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MODERNIZING THE “NEW SOUTH”: THE LEGACY OF JUDGE PHILLIPS’S LATE- CAREER, LATE-CENTURY RULINGS IN *SHAW* AND *VMI**

HAMPTON DELLINGER**

The story of James Dickson Phillips Jr. is that of a century, the one known numerically as the twentieth and historically as the American. Phillips was born into its beginnings.¹

Professional realms in the Old North State of his infancy were deeply cleaved along lines of color and gender, with segregation and sexism predominant facts of public life, including the law. Beyond North Carolina, leadership opportunities for blacks and women were little better. So even a long lifetime later, the United States of today would seem unimaginable to a son of the Scarlett O’Hara and Jim Crow South: a President of color with a female frontrunner to be his successor;² three women on the United States Supreme Court with a fourth retired; minorities and women in high-ranking positions throughout the military; and barriers surmounted and glass ceilings broken (or at least cracked) at the pinnacles of power in business, law, medicine, and academia.

In his home state, Phillips has seen two women preside as Chief Justice of the North Carolina Supreme Court and a third serve as Governor. James A. Wynn Jr., an esteemed African American jurist,

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** I graduated from Yale Law School in 1993 and, along with Melissa Saunders (now a UNC Law School professor and recipient of the McCall Teaching Award) and Christina Goshaw Hinkle (a board-certified trusts and estates attorney in Chapel Hill), had the honor of clerking for Judge Phillips that year and the next. Later, I served as a Deputy Attorney General in the North Carolina Department of Justice. I now practice with the law firm of Boies, Schiller & Flexner LLP. This essay was improved by comments from Katharine T. Bartlett, H. Jefferson Powell and Jolynn Childers Dellinger. It is dedicated to the wonderful group that comprises the “Judge Phillips Former Law Clerk Family,” Judge Phillips’s family (including his son Dickson, a distinguished lawyer), and my own.

1. Tod M. Leaven, *From Cincinnatus to Cicero: North Carolina’s Lawyers in the Service: An Interview with Judge J. Dickson Phillips, Jr.*, ADVOC. (N.C. Bar Ass’n Young Lawyers Div., Cary, N.C.), Mar. 2011, at 4, 4, available at <http://younglawyers.ncbar.org/newsletters/theadvocatemarch2011/cincinnatusmarch>.

2. See, e.g., Harry Enten, *Clinton is Polling Like an Incumbent and That Could Help Her in 2016*, FIVETHIRTYEIGHT (Mar. 26, 2014, 7:34 AM), <http://fivethirtyeight.com/features/clinton-is-polling-like-an-incumbent-and-that-could-help-her-in-2016/>.

replaced him on the United States Court of Appeals for the Fourth Circuit, a bench that was all-white (and all-male) when Phillips joined it in 1978. Wynn's Fourth Circuit colleagues resident in North Carolina—Allyson K. Duncan and Albert Diaz—similarly reflect not only the talent of today's Tar Heel bar but also its diversity.³

Over the course of Phillips's ninety-two years, his fellow Americans have taken thousands of steps toward greater racial and gender equality. Advancements were wrought by countless heroes—many heralded, many more obscure. Phillips, by turns, was both. He first lent an untrumpeted hand to the cause of progress long before he began drafting the court opinions—always penciled in tight cursive on long yellow pads—that would define and distinguish him. In the 1940s, he joined a generation's worth of soldiers to defeat the most diabolical military regime the modern world had seen while crediting (in conversations with his law clerks and others) the often overlooked role of minorities and women in the World War II effort.⁴ In the 1950s and 1960s, he quietly advised leading Southern progressives such as North Carolina Governor Terry Sanford and University of North Carolina ("UNC") System President William C. Friday. In the 1970s, as Dean of the UNC School of Law, Phillips encouraged (without fanfare) a marked expansion in the number of African Americans and women in the student body and on the faculty.⁵

Yet Phillips's most enduring contributions to the cause of racial and gender advancement arguably came near the end of his judicial career and decades after the watershed moments of the civil rights and feminist movements. Between 1992 and 1995, Judge Phillips confronted two cases—the racial redistricting suit known as *Shaw*⁶

3. See generally Carl Tobias, *Filling the Fourth Circuit Vacancies*, 89 N.C. L. REV. 2161, 2175 (2011) (discussing the increasing diversity of the Fourth Circuit).

4. Professor Bill Aycock's fine appreciation of Judge Phillips two decades ago for this Review provides more details on Phillips's military service, noting that he was a rifle platoon leader in the 513th Parachute Regiment, served with distinction in three campaigns in the European Theater, and was awarded a Bronze Star, a Purple Heart, and a Presidential citation for the Rhine airborne crossing. William B. Aycock, *The Vietnam Era: The Deanship of James Dickson Phillips, Jr. (1964–74)*, 73 N.C. L. REV. 601, 602 (1995), in *The University of North Carolina School of Law: A Sesquicentennial History*, 73 N.C. L. REV. 563 (1995). A separate tribute, co-authored by a three-judge panel of Judge Phillips's Fourth Circuit colleagues, adds that he "fought in a number of battles, including the Battle of the Bulge. He helped to lift the German siege of Bastogne." Sam J. Ervin, III, Francis D. Murnaghan, Jr. & John D. Butzner, Jr., *A Tribute: Judge James Dickson Phillips, Jr.*, 73 N.C. L. REV. 1, 1 (1994); see also Leaven, *supra* note 1 (providing recollections from Judge Phillips on his WWII military service).

5. See Aycock, *supra* note 4, at 604.

6. The *Shaw* litigation began with Judge Phillips's opinion in *Shaw v. Barr (Shaw I)*, 808 F. Supp. 461 (E.D.N.C. 1992), *rev'd sub nom. Shaw v. Reno*, 509 U.S. 630 (1993). The

and the challenge to a publicly funded, all-male military college shorthanded as *VMI*⁷—that raised questions about the vestiges of white and male privilege. Indeed, core aspects of each case—the failure of any African American from North Carolina to be elected to Congress since 1898 and the ban on women attending the taxpayer-supported Virginia Military Institute—made the “New South” label affixed long ago by the region’s progressive boosters look still somewhat aspirational.⁸ Or as William Faulkner, the South’s Shakespeare, put it: “The past is never dead. It’s not even past.”⁹

The answers Judge Phillips crafted to the specific issues presented in *Shaw* and *VMI* were consistent with the hopes of those who labored for a greater societal role for minorities and women. In *Shaw I*, he denied that white voters had a cognizable claim to challenge oddly shaped congressional districts where black voters might dictate electoral outcomes for the first time in nearly one hundred years.¹⁰ Then, in *Shaw II*, Phillips found that the two

remanded case led to the Phillips opinion that is a principal focus of this article: *Shaw v. Hunt (Shaw II)*, 861 F. Supp. 408 (E.D.N.C. 1994), *rev’d*, 517 U.S. 899 (1996). While *Shaw II* was also later reversed by the U.S. Supreme Court, the two Congressional districts at issue in *Shaw* were—even after the redrawing necessitated by the Supreme Court’s ruling in *Shaw II*—left sufficiently intact such that African American voters held sway in both districts. See *Easley v. Cromartie*, 532 U.S. 234, 237–39 (2001) (describing the history of the *Shaw* jurisprudence and reversing the lower court’s finding that the contested Twelfth Congressional District violated the Equal Protection Clause).

7. *VMI*’s case history is only a bit less tortured than that of *Shaw*. Judge Phillips’s first engagement with the challenge to the male-only admission policy came in *United States v. Virginia (VMI I)*, 976 F.2d 890 (4th Cir. 1992), where his appellate panel unanimously reversed a district court order allowing Virginia to continue supporting VMI without need for either admission of women or the establishment of a parallel alternative and equivalent program for women. On remand, in *United States v. Virginia (VMI II)*, 44 F.3d 1229, 1233–42 (4th Cir. 1995), the panel decided two to one (with Phillips the dissenter) to uphold the district court finding that the creation of a “Virginia Women’s Institute for Leadership” with state funds at the all-female Mary Baldwin College would satisfy equal protection without need for admitting women to VMI. The Fourth Circuit refused to review the split panel decision en banc. See *United States v. Virginia*, 52 F.3d 90, 91 (4th Cir. 1995) (Motz, J., dissenting) (noting “Judge Phillips’s thoughtful dissenting opinion on the merits of this case”). The Supreme Court subsequently granted certiorari and reversed the decision of the panel majority in *VMI II*. *United States v. Virginia*, 518 U.S. 515, 519 (1996).

8. The phrase “the New South” is most closely identified with the historian and social activist C. Vann Woodward, who earned his Ph.D. from UNC-Chapel Hill in 1937. Woodward’s book, *ORIGINS OF THE NEW SOUTH, 1877–1913*, was published in 1951 and brought attention to the region’s post-Civil War complexities and possibilities.

9. WILLIAM FAULKNER, *REQUIEM FOR A NUN* 80 (1975).

10. See *Shaw I*, 808 F. Supp. at 473 (“In this ‘racial gerrymandering’ case, plaintiffs have raised a number of questions about the political and social wisdom of the North Carolina congressional redistricting plan’s creation of two tortuously configured black-majority districts. The questions they have raised, however, are in the end political ones.

“majority-minority” districts at issue were narrowly tailored to meet a compelling state interest.¹¹ In *VMI I*, he was part of a unanimous panel that held that Virginia’s decision to provide a “unique educational opportunity to men only” violated the U.S. Constitution’s Equal Protection Clause.¹² But in *VMI II*, Phillips split with his two colleagues and concluded in a dissenting opinion that “[n]o separate single-gender arrangement that involved VMI as the all-mens’ school and any newly-founded *separate* institution (whether free-standing or an appendage) as the all womens’ component could pass equal protection muster.”¹³

Judge Phillips imbued his pivotal opinions in *Shaw* and *VMI* with an understanding of United States history, particularly the stains of discrimination that seeped so deeply from the 1800s into the century that he lived through. In each, he deftly wove ignominious chapters of the American story into his legal conclusion with the clarity and precision of written expression that was his hallmark. And so, in *Shaw II*, Judge Phillips summed up his sixty page opinion (written for himself and for renowned federal district court judge, W. Earl Britt¹⁴) by explaining:

The question in the end is whether a deliberately race-based districting plan enacted by an overwhelmingly white legislature in one of the former Confederate states in order to comply with its understanding of the commands of national law enacted to enforce the guarantees of the Fourteenth and Fifteenth Amendments shall be declared unconstitutional at the behest of five white voters whose voting rights have been in no legally cognizable way harmed by the plan. We have concluded that under controlling law and the material facts of this case, the legislation passes strict scrutiny as a sufficiently narrowly tailored effort by the state legislature to serve the state’s compelling interest in complying with that national remedial law.

Pointing essentially to the odd shapes of the two districts resulting in part—though by no means entirely—from the

Though legally justiciable, none of their specific claims of constitutional violation has merit.”).

11. *Shaw II*, 861 F. Supp. at 476.

12. *VMI I*, 976 F.2d at 892.

13. *VMI II*, 44 F.3d 1229, 1250 (4th Cir. 1995).

14. For an appreciation of Judge Britt, see Russell Rawlings, *Judge Earl Britt: A Most Deserving Recipient of NCBA’s Annual Liberty Bell Award*, N.C. B. ASSOC. (May 1, 2012), <http://www.ncbar.org/about/communications/nc-lawyer/2012-nc-lawyer-editions/may-2012/judgeearlbritt>.

legislature's racial design, the plaintiffs, through counsel, have characterized the plan as a 'constitutional crime.' We have concluded instead that, under controlling law, it is a justifiable invocation of a concededly drastic, historically conditioned remedy in order to continue the laborious struggle to break free of a legacy of official discrimination and racial bloc voting in North Carolina's electoral processes that has played a significant part in the inability of any African American citizen of North Carolina, despite repeated responsible efforts, to be elected to Congress in a century. We decline in this case to put a halt to the effort by declaring the plan unconstitutional.¹⁵

Just six months later, in *VMI II*, Judge Phillips wrote:

[T]he actual, overriding purpose of the proposed separate-but-equal arrangement remains the preservation by that means of the original 1839 policy of excluding women from VMI, a policy that unquestionably has been driven unchanged since its origins by a stereotyped view of the proper role and capabilities of women in society. . . .

. . . .

. . . If every good thing projected for the VWIL [Virginia Women's Institute for Leadership] program is realized in reasonably foreseeable time, it will necessarily be then but a pale shadow of VMI The student and eventual graduate of VWIL will not be able to call on the prestigious name of 'VMI' in seeking employment or preference in her various endeavors; the powerful political and economic ties of the VMI alumni network cannot be expected to open for her; the prestige and tradition of her own fledgling institution cannot possibly ever achieve even rough parity with those of VMI. The catch-up game is an impossible one, as any honest reflection upon the matter must reveal. . . .

The implication of all this is, as I realize, a stark one. No separate single-gender arrangement that involved VMI as the all-mens' school and any newly-founded *separate* institution (whether free-standing or an appendage) as the all womens' component could pass equal protection muster. It could not provide substantially equal educational benefits or opportunities to both genders.

. . . .

15. *Shaw II*, 861 F. Supp. at 476.

It will not work.¹⁶

After a fitful hundred years—with advancements so often followed by retreats—these passages, along with the ultimate outcomes of the cases that generated them, closed the twentieth century on a high note for those seeking to expand opportunities for African Americans and women, most especially in the South.

The power of Judge Phillips's *Shaw* and *VMI* opinions came not just from their rhetoric, but also from the fact that they were in no way the result of judicial fiat. To the contrary, in both instances Phillips's legal viewpoint amplified rather than defied the political branches. In the *Shaw* jurisprudence, the creation of two districts where African American voters could hold sway was the result of substantial negotiation between Republican federal officials and Democratic state officials.¹⁷ The back-and-forth between Democrats in Raleigh and the GOP in Washington, D.C., while undoubtedly fueled by partisan self-interest, resulted in the Bush Justice Department ultimately approving a redistricting map drawn by General Assembly Democrats in the early 1990s.¹⁸ The bipartisan brinksmanship among elected officials gave the contested districts a democratic legitimacy that Phillips refused to overturn lightly.¹⁹

16. *VMI II*, 44 F.3d at 1248, 1250–51. For another poignant judicial comment on the infirmities, legal and otherwise, inherent in excluding women from state-sponsored military schools that also invokes the march of history, see *Faulkner v. Jones*, 51 F.3d 440, 451 (4th Cir. 1995) (Hall, J., concurring) (“In fact, though *VMI*, *The Citadel*, and their advocates have ceaselessly insisted that education is at the heart of this debate, I suspect that these cases have very little to do with education. They instead have very much to do with wealth, power, and the ability of those who have it now to determine who will have it later. The daughters of Virginia and South Carolina have every right to insist that their tax dollars no longer be spent to support what amount to fraternal organizations whose initiates emerge as full-fledged members of an all-male aristocracy. Though our nation has, throughout its history, discounted the contributions and wasted the abilities of the female half of its population, it cannot continue to do so. As we prepare, together, to face the twenty-first century, we simply cannot afford to preserve a relic of the nineteenth.”)

17. For background on the political maneuvering that led to the creation of the two majority-minority districts, see Melissa L. Saunders, *A Cautionary Tale: Hunt v. Cromartie and the Next Generation of Shaw Litigation*, 1 *ELECTION L.J.* 173, 173–76 (2002); see also Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere*, 127 *HARV. L. REV. F.* 58, 68 (2014) (noting that North Carolina's “1990s process of redistricting was brutal and political”).

18. See *Shaw v. Reno*, 509 U.S. 630, 636 (1993) (“The Attorney General did not object to the General Assembly's revised plan.”).

19. See Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 *B.U. L. REV.* 667, 671 (2002) (discussing how, in the *Shaw* jurisprudence, the Supreme Court “entered into a series of what really are policy determinations that reflect dramatically contestable views of what

Similarly, in *VMI*—notwithstanding the alumni who pressured the state legislature to oppose judicial intervention—an increasing number of Virginia’s elected officials and the public wanted to see the school’s ban on women abandoned.²⁰ While the oath and obligation of judges is to follow the commands of established law, not (possibly ephemeral) popular opinion, Phillips’s opinions did in fact echo, rather than repudiate, the views of many citizens and their chosen representatives.

Even more important than their connection to the political will, the opinions display a fealty to touchstones of principled adjudication such as judicial precedent and judicial restraint. In *Shaw I*, Phillips found that the white plaintiffs were unable to articulate a harm that had ever before been judicially recognized.²¹ A Supreme Court divided five justices to four reversed, thus creating a new cause of action when the irregular shape of a political district suggests it has been drawn such “that [the redistricting legislation] rationally can be viewed only as an effort to segregate the races for purposes of voting.”²² But as legal commentators at the time and later pointed out, Justice O’Connor’s majority opinion utterly failed to articulate a workable standard for what separates a constitutional from an unconstitutional racial gerrymander.²³

politics is for and how the Constitution requires it to be conducted”).

20. See *VMI I*, 976 F.2d 890, 894 (4th Cir. 1992) (noting the decision of Virginia’s Governor and Attorney General not to defend the school’s ban on women); see also Katharine T. Bartlett, *Unconstitutionally Male?: The Story of United States v. Virginia*, in *WOMEN AND THE LAW STORIES* 133, 143–44 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011) (noting that unlike Virginia Governor Douglas Wilder, state Attorney General Mary Sue Terry, and other statewide elected officials, “only Republican George Allen, when he became Governor in 1994, enthusiastically supported VMI’s exclusion of women. The legislature also stood behind VMI, reflecting the strong influence of VMI alumni in the state, but some legislators made vigorous efforts to change the all-male admissions policy. A majority of the Virginia public at the start of the litigation thought that VMI should admit women . . .”).

21. See *Shaw I*, 808 F. Supp. 461, 470 (E.D.N.C. 1992) (“The broad claim of *per se* unconstitutionality solely because of the form of race-consciousness in redistricting at issue here is flatly foreclosed by Supreme Court precedent.”), *rev’d sub nom.* *Shaw v. Reno*, 509 U.S. 630 (1993).

22. *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

23. See, e.g., Michael S. Kang, *When Courts Won’t Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1108 (2007) (“In *Shaw v. Reno* . . . the Court found that the statewide redistricting of North Carolina raised an equal protection violation, but the Court was ambiguous about the nature of the injury in question As a minimally theorized decision, *Shaw v. Reno* left much undecided about the contours of the Court’s reasoning.”); Karlan, *supra* note 19, at 673 (stating that even a decade after the 1993 *Shaw* decision, “the Court remains unable to articulate a workable, intelligible regime telling the political branches how to act during

After reviewing the two *Shaw* districts four times, five justices ultimately decided that they could not disentangle the relationship between race and party and, thus, accepted the State's defense that the district contours were sufficiently driven by political considerations.²⁴ While the Court majority in 2001 did not admit that Phillips got it right in 1992, the real-world result—the upholding of two congressional districts (out of North Carolina's twelve) where African American voters could have predominant influence—was vindication enough. For all the problems with having politicians draw their own districts,²⁵ and with the jurisprudence regulating the process,²⁶ white-dominated legislatures deciding that white voters will be only somewhat overrepresented rather than substantially overrepresented was not one of them. Judge Phillips realized this fundamental truth immediately²⁷—the Supreme Court, a decade later.

In contrast to Phillips's opinions in *Shaw*, a majority of the Supreme Court endorsed his dissent in *VMI II* from the outset and decisively.²⁸ In *VMI II*, Phillips found the exclusion of women to be an equal protection violation utilizing the "intermediate scrutiny" standard common in cases alleging discrimination based on sex.²⁹

the most political activity they undertake"); Jeffrey Rosen, *Gerrymandered*, NEW REPUBLIC (Oct. 25, 1993), <http://www.newrepublic.com/article/politics/gerrymandered> (noting the "opaque majority opinion in *Shaw v. Reno*" and arguing that "although her frustration with racial balkanization is understandable, O'Connor is unable to translate the impulse into an intelligible legal principle").

24. See *Easley v. Cromartie*, 532 U.S. 234, 257–58 (2001) (noting that "race in this case correlates closely with political behavior" and holding that the district court's finding that North Carolina's General Assembly used race as the "predominant factor" in drawing its congressional districts was clearly erroneous); see also Hasen, *supra* note 17, at 69 ("In *Easley v. Cromartie*, the Court held that the crazy-shaped district lines in the latest North Carolina plan were not unconstitutional because they were designed to protect party, not to divide on the basis of race.").

25. See, e.g., D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 672 (2013) ("The predominant practice of allowing incumbent legislators to draw the districts from which they are elected—to essentially pick the voters who will get to vote for them—creates a glaring conflict of interest.").

26. See, e.g., Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 505 (2004) ("The Supreme Court's most recent election law decision—*Vieth v. Jubelirer*—offers the clearest evidence to date that the Supreme Court has reached an intellectual dead end in election law.").

27. See *Shaw I*, 808 F. Supp. 461, 472 (E.D.N.C. 1992) ("While it is sadly the case in contemporary society that such an [improper] intent [to deny white voters an equal opportunity to participate in the political process and to elect the candidates of their choice] might be judicially inferred were the state legislature controlled by a black majority . . . that, as a matter of judicial notice, obviously is not the fact here."), *rev'd sub nom.* *Shaw v. Reno*, 509 U.S. 630 (1993).

28. *United States v. Virginia*, 518 U.S. 515, 529–30 (1996).

29. *VMI II*, 44 F.3d 1229, 1243 (4th Cir. 1995) (Phillips, J., dissenting) ("I would hold

While a seven to one majority of the Supreme Court embraced Judge Phillips's dissent, the Justices did so in a ruling that seemed to adopt a new review standard: sex-based classifications must be supported by an "exceedingly persuasive justification."³⁰ According to Duke Law Professor Katharine Bartlett: "Whatever the Justices may have intended when the decision was published in 1996, no case before [VMI], or since, summoned a majority to state the test in such strong terms; the case set a heightened, near-strict standard of review, from which subsequent majorities have seemed to withdraw."³¹ Thus, in both *VMI* and *Shaw*, the Supreme Court ultimately embraced the result Judge Phillips sought in each case, even if it declined to follow the circumspect legal course he laid out.

Judge Phillips would not have decided the way he did unless he believed in the correctness of his legal conclusions irrespective of how positive the outcomes for the African Americans and women at the heart of the litigation would have been. But there is no disputing the benefits of his opinions once backed by the Supreme Court. With substantial support from black voters, three African Americans with lengthy records of prior public service have represented North Carolina's First Congressional District: longtime county commissioner Eva Clayton, state legislative leader Frank Ballance, and onetime North Carolina Supreme Court justice G.K. Butterfield. Two of the three—Clayton and Butterfield—served in Congress with distinction.³²

With similarly strong black electorate backing, the Twelfth District seat was held from 1992 to 2014 by Mel Watt, a Yale Law School graduate and a leading figure in North Carolina law and politics.³³ In 2013, President Obama nominated Watt to head the Federal Housing Finance Agency.³⁴ Watt earned the support of both U.S. Senators from North Carolina, Republican Richard Burr and

that the proposed remedial plan fails . . . to pass equal protection muster under the appropriate intermediate level of scrutiny."), *rev'd*, 518 U.S. 515 (1996).

30. *United States v. Virginia*, 518 U.S. 515, 515 (1996) (holding that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action") (citations omitted).

31. Bartlett, *supra* note 20, at 158.

32. See OFFICE OF HISTORY AND PRES., OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, *BLACK AMERICANS IN CONGRESS 1870–2007*, H.R. Doc. No. 108-224, at 596–99, 676–77 (2008). Ballance pled guilty to felony embezzlement charges soon after resigning from Congress. See *id.* at 660–63 (discussing Ballance's tenure).

33. See *id.* at 744–45.

34. Annie Lowrey, *Obama Nominates Congressman to Lead Mortgage Agency*, N.Y. TIMES, May 1, 2013, http://www.nytimes.com/2013/05/02/business/obama-to-name-melvin-watt-to-oversee-fannie-and-freddie.html?_r=0.

Democrat Kay Hagan, and the Senate ultimately confirmed him for the position.³⁵

Clayton, Butterfield and Watt proved to be able, conscientious legislators who sought to represent all of their constituents regardless of race or political party. In fact, attributes of the individuals aside, Judge Phillips recognized that the districts always made more sense in practice than on paper.³⁶ The First District encompassed a primarily rural part of the state,³⁷ one where African American farmers faced decades of discrimination.³⁸ In contrast, the Twelfth District bound together urban areas confronting—as even the Supreme Court ultimately recognized—common challenges.³⁹

As for the beneficial outcomes of the *VMI* case, women first matriculated in 1997.⁴⁰ Like male enrollees, a number of women withdrew from school.⁴¹ But twenty-three of the thirty women did make it to the end of the year, and many of them went on to graduate.⁴²

35. See Nick Timiraos, *Senate Confirms Rep. Mel Watt to Lead Federal Housing Finance Agency*, WALL ST. J., <http://online.wsj.com/news/articles/SB10001424052702303330204579250532313732434> (last updated Dec. 10, 2013, 6:17 PM).

36. See *Shaw II*, 861 F. Supp. 408, 459–63, 473 (E.D.N.C. 1994) (describing North Carolina's geographic and demographic makeup, and the ways in which that makeup influenced the drawing of the two "majority-minority" districts at issue), *rev'd*, 517 U.S. 899 (1996); see also Hampton Dellinger, *Words are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704, 1738–40 (1997) (describing how North Carolina's Twelfth District, in particular, could be considered reasonably drawn under "socio-political" and transportation-based conceptions of compactness embraced by Supreme Court justices and understood by voters).

37. See *Shaw II*, 861 F. Supp. at 473.

38. See, e.g., Jess Gilbert, Gwen Sharp & M. Sindy Felin, *The Decline (and Revival?) of Black Farmers and Rural Landowners: A Review of the Research Literature* 6–7 (Inst. for Res. & Educ. on Soc. Structure, Rural Inst., Resource Use, & Dev., Working Paper No. 44, 2001), available at ageconsearch.umn.edu/bitstream/12810/1/lrcwp44.pdf (discussing the hardships faced by African American farmers in rural Warren County, North Carolina).

39. See *Easley v. Cromartie*, 532 U.S. 234, 250 (2001) (noting that the redistricting plan at issue "joined three major cities in a manner legislators regarded as reflecting 'a real commonality of urban interests, with inner city schools, urban health care . . . problems, [and] public housing problems'").

40. PHILIPPA STRUM, *WOMEN IN THE BARRACKS: THE VMI CASE AND EQUAL RIGHTS* 312 (2002).

41. See *id.* at 313 (stating that "by early September 1997, three female and twenty-eight male rats had left"); see also Peter Finn, *VMI Women Reach End of Rat Line*, WASH. POST, Mar. 17, 1998, www.washingtonpost.com/wp-srv/local/longterm/library/vmi/vmi0317.htm ("VMI has survived women, and 23 women have survived VMI.").

42. STRUM, *supra* note 40, at 312, 315; see also, *After VMI and UVA Law, Elizabeth Dobbins '13 Ready for Marine JAG Corps*, U. VA. SCH. L. (Apr. 30, 2013), www.law.virginia.edu/html/news/2013_spr/dobbins.htm (heralding "the first woman who

Indeed, the ripple effects of *Shaw* and *VMI* went beyond the African American legislators and their constituents, and *VMI* and its female graduates. Two of the *Shaw* congressman, Watt and Butterfield, played vital roles in Barack Obama's 2008 victories in the North Carolina primary and general elections.⁴³ And contemporaneous with the debunking of the claim by *VMI* supporters that only men could withstand the "adversative" training method,⁴⁴ women have taken on leadership roles throughout the military and now—thanks to support from the President the *Shaw* congressmen helped elect—they can serve in combat roles.⁴⁵

Yet for all the comfort Judge Phillips's rulings gave to progressives, neither *Shaw* nor *VMI* can be considered permanent victories, as minorities and women have faced recent defeats in the legal realm nationally and in the political realm in North Carolina.⁴⁶ In terms of the law, positions advanced on behalf of minorities and women have failed to prevail before the Supreme Court in recent years.⁴⁷ Politically, the redrawing of state legislative district lines following the 2010 census precipitated diminished roles for many African Americans and women previously in positions of power in

will graduate from UVA Law who also has an undergraduate degree from the Virginia Military Institute").

43. Congressmen G.K. Butterfield and Melvin L. Watt both supported President Obama's 2008 presidential campaign. See G.K. Butterfield, WALL ST. J., <http://projects.wsj.com/campaign2012/candidates/view/g.k.-butterfield--NC-H> (last visited Sept. 5, 2014); *North Carolina: Melvin Watt*, WASH. TIMES, <http://www.washingtontimes.com/camapaign-2012/candidates/Melvin-l-watt-458> (last visited Sept. 5, 2014).

44. *VMI II*, 44 F.3d 1229, 1247 n.7 (4th Cir. 1995).

45. President Obama supported the Secretary of Defense's decision to "lift restrictions on women in combat." *Obama Backs Women in Combat*, USA TODAY, Jan. 24, 2013, <http://usatoday.com/story/theoval/2013/01/24/obama-panetta-pentagon-women-in-combat/1862075>.

46. See, e.g., Aaron Blake, *North Carolina Governor Signs Extensive Voter ID Law, Post Politics*, WASH. POST (Aug. 12, 2013, 2:35 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/08/12/north-carolina-governor-signs-extensive-voter-id-law/> (explaining the outcry by minority groups against the recently passed voter ID law who argue that it will sharply limit the number of minorities able to vote in upcoming elections); Annalise Frank, *McCrory Signs NC Abortion Bill as Protesters Hold Vigil Outside Government Mansion*, NEWS & OBSERVER (Raleigh), July 30, 2013, <http://www.newsobserver.com/2013/07/30/3068013/mccrory-signs-nc-abortion-bill.html> (discussing the similarly negative reaction by women's groups to a bill that imposes greater restrictions on abortion facilities in the state).

47. See generally, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 U.S. 2751 (June 30, 2014) (finding that the Affordable Care Act regulation requiring that employee health plans include contraceptive coverage can violate the Religious Freedom Restoration Act in certain instances); *Shelby Co. v. Holder*, 133 S. Ct. 2612 (2013) (striking down section 4 of the Voting Rights Act as unconstitutional).

North Carolina's General Assembly.⁴⁸ And, in recent sessions, the General Assembly has passed a number of bills opposed by progressive interest groups.⁴⁹

The setbacks raise the question of what inspiration can be drawn in this century from the work of Judge Phillips in the last. As a legal matter, when reviewing recent legislation alleged to harm African Americans and women in particular, federal judges should do so with an understanding of history. Judge Phillips's opinions in *Shaw II* and *VMI II* offer a factual record of just how recently blacks and women faced treatment with the intent, or at least the effect, of disfavoring them in material ways.⁵⁰ And while Judge Phillips did not abjure eloquence, his *Shaw* and *VMI* opinions show the power and importance of mastering such prosaic concepts as standing and standard of review.⁵¹ Finally, a key legacy of Judge Phillips's decisions

48. See Thomas B. Edsall, *The Decline of Black Power in the South*, N.Y. TIMES, (July 10, 2013, 9:34 PM), http://opinionator.blogs.nytimes.com/2013/07/10/the-decline-of-black-power-in-the-south/?_php=true&_type=blogs&_r=0 (noting that throughout the South "an estimated 86 African Americans who spent years accumulating seniority have lost their chairmanships of state legislative committees to white Republicans"); Sara Libby, *The Cracked Pipeline: How Redistricting Targeted Women Lawmakers in Statehouses Around the Country*, SOUTHEASTERN INST. FOR WOMEN IN POL. (May 24, 2012, 5:10 AM), www.scelectswomen.com/media_center/news/news/260/ ("In all, 10 of 25 Democratic women lawmakers in the state were either 'double bunked'—forced into a district with another incumbent—or drawn into heavily Republican districts.").

49. See Michael A. Fletcher, *In North Carolina, Unimpeded GOP Drives State Hard to the Right*, WASH. POST (May 25, 2013), http://www.washingtonpost.com/business/economy/in-north-carolina-unimpeded-gop-drives-state-hard-to-the-right/2013/05/25/a9c9ccd2-c3c7-11e2-914f-a7aba60512a7_story.html (detailing the negative reaction to legislation on issues such as jobless benefits, tax credits for low-income people, and Medicaid that were enacted during recent legislative sessions); see also Anne Blythe, *Largest Moral Monday Crowd Yet Floods Downtown Raleigh*, NEWS & OBSERVER (Raleigh), July 29, 2013, <http://www.newsobserver.com/2013/07/29/3068037/largest-moral-monday-crowd-yet.html> (relating specific complaints of the demonstrators who came to Raleigh for weekly protests called "Moral Mondays" throughout the summer of 2013).

50. See, e.g., *Shaw II*, 861 F. Supp. 408, 465 & n.57 (4th Cir. 1995) (noting the continuation of racial-bloc voting to the detriment of African American candidates along with "racial appeals and tactics in political campaigning" and offering the fact that "[the Jesse] Helms campaign made extensive use of a television ad which directly appealed to white voter resentment of affirmative action programs in employment" during the 1990 U.S. Senate race against African American opponent Harvey Gantt); *VMI II*, 44 F.3d 1229, 1248 (4th Cir. 1995) (noting that VMI's male-only admissions policy "unquestionably has been driven unchanged since its origins [in 1839] by a stereotyped view of the proper role and capabilities of women in society").

51. New law clerks quickly learned that a sure way to earn a word of praise from Judge Phillips was to furnish a cite in support of his legal determination from one of the many well-thumbed volumes of his cherished Wright & Miller on FEDERAL PRACTICE AND PROCEDURE.

for today's jurists (and advocates) is the unmistakable impact of having the central core of your legal positions ultimately upheld.

Of course, the road to vindication did not pass quickly for Phillips. He faced repeated Supreme Court slap-downs in *Shaw* before the justices themselves finally "cried uncle." In *VMI*, Phillips faced the necessity of splitting from fellow panel members at the remedial stage (*VMI II*) after agreeing with them on the presence of a constitutional violation should Virginia continue with a military school training offering for men alone (*VMI I*). But Phillips's views—backed by meticulous analysis expressed with care and precision—ultimately carried the day. Currently, several North Carolina General Assembly enactments opposed by civil rights and women's groups are the subject of court challenges.⁵² It will be interesting to see the ultimate verdicts in these cases—and the verdict of history.

But those frustrated by judicial and legislative losses need not think of Judge Phillips solely as an inspiration for legal action. Beyond the law and over the long term, Judge Phillips would surely endorse knowledge as an antidote for narrow-mindedness and prejudice. Phillips devoted the better part of two decades in service to UNC-Chapel Hill, first teaching and later adding administrative responsibilities as Dean of the Law School. Over the years, he has often shared with others the sentiment that strong and well-funded K-12 and higher education systems are keys to promoting greater equality and justice for all North Carolinians and Americans.

In the near term, Phillips might well embrace politics as the quickest and surest way to respond to enactments—whether by legislators or judges—that impede racial and gender progress.⁵³ Phillips scrupulously adhered to the conduct code for federal judges and, as noted above, he was law-focused and not results-oriented. But Phillips did not abhor the political process nor dismiss those who sought elective office. Indeed, he participated in it. His early political foray—running for a position as a local prosecutor while also aiding the 1950 U.S. Senate campaign of Frank Porter Graham—is to my

52. See, e.g., *Stuart v. Loomis*, No. 1:11-CV-804, 2014 U.S. Dist. LEXIS 6194, at *4–5 (M.D.N.C. Jan. 17, 2014) (finding unconstitutional a 2011 law that required doctors to display ultrasound images to women seeking abortions and make certain statements to patients); Complaint, *United States v. North Carolina*, No. 13-cv-861, (M.D.N.C., filed Sept. 30, 2013), available at <http://www.justice.gov/iso/opa/resources/646201393013723793555.pdf> (challenging the alleged discriminatory effects of North Carolina's HB 589 passed in 2013 that "makes significant changes to North Carolina's election laws").

53. See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007) (holding that a woman's claim for pay discrimination was untimely), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

mind a seminal episode in his biography because, at some level, it animated his understanding of twentieth century history in ways it seems to me he later channeled in *Shaw* and *VMI*.

Books have been written about the race between Graham, the sitting Senator and former President of the UNC System, and business lawyer Willis Smith.⁵⁴ The historians' consensus is that Willis and his supporters ran a scurrilous, race-baiting campaign against Graham.⁵⁵ The nastiest moment occurred when flyers appeared showing African American soldiers dancing with white women in the aftermath of World War II accompanied by the warning that a vote for Graham would lead to integration.⁵⁶ At another point, Graham's opponents superimposed a photo of his wife onto one of the women's faces.⁵⁷

Some questioned the extent to which the flyers were widely spread.⁵⁸ Judge Phillips, however, did not doubt their influence. Decades later, he recalled spending the last days of the 1950 campaign driving around a still very rural eastern North Carolina and seeing the base handiwork of Smith supporters. The racist handbills were everywhere: in general stores, on telephone polls, hammered into the Carolina pines that lined the roadways. As fast as he tore one down, he remembered, ten more would appear. Fear and prejudice moved faster than facts and Phillips as the segregationist Smith bested Graham by twenty thousand votes.⁵⁹ Phillips, hindered in his own quest for rural votes by his known support for the progressive Graham, likewise went down to defeat.

54. See, e.g., FRANK PORTER GRAHAM AND THE 1950 SENATE RACE IN NORTH CAROLINA (Julian M. Pleasants & Augustus M. Burns, III eds., 1990) [hereinafter 1950 SENATE RACE].

55. See *id.* at 219 (describing the campaign as "an impending racial Armageddon"); see also ROB CHRISTENSEN, THE PARADOX OF TAR HEEL POLITICS: THE PERSONALITIES, ELECTIONS, AND EVENTS THAT SHAPED MODERN NORTH CAROLINA 140 (2008) ("In his first campaign appearance of the runoff, Smith criticized what he called bloc voting by blacks for Graham and declared his devotion to the principles of segregated schools.").

56. 1950 SENATE RACE, *supra* note 54, at 220–21.

57. *Id.* at 221.

58. *Id.* (stating that "[s]uch materials were not generally circulated but were pulled from pockets and flashed to individuals"). But see CHRISTENSEN, *supra* note 55, at 140 ("A week before the election, the most famous flier of the campaign was circulated across the state. 'WHITE PEOPLE WAKE UP,' cried the circular distributed by the 'Know the Truth Committee.'").

59. See CHRISTENSEN, *supra* note 55, at 142 ("On a sweltering June day, 550,000 people went to the polls, a state record for a runoff. Graham's lead in the first primary had evaporated in the racial hysteria . . . Smith had won 281,114 votes to Graham's 261,789.").

The political radioactivity of the dirty tricks said a lot about the prejudices of the electorate. It also symbolized the straitjacket in which African Americans and women found themselves nearly a century after the Civil War and decades after the Nineteenth Amendment. The flyers evidenced the racial animosity that animated black citizens' continuing subjugation as less than full Americans. For women, the images symbolized the so-called social "pedestal" that was, in essence, house arrest.

Decades later, and aided in material measure by Judge Phillips's opinions in *Shaw* and *VMI*, African Americans representing North Carolina are serving in the halls of Congress and women on the military's front lines. Phillips never directly connected the deplorable tactics he encountered in 1950 to his door-opening decisions in the 1990s. But it seems to me that those early times must have changed him. Years later, he changed the times. Above all, his rulings remain a vital legal and history lesson, particularly for jurists all too eager to equate modern race-consciousness with historic racial discrimination⁶⁰

60. An egregious example of such false equivalency was one Judge Phillips knew all too well: the Supreme Court's majority opinion reversing *Shaw I* and suggesting that North Carolina's redistricting approach "bears an uncomfortable resemblance to political apartheid." *Shaw v. Reno*, 509 U.S. 630, 648 (1993); see also A. Leon Higginbotham, Jr., Gregory A. Clarick & Marcella David, *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1625 (1994) ("Anyone conversant with the origins and development of apartheid [in South Africa] would be shocked with the Supreme Court's suggestion that the North Carolina plan resembles 'political apartheid.'"). Chief Justice Roberts made a similarly inapposite historical conflation in a 2007 opinion when he compared efforts by Seattle and Louisville to consider race as part of maintaining integrated schools to the pre-*Brown v. Board of Education* era of using race to segregate schools. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743 (2007). For a critique, see Walter Dellinger, *How Brown v. Board of Education Changed the South Forever*, SLATE, (June 28, 2007, 9:32 AM), http://www.slate.com/articles/life/the_breakfast_table/features/2007/a_supreme_court_conversation/how_brown_v_board_of_education_changed_the_south_forever.html ("It is the worst form of literalism to believe that the cases now before the court can be decided by the fact that the phrase 'classifying by race' can be used to cover two radically different notions. Only by blinding oneself to history and common sense can one assume that the use of race to maintain the monstrosity of the Jim Crow regime of the South and the use of race to achieve an integrated society in Louisville are one and the same."); Walter Dellinger, *Everything Conservatives Should Abhor*, SLATE, (June 29, 2007, 11:17 AM), http://www.slate.com/articles/life/the_breakfast_table/features/2007/a_supreme_court_conversation/everything_conservatives_should_abhor.html (noting that Roberts's opinion "equates the well-intentioned and inclusive programs supported by both white and black people in Louisville and Seattle with the whole grotesquerie of [earlier] racially oppressive practices The plurality opinion is elegantly reasoned and reads as if it could have been written by a law review president. But it fails the very first lesson taught to preschoolers who watch *Seasame Street*: 'Which of These Things is Not Like the Others?'").

or to allow half-measures to substitute for true equality of gender opportunity.⁶¹

How the South in general and North Carolina in particular fared in the last century is an assessment that continues and can never be definitive. When he and the century were young, Dick Phillips saw virulent racism and suffocating sexism. Soon after it closed and a new millennium opened, Judge Phillips could watch the inaugurations of President Barack Obama (who in 2008 carried three formerly Confederate states, including North Carolina) and Governor Beverly Perdue. In between, North Carolina was indeed a paradox: a state whose U.S. Senate delegation for years paired arguably the South's most conservative and liberal members;⁶² a state whose lawmakers could defeat the Equal Rights Amendment one year and establish the South's only state-sponsored abortion fund the next;⁶³ a state with a well-endowed university system and underfunded primary schools;⁶⁴ a state known for remarkable acts of conservation⁶⁵ as well as notorious environmental degradation.⁶⁶

61. While the military has made substantial progress in ensuring equality of opportunity for women in the twenty years since Judge Phillips's opinion in *VMI II*, the Department of Defense's inability to deal effectively with the scourge of sexual assault has been a notable failure. See generally MIC HUNTER, *HONOR BETRAYED: SEXUAL ABUSE IN AMERICA'S MILITARY* (2007) (detailing the sexual abuse of women in the modern military); *THE INVISIBLE WAR* (Chain Camera Pictures 2012) (providing a number of first-hand experiences with sexual abuse from women in the military). The recent political attention brought to the issue (most notably by Senators Claire McCaskill and Kristen Gillenbrand) and the Department of Defense's increased efforts through the Sexual Assault Prevention and Response Office will hopefully lead to safer workplace conditions for all service members, women in particular.

62. See CHRISTENSEN, *supra* note 55, at 2 ("National observers are often confounded by North Carolina's puzzling politics. What kind of state is North Carolina? Was it the state that repeatedly sent Jesse Helms, Josiah Bailey, Sam Ervin, and a parade of other conservatives to Washington, or was it a state that elected a stream of center-left Democrats such as Jim Hunt, John Edwards, and Terry Sanford?").

63. Paul Stam, *The End of the North Carolina Abortion Fund*, 22 CAMPBELL L. REV. 119, 120–21 (1999) ("In 1978, North Carolina became the only state in the South to begin a fund for payment of elective abortion.").

64. See William Kent Packard, Note, *A Sound, Basic Education: North Carolina Adopts an Adequacy Standard in Leandro v. State*, 76 N.C. L. REV. 1481, 1495–96 (1998); *ENCYCLOPEDIA OF NORTH CAROLINA* 1206 (William S. Powell ed., 2006).

65. See, e.g., JAY ERSKINE LEUTZE, *STAND UP THAT MOUNTAIN: THE BATTLE TO SAVE ONE SMALL COMMUNITY IN THE WILDERNESS ALONG THE APPALACHIAN TRAIL* (2012) (telling the story of the group of locals, environmentalists and lawyers who prevented a mining company from destroying Belview Mountain in North Carolina).

66. See, e.g., *ENCYCLOPEDIA OF NORTH CAROLINA*, *supra* note 64, at 278–82 (noting that "[i]n the summer of 1978, for example, the state experienced an environmental nightmare when 30,000 gallons of cancer-causing polychlorinated biphenyl (PCB) were dumped along 210 miles of the state's roads"; discussing the challenges posed by hog waste and air pollution; and detailing state environmental protection efforts).

Along the century's way, many elected officials moved North Carolina forward. But many more outside the traditional political realm also aided the State's march towards true modernity including civil rights attorney Julius Chambers,⁶⁷ the home grown business leaders who brought the Research Triangle Park into being,⁶⁸ economic justice advocates such as Martin Eakes, and those like my mother, Anne Dellinger, and her colleagues at the UNC School of Government who provided invaluable advice and assistance to public officials at the municipal, county and state levels.

Then there are the North Carolina judges who believed in and followed the rule of law, yet stood for something more—jurists such as Susie Sharp and Henry Frye, Richard Erwin and James McMillan. And on any short list of the past century's greatest Tar Heels belongs James Dickson Phillips Jr. He would surely oppose the attention brought to him and no doubt point to others worthy of the honor. But while it is not susceptible to proof in a court of law, it is (with his opinions in *Shaw* and *VMI* as supporting exhibits) in the verdict of history and in language Judge Phillips would appreciate—so ordered.

67. See generally John Charles Boger, *Julius LeVonne Chambers, Class of 1962: In Memoriam*, 91 N.C. L. REV. 1881 (memorializing the work of one of the University of North Carolina's most distinguished alumni).

68. See generally Mac McCorkle, *History and the "New Economy" Narrative: The Case of Research Triangle Park and North Carolina's Economic Development*, 12 J. OF THE HIST. SOC'Y 479 (2012) (noting how businessmen such as Robert M. Hanes worked with North Carolina Governor Luther Hodges to create the Research Triangle Park).

