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Afterword: Shaw v. Reno

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AFTERWORD

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The Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment speak in terms of persons rather than groups. The redistricting plan overturned in *Shaw v. Reno*¹ was at fault because it disregarded constitutionally recognized individual rights in favor of group rights. Moreover, the concept of vicarious representation on which North Carolina's redistricting plan and others like it are based relies on the stereotype that any person of one race has more in common with persons of that race than with any person of another race—no matter what may be the relationship to the person of the other race. The effect is to perpetuate racial polarization in a purported effort to eliminate it.

Actually, the single-member congressional districts, which are mandated by federal statute² and which are predicated on geography, are antithetical to the concept of proportional representation, which underlies the North Carolina redistricting plan. The concept of proportional representation is also implicit in the preclearance requirement of the United States Department of Justice that a legislature must create the maximum number of possible majority-minority congressional districts.

Proponents of the redistricting explain that any inconsistency between proportional and geographical representation is warranted by the goal of diversity in the electoral process. This amounts to an end-justifies-the-means rationale. Some political scientists have concluded that the racially gerrymandered districts do not necessarily lead to better substantive representation of minorities.³ The "safe" minority district may produce, in the long run, an entrenched incumbent with little concern for his constituents. Moreover, if racial diversity is so important, there are better ways to achieve it. Indeed, by providing that a forty percent-plurality is sufficient for victory in a primary election, North Carolina has already moved in that direction.

Finally, I believe it important that *Shaw*, in line with the language of the Fourteenth and Fifteenth Amendments and with recent cases dealing

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

2. See 2 U.S.C. § 2(c) (1988).

3. See CAROL SWAIN, *BLACK FACES, BLACK INTERESTS* (1993).

with peremptory challenges, recognized the standing of whites to invoke the equal protection guarantees of the Constitution. Certainly this ruling enhances the perception that the Constitution is for the benefit of all people.

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"People, not trees or pastures, vote."¹ That rationale was the basis of the U.S. Supreme Court's 1964 decision in *Reynolds v. Sims*² which established the landmark "one person, one vote" principle. Almost thirty years later, the Supreme Court's decision in *Shaw v. Reno*³ focuses again on the role of geographic factors (this time highways, rather than trees or pastures) in defining the rights of voters in the electoral process. By focusing on the geography of electoral districts, rather than on the people who vote in them, the Supreme Court may be poised in future decisions to require a dramatic change in the way voting districts are drawn. If so, the negative impact on minority participation and influence in the electoral process could well be as historic as the positive impact of the Court's one person, one vote decision.

But there are troubling concerns about the rhetoric and reasoning of the Supreme Court's opinion in *Shaw* that go beyond the impact the case and its progeny could have on voting rights in this country. Subtle (perhaps even racist) implications in the opinion suggest the serious failure of our country to deal with issues of race, either from a personal or from a legal perspective.

One such concern is the Court's implication that electoral districts that are ten to twenty percent black, are somehow "integrated," while districts that are forty to forty-five percent white constitute "racial apartheid." The fact is that the electoral districts created to enhance minority representation in North Carolina, and typically in other parts of the country, are more racially mixed than other electoral districts. Must a voting district be majority white to qualify as integrated?

Another concern is the Court's implication that a white representative can (and will) effectively represent the interests of both majority *and* minority constituents, but a minority representative can (and will) represent only

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1. *Reynolds v. Sims*, 377 U.S. 533, 580 (1964).

2. 377 U.S. 533 (1964).

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

the interests of minority constituents. The Supreme Court furthers no useful objective by perpetuating these kinds of misconceptions or stereotypes.

Finally, it is blatantly inconsistent for the Supreme Court to suggest that minority voters might be better off in a thirty to forty percent "minority influence" district because they can exercise substantial influence over their white representative, while implying that white voters who constitute thirty to forty of a majority-minority voting district somehow have no influence and, furthermore, may be victims of racial apartheid.

In considering the Supreme Court's opinion in *Shaw*, it is important to remember that voting rights litigation and the creation of majority-minority districts usually take place against a historical backdrop of Jim Crow laws and racially polarized voting. Patterns of racially polarized voting confirm that race is still very much a factor in our daily lives. The aspiration expressed by the Court in *Shaw* that our laws be "color-blind" is an aspiration to which we all subscribe. The Court must realize, however, that our laws and the remedies they provide can be color-blind only when the actions of our people are color-blind.