NORTH CAROLINA LAW REVIEW

Volume 72 | Number 3 Article 5

3-1-1994

The Fancied Line: Shaw v. Reno and the Chimerical Racial Gerrymander

Ripley Eagles Rand

NOTE

The Fancied Line:* *Shaw v. Reno* and the Chimerical Racial Gerrymander

It has been called "ugly,"[1] "grotesque,"[2] "tortured,"[3] "labyrinthine,"[4] even "an offense to the sensibilities"[5] and a "monstrosity."[6] Although its detractors call it "political pornography,"[7] likening it to an "angry snake,"[8] a "Rorschach ink-blot test,"[9] a "ketchup splash,"[10] or a "bug splat,"[11] its admirers call it a "string of pearls."[12] Whatever the applied terminology, the enactment of North Carolina's Twelfth Congressional District sparked a nationwide debate.[13] After its 1980 redistricting was subjected to five years of litigation,[14] North Carolina's reconfiguration and reapportionment of its

---

* "Now two punctilious envoys, Thine and Mine, / Embroil the earth about a fancied line; / And, dwelling much on right and much on wrong, / Prove how the right is chiefly with the strong." Nicolas Boileau-Despréaux, *Satire* 11, l.141 *reprinted in* JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 311 (15th ed. 1980).

1. Clarence Page, *Court's Gerrymandered Justice; The Test Is, Who's Hurt By The Districts?*, SACRAMENTO BEE, July 17, 1993, at B7.

2. Martin Smith, *Racial Gerrymandering*, SACRAMENTO BEE, July 12, 1993, at B14.

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

4. *Shaw*, 808 F. Supp. at 480 (Voorhees, C.J., concurring in part and dissenting in part).

5. Ronald Smothers, *The 1992 Campaign: Congressional Races; 2 Strangely Shaped Hybrid Creatures Highlight North Carolina's Primary*, N.Y. TIMES, May 3, 1992, § 1, at 28.

6. Page, *supra* note 1, at B7.

7. *Political Pornography-II*, WALL ST. J., Feb. 4, 1992, at A14.

8. Tony Mauro, *Justices Look at Race Based Redistricting*, USA TODAY, Apr. 21, 1993, at 7A.

9. Max Boot, *Supreme Court Rules That "Bizarre" Districts May Be Gerrymanders*, CHRISTIAN SCI. MONITOR, June 30, 1993, at 7.

10. Page, *supra* note 1, at B7.

11. *Back to the Ghetto?*, THE ECONOMIST, July 10, 1993, at 13. The pundits are not alone in characterizing the odd shape of the district. One candidate for the congressional seat noted the narrowness of the district by claiming: "I can drive down I-85 with both car doors open and hit every person in the district." Page, *supra* note 1, at B7. The configuration of the district has even prompted a bit of poetry: "Ask not for whom the line is drawn; it is drawn to avoid thee." Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: "When It Comes To Redistricting, Race Isn't Everything, It's The Only Thing"?*, 14 CARDOZO L. REV. 1237, 1261 n.96 (1993) (quoting interview with Professor Allan Wuffle).

12. David Van Biema, *Snakes or Ladders; A Controversial Supreme Court Decision on Racial Redistricting Uncovers a Can of Worms. Or is it a string of pearls?*, TIME, July 12, 1993, at 30.

13. *See, e.g.*, Joan Biskupic, *N.C. Case to Pose Test of Racial Redistricting; White Voters Challenge Black Majority Map*, WASH. POST, April 20, 1993, at A4; *Political Pornography-II*, *supra* note 7, at A14; Smothers, *supra* note 5, at 28.

14. *See* Gingles v. Edmisten, 590 F. Supp. 345, 350 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom.* Thornburg v. Gingles, 478 U.S. 30 (1986).

electoral districts became the subject of renewed judicial scrutiny that culminated in the United States Supreme Court's decision in *Shaw v. Reno*.[15] The *Shaw* Court encountered the problem of a gerrymandered[16] district allegedly drawn along racial lines, and was thus compelled to decide the place of such a district in the modern voting rights dialogue.[17] The plan at issue in *Shaw*, in effect, forced a clash between the dual goals of racial diversity in government, which some argue promotes more effective representation of the population as a whole, and a "color-blind" society in which the factor of race acts as neither a barrier nor a benefit to individuals or groups. The plan also brought about a confrontation between the development of Fourteenth Amendment equal protection jurisprudence and the Court's historical treatment of voting rights litigation.

This Note first details the factual background involved in *Shaw* and summarizes the Court's decision.[18] It then reviews the two threads of jurisprudence that came together to produce the *Shaw* Court's approach[19] and scrutinizes the practical effects of the decision.[20] Finally, the Note suggests an alternative solution to the problems associated with reapportionment.[21]

The population evidenced by the 1990 Decennial Census entitled North Carolina to an additional seat in the United States House of Representatives.[22] Consequently, the North Carolina General Assembly enacted reapportionment legislation in July 1991 to reflect the increase in the state's

---

15. 113 S. Ct. 2816 (1993).

16. "Gerrymander" is defined as

> the process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose, as, for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines.

BLACK'S LAW DICTIONARY 687 (6th ed. 1990). This process derives its name from Elbridge Gerry, who, in drawing the districts for the state of Massachusetts, sought to advance the interests of the Republican Party. Stephen E. Gottleib, *Fashioning a Test for Gerrymandering*, 15 J. LEGIS. 1, 1 n.4 (1988). The problems with gerrymandering in the United States, however, can be traced back to the first Congress, in which "founding father" Patrick Henry tried to gerrymander future President James Madison out of a seat. *Id.* at 1 n.3.

17. *See infra* text accompanying notes 35-40.

18. *See infra* text accompanying notes 22-54.

19. *See infra* text accompanying notes 55-164.

20. *See infra* text accompanying notes 165-235.

21. *See infra* text accompanying notes 236-63.

22. Shaw v. Barr, 808 F. Supp. 461, 463 (E.D.N.C. 1992), *rev'd sub nom.* Shaw v. Reno, 113 S. Ct. 2816 (1993); *see also* U.S. CONST. art. 1, § 2, cl. 3 ("Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers."). North Carolina's population increased from 5,881,766 to 6,628,637, making North Carolina the tenth largest state in the country. RESEARCH DIVISION, N. C. GEN. ASSEMBLY, REDISTRICTING 1991: LEGISLATOR'S GUIDE TO NORTH CAROLINA LEGISLATIVE AND CONGRESSIONAL REDISTRICTING 27 (1991).

congressional districts from eleven to twelve.[23] This plan included a First District that covered much of the northeastern corner of North Carolina, and included a majority population of black registered voters.[24] Because parts of North Carolina are covered by section 5 of the Voting Rights Act,[25] the General Assembly submitted the legislature's overall reapportionment plan for preclearance[26] by the United States Attorney General.[27] In late 1991, the Attorney General formally objected to the proposed congressional districting plan pursuant to section 5.[28] Recounting that another minority-majority district could have been created and that proposals for the creation of such a district had not been presented by the state to the public for comment, the Attorney General concluded that the General Assembly had declined to create a second minority-majority district for "pretextual" reasons.[29]

---

23. *Shaw*, 113 S. Ct. at 2819. North Carolina's voting-age population is approximately 78% white, 20% black, 1% Native American and 1% other (predominantly Asian). *See id.* at 2820.

24. *Shaw*, 808 F. Supp. at 463.

25. The relevant part of § 5 pertains to covered states that seek to institute changes in voting standards, practices, or procedures; these states must obtain a declaratory judgment from the United States District Court for the District of Columbia that these changes do not "have the purpose [or] effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973(c) (1988). The 40 North Carolina counties covered by this provision are listed in 28 C.F.R. app. § 51 (1993).

26. "Preclearance" under § 5 of the Voting Rights Act requires a covered state to submit any proposed changes to voting standards, practices, or procedures to the Attorney General. 42 U.S.C. § 1973(c) (1982). If the Attorney General does not object to the proposed changes or affirmatively indicates that no objection will be made, the changes may be enforced without a declaratory judgment from the District Court for the District of Columbia that the changes do not have the "purpose [or] effect of denying or abridging the right to vote on account of race or color." *Id.* Neither a declaratory judgment nor the satisfaction of the Attorney General as to the changes as provided for in § 5, however, acts to bar a subsequent action to enjoin the enforcement of the proposed changes. *Id.*

27. *Shaw*, 808 F. Supp. at 463.

28. *Id.*

29. *Id.* The relevant part of the letter conveying the objection reads:

> "The proposed congressional plan contains one majority black congressional district drawn in the northeastern region of the state. . . . [T]he proposed configuration of the district boundary lines in the south-central to southeastern part of the state appear to minimize minority voting strength given the significant minority population in this area of the state. . . . [T]he state was well aware of the significant interest on the part of the minority community in creating a second majority-minority congressional district in North Carolina. For the south-central to southeast area, there were several plans drawn providing for a second majority-minority congressional district. . . . These alternatives, and other variations provided in our analysis, appear to provide the minority community with an opportunity to elect a second member of congress of their choice to office, but, despite this fact, such configuration for a second majority-minority congressional district was dismissed for what appears to be pretextual reasons. Therefore, on behalf of the Attorney General, I must object to the 1991 redistricting for the North Carolina [Congressional plan].

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).

In response to the objection of the Attorney General, the General Assembly enacted a second plan[30] that created a second minority-majority district.[31] This district, the Twelfth, was not in the southeastern part of the state, as the Attorney General had suggested, but along a narrow strip some 160 miles long in the north-central Piedmont area.[32] This plan divided counties, cities, and even precincts among two or three congressional districts.[33] The Attorney General did not object to the revised plan.[34]

Five white registered voters from Durham County then brought an action against both state and federal officials seeking a permanent injunction to bar implementation of the approved plan.[35] The plaintiffs claimed that the North Carolina legislature "created two Congressional Districts in which a majority of black voters was concentrated arbitrarily . . . with the purpose to create Congressional districts along racial lines and to assure the election of two black representatives to Congress."[36] The plaintiffs argued that the creation of these districts constituted unconstitutional racial gerrymanders that violated the Fourteenth Amendment.[37] The three-judge dis-

30. See Appendix A for a diagram of the North Carolina plan and Appendix B for a diagram of the Twelfth District.

31. Act of Jan. 24, 1992; ch. 7; 1991 N.C. Extra Sess. Laws 77. A minority-majority district is one in which blacks, Latinos, or other minorities, compose a majority of voters. Lynne Duke, *Advocates Say Justices Muddy Voting Rights; Decision in North Carolina Congressional Redistricting Case Criticized as 'Utopianism,'* WASH. POST, June 30, 1993, at A8.

32. *Shaw*, 808 F. Supp. at 464.

33. *Id.*

34. *Shaw*, 113 S. Ct. at 2821. The Republican Party of North Carolina and others instituted an action prior to the *Shaw* suit, claiming that the plan was a political gerrymander designed to protect incumbents. The suit was dismissed by the district court, and the dismissal was summarily affirmed by the Supreme Court. Pope v. Blue, 809 F. Supp. 392, 394 (W.D.N.C. 1992), *aff'd*, 113 S. Ct. 30 (1992).

35. *Id.* The fact that the plaintiffs in *Shaw* were white was not part of the complaint. In describing the injury allegedly caused by the North Carolina plan, the plaintiffs asserted that the injury was suffered by "all . . . citizens and registered voters of North Carolina—whether black, white, native-American, or others." Shaw v. Barr, 808 F. Supp. 461, 470 (E.D.N.C. 1992), *rev'd sub nom.* Shaw v. Reno, 113 St. Ct. 2816 (1993).

The majority did not directly address the issue of the *Shaw* plaintiffs's standing to bring this type of equal protection claim, and this issue is not addressed in this Note. For a discussion of the standing issue in *Shaw*, see Richard H. Pildesand & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after* Shaw v. Reno, 92 MICH. L. REV. 483, 513-16 (1993).

36. *Id.* (quotations and citation omitted). The First District contains a 53.40% black voting age population and 52.41% black registered voters. The Twelfth District contains a 53.34% black voting age population and 54.71% black registered voters. Brief for Appellees at 7 n.6, *Shaw* (No. 92-357).

37. The Fourteenth Amendment provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

trict court dismissed the claim.[38] The Supreme Court granted certiorari[39] to determine

> [w]hether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own.[40]

In considering the appellants' claim that the reapportionment plan created an unconstitutional racial gerrymander, Justice O'Connor, writing for the majority,[41] examined the Court's prior treatment of racial classifications.[42] Under the Equal Protection Clause of the Fourteenth Amendment, the Court has previously held that, whether express or implied, racial classifications are "suspect" and demand "searching judicial inquiry" to determine whether a "purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries."[43] Applying this concept to the process of reappor-

---

38. The district court held that it had no subject matter jurisdiction over the federal defendants, as the District Court for the District of Columbia has exclusive jurisdiction to issue injunctions against the execution of the Voting Rights Act and to enjoin actions taken by federal officers in that context. Shaw v. Barr, 808 F. Supp. 461, 466-67 (E.D.N.C. 1992), *rev'd sub nom.* Shaw v. Reno, 113 S. Ct. 2816 (1993) (Voorhees, C.J., concurring in part) (citing 42 U.S.C. § 1973*l*(b) (1982)). Two of the judges also concluded that the federal claim, to the extent that it questioned the Attorney General's preclearance decisions, was foreclosed by Morris v. Gressette, 432 U.S. 491, 505-07 (1977), which held that the Attorney General's actions in these matters are not subject to judicial review. *Shaw*, 808 F. Supp. at 467.

By a two-to-one vote, the district court also dismissed the claim against the state defendants, ruling that the North Carolina redistricting scheme did not violate the rights of white voters, as it was not "adopted with the purpose and effect of discriminating against white voters . . . on account of their race" as required in United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 165-68 (1977) (plurality opinion). *Shaw*, 808 F. Supp. at 472. Chief Judge Voorhees dissented, however, and argued that the failure of the North Carolina legislature to follow "[t]ime honored constitutional concepts of districting" such as compactness and contiguity in the reapportionment plan "augur[ed] a constitutionally suspect, and potentially unlawful, intent" and, as such, was sufficient to surmount the state defendants' motion to dismiss. *Shaw*, 808 F. Supp. at 476-77.

39. 113 S. Ct. 653 (1993). Cases heard under the Voting Rights Act are heard by a special three-judge district court, and appeals lie with the Supreme Court. 42 U.S.C. § 1973(c) (1988).

40. Brief for Appellants at 4, *Shaw* (No. 92-357).

41. Ironically, Justice O'Connor is the only member of the Court who has dealt with redistricting from a legislative viewpoint; she served in the Arizona legislature during that state's 1972 reapportionment. Susan B. Glasser, *Who's Next? Black, Hispanic Members Fear Lawsuits After Court's N.C. Ruling*, ROLL CALL, July 1, 1993, at 1, 18. She served in the Arizona legislature from 1969 to 1974, and as the majority leader of the Arizona State Senate from 1973 to 1974. B. Drummond Ayres, Jr., *Woman in the News: "A Reputation for Excelling,"* N.Y. TIMES, July 8, 1981, at A1. Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy constituted the remainder of the majority.

42. *Shaw*, 113 S. Ct. at 2824-28.

43. *Id.* at 2824 (quotations and citations omitted).

tionment, the majority concluded that any plan that separates individuals based merely on racial considerations too closely resembles "political apartheid."[44] The majority reasoned that such a plan may reinforce the perception that individuals of the same racial group think alike and share the same interests, thereby perpetuating "impermissible racial stereotypes."[45] Where such a reapportionment plan is "unexplainable on grounds other than race,"[46] the Court concluded that the "strict scrutiny"[47] test used to evaluate state laws that classify citizens by race should be applied to determine its constitutionality.[48]

Because it had rejected such racial distinctions in other contexts,[49] the Court held by a five-to-four vote that a reapportionment plan which was "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race" constituted proper foundation for a claim under the Equal Protection Clause.[50] Although the four dissenters[51] maintained that the irregular shape of the district, because it was not indicative of an invidiously discriminatory purpose or effect, did not provide the basis for such a claim,[52] the majority concluded that "appearances do matter"[53] in the reapportionment context. The Court thus remanded the case to the district court and required the state to prove that it has a "compelling governmental interest" in the reapportionment plan and that the plan is "narrowly tailored" to fit that interest.[54]

The *Shaw* decision results from the convergence of two previously discrete lines of Supreme Court jurisprudence: the judicial interpretation of the right to vote, pursuant to the Constitution and the Voting Rights Act,

---

44. *Id.* at 2827.

45. *Id.* (citing Holland v. Illinois, 493 U.S. 474 (1990); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991)).

46. *Id.* at 2825 (citing Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

47. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989): In *Croson*, the Court stated that strict scrutiny is used to

> "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect classification. [Strict scrutiny] also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Id.

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

49. *See infra* notes 54-88.

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

51. *Id.* at 2834 (White, J., dissenting); *id.* at 2843 (Blackmun, J., dissenting); *id.* at 2843 (Stevens, J., dissenting); *id.* at 2845 (Souter, J., dissenting).

52. *Id.* at 2840-42 (White, J. dissenting); *id.* at 2843-45 (Stevens, J., dissenting); *id.* at 2848-49 (Souter, J., dissenting).

53. *Id.* at 2827.

54. *Id.* at 2832.

and the scrutiny given racial classifications under the Equal Protection Clause.

After the courts succeeded in striking down laws that were aimed at preventing blacks and other minorities from exercising the right to vote,[55] the Court turned its focus to more subtle discriminatory practices. *Gomillion v. Lightfoot*[56] was one of the first cases that dealt with reapportionment schemes and the issue of race, and it may have foreshadowed the controversy at issue in *Shaw*. *Gomillion* involved the Alabama legislature's redefinition of the boundaries of the city of Tuskegee from a square-shaped figure to a twenty-eight sided form.[57] The *Gomillion* plaintiffs alleged that this redefinition, which removed all but a handful of the city's 400 blacks from within the city's boundaries, violated their constitutional rights.[58] The Court held that the plaintiffs should have the opportunity to prove their allegations. If true, these assertions would show that the redesignation "was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering"[59] and that this process of "fencing out" deprived black voters of their right to vote.[60] The Court further refined this idea in *Wright v. Rockefeller*.[61] In *Wright*, the plaintiffs brought suit claiming that the 1961 New York congressional districting plan was drawn "with racial considerations in mind," creating racially segregated districts in violation of the Fourteenth and Fifteenth Amendments.[62] The Court upheld the district court's finding that irregular districts drawn largely on racial lines did not violate the Constitution so long as they were not "the product of a state contrivance to segregate on the basis of race or place of origin."[63]

The Court again confronted the issue of Alabama's reapportionment, albeit in a different context, in *Reynolds v. Sims*.[64] The *Reynolds* plaintiffs claimed that their votes were being "diluted" in violation of the Fourteenth Amendment through the apportionment of the Alabama legislature; the legislative districts had not been reapportioned in sixty years and contained gross population disparities.[65] Extending the concept established in *Baker v. Carr*[66] that an equal protection challenge to the constitutionality of ap-

55. *See* South Carolina v. Katzenbach, 383 U.S. 301, 311 (1965).
56. 364 U.S. 339 (1960).
57. *Id.* at 340.
58. *Id.* at 340-41. Only four or five of the city's black citizens remained within the city after the boundaries were redrawn. *Id.*
59. *Id.* at 341.
60. *Id.* at 341, 345.
61. 376 U.S. 52 (1964).
62. *Id.* at 54.
63. *Id.* at 58.
64. 377 U.S. 533 (1964).
65. *Id.* at 538-40.
66. 369 U.S. 186, 209, 237 (1962).

portionment of a legislature based on dilution was justiciable, the *Wright* Court held that state legislative districts must be apportioned in such a manner that each district contains an equivalent number of people.[67] This became known as the "one person, one vote" principle.[68]

While "one person, one vote" may have reflected a dedication to equality in the district population of reapportionment plans, it did not represent the practical realities of the time regarding the right to vote, as many states employed literacy tests and other devices to discriminate against black voters.[69] After several unsuccessful attempts to remedy these problems,[70] Congress passed the Voting Rights Act of 1965,[71] which, rather than dealing with discrimination on a case-by-case basis, operated in a preventative manner by shifting the "advantage of time and inertia from the perpetrators of the evil to its victims."[72]

The Voting Rights Act effectively combatted the more blatant manifestations of discrimination in voting,[73] but the reapportionment process remained a significant area of controversy. The concepts of racial discrimination and vote dilution appeared again in *Whitcomb v. Chavis*.[74] *Whitcomb* involved a multimember district[75] encompassing Marion County, Indiana, which held at-large elections[76] for both state senators and representatives. The *Whitcomb* plaintiffs claimed that the districting plan diluted the strength of black voters and, therefore, violated the Equal Protection Clause.[77] The Court recognized that a claim challenging the constitutionality of a multimember districting plan is justiciable when the circumstances "operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[78] The Court noted the difference, however, between a group's candidates being defeated at the polls and that

67. *Reynolds*, 377 U.S. at 568. The Court extended this notion to congressional districts in Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964).

68. *Shaw*, 113 S. Ct. at 2823. Justice Harlan actually coined the phrase "one man, one vote" in Lathrop v. Donohue, 367 U.S. 820, 856 (1961) (Harlan, J., concurring).

69. *See* South Carolina v. Katzenbach, 383 U.S. 301, 311-12 (1966).

70. *Id.* at 312-15 (describing the Civil Rights Acts of 1957, 1960, and 1964).

71. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (1988)).

72. *Katzenbach*, 383 U.S. at 328.

73. *See Shaw*, 113 S. Ct. at 2823 ("The Act proved immediately successful in ensuring racial minorities access to the voting booth . . . .").

74. 403 U.S. 124 (1971).

75. A multimember district is one in which two or more representatives are elected from one district. *Id.* at 127-28.

76. An at-large election is one in which a number of representatives are chosen by the entire population of a county, state, or other subdivision, rather than being separated into different districts. BLACK'S LAW DICTIONARY 125 (6th ed. 1990).

77. *Whitcomb*, 403 U.S. at 128-29.

78. *Id.* at 143 (citation omitted).

group being denied equal participation in the process, and found that the Equal Protection Clause was not violated where members of a group had equal access and equal opportunity to participate in the political process—even where the group's candidates lost in elections in "safe" districts where the same individuals or parties won consistently.[79] Although these effects were absent in *Whitcomb*, the Court found them to be prevalent in *White v. Regester*.[80] Applying a "totality of the circumstances"[81] test, the Court concluded that the multimember district in question "invidiously excluded Mexican-Americans from effective participation in political life."[82] The Court upheld the invalidation of the plan.[83]

In *Beer v. United States*,[84] the Court shifted its analysis by examining the mathematical aspects of a redistricting plan. The plan at issue, dividing New Orleans into city council districts, contained three districts with a majority of black residents, one of which contained a majority of black registered voters.[85] The district court found that the plan did have the effect of abridging the right to vote on account of race, as there was a great difference between the potential for blacks, based on their population in the city, to elect their candidates of choice and the probable outcome of the elections, based on the way in which the districts were drawn.[86] In overturning the judgment for the plaintiffs, the Court held that the reapportionment plan actually enhanced the position of black voters, as it would result in an increase in black representation on the council, and therefore could not have the effect of diluting the right to vote based on racial considerations as defined in the Voting Rights Act.[87] According to the Court, the Act was intended to "insure that (the gains thus far achieved in minority political participation) shall not be destroyed through new (discriminatory) procedures and techniques."[88] The Court further stated that section 5 prevented "retrogression[s] in the position of racial minorities with respect to their effective exercise of the electoral franchise."[89] Although the Court held in *Beer* that a change in voting that did not have a retrogressive effect on the position of minority voters did not violate the Voting Rights Act,[90] Justice Marshall observed that it did so while disregarding the issues of discrimina-

79. *Id.* at 153.
80. 412 U.S. 755 (1973).
81. *Id.* at 769.
82. *Id.*
83. *Id.* at 769-70.
84. 425 U.S. 130 (1976).
85. *Id.* at 136-37.
86. *Id.*
87. *Id.* at 141-42.
88. *Id.* at 140-41 (citing S. REP. No. 295, 94th Cong., 1st Sess. 19 (1975)).
89. *Id.* at 141.
90. *Id.*

tory intent and effect that had been the paramount concerns in the Court's previous voting rights jurisprudence.[91]

The Court again confronted the issues of race and reapportionment in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*.[92] The *United Jewish Organizations* plaintiffs, members of a Hasidic Jewish group, claimed that the districting plan for Kings County, New York unconstitutionally diluted their voting strength and that they were assigned to districts based upon purely racial considerations.[93] In affirming the court of appeals, a plurality of the Supreme Court held that the Constitution does not prevent a state subject to the Voting Rights Act from "deliberately creating . . . black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5 [of the Act]."[94] Although the plan used racial considerations in establishing the districts, it "represented no slur or stigma with respect to whites or any other race."[95] The Court reasoned that because there had been no "fencing out" of whites from political participation, and the scheme had not reduced white voting strength, the New York plan did not violate the Fourteenth Amendment.[96]

The Court instituted a different approach to its evaluation of claims of vote dilution in *City of Mobile v. Bolden*.[97] In *Bolden*, the Court held that violations of the Equal Protection Clause occur only where there is purposeful discrimination. Stating "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to an ultimately discriminatory purpose,"[98] a plurality of the Court held that the at-large multimember district of the City of Mobile did not violate the Voting Rights Act or the Fourteenth Amendment.[99] Because the Court previously had held that the racially disproportionate impact of a state program is insufficient on its own to render an action unconstitutional,[100] the plurality thought that it would be inconsistent to conclude that an action could constitute discrimination absent a showing of discriminatory intent.[101] In *Rogers v. Lodge*,[102] however, the Court deter-

91. *Id.* at 145-58 (Marshall, J., dissenting).
92. 430 U.S. 144 (1977).
93. *Id.* at 152-53 (plurality opinion).
94. *Id.* at 161 (plurality opinion).
95. *Id.* at 165 (plurality opinion).
96. *Id.* (plurality opinion).
97. 446 U.S. 55 (1980).
98. *Id.* at 69 (plurality opinion) (quoting Washington v. Davis, 426 U.S. 229, 240 (1976)).
99. *Id.* at 60-61, 65, 74 (plurality opinion).
100. *See* Washington v. Davis, 426 U.S. 229, 239-48 (1976) (holding that a program is not unconstitutional solely due to discriminatory impact in the absence of a discriminatory purpose); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1976) (requiring proof of a discriminatory purpose to show a violation of Fourteenth Amendment).
101. *Bolden*, 446 U.S. at 72-73.

mined that "'an invidiously discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if . . . true, that the law bears more heavily on one race than another.' "[103] Indeed, these cases signalled the Court's initial movement toward integrating its racial classification and voting rights jurisprudence.

The Court's decision in *Bolden* prompted Congress to amend section 2 of the Voting Rights Act to provide that a discriminatory effect alone could establish a violation of the Act.[104] Furthermore, the amendment authorized the "results" test which provided that a showing that members of a group within a district had less opportunity to participate in the political process than did other members of the district would constitute a violation of the Act.[105] The Senate Judiciary Committee majority report accompanying the proposed changes to section 2 listed several "typical factors" that might indicate a violation of this section.[106] A "totality of the circumstances"[107] test was provided in the revised section 2.[108]

---

102. 458 U.S. 613 (1982).

103. *Id.* at 618 (quoting *Washington*, 426 U.S. at 242).

104. Velasquez v. City of Abilene, 725 F.2d 1017, 1021 (5th Cir. 1984).

105. The "results" test was set forth by the Supreme Court in White v. Regester, 412 U.S. 755, 766 (1973), and was applied by other federal courts prior to the *Bolden* decision. *See, e.g.*, United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 165-66 (1977); Whitcomb v. Chavis, 403 U.S. 124, 149-50 (1971).

106. The committee listed nine factors that it considered indicative of a violation in a state or political subdivision. These included: (1) the historical discrimination against minority voters; (2) racially polarized voting; (3) the use of electoral devices that could enhance opportunities for discrimination against minorities; (4) the denial of minority access to a slating process where one is available; (5) discrimination in other areas, such as education, employment and health, that hinders minority participation in the political process; (6) racial appeals in political campaigns; (7) the extent to which minorities have been elected to public office; (8) a lack of responsiveness by elected officials to particularized needs of the minority community; and (9) a tenuous policy underlying the use of voting qualifications or other practices. S. REP. No. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07.

107. 42 U.S.C. § 1973(b) (1988) provides:

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

Id.

108. *See* S. REP. No. 417, *supra* note 106, at 27, *reprinted in* 1982 U.S.C.C.A.N. at 205 ("Plaintiffs . . . must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.")

The Supreme Court applied this test for the first time in *Thornburg v. Gingles*[109] when it evaluated several districts created in the 1982 North Carolina state legislative redistricting plan.[110] The *Gingles* plaintiffs claimed that multimember districts in several areas of the state served to dilute the voting strength of black voters, while other districts were formed to fracture a concentration of black voters sufficient to form a voting majority in one district.[111] The Court held that a minority group would be required to demonstrate three facts in order to establish a claim of voting impairment in a multimember district:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed . . .—usually to defeat the minority's preferred candidate.[112]

Concluding that the districting scheme in North Carolina met these requirements and that the "use of a multimember electoral structure has caused black voters in the districts . . . to have less opportunity than white voters to elect representatives of their choice,"[113] the Court upheld the district court's judgment that the proposed plan was unconstitutional.[114]

On the same day it decided *Gingles*, the Court resolved a different reapportionment problem in *Davis v. Bandemer*.[115] In *Bandemer*, several Indiana Democrats claimed that the Republican-controlled Indiana legislature violated the Fourteenth Amendment in its 1981 legislative reapportionment plan by unfairly diluting their votes through a political gerrymander.[116] Extending a notion intimated in another reapportionment controversy,[117] the Court determined preliminarily that such controversies

---

109. 478 U.S. 30 (1986).

110. *Id.* at 34-35.

111. Gingles v. Edmisten, 590 F. Supp. 345, 349-50 (1984), *aff'd in part and rev'd in part sub nom.* Thornburg v. Gingles, 478 U.S. 30 (1986).

112. *Gingles*, 478 U.S. at 50-51.

113. *Id.* at 80; *cf.* Growe v. Emison, 113 S. Ct. 1075, 1084-85 (1993) (holding that the *Gingles* requirements also apply to single-member districts).

114. *Gingles*, 478 U.S. at 80. The Court reversed the district court's judgment as to one district, ruling that black voters had experienced sustained success in that district. *Id.* at 77, 80.

115. 478 U.S. 109 (1986).

116. *Id.* at 113-15.

117. Gaffney v. Cummings, 412 U.S. 735, 751-54 (1973). In evaluating a legislative apportionment plan, the *Gaffney* Court noted that although those who prepared the plan admitted that

> virtually every Senate and House district line was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican parties, . . . [w]e are quite unconvinced

are justiciable under the Fourteenth Amendment and agreed with the plaintiffs that "each political group in a State should have the same chance to elect representatives of its choice as any other political group."[118] However, the Court reversed the district court's ruling that the districting plan violated the Fourteenth Amendment.[119] The Court found that, since the Indiana plan was not "arranged in a manner that [would] consistently degrade a voter's or a group of voters' influence on the political process as a whole,"[120] the effects of such a plan were not "sufficiently serious" to warrant judicial intervention into the state reapportionment process and, therefore, the Democrats' equal protection rights were not violated.[121] *Bandemer* was the Court's last significant ruling on voting rights that is directly relevant to *Shaw*.

The second line of cases implicated in *Shaw*—the application of strict scrutiny to racial classifications—is well established in the jurisprudence of the Supreme Court. The Court has long regarded racial classifications with suspicion, and, indeed, there were several early cases indicating that governmental categorizations based merely on considerations of race were impermissible.[122] The modern analysis of racial classifications has expanded

---

> that the reapportionment plan offered by the three-member board violated the Fourteenth Amendment because it attempted to reflect the relative strength of the parties in locating and defining election districts. It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. . . . The very essence of districting is to produce a different—a more "politically fair"—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment. . . . As we have indicated, multimember districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized.

Id. at 752-54.

118. *Bandemer*, 478 U.S. at 124-27 (plurality opinion).

119. *Id.* at 113 (plurality opinion).

120. *Id.* at 132 (plurality opinion).

121. *Id.* at 134, 143 (plurality opinion).

122. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886). In *Yick Wo* the Court stated:

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

Id. at 373-74; *see also* Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."); Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [and] courts must subject them to the most rigid scrutiny.")

The *Hirabayashi* and *Korematsu* cases are two of only a handful to have withstood the "strict in theory, fatal in fact" scrutiny. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 362 (1978);

upon this suspicion by instituting a framework for evaluating such categorizations.

In 1976, the Court confronted a case dealing with the discriminatory effects of various government programs. *Washington v. Davis*[123] concerned employment tests that resulted in the hiring of many more whites than blacks because blacks failed the test in disproportionately high numbers.[124] The plaintiffs claimed that the tests, which were designed to measure verbal capacity and reading comprehension, resulted in the exclusion of blacks at an exaggerated level and thus violated the Equal Protection Clause.[125] Holding that discriminatory impact alone is insufficient to support such a claim, the Court explained that

> an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. . . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.[126]

One year later, in *Arlington Heights v. Metropolitan Housing Development Corp.*,[127] the Court encountered a municipal ruling that denied a rezoning petition for a low- and moderate-income housing development. The plaintiffs alleged that the Village of Arlington Heights's denial of the petition was racially discriminatory and violated, among other things, the Fourteenth Amendment.[128] Reiterating the position established in *Washington v. Davis*, the Court held that proof of a discriminatory purpose is "required" to show a violation of the Equal Protection Clause.[129] The Court added that

---

Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). These decisions have been harshly criticized. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1466 (2d ed. 1988) (noting that *Korematsu* is the "one justly infamous episode in which the Court *upheld* as 'compellingly justified' an overtly racial discrimination"); David P. Currie, *The Constitution in the Supreme Court: The Preferred-Position Debate, 1941-1946*, 37 CATH. U. L. REV. 39, 70 (1987) ("[*Hirabayashi*] and [*Korematsu*] were sobering reminders both of the limits of judicial review and of the responsibility of other branches for safeguarding fundamental liberties.").

123. 426 U.S. 229 (1976).

124. *Id.* at 235.

125. *Id.* at 233-35.

126. *Id.* at 242 (citation omitted).

127. 429 U.S. 252 (1977).

128. *Id.* at 254. Reversing the trial court, the court of appeals found that the plan had a racially discriminatory impact. As the denial did not serve any "compelling interests," the court ruled for the plaintiffs. *Id.* at 259-60.

129. *Id.* at 265-66.

the lack of a discriminatory purpose does not activate a strict scrutiny analysis and will not support an Equal Protection claim.[130]

In *Regents of University of California v. Bakke*,[131] the Court further developed the "strict scrutiny" analysis. In *Bakke*, the mechanisms of a "special admissions" program designed to increase the representation of "disadvantaged" students in a medical school class came into question.[132] Under the program, sixteen spaces in the class were reserved for minority applicants including "Blacks," "Chicanos," "Asians," and "American Indians."[133] Applicants who chose to be considered for this program[134] were evaluated in a committee completely separated from the rest of the admissions process; candidates from the general and the special programs were not compared when evaluated for admission purposes.[135] After being denied admission in two consecutive years, the white plaintiff filed a "reverse discrimination"[136] claim alleging that the special admissions program unconstitutionally excluded him from the medical school on account of his race.[137]

In a divided opinion,[138] the *Bakke* Court invalidated the special admissions program.[139] The Court was confronted with the question of whether an express racial classification with benign or remedial effect was permissible. Although a majority of the Court agreed, after a "stringent examination,"[140] that consideration of race was permissible as part of the admissions process,[141] a majority nonetheless found that the program was unlawful.[142] Realizing that the "concepts of 'majority' and 'minority' necessarily reflect

130. *Id.*

131. 438 U.S. 265 (1978).

132. *Id.* at 272-73.

133. *Id.* at 274.

134. Candidates were asked on the application form whether they wished to be considered for the special admissions program. On the 1973 application, the classification was "economically and/or educationally disadvantaged"; on the 1974 application the classification was "minority group." *Id.*

135. *Id.* at 272-75.

136. *See id.* at 413 (Stevens, J., concurring in the judgment in part and dissenting in part).

137. *Id.* at 276-78.

138. Justice Powell wrote the opinion announcing the judgment of the Court. *Id.* at 269. Justices Brennan, Marshall, Blackmun and White wrote a joint opinion concurring in the judgment in part and dissenting in part, *id.* at 324, and joined in various parts of Justice Powell's opinion. Justice Stevens concurred in the judgment in part and dissented in part, joined by Chief Justice Burger and Justices Stewart and Rehnquist. *Id.* at 408. Justices White, *id.* at 379, Marshall, *id.* at 387, and Blackmun, *id.* at 402, each filed separate opinions.

139. *Id.* at 320.

140. *Id.* at 290.

141. *Id.* at 320, 325.

142. *Id.* at 319-20 (finding that the program was unconstitutional under the Fourteenth Amendment); *id.* at 421 (Stevens, J., concurring in the judgment in part and dissenting in part) (finding that the program violated Title VI of the Civil Rights Act of 1964).

temporary arrangements,"[143] Justice Powell concluded that racial and ethnic distinctions "of any sort are inherently suspect and thus call for the most exacting judicial examination."[144]

In *Fullilove v. Klutznick*,[145] the Court once again splintered on the issue of racial considerations. The Court confronted a congressional spending program that required ten percent of the federal funds used for public works projects to be directed to minority businesses.[146] While attributing "great weight"[147] to the congressional approach to the matter, the Court evaluated the constitutionality as well as the objectives of the set-aside plan and upheld the program.[148] Chief Justice Burger, writing for the Court, concluded that the remedial objectives served by the program were within the powers reserved to Congress.[149] As Congress was not required to act in a completely "color-blind" fashion,[150] a majority of the Court concluded that such a remedial program would pass a test of "strict scrutiny."[151]

The Court used a similar approach when it analyzed a collective-bargaining agreement in *Wygant v. Jackson Board of Education*.[152] This agreement permitted a school district to retain minority teachers with less seniority while nonminority teachers with greater seniority were laid off.[153] The nonminority plaintiffs alleged that this race-based policy vio-

143. *Id.* at 295.

144. *Id.* at 291. Two different "strict scrutiny" tests were set forth in *Bakke*. Justice Powell's approach closely resembled that of the traditional "strict scrutiny" analysis: that the purpose of the classification be "permissible and substantial," *id.* at 305, and that its use be "necessary" to accomplish that objective. *Id.* The test advocated in the joint opinion of Justices White, Brennan, Marshall, and Blackmun, developed in earlier gender discrimination cases, *see, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976), required that the classifications adopted for remedial purposes "serve important governmental objectives and . . . be substantially related to . . . those objectives." *Bakke*, 438 U.S. at 359 (citations omitted).

145. 448 U.S. 448 (1980).

146. *Id.* at 453.

147. *Id.* at 472 ("[W]e are bound to approach our task with appropriate deference to Congress, a co-equal branch charged by the Constitution with the power to 'provide for the general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment.").

148. *Id.* at 472-73, 492.

149. *Id.* at 478.

150. *Id.* at 482.

151. *Id.* at 491-92; *see also* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). The *Fullilove* plurality opinion, written by Chief Justice Burger, indicated that the plan would have passed either of the "strict scrutiny" analyses developed in *Bakke*. *Fullilove*, 448 U.S. at 492. Justice Powell, concurring in the judgment, agreed that the means in implementing the program were "reasonably necessary" and found the program constitutional. *Id.* at 516-17 (Powell, J. concurring in judgment). Justice Marshall, also concurring, found that the plan survived the "strict scrutiny" analysis put forth in his joint opinion in *Bakke*. *Id.* at 521 (Marshall, J., concurring in judgment).

152. 476 U.S. 267 (1986) (plurality opinion).

153. *Id.* at 270-72 (plurality opinion).

lated the Equal Protection Clause.[154] Recognizing that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subjected to governmental discrimination,"[155] the plurality held that the remedial layoff policy was not "justified by a compelling governmental interest."[156] While the district court had held that remedying general societal discrimination was a sufficient interest to justify the agreement, the Court ruled that this approach was too indefinite an approach, stating that "[i]n the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future."[157]

A majority of the Court finally adopted the application of "strict scrutiny" to benign race-based classifications in *City of Richmond v. J. A. Croson Co.*[158] The *Croson* Court examined a Richmond, Virginia municipal plan requiring contractors to subcontract thirty percent of their contract to "minority business enterprises" in order to remedy past discrimination.[159] Stating that "there is no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics"[160] without a "searching judicial inquiry,"[161] Justice O'Connor, writing for the Court, found that the plan failed to meet either requirement.[162] Because none of the evidence specifically identified any discrimination in the Richmond construction industry, and because using past general societal discrimination would be an unrealistic and unwieldy standard, the Court held that no "compelling interest" existed to justify the allotment of public contracts based on race.[163] Furthermore, the plan was not "narrowly tailored" because the city failed to show a need for the remedy; the plan had not been linked to identifiable discrimination and the city had not considered any of the "array" of race-neutral means of increasing the availability of opportunities to minorities as well as other small businesses.[164]

---

154. *Id.* (plurality opinion).

155. *Id.* at 273 (plurality opinion).

156. *Id.* at 274-76 (plurality opinion).

157. *Id.* at 276.

158. 488 U.S. 469 (1989); *cf.* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (holding unconstitutional an intentional preference for one race over another in administering layoffs); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (holding that the reservation of a fixed number of university admissions for minorities is unconstitional).

159. *Croson*, 488 U.S. at 477-81.

160. *Id.* at 493.

161. *Id.*

162. *Id.* at 505, 507-08.

163. *Id.* at 505.

164. *Id.* at 507-11.

The *Shaw* decision is a product of a *Croson*-style analysis extended into the area of voting rights: a stringent examination of a state's reapportionment plan where districts are allegedly drawn on racial lines. The goal embodied in *Shaw* is a laudable one: "[A] political system in which race no longer matters."[165] The Court's extension of "color-blindness" into the area of voting rights jurisprudence is intended to prevent the "balkanization" of American politics into competing racial factions.[166] Thus, the *Shaw* Court affirmed the principle previously stated in *Croson* and intimated in other opinions:[167] While Americans must still fight to expose racism and the injustices that it inflicts on society, it is time to "reach out across lines of color and creed to touch and mobilize people from all groups."[168]

Be that as it may, the *Shaw* framework contains several shortcomings. First, it fails to distinguish the facts of *Shaw* from those in cases that conflict with its rationale.[169] Second, the *Shaw* court applies strict scrutiny in a manner inconsistent with voting rights precedent and infeasible in the context of redistricting.[170] Finally, the *Shaw* decision creates more questions about apportionment than answers.[171]

Although the *Shaw* majority gives the *United Jewish Organizations*[172] opinion only cursory mention, the controversy over the North Carolina plan most closely resembles the situation in that case. As noted earlier, the challenged reapportionment plan in *United Jewish Organizations* split a Hasidic Jewish group into two different districts, a move that the plaintiffs alleged unconstitutionally "diluted" their votes simply for the purpose of achieving a racial "quota" in the districts.[173] The *Shaw* majority considered the ruling "highly fractured"[174] due to the three different justifications enumerated for upholding the New York plan.[175] Yet a majority in *United Jewish Organi-*

---

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

166. *Id.*

167. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 319-20 (1986) (Stevens, J., dissenting); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 295 (1978).

168. Jim Sleeper, *Ethnic 'Sensitivity' Is Drawing Lines It Means to Erase*, CHI. TRIB., Oct. 12, 1993, at 19.

169. *See infra* text accompanying notes 172-96.

170. *See infra* text accompanying notes 197-228.

171. *See infra* text accompanying notes 229-235.

172. United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977) (plurality opinion).

173. *Id.* at 153 (plurality opinion).

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

175. *See United Jewish Orgs.*, 430 U.S. at 165 (plurality opinion) ("[T]he plan did not minimize or unfairly cancel out white voting strength."); *id.* at 176 (Brennan, J., concurring in part) ("[T]he resort to a numerical racial criterion as a method of achieving compliance with the aims of the Voting Rights Act is . . . consistent with [the] consensus [supporting more elaborate measures to secure the right to vote]."); *id.* at 180 (Stewart, J., concurring in judgment) ("The

zations agreed that discriminatory purpose and effect are the important considerations in evaluating a reapportionment plan.[176]

The *Shaw* Court held that "[n]othing in [*United Jewish Organizations*] precludes white voters . . . from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate voting districts on the basis of race without sufficient justification."[177] Nonetheless, this contention was the centerpiece of the *United Jewish Organizations* plaintiffs' argument: "Our argument is . . . that . . . there could be—and in fact was—*no reason other than race to divide the community* . . . ."[178] The Court resolved this question against the plaintiffs, employing the basic test regarding discriminatory purpose and effect.[179] Justice White therefore concluded that the claim created by the *Shaw* majority was "in plain view and did not carry the day for petitioners."[180]

Apparently, the shape of North Carolina's districts distinguishes the state's plan from the one in *United Jewish Organizations*. The *Shaw* Court relied on "traditional districting principles"[181] as the main characteristic separating what may be acceptable racial considerations in the reapportionment process from those that are unacceptable. In previous cases, the Court had focused its inquiry on whether the electoral system at issue had "substantially disadvantag[ed] certain voters in their opportunity to influence

---

clear purpose with which the New York Legislature acted—in response to the position of the United States Department of Justice under the Voting Rights Act—forecloses any finding that it acted with the invidious purpose of discriminating against white voters.").

176. *Shaw*, 113 S. Ct. at 2837 (White, J., dissenting). Five members of the Court "were of the view that, absent any contention that the proposed plan was adopted with the intent, or had the effect, of unduly minimizing the white majority's voting strength, the Fourteenth Amendment was not implicated." *Id.*; *see also United Jewish Orgs.*, 430 U.S. at 165 (plurality opinion) ("[T]here was no fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength."); *id.* at 179, 180 (Stewart, J., concurring in judgment) ("Having failed to show that the legislative reapportionment plan had either the purpose or the effect of discriminating against them on the basis of their race, the petitioners have offered no basis for affording them the constitutional relief they seek.").

The North Carolina plan was not found to have violated the Voting Rights Act as interpreted prior to *Shaw*; while the majority did not address the issue, both the district court, *see* Pope v. Blue, 809 F. Supp. 392, 396-97 (W.D.N.C. 1992); Shaw v. Barr, 808 F. Supp. 461, 472 (E.D.N.C. 1992), as well as the *Shaw* dissenters, *see Shaw*, 113 S. Ct. at 2838 (White, J., dissenting); *id.* at 2843 (Blackmun, J., dissenting); *id.* at 2844 (Stevens, J., dissenting); *id.* at 2847 (Souter, J., dissenting), found that the plan did not have the requisite discriminatory purpose and effect as provided for under 42 U.S.C. § 1973 (1988).

177. *Shaw*, 113 S. Ct. at 2830.

178. *Id.* at 2839 (White, J., dissenting) (quoting Brief for Petitioners at 6 n.6, United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1976) (No. 75-104) (citation omitted).

179. *See supra* note 175.

180. *Shaw*, 113 S. Ct. at 2839 (White, J., dissenting).

181. *Id.* at 2824, 2829; *see also id.* at 2829, 2832 ("sound districting principles").

the political process effectively."[182] Justice O'Connor expressed her views on this type of evidence in her *Bandemer* concurrence:

> [W]here a racial minority group is characterized by "the traditional indicia of suspectness" and is vulnerable to exclusion from the political process, . . . individual voters who belong to that group enjoy some measure of protection against intentional dilution of their group voting strength by means of racial gerrymandering. As a matter of past history and present reality, there is a direct and immediate relationship between the racial minority's group voting strength in a particular community and the individual rights of its members to vote and to participate in the political process. . . . Even so, *the individual's right is infringed only if the racial minority group can prove that it has "essentially been shut out of the political process."*[183]

A particular aesthetic quality has never been held to constitute a federal constitutional requirement for districts,[184] and, although the *Shaw* majority recognizes this, the opinion primarily emphasizes the odd shape of the district.[185] While the infeasibility of mandating a standard based on the

---

182. *Id.* at 2836 (White, J., dissenting) (quoting Davis v. Bandemer, 478 U.S. 109, 133 (1986)); *see also* Whitcomb v. Chavis, 403 U.S. 124, 153 (1971) ("[I]nvidious discrimination . . . results when the ghetto, along with all other Democrats, suffers the disaster of losing too many elections."); United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 165 (1977) (plurality opinion) ("[T]here was no fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength."); White v. Regester, 412 U.S. 755, 766 (1973) ("The plaintiffs' burden is to produce evidence . . . that the political processes leading to nomination and election were not equally open to participation by the group in question . . . .").

183. *Bandemer*, 478 U.S. at 151-52 (O'Connor, J., concurring in judgment) (emphasis added) (quoting majority opinion, *id.* at 139), *quoted in Shaw*, 113 S. Ct. at 2836 n.4 (White, J., dissenting). Justice O'Connor also commented on this matter in Thornburg v. Gingles, 478 U.S. 30 (1986):

> I would adhere to the approach outlined in *Whitcomb* and *White* and followed [in other cases]. Under that approach, a court should consider all relevant factors bearing on whether the minority group has "less opportunity than other members of the electorate to participate in the political process *and* to elect representatives of their choice." 42 U.S.C. § 1973 (1982) (emphasis added). The court should not focus solely on the minority group's ability to elect representatives of its choice. Whatever measure of undiluted minority voting strength the court employs in connection with evaluating the presence or absence of minority electoral success, it should also bear in mind that "*the power to influence the political process is not limited to winning elections.*"

Id. at 99 (O'Connor, J., concurring in judgment) (second emphasis added) (quoting *Bandemer*, 478 U.S. at 132).

184. *Shaw*, 113 S. Ct. at 2841 (White, J., dissenting) (quoting Gaffney v. Cummings, 412 U.S. 735, 752 n.18 (1973)).

185. *Compare Shaw*, 113 S. Ct. at 2827 ("We emphasize that [the criteria of compactness, contiguity, and respect for political subdivisions] are important not because they are constitutionally required—they are not . . . but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.") *with id.* at 2824 ("It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the

"attractiveness" of a districting plan is apparent, the Court's emphasis on form is also inconsistent with its prior treatment of similar districting situations.[186] In *Bandemer*,[187] the Court drew its rationale from earlier racial gerrymandering cases,[188] holding that the "deliberate and arbitrary distortion"[189] of district lines does not result in a constitutional violation unless the lines are "arranged in a manner that will consistently degrade a voter's or group of voters' influence on the political process as a whole."[190] Justice White borrowed from this rationale to argue in his dissenting opinion that the Court's approach in *Shaw*[191] "immediately casts attention in the wrong direction—toward superficialities of shape and size, rather than toward the political realities of district composition."[192]

These political realities also reveal problems with the majority's approach. The implementation of minority-majority districts is often precipitated by bloc voting along racial lines coupled with historical discrimination against minorities. In areas where there is bloc voting of this type and minority voting is traditionally aligned with one political party, courts will be unable—when a district like North Carolina's Twelfth is drawn—to delineate the unconstitutional "racial-consideration" gerrymanders on the one hand from the constitutional political gerrymanders, as provided for in *Bandemer*, on the other. In these situations, which arguably would include

---

past."), *id.* at 2820-21 (describing district as "unusually shaped") *and id.* at 2827 ("[W]e believe that reapportionment is one area in which appearances do matter.").

186. *See id.* at 2848-49 (Souter, J., dissenting) As Justice Souter stated:

> [Where the *Shaw* claim is pleaded], the State will have to justify its decision to consider race as being required by a compelling state interest, and its use of race as narrowly tailored to that interest. Meanwhile, in other districting cases, specific consequential harm will still need to be pleaded and proven. . . . The Court offers no adequate justification for treating the narrow category of bizarrely shaped district claims differently from other districting claims. The only justification I can imagine would be the preservation of "sound districting principles," [but] we have held that such principles are not constitutionally required, with the consequence that their absence cannot justify the distinct constitutional regime put in place by the Court today.

Id. (footnotes and citations omitted).

187. Davis v. Bandemer, 478 U.S. 109 (1986).

188. *Id.* at 131 n.12 ("Although these cases involved racial groups, we believe that the principles developed in these cases would apply equally to claims by political groups in individual districts."), *cited in Shaw*, 113 S. Ct. at 2836 n.3 (White, J., dissenting).

189. *Bandemer*, 478 U.S. at 138.

190. *Id.* at 132, 142-43; *see also id.* at 138-39 ("We disagree . . . with . . . the conception that 'the intentional drawing of district boundaries for partisan ends and for no other reason violates the Equal Protection Clause in and of itself.'").

191. See *infra* text accompanying notes 240-58 for a further discussion of the role of the "traditional notions" of reapportionment.

192. *Shaw*, 113 S. Ct. at 2841 (White, J., dissenting) (quoting ROBERT G. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 459 (1968)).

the North Carolina plan,[193] it will be impossible to distinguish where the racial considerations end and where the political considerations begin. Therefore, proving that there has been a constitutionally impermissible use of race in drawing the plan will be impossible. Indeed, Justice Stevens's dissent in *Shaw* notes that invoking the *Gingles* factors[194]—that a minority group is "politically cohesive" and that white voters ordinarily vote as a bloc to defeat the minority's preferred candidate—necessitates proving what the majority labels as "impermissible racial stereotypes."[195] Justice Stevens observed that, as a result, "citizens and legislators . . . will no doubt be confused by the Court's requirement of evidence [regarding vote dilution] in one type of case that the Constitution now prevents reliance on in another."[196]

In evaluating the plaintiffs' claim that the North Carolina plan was "so bizarre on its face that it is unexplainable on grounds other than race,"[197] the Court drew upon its recent decisions in *Wygant v. Jackson Board of Education*[198] and *City of Richmond v. J.A. Croson Co.*[199] to apply strict

193. Justice White hinted at this in his dissent, in which he stated that districting to protect incumbents

> appears to be what has occurred in this instance. . . . North Carolina's decision to create a majority-minority district can be explained to meet [the objection of the Attorney General]. Its decision not to create the more compact southern minority-majority district that was suggested, on the other hand, was more likely a result of partisan considerations. . . . With respect to this incident, one writer has observed that "understanding why the configurations are shaped as they are requires us to know at least as much about the interests of incumbent Democratic politicians, as it does knowledge of the Voting Rights Act."

Shaw, 113 S. Ct. at 2841-42 n.10 (White, J., dissenting) (quoting Grofman, *supra* note 12, at 1258). Indeed, much of the negative commentary about the plan in the legislative debate revolved around assertions that it was a partisan gerrymander. *See, e.g.*, Remarks of Sen. Cochrane, Senate Chamber Proceedings, 1991 Extra Session of the N.C. General Assembly, Jan. 24, 1992, at 23 ("[The plan] is gerrymandering of the most partisan order."); Remarks of Rep. Balmer, House Floor Debate, 1991 Extra Session of the N.C. General Assembly, Jan. 23, 1992, at 10 ("[T]his map right here is going to become the test case in the Federal Courts for the issue of partisan gerrymandering."); Remarks of Rep. Pope, *id.* at 39 ("[The plan] is pure partisan gerrymandering."). The first suit involving the North Carolina plan was brought by, among others, the North Carolina Republican Party, which claimed that the reapportionment plan violated its members' equal protection rights under *Bandemer* as a political gerrymander. Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd*, 113 S. Ct. 30 (1992). The claim was dismissed by the district court, which stated that the plaintiffs "do not allege, nor can they, that the state's redistricting plan has caused them to be 'shut out of the political process.' " *Id.* at 397. The Supreme Court summarily affirmed this decision. 113 S. Ct. 30 (1992).

194. Thornburg v. Gingles, 478 U.S. 30, 51 (1986).

195. *Shaw*, 113 S. Ct. 2844 n.3 (Stevens, J., dissenting) (quoting *id.* at 2827); *see also id.* at 2845 n.2 (Souter, J., dissenting) ("Recognition of actual commonality of interest and racially polarized bloc voting cannot be equated with the 'invocation of race stereotypes' described by the Court . . . and forbidden by our case law." (quotations omitted)).

196. *Id.* at 2844 n.3 (Stevens, J., dissenting).

197. *Id.* at 2825.

198. 476 U.S. 267 (1986).

scrutiny to what is arguably a benign racial classification in a voting rights context. This approach, as noted earlier, is based upon the theory that "[c]lassifications based on race carry a danger of stigmatic harm [and] may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[200] Therefore, racial classifications are required to be "justified by a compelling governmental interest, and . . . the means chosen by the State to effectuate its purpose [must] be narrowly tailored,"[201] a notion earlier indicated in *Bakke*.[202] The Court concluded that its prior voting rights jurisprudence, in particular *Gomillion v. Lightfoot*[203] and *Wright v. Rockefeller*,[204] supported such a "strict scrutiny" analysis of the plaintiffs' claim.[205]

Reliance on these cases, however, seems misplaced. In *Gomillion*, the plaintiffs' claim was resolved under the *Fifteenth* Amendment; because Tuskegee's redefinition of the city boundaries operated to "depriv[e] the petitioners of the municipal franchise and [its] consequent rights [thus] despoil[ing] colored citizens, and only colored citizens, of their theretofore enjoyed voting rights,"[206] the Court's paramount concern was the *effect* of the city's action.[207] Although the concurring opinion of Justice Whittaker remarked that the decision would more properly be based on the Fourteenth Amendment, he appeared to agree that the important issue was that black voters were being "fenced out" of the process.[208] The *Gomillion* opinion simply does not support the "contention that district lines drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption."[209] Indeed, the *Gomillion* opinion does not even address the issue of the proper Fourteenth Amendment standard of review.[210]

---

199. 488 U.S. 469 (1989).

200. *Id.* at 493.

201. *Wygant*, 476 U.S. at 285 (O'Connor, J., concurring in part and concurring in judgment) (quotation marks and citation omitted).

202. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978) ("We have held that in order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose or the safeguarding of its interest." (quotations and citations omitted)).

203. 364 U.S. 339 (1960).

204. 376 U.S. 52 (1964).

205. *Shaw*, 113 S. Ct. at 2825-28.

206. *Gomillion*, 364 U.S. at 347.

207. *But see* United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 181 (1977) (Burger, C.J., dissenting) ("If *Gomillion* teaches anything, I had thought it was that drawing of political boundary lines with the sole, explicit objective of reaching a predetermined racial result cannot ordinarily be squared with the Constitution.")

208. *Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring).

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

210. See *supra* text accompanying notes 56-60 for a discussion of *Gomillion*.

The Court cites *Wright* to illustrate "the difficulty of determining from the face of a single-member districting plan that it purposefully distinguishes between voters on the basis of race."[211] Although this is undoubtedly a valid proposition, it does not seem to support the majority's conclusion that strict scrutiny is necessary in this instance. The Court in *Wright* affirmed the district court's judgment that the plaintiffs "failed upon the facts and the law" to prove that the congressional reapportionment plan devised by the New York legislature in 1961 was implemented with discriminatory intent.[212] As Justice White stated in his dissent in *Shaw*,

> I fail to see how a decision based on a failure to establish discriminatory *intent* can support the inference that it is unnecessary to prove discriminatory *effect*.
>
> *Wright* is relevant only to the extent that it illustrates a proposition with which I have no problem: That a complaint stating that a plan has carved out districts on the basis of race *can*, under certain circumstances, state a claim under the Fourteenth Amendment. To that end, however, there must be an allegation of discriminatory purpose and effect, for the constitutionality of a race-conscious redistricting plan depends on these twin elements. . . . In the present case, the facts could sustain no such allegation.[213]

While the *Shaw* majority invoked previous voting rights cases in reaching its decision that a district drawn along racial lines is impermissible, a close examination of the Court's prior voting rights jurisprudence suggests a different conclusion: The primary concern in analyzing a redistricting plan is the purpose and effect of the plan. As noted earlier, Justice O'Connor reviewed the Court's racial gerrymandering cases in her concurring opinion in *Bandemer* and expressed her view that "the individual's right is infringed only if the racial minority group can prove that it has 'essentially been shut out of the political process.'"[214] Other recent cases have all recognized the same point—that the integral considerations in voting rights cases are discriminatory purpose and effect.[215]

---

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

212. Wright v. Rockefeller, 376 U.S. 52, 55, 58 (1964). For a discussion of *Wright*, see *supra* text accompanying notes 61-63.

213. *Shaw*, 113 S. Ct. at 2839-40 (White, J., dissenting).

214. Davis v. Bandemer, 478 U.S. 109, 151-52 (1986) (O'Connor, J., concurring in judgment) (quoting plurality opinion, *id.* at 139).

215. *See* Voinovich v. Quilter, 113 S. Ct. 1149, 1157 (1993); Thornburg v. Gingles, 478 U.S. 30, 35-38, 44-46 (1986); *id.* at 84, 91, 98-99 (O'Connor, J., concurring in judgment); City of Mobile v. Bolden, 446 U.S. 55, 62, 66, 69 (1980); *id.* at 90-92 (Stevens, J., concurring in judgment); *id.* at 95, 97 (White, J., dissenting); *id.* at 104, 108 (Marshall, J., dissenting); *see also* 42 U.S.C. § 1973 (1982) (forbidding voting laws with discriminatory purpose and effect).

The Court also ignored the fundamental inconsistency of the standard set forth in *Shaw*; although a "strict scrutiny" analysis is effective in eradicating invidiously discriminatory programs in other contexts,[216]

> electoral districting calls for decisions that nearly always require some consideration of race for legitimate reasons where there is a racially mixed population. . . . One need look no further than the Voting Rights Act to understand that this may be required, and we have held that race may constitutionally be taken into account in order to comply with that Act.[217]

Whereas situations traditionally subjected to strict scrutiny analysis "characteristically occur in circumstances in which the use of race to the advantage of one person is necessarily at the obvious expense of a member of a different race,"[218] electoral districting does not possess such a "zero-sum" nature. As Justice Souter explained in his dissent, "the mere placement of an individual in one district instead of another denies no one a right or benefit provided to others."[219] Although the Court has recognized the concept of the "dilution"[220] of minority votes inside a majority district, this recognition has been within a framework in which discriminatory purpose and effect compose integral parts of the equation.

Justice Souter's dissent proposed one approach to this quandary:

> [I]n the absence of an allegation of [discriminatory purpose and effect constituting] cognizable harm, there is no need for further scrutiny because a gerrymandering claim cannot be proven without the element of harm. Nor if dilution is proven is there any need for further constitutional scrutiny; there has never been a suggestion that such use of race could be justified under any type of scrutiny, since the dilution of the right to vote can not be said to serve any legitimate governmental purpose.[221]

---

216. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (city contracting); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (teacher layoffs).

217. *Shaw*, 113 S. Ct. at 2845 (Souter, J., dissenting) (citations omitted). While race may always play some role in districting decisions, the only circumstance in which it is undisputable that a reapportionment plan would be absolutely "unexplainable on grounds other than race," *id.* at 2825 (citation omitted), is one in which race is the *only* demographic factor considered: if, for example, a "district" were to be created by compiling a list limited to minority voters. Interview with Professor John C. Boger, University of North Carolina School of Law (Jan. 27, 1994).

218. *Shaw*, 113 S. Ct. at 2846 (Souter, J., dissenting) (citing *Croson*, 488 U.S. at 493; Fullilove v. Klutznick, 448 U.S. 448, 484 (1979)); *see also Wygant*, 476 U.S. at 282-83 (1986) (plurality opinion) (addressing racial quotas in teacher layoffs).

219. *Shaw*, 113 S. Ct. at 2846 (Souter, J., dissenting) (footnote omitted).

220. *See* Thornburg v. Gingles, 478 U.S. 30, 46-51 (1986) (multimember districts); Growe v. Emison, 113 S. Ct. 1075, 1084-85 (1993) (single-member districts).

221. *Shaw*, 113 S. Ct. at 2847-48 (Souter, J., dissenting). Presumably, such dilution would violate the Fifteenth Amendment regardless of the level of scrutiny under Gomillion v. Lightfoot, 364 U.S. 339 (1960).

As the *Shaw* majority recognizes, "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors."[222] The customary "strict scrutiny" analysis is therefore an infeasible and inappropriate means with which to evaluate such a reapportionment plan.[223]

Even if the strict scrutiny test is appropriate in the reapportionment context, the North Carolina plan may satisfy its requirements. Compliance with the Voting Rights Act should meet the requirement that the plan be "justified by a compelling governmental interest."[224] The question of whether the plan was "narrowly tailored,"[225] however, presents a more complicated question. Justice White asserted that North Carolina's actions in creating the second plan were "narrowly tailored," in that it was "precisely tailored to meet the objection of the Attorney General to its prior plan."[226] The concept of a "narrowly tailored" plan as enumerated in

---

222. *Shaw*, 113 S. Ct. at 2826 (emphasis in original).

223. The majority opinion intimated, *see id.* at 2832, and the petitioners' brief alleged, Brief for Appellant at 11, *Shaw* (No. 92-357), that the North Carolina plan violated the ideal of the "color-blind Constitution." *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting)). Although espousing the "dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement," *Croson*, 488 U.S. at 505-06, this concept has been criticized in that it "legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans." Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 2-3 (1991). *But see* ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992) (arguing that the "color-blind" approach is better suited toward historical goals of racial equality); Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1318-20 (1986) (arguing that affirmative action "is both destructive of the racial equality and potentially harmful to society," and that the consequences include "the decline of occupational and professional standards" resulting in a "spoils system among competing racial and ethnic groups").

224. *See Shaw*, 113 S. Ct. at 2830 ("The States certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied."); *id.* at 2842 (White, J., dissenting) ("I have no doubt that a State's compliance with the Voting Rights Act clearly constitutes a compelling interest."). This, of course, assumes that § 2 of the Voting Rights Act remains constitutional. The *Shaw* plaintiffs' contention was that, if the Voting Rights Act required North Carolina to adopt the plan in question, then § 2 was unconstitutional. *Id.* at 2831. The *Shaw* majority refused to resolve this question, leaving it open for consideration on remand. *Id.* Complying with the "nonretrogression" principle in Beer v. United States, 425 U.S. 130, 141 (1976), avoiding dilution of black voting strength, *see* Thornburg v. Gingles, 478 U.S. 30, 46-51 (1986), and eliminating the past effects of racial discrimination, *see Croson*, 488 U.S. 469, 498-506, were also discussed as possible alternatives in making out a "compelling interest." *Shaw*, 113 S. Ct. at 2830-32; *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (plurality opinion) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." (citations omitted)).

225. *See Shaw*, 113 S. Ct. at 2831.

226. *Id.* at 2842 (White, J., dissenting).

Croson,[227] however, looks to "alternative remedies," including "race-neutral means," to rectify an equal protection violation.[228]

The concept of "alternative remedies" in a voting rights claim is complicated: what exactly constitutes an "alternative remedy"? One obvious answer, and the one hinted at by the *Shaw* majority,[229] would be the drawing of a "better" district. This solution, however, would prove to be unmanageable. The available alternatives for a districting plan are virtually endless, and with current computer technology enabling one to "revise a boundary line and receive instant readouts of the voting behavior, racial composition and other . . . characteristics [of the] district,"[230] a contest to see who could come up with the "best" district would be not only unwieldy, but unwinnable as well. Such is the reasoning behind the Court's reluctance to "embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature."[231]

Countless other questions are created by imposing a standard that the remedy be "narrowly tailored" in these types of circumstances:

> 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? Of the following two options—creation of two minority influence districts or of a single majority-minority district—is one "narrowly tailored" and the other not? Once the Attorney General has found that a proposed redistricting change violates § 5's nonretrogression principle in that it will abridge a racial minority's right to vote, does "narrowly tailoring" mean that the most the State can do is preserve the *status quo*? Or can it maintain that change, while attempting to enhance minority voting power in some other manner?[232]

The infeasibility of the strict scrutiny standard becomes all the more apparent when one considers "narrowly tailoring" in the context of a claim that arguably lacks a constitutional injury. This unmanageability reinforces the dissenters' contention that state efforts designed to remedy minority vote dilution are qualitatively different from the "affirmative action" programs that the Court has previously resolved with strict scrutiny.[233] The dissenters

227. 488 U.S. 469 (1989).

228. *Id.* at 507 (quoting United States v. Paradise, 480 U.S. 149, 171 (1987)).

229. *Shaw*, 113 S. Ct. at 2827 ("[W]e believe that reapportionment is one area in which appearances do matter.").

230. Arthur A. Anderson & William S. Dahlstrom, *Technological Gerrymandering: How Computers Can Be Used in the Redistricting Process to Comply with Judicial Criteria*, 22 URB. LAW. 59, 74 (1990).

231. Davis v. Bandemer, 478 U.S. 109, 133 (1986) (O'Connor, J., concurring in judgment).

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

233. *Id.* at 2842-43 (White, J., dissenting).

thus conclude that the matters of redistricting at issue in *Shaw*, rather than involving preferential treatment to one group at the expense of another,[234] operated to balance the playing field through creating districts that did not "unfairly minimize the voting power of any group."[235]

Several different solutions have been attempted and others proposed to counteract the problems associated with the "shutting out" of certain groups from the political process. Cumulative voting,[236] limited voting,[237] and the single transferable vote[238] are practices that have been experimented with and debated in various forums. As "form" was the driving component of the majority's rationale, a solution also lies in evolving from the "traditional notions" of form in the process of redistricting. As noted earlier, the concept of "form" as an integral requirement of complying with the Voting Rights Act not only ignores the reality, recognized even by the *Shaw* majority, that "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines,"[239] but also disregards the inadequacies of a strict "compactness" requirement.

---

234. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 270-73 (1986) (addressing layoffs); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477-83 (1989) (discussing a set-aside plan).

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

236. Under a cumulative voting scheme, each voter is entitled to cast as many votes as there are seats to be filled, just as in traditional at-large elections, but voters may aggregate their votes by giving a preferred candidate or candidates more than one vote. Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 231 (1989). For example, if there are seven seats to be filled in an election, each voter would have seven votes; voters could vote for seven different candidates, distribute their votes among fewer than seven, or "plump" all their votes for one favorite candidate. *Id.* at 232 (citation omitted). Cumulative voting systems are commonly used in elections for corporate boards of directors. *Id.* For a more detailed discussion of cumulative voting, see *id.* at 231-36. *See also* Richard L. Engstrom et al., *Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamagordo, New Mexico*, 5 J.L. & POL. 469 (1989) (discussing cumulative voting); Daniel R. Ortiz, Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144 (1982) (same).

237. Under a limited voting scheme, each voter has fewer votes than there are seats to be filled in a multimember district—"the voter is limited to voting for less than a full slate." Karlan, *supra* note 236, at 223-24. For example, in a district with three seats to be filled, voters are limited to voting for only two candidates. *Id.* at 224. Limited voting systems have been used by local governments in many areas, particularly in the Northeast. *Id.* For a more detailed discussion of limited voting, *see id.* at 223-31.

238. The single transferable vote allows voters to rank candidates on their ballots, with each voter listing their choices in order of preference. Dana R. Carstarphen, *The Single Transferable Vote: Achieving the Goals of Section 2 Without Sacrificing the Integration Ideal*, 9 YALE L. & POL'Y REV. 405, 420 (1991). The drawing of districts is unnecessary, as all voters may choose among all candidates in an election. *Id.* The system "maximizes the effectiveness of individual votes by transferring votes from (1) candidates who have more than enough votes to be elected and (2) candidates who have little or no chance of being elected." *Id.* (citation omitted). For a more detailed discussion of the single transferable vote, see *id.* at 420-29.

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

In speaking to the issue of population equality among districts thirty years ago, Chief Justice Warren discussed the role of geography in districting plans:

> [P]eople, not trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960s, most claims that deviations from population-based representation can be validly based solely on geographical considerations. Arguments for allowing such deviations in order to . . . prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.[240]

These words ring equally true, if not more so, today. It is unrealistic to say that, in a nation as technologically advanced and interconnected as ours, a district such as North Carolina's Twelfth, or any other that might cover a large or irregularly-shaped geographical area, prevents voters from gaining access to the candidates running for or representatives serving in an elective post.[241]

Some argue that the "traditional" idea of geographic compactness, as expressed in *Shaw*, also reflects the trend by which geographic compactness "has been transformed from a shorthand expression for broadly inclusionary values into a way of short-circuiting claims of racial vote dilution."[242] Although there have been many mathematical definitions of compactness devised,[243] they are usually defined in strict geographic terms.[244] Indeed,

---

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

241. For example, the entire state of Montana, which has a land area of 147,076 square miles, 29 THE NEW ENCYCLOPEDIA BRITTANICA 418 (1992), constitutes one congressional district. U.S. GOV'T PRINTING OFFICE, 1993-1994 OFFICIAL CONGRESSIONAL DIRECTORY, 103d CONGRESS 1163 (1993).

242. Karlan, *supra* note 236, at 210.

243. These definitions include:

> 1. Compare the area of a district to the area of the smallest circle that could contain the districts [sic].
> 2. Compare the perimeter of the district to the perimeter of a circle of equal area.
> 3. Compute the ratio of the length [sic] of the major and minor axes of the district.
> 4. Compare the aggregate length of the boundaries of all the districts with the aggregate length of all districts under any other plan consistent with the population and political subdivision standards.

Anderson & Dahlstrom, *supra* note 230, at 74-75.

However, one geographer has criticized these types of definitions and proposed a more sociopolitical view of compactness:

> A too simplistic application of such geographic compactness measures is foolish, especially where the distribution of population is irregular within districts. In many regions, the population is uneven, perhaps strung out along roads or railroads. Travel may be easier and cheaper in some directions than in others, such that an elongated district astride a major transport corridor might in fact be the most compact in the sense of minimum travel time for a representative to travel around the district. If so, then a

some district court opinions indicate the restrictive manner in which the concept of "compactness" in a *Gingles*-type analysis has been construed. In *Potter v. Washington County*,[245] for example, a Florida district court invalidated—partially on the basis of a lack of compactness—a municipal districting plan creating a minority-majority district by combining pieces of three different areas of the county. In stating that the plan "suffer[ed] from unacceptable 'gerrymandering' by creating a minority district that arbitrarily cuts diagonally through the center of the county,"[246] the court used geographical considerations to deny a minority group a more influential role in the political process where a more geographically concentrated, but equally populous minority group would have been able to ensure such a role.[247]

Dillard v. Baldwin County Board of Education,[248] an Alabama federal district court decision, advocates a different approach. In *Dillard*, the defendant board objected to the creation of a minority-majority district due to the "elongated and curvaceous" nature of the district, and its therefore not

---

modified criterion, the ratio of maximum to minimum travel time, would be a preferred measure.

RICHARD L. MORRILL, POLITICAL REDISTRICTING AND GEOGRAPHIC THEORY 22 (1981). Such an approach could be applied to North Carolina's Twelfth District, which runs down Interstate 85 from Durham to Gastonia. Shaw v. Barr, 808 F. Supp. 461, 464 (E.D.N.C. 1992) *rev'd sub nom.* Shaw v. Reno, 113 S. Ct. 2816 (1993).

While such an approach was not mentioned in any of the *Shaw* opinions, it has not gone unnoticed by the Supreme Court. Justice Stevens noted this theory in a discussion of "compactness" in his concurrence in Karcher v. Daggett, 462 U.S. 725, 768 n.20 (1983), a case involving the "one person, one vote" rule as applied to New Jersey's 1980 reapportionment of its congressional districts.

244. Twenty-eight states have compactness provisions regarding legislative or congressional apportionment plans. *See* ALASKA CONST. art. 6, § 6; ARK. CONST. art. 8, § 3 (providing for "convenient" districts); COLO. CONST. art. 5, § 47(1); ILL. CONST. art. 4, § 3(a); IOWA CONST. § 42.4 (West 1993) (providing for "convenient" districts); ME. CONST. art. 4, Pt. 1, § 2; MICH. CONST. art. 4, § 2(2); MD. CONST. art. 3, § 4; MINN. CONST. art. 4, § 3; MO. CONST. art. 3, §§ 2, 5, 45; MONT. CONST. art. V, § 14(1); NEB. CONST. art. III, § 5; N.Y. CONST. art. 3, § 4; N.D. CONST. art. 4, § 2; PA. CONST. art. 2, § 16; R.I. CONST. art. 7, § 1, art. 8, § 1; S.D. CONST. art. 3, § 5; VA. CONST. art. 2, § 6; VT. CONST. Ch. II, § 13; WASH. CONST. art. 2, § 43(5) (providing for "compact and convenient" districts); W. VA. CONST. art. 1, § 4; WIS. CONST. art. 4, §§ 4, 5 (providing for "convenient" districts"); WYO. CONST. art. 3, § 49; FLA. STAT. ANN. § 98.031 (West 1993); HAW. REV. STAT. § 25-2(b)(2) (Michie 1992); ME. REV. STAT. ANN. tit. 21-A, § 1201 (West 1993); MISS. CODE ANN. § 5-3-101(a) (1991); N.J. STAT. ANN. § 19:4-10 (West 1993); N.M. STAT. ANN. §§ 2-7C-3, 2-8C-2 (1993); N.Y. ELEC. LAW § 4-100 (McKinney 1993); WIS. STAT. ANN. § 4.001 (West 1993).

245. 653 F. Supp. 121 (N.D. Fla. 1986).

246. *Id.* at 130.

247. Karlan, *supra* note 236, at 208-09; *see also* Gomez v. City of Watsonville, 863 F.2d 1407, 1414 (9th Cir. 1988) ("It is sadly ironic that the district court concluded that because many Hispanic voters would still not be able to elect representatives of their choice under the proposed plan, no Section 2 claim could be maintained, thereby relegating all Hispanic voters to having no political effectiveness."), *cert. denied*, 489 U.S. 1080 (1989).

248. 686 F. Supp. 1459 (M.D. Ala. 1988).

meeting the *Gingles* requirement of "compactness."[249] The *Dillard* court read *Gingles* in a different fashion:

> By compactness, [*Gingles*] does not mean that a proposed district must meet, or attempt to achieve, some aesthetic absolute, such as symmetry or attractiveness. . . . It is apparent from the [*Gingles*] opinion that compactness is a relative term tied to certain practical objectives under § 2; the requirement is not that a district be compact, but that it be "sufficiently compact" under § 2. The term is a "practical" or "functional" concept, which must be considered in relation to § 2's laudatory national mission of opening up the political process to those minorities that have been historically denied such [participation]. . . . [Compactness] is therefore a desirable consideration for districting, but only to the extent it aids or facilitates the political process. . . .[250]

The conclusion drawn in *Dillard* reflects a more functional approach to section 2 and the *Gingles* requirements: that "a district is sufficiently geographically compact if it allows for effective representation."[251]

Justice Souter suggests a similar method of interpreting section 2 in his dissenting opinion in *Shaw*.[252] His dissent speaks to the "commonality of interest" prevalent in some racial groups that makes the terminology "minority voting strength" and "dilution of minority votes" meaningful.[253] This "commonality" reflects similar concerns and experiences and provides a means by which people attain a community with a coherent identity. Commonality of interest, as employed in reapportionment cases prior to *Shaw*, has been used to determine whether dilution of minority voting has occurred.[254]

Districts with coherent identities, therefore, need not be drawn along geographical lines; although geographical considerations do provide a means by which a district can have a coherent identity, it is not the only

---

249. *Id.* at 1465.

250. *Id.* at 1465-66.

251. *Id.* at 1466; *see also* Burton v. Sheheen, 793 F. Supp. 1329, 1356 (D.S.C. 1992), *vacated sub nom.* Statewide Reapportionment Advisory Committee v. Theodore, 113 S. Ct. 2954 (1993) ("[The functional view of compactness described in *Dillard*] in light of effective representation is a sound approach to the problems of compactness. . . . Further, this approach allows the court to consider communities of interest which may be involved."); Wilson v. Eu, 823 P.2d 545, 549-50 (Cal. 1992) In *Wilson* the court stated that

> the functional aspect of geographical compactness takes into account the presence or absence of a sense of community made possible by open lines of access and communication. We approve of the Masters' approach in determining the compactness of a particular minority group for purposes of assuring its protection under the Voting Rights Act.

Id. (citation omitted).

252. *Shaw*, 113 S. Ct. at 2845 (1993) (Souter, J., dissenting).

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

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

means. In using the demographic data already employed in drawing the districts themselves, a state could justify its reapportionment plan by showing that, despite the lack of a "true" geographical affiliation, a district in question has a coherent identity and therefore warrants, and indeed can practically support, an effective governmental representative.

An approach concentrating on the "personality" of a district would also effectively address the problematic issue of race as the paramount concern in reapportionment. Such an approach would allow a "suspect" district to be validated where a *Shaw* claim is pleaded and a strict scrutiny analysis is applied—after a state demonstrated a "compelling governmental interest," a plan would be narrowly tailored after a showing that a district questioned within the *Shaw* framework possessed sufficient "commonality" to support an effective representative.[255] Such an arrangement would more properly reflect the functional approach to section 2,[256] and would embody what has been described as the "inclusionary" spirit of the Voting Rights Act.[257]

Regarding the North Carolina plan, such an approach would show that the districts do indeed possess coherent identities: as the most urban district in North Carolina,[258] voters in the Twelfth District have common concerns

255. This approach is consistent with Thornburg v. Gingles, 478 U.S. 30 (1986), in examining the "commonality" of a district. While evidence of "commonality" was used in *Gingles* as part of an overall scheme to establish vote dilution, *see Gingles*, 478 U.S. at 45, in this type of approach the same type of evidence would be utilized to legitimize a district drawn where a "compelling governmental interest," for example, a violation of the Voting Rights Act, has been proven. *See also supra* note 224 (discussing other possible compelling governmental interests). Where no violation has been established, presumably the focus would be more on whether a "compelling governmental interest" has been met. One could argue, however, that an approach that allows for the inclusion of race as one of many considerations in a reapportionment plan would not even be subject to a *Shaw* analysis in that it employs, and therefore can be explained by, factors other than race.

256. *See* Thornburg v. Gingles, 478 U.S. 30, 45 (1986) ("[T]he Committee determined that 'the question of whether the political processes are "equally open" depends upon a searching practical evaluation of the "past and present reality" . . . and on a 'functional' view of the political process.'" (quoting S. REP. NO. 417, *supra* note 101, at 30 & n.120, *reprinted in* 1982 U.S.C.C.A.N. 177, 208)).

257. *See, e.g.*, Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 1-2 (1991) ("[The Voting Rights Act and its amendments] represent a national political consensus about the need to take extraordinary measures to bring about the effective inclusion of black Americans in the political system."); Edward J. Sebold, Note, *Applying Section 2 of the Voting Rights Act to Single-Member Offices*, 88 MICH. L. REV. 2199, 2201 (1990) ("[T]he goal of Section 2 is to bolster civic inclusion in the political process by eliminating the lingering effects of race discrimination."); Evelyn Elayne Shockley, Note, *Voting Rights Act Section 2: Racially Polarized Voting and the Minority Community's Representative of Choice*, 89 MICH. L. REV. 1038, 1059 (1991) ("'[C]ivic inclusion' is what Congress meant by its 'participat[ion] in the political process' language [found in 42 U.S.C. § 1973 (b)].").

258. U.S. DEPT. OF COMMERCE, 1990 UNITED STATES CENSUS OF POPULATION AND HOUSING, POPULATION AND HOUSING CHARACTERISTICS FOR CONGRESSIONAL DISTRICTS OF THE 103D CON-

about issues such as transportation, crime, education, and health care that may differ in many respects from those of North Carolinians living in rural areas.[259] The district also has the most dense population,[260] the second lowest per capita income,[261] the highest percentage of single-mother households,[262] and the highest rate of public transportation use in the state.[263] Although recognizing that there is indeed a great degree of commonality within some racial groups, an approach that employs common characteristics like these also allows for coherent representation across racial lines. This type of representation is practical and meaningful, not only to those who are included in these groupings, but also to those who are affected by the problems inherent in a district with the qualities represented by these groupings.

"In order to get beyond racism, we must first take account of race. There is no other way."[264] In advocating a move toward a "color-blind"

GRESS 40 (1993) [hereinafter POPULATION AND HOUSING CHARACTERISTICS]. The Twelfth District is 86.3% urban. *Id.*

259. These common areas of interest were apparently a significant issue of concern in the process of creating the plans. *See* Remarks of Rep. Fitch, House Floor Debate, 1991 Extra Session of the N.C. General Assembly, Jan. 23, 1992, at 3. As Representative Fitch stated in the House floor debate:

> Although these majority black districts are spread out they have a commonalty [sic] of characteristics. District 1 in the Eastern part of North Carolina is largely rural in character. Only 18 percent of its population lives in cities of 20,000 or more. In contrast District 12 which runs from Gastonia through Charlotte to Winston Salem to Greensboro and to Durham is urban in character. Eighty percent of its population lives in cities of 20,000 or more.... [The proposed southeastern district] does not have commonalty [sic] of characteristics providing people of Charlotte and Wilmington in their urban needs with people of Anson and Bladen counties which are rural and have rural needs.

Id.; *see also, e.g.* Remarks of Sen. Winner, Meeting of the Senate Subcommittee on Congressional Redistricting, 1991 Extra Session of the N.C. General Assembly, Jan. 22, 1992, at 21:

> There is clearly more of a community of interest (with the plan as opposed to other proposals). I mean you are combining urban people essentially—up and down, all the way from up in Gastonia to Durham.... It is solely a piedmont district and you have that community of interest rather than trying tot [sic] combine the rural east with the piedmont.

260. POPULATION AND HOUSING CHARACTERISTICS, *supra* note 258, at 17-18.

261. *Id.* at 45-46. The First District has the lowest. *Id.*

262. *Id.* at 39-40.

263. *Id.* at 41-42. It also apparently has the highest rate of AIDS cases among the North Carolina congressional districts. Interview with Teresa Klimko, R.N., D.V.M., M.P.H., Epidemiologist, HIV/STD Control Branch, N.C. Dept. of Environment, Health and Natural Resources (Oct. 18, 1993). Similarly, the First District, which has also been questioned as a "racial-consideration" gerrymander, has the state's most rural and least dense population, POPULATION AND HOUSING CHARACTERISTICS, *supra* note 258, at 17-18, 39-40, the highest percentage of female residents, *id.* at 1-2, the lowest average owned housing-unit value, *id.* at 20-21, the lowest average per capita income, *id.* at 45-46, the highest percentage of families living below poverty level, *id.*, and the highest percentage of people over the age of 25 without a high school education, *id.* at 41-42.

264. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (opinion of Blackmun, J.).

society[265] while simultaneously using such incendiary terms as "political apartheid,"[266] the *Shaw* Court not only does a great disservice to the cause of voting rights, but also strikes a blow to a greater goal: the celebration of diversity, not only within the governmental arena, but in the country as a whole. In evaluating the North Carolina plan, the Court ignores the unfortunate reality that the problems of racism remain all too readily apparent throughout America. While the majority sees the type of districts North Carolina and other states have drawn in an effort to promote truly "representative" government and to rectify the discrimination that plagues the United States as an effort to "segregate" voters,[267] the North Carolina plan actually brings together voters with common interests, concerns, and experiences. Such plans are well within the spirit of the Court's racial classification and voting rights jurisprudence and should not unnecessarily fall victim to an elusive inquiry with potentially undesirable effects. The irony of this decision was not lost on Justice Blackmun, who observed that the majority's newly invented claim came as a result of a "challenge by white voters to the plan under which North Carolina has sent black representatives to Congress for the first time since Reconstruction."[268] It will only compound the irony if this decision serves to contribute to the deterioration of race relations, thereby injuring all Americans.

RIPLEY EAGLES RAND

265. *See Shaw*, 113 S. Ct. at 2832.

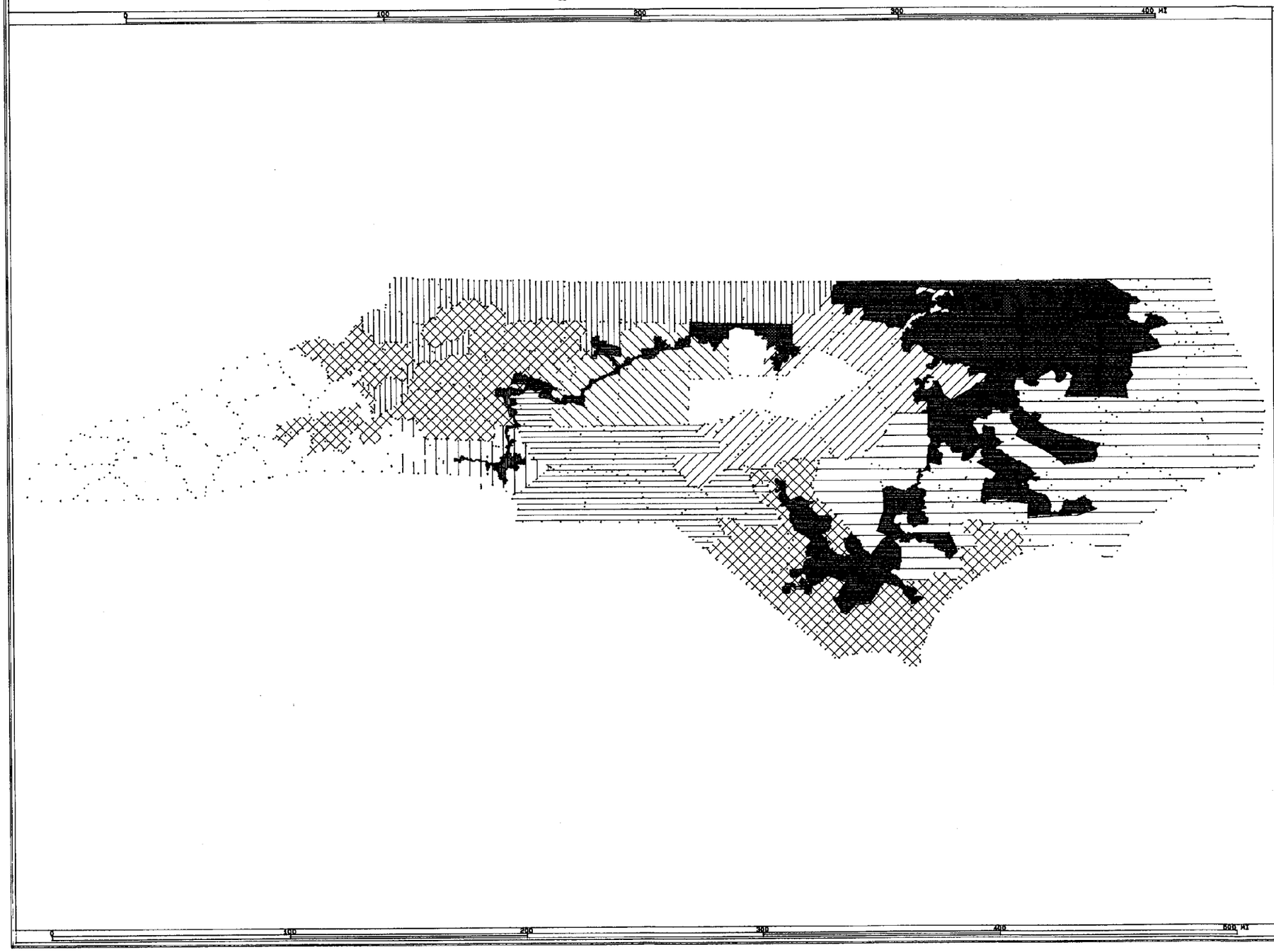
266. *Id.* at 2827.

267. *See id.* at 2826, 2832. Other districts that have been disputed as "racial-consideration" gerrymanders include, among others, Louisiana's Fourth District, Georgia's Eleventh District, Florida's Third District, Texas's Twenty-Ninth District and Illinois's Fourth District; Glasser, *supra* note 40, at 18-19; Van Biema, *supra* note 12, at 30. On December 28, 1993, a Louisiana district court, relying on *Shaw*, struck down the congressional districting plan for that state, concluding that the plan was "undoubtedly a child of racial gerrymandering." Hays v. State of Louisiana, No. 92-CV-1522, 1993 U.S. Dist. LEXIS 18775, at *40 (W.D. La. Dec. 28, 1993).

268. *Id.* at 2843 (Blackmun, J., dissenting). They are Representative Eva Clayton of the First District and Representative Melvin Watt of the Twelfth District. Glasser, *supra* note 40, at 18.

NC Congressional Plan
Chapter 7 of the 1991 Extra Session Laws

November 1, 1993

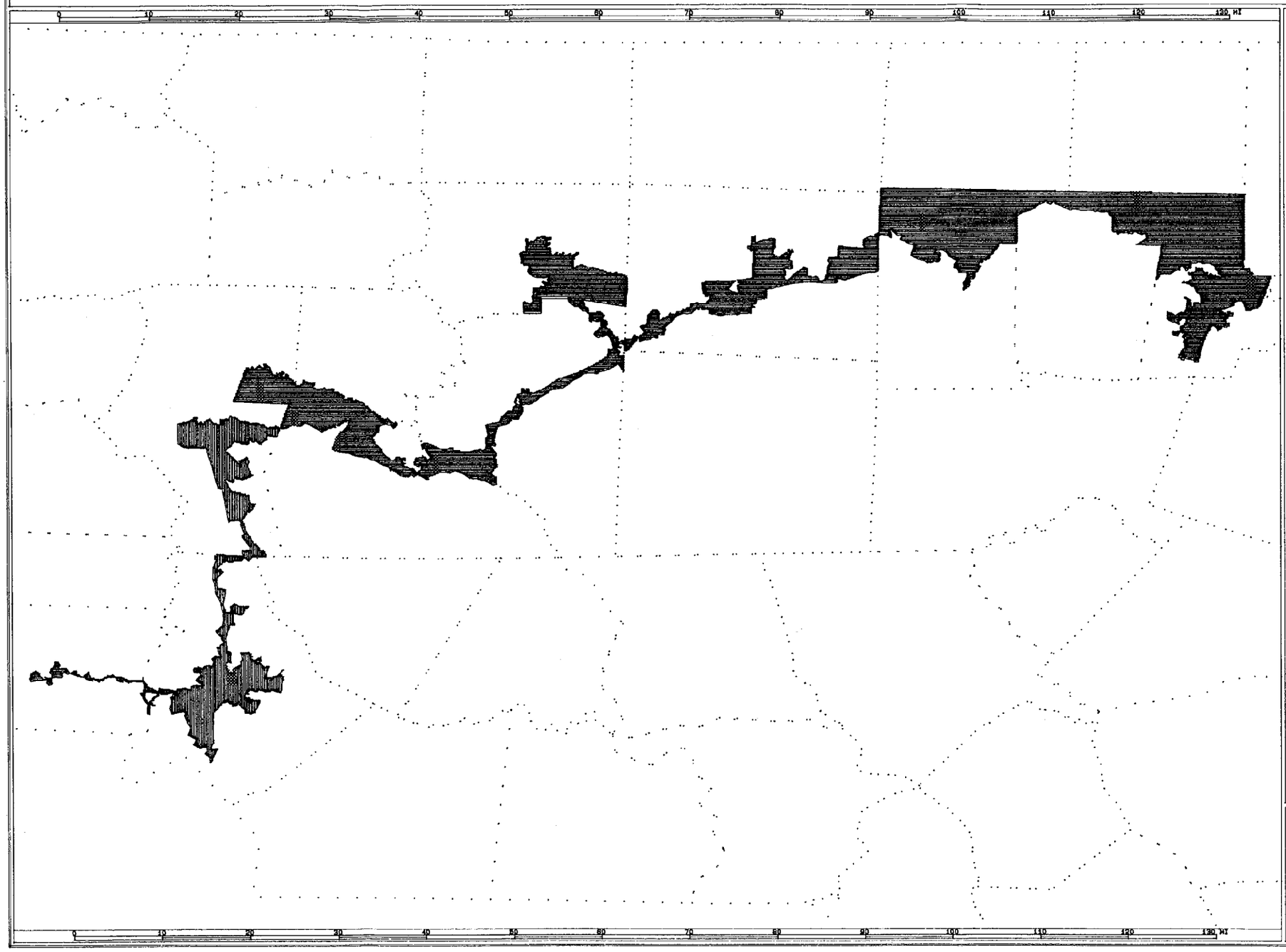


LEGEND

- County Boundary
- District 1
- District 2
- District 3
- District 4
- District 5
- District 6
- District 7
- District 8
- District 9
- District 10
- District 11
- District 12

NC Congressional Plan
District 12

November 3, 1993



LEGEND

- County Boundary
- District 1
- District 2
- District 4
- District 5
- District 6
- District 7
- District 8
- District 9
- District 10
- District 12