny requires that the statute be narrowly tailored to meeting the state's interest. This leaves open the question, what state interest is the Court referring to? As the dissent frames it: "Is it more 'narrowly tailored' to create an irregular majority-minority district as opposed to one that is compact but harms other State interests such as incumbency protection or the representation of rural interests?"

The dissent recognizes the conflicting interest of compliance with the Voting Rights Act and adhering to traditional districting principles. With the enactment of the Voting Rights Act of 1965, Congress had "ruled" on how the conflict should be resolved. Well-settled jurisprudence supports the dissent's conclusion. The majority—unlike the dissent—fails to reach the ultimate issue: whether the

106. See supra note 99.
108. Id. at 2834 (White, J., dissenting).
109. Id.
111. Shaw, 113 S. Ct. at 2836 (White, J., dissenting).
112. Id. at 2838.
113. Id. at 2842.
114. Id.
Court can mandate that states adhere to traditional districting principles in the reapportionment process when complying with the Voting Rights Act without amending or declaring the Act unconstitutional.

D. The Balancing Test

The majority attempts to strike a balance between the protection of minority voters and the adherence to traditional districting principles. Given the unusual shape of some districts, one might conclude that the balance has weighed heavily in favor of protecting minority interests. However, this conclusion would ignore the states' other legitimate interests, such as incumbency and partisan politics, that clearly play an important role in redistricting.

In United Jewish Organizations, Justice Brennan best described the need to weigh and balance and the function of the Voting Rights Act in this process:

[I]f and when a decisionmaker embarks on a policy of benign racial sorting, he must weigh the concerns that I have discussed against the need for effective social policies promoting racial justice in a society beset by deep-rooted racial inequities. But I believe that Congress here adequately struck that balance in enacting the carefully conceived remedial scheme embodied in the Voting Rights Act.115

The concerns that Justice Brennan refers to are essentially the same concerns of the Shaw majority. They are:

(1) that a purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries; (2) an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs; and (3) that even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely affected by a given classification.116

The consideration that Justice Brennan gives to these concerns evinces that they were taken into account in creating the Voting Rights Act. Thus, the majority in Shaw has no cause for disregarding the Voting Rights Act under the pretense of guarding against these concerns.

The majority sees polarized voting as an evil in our democratic system, yet they offer no alternative to the protection of minority interests. A balance must be struck by deciding, inter alia, which is the greater harm: the acceptance of

116. Id. at 172-74, 97 S. Ct. at 1013-14.
polarized voting or the denial of minorities of their constitutional right of equal representation in the electoral system.

Balanced against the need to protect minority voting rights are the political forces inherent in redistricting and a group of well-settled practices commonly referred to as traditional districting principles.

1. Incumbency Protection and Partisan Politics

Redistricting plans are drawn by legislators who are driven by partisan politics. One very common objective in designing new districts is the protection of incumbents. Indeed, North Carolina's second majority-minority district could have been fashioned so as not to appear as "bizarre," but at the expense of endangering an incumbent democratic representative, "a favorite of the House leadership."\(^{117}\) Although the Supreme Court has never declared that the protection of incumbents is not a legitimate state interest, Shaw demands that this state interest, as well as others, not be satisfied at the expense of traditional districting principles. The fear that the majority in Shaw foresees is best described in a Wall Street Journal article describing North Carolina's first redistricting plan: "The drawing of district lines is an inherently political act, and nothing can change that. But the worst abuses must end. Gerrymandering subverts the democratic process as effectively as a poll tax or physical intimidation. By entrenching incumbents in office, gerrymanders destroy the idea of political competition."\(^{118}\) After the perverse Twelfth District was submitted in the revised plan, a follow-up article went on to conclude: "The lengths to which incumbents will go to protect their power and turf know no bounds. North Carolina is proof of that."\(^{119}\)

Generally the mechanism for protecting incumbents is through partisan politics. It is well known that partisan politics play an important role in redistricting and are often one of the most important if not the sole reason for the results of most districting plans. North Carolina's decision to locate the Twelfth District in its current location resulted from this political dynamic. The second majority-minority district suggested by the Attorney General, which was to be located in the south-central to southeast part of the state, would have arguably been more compact. However, it was rejected by the Democratic General

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117. Thou shalt not injure an incumbent. North Carolina could easily have drawn a much more compact district that still would have made highly probable the election of a black member of Congress, but drawing it would have taken some reliable Democratic voters from the district of Representative Charles Rose. Heaven forfend. Dilute the almost perfect security of a man who came to Washington in 1972 and thus enjoys the most revered entitlement America can offer, incumbency? Not a chance. George F. Will, Restoration: Congress, Term Limits and the Recovery of Deliberative Democracy 50 (1992). See also Political Pornography-II, supra note 33, at A14.

118. Political Pornography, supra note 36, at A10.

119. Political Pornography-II, supra note 33, at A14.
Assembly. The Republicans’ suit alleging a political gerrymander was dismissed.  

2. The Requirement of Compactness

The Shaw majority clearly intimates a curtailment of the states’ interests in incumbency and partisan politics if satisfying these interests is at the expense of traditional districting principles. The traditional districting principle that most concerns the majority is compactness. The requirement of compactness is neither a constitutional nor a statutory mandate; nowhere do the words “compactness” or “contiguity” or any synonymous terms appear in the Voting Rights Act. Compactness is a creature of the jurisprudence and its support can be found in what one generally thinks of as traditional districting principles.

Traditional districting principles such as compactness, contiguity, and political subdivisions draw their support from the same source as fundamental rights, that is, these principles are “deeply rooted in this Nation’s history and tradition.” Districts that adhere to long-standing political boundaries and communities of interest in the geographical sense are what we have come to expect in the electoral process.

The dissent in Shaw limits the lack of compactness to an evidentiary “presumption.” In stating that “while district irregularities may provide strong indicia of a potential gerrymander, they do no more than that,” the dissenting Justices thwart the importance of traditional districting principles. Suggesting that compactness is unimportant is foolish. The majority of the voting public is less concerned with whether a district passes constitutional muster than they are with receiving adequate representation from elected officials. Voters may logically conclude that their elected representative cannot provide adequate representation in a district shaped similar to that at issue in Shaw given limited resources and logistical problems. If voters think that they are not being adequately represented, public support for and participation in government will decline. Trust in government and in the electoral system is essential to a representative democracy, and when it comes to what the public is willing to trust, appearances do matter.

V. The Louisiana Case: Hays v. Louisiana

A federal district court in Louisiana was forced to apply what little guidance the Supreme Court had provided in Shaw to the merits of a case challenging the constitutionality of Louisiana’s Fourth Congressional District. The facts peculiar

(but maybe not so uncommon) to this case allowed the panel to reach a conclusion without having to fully interpret Shaw.

A. The Facts of Hays

As a result of a population decrease reported in the 1990 Census, Louisiana's Congressional delegation was reduced by one member. In response, the legislature passed Act 42 during the 1992 Regular Session of the Legislature which reapportioned Louisiana voters into seven districts. The reapportionment plan was designed to increase the number of black representatives from one out of eight to two out of seven. The second majority black district created was District 4.

Immediately, voters challenged the plan created by Act 42 by seeking an injunction to halt the 1992 elections under the plan. The injunction was denied, the court took under advisement the Voting Rights Act claim made by the plaintiffs, and the elections proceeded. One year after the Louisiana Legislature passed Act 42, the Supreme Court of the United States decided Shaw v. Reno. The federal district court reasoned that Shaw resuscitated the Equal Protection claims originally brought by the plaintiffs, and ordered additional briefs and an evidentiary hearing addressing Shaw.

Hays v. Louisiana falls squarely within the ambit of Shaw v. Reno. Plaintiffs are black, white, and Asian residents of Districts 4 and 6. They allege that the plan created by Act 42, and specifically District 4, violates the Equal Protection Clause of the Fourteenth Amendment. The three-judge panel in Shreveport held that "the Plan in general and Louisiana's Congressional District 4 in particular are the products of racial gerrymandering and are not narrowly tailored to further any compelling governmental interest."

B. The District Court's Analysis Under Shaw

In Shaw, the Court held that voters stated a claim by alleging that the challenged reapportionment plan was so bizarre "that it [could] only be understood as an effort to segregate voters into separate voting districts because of their race." The Court concluded that once plaintiffs state a claim, the burden shifts to the state to prove that the plan is not a racial gerrymander. If the state cannot prove as much, the plan will be subject to strict scrutiny; the state must then demonstrate a compelling state interest and that the plan is narrowly tailored to meet that interest.
1. Plaintiffs Have Stated a Claim Under Shaw

Just as one would expect after reading the opinion in Shaw, the physical appearance of a district is the major determinate of whether plaintiffs state a claim. District 4 is the primary focus of this constitutional challenge and its shape leaves little doubt that this type of district is precisely what Shaw does not allow.

The plan adopted in 1992 to create an additional majority-minority district disregards parish lines by splitting twenty-eight parishes into more than one congressional district, whereas the former plan only divided seven parishes.\textsuperscript{129} District 4 itself encompasses twenty-eight parishes and only four parishes are included within the district in their entirety. The district also includes portions of all major municipalities in the state with the exceptions of New Orleans and Lake Charles.\textsuperscript{130}

Comparing the shape of the challenged district in Shaw to District 4, it would be difficult, given the emphasis placed on physical appearance by the Supreme Court, to conclude that plaintiffs here have not stated a claim that the "Z-shaped" District 4 was a violation of equal protection. However, the question of whether the plan was a product of racial gerrymandering involves a more difficult analysis of the majority's opinion in Shaw.

2. The Plan is a Product of Racial Gerrymandering

The Hays court adopts the following definition of racial gerrymandering from Wright v. Rockefeller: "intentionally draw[ing] one or more districts along racial lines or otherwise intentionally segregat[ing] citizens into voting districts based on their race."\textsuperscript{131} This definition requires no discriminatory intent. It is difficult to conceive of a case that arises under the Voting Rights Act that will not satisfy this liberal definition. It is no secret that a legislature must intentionally use race in the redistricting process in order to avoid Section 2

\textsuperscript{129} Id. at 1200.

\textsuperscript{130} Id. at 1201. The majority calls District 4 an "un-district," id., and describes it as follows: It begins north of Shreveport—in the northwestern corner of Louisiana, just east of the Texas border and flush against the Arkansas border—and sweeps east along that border, periodically extending pseudopods southward to engulf small pockets of black voters, all the way to the Mississippi River. The district then turns south and meanders down the west bank of the Mississippi River in a narrow band, gobbling up more and more black voters as it goes. As it nears Baton Rouge, the district juts abruptly east to swallow predominantly black portions of several more parishes. Simultaneously, it hooks in a northwesterly arc, appropriating still more black voters on its way to Alexandria, where it selectively includes only predominantly black residential neighborhoods. Finally, at its southern extremity, the district extends yet another projection—this one westward towards Lafayette—adding still more concentrations of black residents.

\textsuperscript{131} Id. at 1199-1200. See infra Appendix B for a map of the district.
violations of the Act or to gain preclearance under Section 5. Given plaintiffs' light burden of establishing a racial gerrymander, it is likely that the analysis of claims brought under the Voting Rights Act will focus immediately on the question of a compelling governmental interest and whether the plan is narrowly tailored.

The court in *Hays* spends much time discussing how racial gerrymandering may be proven inferentially. It later concludes that this is not necessary here given the direct evidence of racial gerrymandering. When the original trial was conducted in 1992, no one disputed that Act 42 was designed to create a second majority black district. The state perceived that the second district was necessary for Section 5 preclearance. The state did not contest that the plan was a product of racial gerrymandering. Before *Shaw*, constructing district lines based on race was permissible to gain compliance with the Voting Rights Act.

After *Shaw* was decided, the state attempted to prove that other factors influenced the reapportionment scheme, specifically partisan/incumbent politics and socioeconomic commonalities. The court dismisses these “defenses” as “disingenuous, post hoc rationalizations.”

Unfairly, the court scowls at the fact that “[a]t-the Trial [(which occurred before *Shaw* was handed down)], the Defendants never suggested that partisan or incumbent politics played a role in the determination to create District 4.” Given the state of the law before *Shaw*, the state had no reason to offer any evidence regarding alternative explanations for the shape of the district. The state has the disadvantage of time to contend with. Had this plan been adopted after the Court’s ruling in *Shaw*, the legislature could have formulated non-racial explanations for the plan and avoided the charge of presenting “post hoc rationalizations.”

Besides the pretextual charge rendered against these two defenses, the court concludes that even if the state had genuinely submitted them as rationalizations for the redistricting plan, they would have been insufficient for two reasons: first, they were not established factually; and second, the state could not prove that they totally excluded race as a factor.

The court limits its treatment of the incumbency justification to a footnote and concludes that the justification is “irrelevant.” Testimony indicated that to protect the existing districts (and the existing representatives of those districts), the shape of District 4 was pushed North to the Arkansas border and East to the Mississippi River. This constitutes a large portion of District 4, and more importantly, a large portion of the reason why the district could be called “bizarre.” If protecting incumbents was the partial reason for the shape of the

133. *Id.* at 1205.
134. *Id.* at 1201.
135. *Id.*
136. *Id.* at 1201-04.
137. *Id.* at 1201 n.43.
district (which the court does not seem to dispute), one could hardly agree that the justification of incumbency protection is "irrelevant.""\textsuperscript{138}

The state offered evidence on the socioeconomic commonality and coherence of District 4 and demonstrated that, relative to the other six districts, the citizens of District 4 were the poorest, least educated, and owned fewer telephones and automobiles.\textsuperscript{139} This evidence was offered to prove that: (1) the district was based on something other than race; (2) the state had a compelling interest in creating a district to represent the poor citizens of the state; and (3) to dispute the finding that the district did not adhere to the traditional districting principle of commonality of interests and was thus not narrowly tailored.\textsuperscript{140}

The court discounts the expert testimony on commonality of interest as "spurious," concluding that District 4 includes the poorest and least educated citizens precisely because it is packed with black people.\textsuperscript{141} As the court states: "racially gerrymandered plans, which seek to draw boundaries around various concentrations of black persons, will inevitably tend to concentrate the poorer, less well-educated blacks."\textsuperscript{142}

That the court \textit{factually} finds the two proffered explanations of the defendant unconvincing is less troubling than the court's dicta that even if it had accepted these two alternative explanations as sufficient to meet the defendant's burden of proof, it still would have concluded that District 4 was a racial gerrymander because race was a factor in designing the district. The district court interprets the language in \textit{Shaw} to mean that plaintiffs need only establish that race was an "important" factor in the creation of the district while defendants must prove that the plan can be "wholly explained to be the product of one or more factors other than race."\textsuperscript{143}

It is undisputable that the plaintiff's burden should be to prove only that race was an important factor in redistricting. It is difficult to conceive of a situation in which race will be the only factor. Nonetheless, a situation in which a redistricting plan wholly disregards race as a factor is likewise inconceivable. This court has imposed an unfair burden on the state which is untrue to \textit{Shaw}—to totally exclude race as a factor in redistricting—while permitting plaintiffs to engage in a type of balancing test. A solution to this inequity is to allow the state to engage in a balancing test of its own, to prove that although race played a factor in the process, there were other factors operating that also influenced the shape of the district. The logical conclusion of the court's interpretation of \textit{Shaw} is that if race was a factor in redistricting (which will be one hundred percent of the time in Voting Rights Act cases) the state will have to satisfy strict scrutiny. Why the Supreme Court would afford the state the

\textsuperscript{138} The court did not discuss partisan politics as a separate issue.
\textsuperscript{139} Hays v. Louisiana, 839 F. Supp. 1188, 1203 (W.D. La. 1993).
\textsuperscript{140} \textit{Id.} at 1203 & n.47.
\textsuperscript{141} \textit{Id.} at 1203 n.48.
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.} at 1202 & n.46 (emphasis added).
intermediate step of establishing that the district was not based on race alone, thus avoiding the rigorous test of strict scrutiny, when this would fail in one hundred percent of the cases, is perplexing. The district court cites no authority for its proposition.

3. The Plan Does Not Survive Strict Scrutiny

"The bedrock principle underlying the Court's decision in Shaw is that racially gerrymandered redistricting plans are subject to the same strict scrutiny that applies to other state legislation classifying citizens on the basis of race." This statement explains why the court cut through the intermediate step described above to reach the question of strict scrutiny. However, this overly definitive statement of the district court goes beyond what appears on the face of Shaw; nevertheless, it is a justifiable interpretation of the vague language of the majority's opinion in Shaw.

a. Compelling Governmental Interest

To support its claim, the state advanced four possible compelling state interests: "(1) conformity with Section 2 of the Voting Rights Act, (2) conformity with Section 5 of the Voting Rights Act, (3) proportional representation of Louisiana blacks in Congress, and (4) remedying the effects of past racial discrimination." The court does not decide whether any of the above is a compelling state interest because it resolves the case on the ground that even if a compelling state interest were established, the plan was not narrowly tailored to satisfy any such interest.

The court spends much time discussing that in its view, District 4 (or any second majority-minority district) was not required by the Attorney General's office; therefore, the issue of whether compliance with the Voting Rights Act would be a compelling state interest if the plan were required to comply with the Act remains an important and unanswered question.

According to the court, the plan enacted by Act 42 containing two majority-minority districts would only be required by the Attorney General's Office if failure to include District 4 would have violated either Section 2 or Section 5 of the Voting Rights Act. A violation of Section 2 (vote dilution) can only be established if members of a cognizable racial group establish that they are numerous and geographically compact enough to constitute a majority in a

144. Id. at 1194.
145. Id. at 1205-06.
146. Id. at 1206-09.
147. See supra note 11 for text of statute.
148. See supra note 17 for text of statute.
single district.\textsuperscript{149} District 4 could never meet the requirement of geographical compactness.

Louisiana is a "covered" jurisdiction under Section 5 of the Act and therefore either needs preclearance by the Justice Department or a judgment from the United States District Court for the District of Columbia stating that any changes in voting practice or procedure meet the requirements of 42 U.S.C. §1973c. Section 5 of the Act only requires that changes in voting practices and procedures not have a retrogressive effect on racial minorities with respect to their participation in the electoral franchise.\textsuperscript{150} Act 42 actually increases the number of districts in which blacks would constitute a majority from one of eight to two of seven—an increase in representation. Section 5 only requires a maintenance of the status quo.

The state believed that the Attorney General's Office would not preclear the plan without two majority-minority districts. Letters from the Office of the Assistant Attorney General responding to redistricting plans for the Louisiana Senate and the Board of Elementary and Secondary Education indicating a need for an increase in minority representation led legislators to believe that the Attorney General would require the same for congressional districts.\textsuperscript{151} The state failed to pass a redistricting plan during the 1991 Regular Session of the Legislature; thus, to hold the 1992 elections timely, it was imperative that the devised plan pass the 1992 Regular Session and meet preclearance requirements. Thus, District 4 was included.

The court places too much emphasis on whether a second majority-minority district was required by the Attorney General's Office. Arguably, there will never be a plan that is indisputably required by the Voting Rights Act. Even if Louisiana had disputed whether a second majority-minority district was necessary to comply with the Voting Rights Act, such a challenge would have been impractical. The procedural costs and time delays required to challenge a determination of the Attorney General are unfeasible for most states. The court here ignores the efficiency gained by following the directives of the Attorney General's Office.

Majority-minority districts, even though not required by either Sections 2 or 5, are not per se prohibited.\textsuperscript{152} If a state is able to prove that the challenged district was required to comply with the Voting Rights Act (if this is possible), it remains an open question whether this would constitute a compelling governmental interest. Furthermore, a plan enacted to comply with the Act is more likely to be considered narrowly tailored to the governmental interest of complying with the Voting Rights Act.

\textsuperscript{149} Growe v. Emison, 113 S. Ct. 1075, 1084 (1993) (extending the requirements for stating a dilution claim for multimember districts to single-member districts).
\textsuperscript{151} Hays v. Louisiana, 839 F. Supp. 1188, 1196 n.21 (W.D. La. 1993).
\textsuperscript{152} Voinovich v. Quilter, 113 S. Ct. 1149, 1156 (1993).
b. Narrowly Tailored

The Hays court assumes, *arguendo*, that all of the proffered state interests would satisfy the requirement of a compelling governmental interest. The court ultimately determines District 4 to be unconstitutional because the plan enacted by Act 42 was not narrowly tailored to meet any proffered governmental interest. The court's specific objections are that the plan "entails considerably more segregation than is necessary to satisfy the need for a second black majority district" and "excessively burdens a variety of third party interests." Stated differently, the court finds alternatives to the plan that includes District 4 in its current state. If alternatives exist, the plan is not narrowly tailored and it fails strict scrutiny.

The obvious alternative here is a plan with only one majority-minority district since arguably compliance with the Act did not require the creation of a second district. Also, the court surveys other majority-minority districts to determine what percentage of voting-age blacks was required to realistically elect a black candidate. The court determined that the percentage of blacks in District 4, sixty-three percent, packed more blacks into the district than was reasonably necessary to elect a black candidate. Lastly, the court determines that the boundaries of District 4 violated traditional districting principles more than was necessary. As the court states, "the Legislature could have developed and adopted a redistricting plan—even one with a second majority black district—that reflected greater respect for traditional redistricting criteria and that was less disruptive to the traditional political, social, economic, ethnic, geographical, and religious organization of the State."

A state will rarely satisfy the narrowly tailored prong of the strict scrutiny test because there will almost always be an alternative district that could have been drawn giving more respect to traditional districting principles; and it is unlikely that the Supreme Court of the United States will reduce its emphasis on the importance of these principles. The problem for state legislatures is that traditional districting principles rarely coincide with traditional political practices of the state.

C. What Hays adds to Shaw v. Reno

*Hays v. State of Louisiana* is not a case in which the challenged plan was required by the Voting Rights Act. It is possible that most cases will not be "required" by the Act and, therefore, this type of analysis might be what we can expect from the district courts as Shaw's progeny.

154. *Id.* at 1207-08.
155. *Id.* at 1208-09.
156. *Id.* at 1209.
What *Hays* does tell us is that the court will apply strict scrutiny once a racial gerrymander is found, which will be one hundred percent of the time in Voting Rights Act cases. Whether a court will sustain as a compelling state interest one of those articulated by the defendants here under a stronger factual situation remains uncertain. It is likely, however, that if the court determines that an alternative existed to the challenged plan that would have more closely adhered to traditional districting principles, the plan will fail to be narrowly tailored. The result of a case like *Hays* being tried on the merits under *Shaw* is that states that use race as a factor in redistricting must satisfy strict scrutiny, despite what the Voting Rights Act requires.157

VI. CONCLUSION

Through its use of ambiguous language and symbolic quotations, the majority in *Shaw v. Reno* clouds a simple solution that it refuses to recognize. If there is a factual finding that minorities are being denied equal access to the electoral system (discriminatory effect) and there exists polarized voting in the jurisdiction, a remedy should be fashioned under the Voting Rights Act, taking race into account. Otherwise, the Voting Rights Act must be declared unconstitutional.

Yet the Court intentionally clouds this simple solution to address the issue of racial segregation in general. In both *Shaw* and *Hays*, the parties on each side of the litigation attempt to achieve similar goals. Both sides envision an electoral process in which every individual is afforded an equal opportunity to affect the electoral system. The difference emerges when it comes to the means of reaching this goal. Plaintiffs feel that society has developed to a point where we do not need government intervention protect minorities’ right to vote. In their view, we have reached a stage where racial stigmas and polarized voting no longer exist. On the other hand, the state would continue to protect minority involvement in voting under the Voting Rights Act, because in their view, we have not achieved a “color-blind society.” The state chooses the path of the Voting Rights Act to create districts in which minorities are able to elect candidates of their choice. The judicial and legislative history of the Act seems to support their view. The plaintiffs, having failed under the Voting Rights Act, have successfully gone the way of the Constitution. The next stage for the Court is to resolve the conflict it has created between the Voting Rights Act and what the Court determines the Constitution requires. The parties in *Shaw* and *Hays* are closer than they might realize when it comes to what they hope to achieve. It is simply the means on which they disagree.

*Tricia Ann Martinez*

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157. As a result of *Hays*, the Louisiana Legislature adopted the plan depicted in Appendix C during the 1994 Regular Session.
APPENDIX A: THE NORTH CAROLINA PLAN
APPENDIX B: THE LOUISIANA PLAN BEFORE *HAYS*
APPENDIX C: CONGRESSIONAL DISTRICTS ADOPTED BY THE LOUISIANA LEGISLATURE