EQUAL PROTECTION LAW AND JUDICIAL OVERSIGHT OF ELECTIONS IN THE UNITED STATES

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SUMMARY: I. An Introductory Note on the U.S. Constitution and the Right to Vote; II. Current Regulation of Redistricting; A. The Role(s) of One Person, One Vote; B. The Transmutation of Political Gerrymandering Claims; C. The Preclearance Process of Section 5; D. Section 2 Claims of Racial Vote Dilution; E. The Emergence of "Wrongful Districting" and the *Shaw* Cases; Conclusion.

I. AN INTRODUCTORY NOTE ON THE U.S. CONSTITUTION AND THE RIGHT TO VOTE

As the U.S. Supreme Court reminded us in *Bush v. Gore* (2000), individual citizens have "no federal constitutional right to vote for electors for the President of the United States." In fact, the original U.S. Constitution virtually ignored voting. The only branch of the national government that was elected directly was the House of Representatives. Article I, section 2, clause 1 provided simply that the House be "composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The right to vote in federal elections was completely a creature of each state's decisions about who could participate in the state's own political process, and all states limited the franchise to only a subset of the population. The most widespread

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limitations involved age, sex, race, property ownership, and length of residence within the jurisdiction, but there were others as well. Throughout the nineteenth century, the Supreme Court reiterated that "the Constitution of the United States has not conferred the right of suffrage upon any one." The history of right to vote in the United States is one of expansion and contraction, of punctuated equilibria, rather than gradual evolution. And that history is bloody not just in the sense that individual citizens have died for the right to vote in places from Rhode Island in the 1840's to the Mississippi Delta and Selma, Alabama in the 1960's, but also in the fact that virtually every major expansion in the right to vote was connected intimately to war.

Reconstruction after the Civil War of 1861-65, however, dramatically changed the shape of the U.S. constitution, and with it —at least potentially— the federal government's role in protecting the electoral process. Section 2 of the Fourteenth Amendment threatened to penalize states that disenfranchised blacks (or, arguably, other adult male citizens) by reducing the size of their congressional delegations and thus their allotment of electoral votes as well. And the Fifteenth Amendment explicitly provided that the right of citizens to vote "shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

During Reconstruction, Congress vigorously enforced notions of equality in the political process. For example, it denied readmission to southern states whose constitutions did not adequately protect black voters. And between 1869 and 1900, the House used its power under the Qualifications Clause —which makes each house the judge of the elections and qualifications of its members— to set aside results in more than thirty elections in southern states where black voters had been excluded by unfair registration statutes, fraud, violence, or intimidation. Finally, Congress used its power to enforce the Fifteenth Amendment to pass legislation making it a crime to interfere with the right to vote.

By contrast, the nineteenth-century Supreme Court gutted the federal government's ability to enforce political equality. The Court's opinions precluded federal prosecutors from securing convictions of defendants who interfered with citizens' voting rights. By the turn of the century, the Supreme Court essentially abdicated any responsibility for enforcing voting rights. Not until World War II, when the Supreme Court struck

down the use of all white primary elections to nominate party candidates, did the Court re-enter the field of election law.

II. Current Regulation of Redistricting

In 1962, the Supreme Court involved itself intimately with the actual allocation of political power. It held that the equal protection clause prevents states from locking particular election districts into place. In the last 40 years, the United States has moved from the problem that first animated the Court —the complete refusal of entrenched interests ever to address questions of reapportionment and reallocation of political power— to a very different problem: a never-ending and essentially uncertain redistricting process in which judicial intervention completely changes the terms of engagement.

In these materials, I focus on the unsettled questions raised by the interaction of the various constraints on the reapportionment process. In particular, I approach these questions from the dual perspectives of a scholar whose primary area of expertise concerns legal regulation of the political process and a lawyer whose practice involves primarily the representation of members of racial minority groups and elected officials who represent majority-minority constituencies.

Federal law contains essentially seven requirements governing redistricting. Under the Fourteenth Amendment's Equal Protection Clause or Article I, '2, a plan must (1) comply with one person, one vote —that is, draw distincts with equal numbers of persons in them; (2) not discriminate purposefully against racial minorities, particularly African Americans, Hispanics, and Native Americans (indigenous peoples); (3) not reflect an excessive political "gerrymandering"— that is unfairly allocate power between the major political parties; and (4) not "subordinat[e] traditional race-neutral districting principles" to racial considerations. Under the Voting Rights Act of 1965, as amended, a plan cannot (5) result in a dilution of minority voting strength (section 2) or (6) reduce minority voting strength relative to prior levels (section 5). Finally, federal law requires, at least regarding a state's congressional delegation, that a plan (7) use single-member districts. (Most, but not all, state-level legislatures use single-member districts. A

majority, but not all municipal-level bodies use single-member districts.) On top of these federal requirements, most states have their own constitutional or statutory constraints on districts. These most often involve respect for political subdivisions, such as counties; compactness and contiguity; and respect for communities of interest. Particularly in recent rounds of redistricting, both federal and state courts have been faced with complex, multi-claim challenges to redistricting plans.

As a matter of federal law, voting cases have one relatively unusual characteristic: a large number, including many of the most important, are still heard by three-judge district courts, with mandatory appellate jurisdiction at the Supreme Court. (Virtually all other cases in U.S. courts go to single-judge trial courts with appeal to regional courts of appeals and only discretionary review by the U.S. Supreme Court.) This means that voting rights law in several areas does not have the benefit of two levels of review or the percolating effect of circuit court decisions.

A. The Role(s) of One Person, One Vote

The Supreme Court has construed Article I, ‘ 2 of the Constitution to require congressional districts that achieve population equality“ as nearly as is practicable.” In *Karcher v. Daggett* (1983), the Court held that *any* avoidable population deviation, no matter how small, must be justified by showing that it is necessarily related to a legitimate, consistently pursued governmental objective such as “making districts compact, respecting municipal boundaries, preserving the cores of prior districts, [or] avoiding contests between incumbents.” With respect to state and local elective bodies —such as state legislatures, city councils, or school boards— the Supreme Court has held that “an apportionment plan with a maximum population deviation under 10% falls within [the] category of minor deviations” that are “insufficient to make out a *prima facie* case of invidious discrimination,” while plans with greater deviations do require justification.

The Supreme Court issued two decisions bearing on one person, one vote during the last reapportionment cycle. In *Abrams v. Johnson* (1997), the Supreme Court upheld a court-ordered congressional plan for Georgia that contained an overall population deviation of

0.35%, and an average population deviation of 0.11%. It found that the plan furthered the state's strong historical preference for using whole counties as the building blocks for districts outside the Atlanta area, respected preexisting "communities of interest," and avoided splitting precincts. And in *Voinovich v. Quilter* (1993), the Supreme Court held that Ohio should be given an opportunity to justify a total population deviation of 13.82 percent in its state legislative districts by showing that the plan "may reasonably be said to advance [the] rational state policy of preserving county boundaries."

Advances in redistricting technology have stripped one person, one vote of much of its bite: Chief Justice Warren's optimistic assumption that "henceforth elections would reflect the collective public interest... rather than the machinations of special interests" has proved a spectacular failure. Finer-grained census data —broken down to the precinct level where it can easily be combined with prior election returns— and more sophisticated computer models predicting future political behavior have made the "equipopulous gerrymander" a staple of current redistricting.

One person, one vote has two major consequences for the reapportionment process. The first, and most obvious, is that one person, one vote narrows the universe of possible plans. The greater the number of constraints, the fewer the solutions that can satisfy them all. So the need to satisfy one person, one vote may explain some boundary irregularities: in order to "top off" a district's population while also satisfying various political imperatives, the district may have to reach out to capture additional voters who live outside the district's core. The stringency of the congressional equipopulosity requirement may explain some of the boundary irregularities that rendered post-1990 districts constitutionally suspect; it is not surprising that the more generous 10% "safe harbor" for state and local apportionment plans allowed for more regularly shaped districts.

The second, more subtle, consequence has to do with the environment in which reapportionment occurs. The presence of one person, one vote assured that virtually every existing apportionment plan —federal or state— was rendered unconstitutional as soon as the figures from the 2000 census were released in the spring of 2001. The undeniable presence of a cause of action under one person, one

vote means that political factions that foresaw defeat (or the denial of victory) within the state reapportionment process could rush into court. And since redistricting takes place in the shadow of the law, the mere threat of obstruction may change factions' competitive positions by rendering them more intransigent.

Everyone knows that these one person, one vote lawsuits are essentially "vehicle" lawsuits: the point is not really to challenge the population deviations because of their effect on the abstract mathematical equality of individuals' voting power. Rather, the point is to use the lawsuit either as a wedge to get a court to redraw the state's lines or to improve a political bloc's bargaining power within the political processes' redistricting.

There has been a slew of such lawsuits. After the last census, at least 41 states experienced some redistricting litigation and this time around, 34 states are already embroiled in litigation.

B. The Transmutation of Political Gerrymandering Claims

Virtually all elected officials in the United States are members of one of the two major political parties. Given the U.S.'s election system, which uses first-past-the-post elections, usually from single-member districts and virtually never uses the forms of proportional representation employed by most other democracies, the two major political parties have a strangle-hold on elections. Moreover, they very often draw "safe seats." In the last election, for example, no more than 10 percent of the contests for the House of Representatives were competitive. In many states, one-third of the legislative seats will not even have candidates from both parties.

Still, sometimes the party in control of the legislative process sets up a structure that seriously disadvantages the other major party. In 1986, in *Davis v. Bandemer* (1986), the Supreme Court recognized that members of a political party can bring a lawsuit under the equal protection clause claiming that their group has been treated unfairly. But the test laid out by the plurality —which requires the plaintiffs to show "consisten[t] degrad[ation of] a voter's or group of voters' influence on the political process as a whole"—

has never been met, despite explicit and egregious statements by plan drawers. The upshot is that political parties face a tremendous incentive to recast their claims as something else.

The emergence of so-called *Shaw* claims —allegations that a reapportionment plan, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification" —provides one such vehicle. *Shaw v. Reno* (1993) mandates searching judicial review for race-based claims in contrast to the muted standards of review for claims of partisan exclusion. Various characteristics of the plaintiffs in many *Shaw*-type cases suggests that the plaintiffs were recasting essentially political challenges born of electoral frustration as racial ones.

As I shall explain when I discuss *Shaw* claims, it is often quite difficult to disentangle partisan and racial considerations in the selection of an apportionment plan, particularly when minority voters are the most reliable adherents of one of the major parties, as is true with African Americans and the Democratic Party in the southern United States. Thus, it is no accident that two of the plans ultimately struck down as unconstitutional racial gerrymanders —the North Carolina and Texas congressional reapportionments— were challenged originally, and unsuccessfully, as unconstitutional political gerrymanders. The very boundary irregularities that were later used as evidence of an impermissibly predominant racial purpose were also powerful evidence of partisan motivations, since in each case it would have been possible to draw more regularly shaped majority-nonwhite districts in the absence of partisan concerns.

Redistricting post-2000 further tangled the relationship between partisan and racial concerns. During the post-1990 reapportionment, the Democrats controlled the governorship and both houses of the state legislature in eight of the eleven southern states. This complete control led them to engage in creative line drawing, giving just enough minority constituents to new majority-minority districts to get preclearance or avoid the threat of litigation under section 2 of the Voting Rights Act while retaining enough minority voters in adjoining majority-white districts to provide electoral ballast for

Democratic incumbents. The Supreme Court's dim view of these districts puts a severe pinch on the Democratic Party. Conversely, precisely because packing reliable, nonwhite Democratic voters into a single district may end up creating a tidy, compact majority-nonwhite district, Republican alternative plans for majority-nonwhite districts tended to have more regular appearances. By posing the choice to the Democratic Party so starkly —the majority-nonwhite districts most likely to survive judicial scrutiny are configured in the way most "costly" to the Democratic Party—current law sometimes pits black and white Democrats against each other, creating a three-way struggle for power in the redistricting process. At the same time, the general realignment of the South by 2002 increased the number of deadlocks, which threw redistricting into the courts.

C. The Preclearance Process of Section 5

Section 5 of the Voting Rights Act imposes special responsibilities in the reapportionment process on jurisdictions with a history of barriers to full political participation and depressed turnout. "Covered jurisdictions" include most of the South, the Southwest, parts of New York City, Alaska, and scattered parts of California, Florida, Michigan, New Hampshire, and South Dakota. Covered jurisdictions cannot make any change in a voting practice or procedure —including an apportionment— unless they can first convince the Department of Justice (DOJ) or the United States District Court for the District of Columbia (DDC) that the change has neither a discriminatory purpose nor a discriminatory effect. Unless the jurisdiction meets this burden, the DOJ will enter an "objection" or the DDC will deny the jurisdiction's request for a declaratory judgment; the jurisdiction is then barred from implementing the new plan.

"Discriminatory effect" is a term of art. In *Beer v. United States* (1976), the Supreme Court limited its meaning to changes that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Thus, the section 5 inquiry calls upon the DOJ or DDC to ask whether the political power of minority voters has been enhanced, diminished, or maintained at the same level as under the pre-existing plan; it is

expressly comparative. A plan that improves minority voters' position cannot be retrogressive. Similarly, a plan that maintains the status quo ante comports with the effects prong of section 5. But a plan that " increase[s] the degree of discrimination" warrants an objection under the effects prong of section 5.

In *Reno v. Bossier Parish School Board* (*Bossier Parish II*) (2000), the Supreme Court held that the purpose prong of section 5 also rested on an idea of retrogression: only the purpose to make racial minorities worse off, and not also the purpose simply to continue some pre-existing level of dilution, violates ' 5.

During the last round of reapportionment, there was a fairly common understanding of what "retrogression" meant. But the Supreme Court's 1997 decision in *Abrams v. Johnson* (1997), complicates matters. *Abrams* raises the question of what the numerator and denominator should be in assessing reapportionment plans. In *Miller v. Johnson* (1995), the Supreme Court had explained that Georgia did not have to draw a third majority-black district since "Georgia's first and second proposed plans increased the number of majority-black districts from 1 out of 10 (10%) to 2 out of 11 (18.18%). These plans were "ameliorative" and could not have violated 5's non-retrogression principle." But if the move from 1 to 2 seats is ameliorative, then how can the move from 1 out of 10 to 1 out of eleven not be retrogressive? Many covered jurisdictions either lost (New York City, Mississippi) or gained (Georgia, North Carolina) seats in 2000.

At the same time, the Court's opinion in *Abrams* also suggests the question of what to do if a covered jurisdiction *loses* seats, as, for example, in New York and Mississippi. If all that counts for section 5 purposes is the numerator, then those states cannot eliminate majority-minority districts even if blacks or Hispanics are now a smaller share of the state's overall population and only had a majority-black district in the first place because of the larger denominator.

Assessing retrogression after 2000 may be further complicated by the fallout from the *Shaw* cases. In each of the states where majority-minority districts were declared unconstitutional, the remedial response created majority-white districts that nonetheless reelected the incumbent black representatives. What obligations, if any, do states have in 2002 with respect to redrawing these districts?

This consideration is further complicated by the role of incumbency. The incumbency advantage is quite important to black candidates running in majority-white districts. It can add eight to ten percentage points to the share of white votes a minority candidate attracts. Thus, while it may be true that a Sanford Bishop or a Mel Watt can win from a majority-white district, this simply does not mean that black voters in those districts would have a reasonable possibility of electing any other black candidate. Ensuring that "the minority's opportunity to elect representatives of its choice not be diminished" might therefore require, contrary to the Court's hypothesis, augmenting its share of a district's voting age population.

D. Section 2 Claims of Racial Vote Dilution

In 1982, Congress amended section 2 of the Voting Rights Act to eliminate the requirement that plaintiffs prove that a discriminatory purpose lies behind the choice of a particular apportionment; discriminatory *results* are enough to render the plan unlawful. By contrast to section 5, where the focus is explicitly comparative, the question in a section 2 case is the more abstract question whether the challenged plan gives members of minority groups an "equal opportunity to participate in the political process and elect the representatives of their choice." The amendment of section 2, coming on the heels of the 1980 census, unleashed a flood of litigation that dramatically transformed electoral systems in the South. As late as 1982, a sizeable majority of municipal elections were conducted at large and most southern states elected at least some state legislators from multimember districts. But by the end of the decade, most jurisdictions with substantial black or Hispanic populations had switched to using at least some single-member districts, and state legislatures were elected entirely from single-member districts, at least some of which were majority black. The number of black and Hispanic elected officials —the vast majority of whom were elected from majority-minority single-member districts— skyrocketed.

The legislative history accompanying the 1982 amendments set out a list of nine "typical factors" that tended to show that a challenged

election system diluted minority voting strength. One factor was the extent to which socioeconomic differences hindered the minority community's ability to participate effectively. But the other factors were more narrowly focused on the electoral process itself. Two factors looked at the overall structure of the electoral process: they concerned the use of practices like unusually large election districts, majority vote requirements, or anti-single shot provisions that might exacerbate vote dilution; and the strength of the state's reasons for using the challenged practice. Four factors concerned the role of race within the political process: the history of official discrimination in the electoral system; the degree of racial bloc voting; discriminatory slating practices; and racial appeals in campaigns. Finally, two factors focused on electoral outcomes: the extent to which members of the minority group were elected to public office; and the responsiveness of elected officials to the minority community's concerns.

Courts have a natural tendency, when dealing with claims involving political power, to try to develop "bright-line" rules that at least seem to defend the courts against the claim that they are simply replacing the outputs of the democratic process with their own political philosophy. And in 1986, in its pivotal decision in *Thornburg v. Gingles*, the Supreme Court introduced an additional element —geographic compactness— into the test of racial vote dilution. The Court took the nine-factor Senate Report outline of vote dilution analysis and placed a "gloss" on it:

> "While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, *geographically insular* minority."

The three-part test that emerged looked at minority geographic compactness; minority political cohesiveness; and the level of white bloc voting. The latter two factors are simply the flip sides of the question of racially polarized voting.

For roughly a decade, section 2 lawsuits proceeded under the general assumption that if the plaintiffs showed the presence of the three "*Gingles* factors," they would win. But in *Johnson v. De*

Grandy (1994), the Supreme Court emphasized that courts should continue to look at the "totality of the circumstances," rather than applying a mechanical test. In the wake of *De Grandy*, some lower courts condoned a state's failure to draw additional majority-nonwhite districts on the theory that minority voters enjoyed sufficient "influence" in majority-white districts.

Thus, one question that faces section 2 plaintiffs is how to demonstrate the absence of real influence in so-called "influence districts." I have done some preliminary work that shows that the voting records of Democrats elected from majority-white districts in the South do not vary according to the minority population within the district and that the voting records of white Democratic representatives from majority-white districts are quite different from the voting records of black and Hispanic Democratic representatives, but more rigorous empirical work remains to be done.

Moreover, like one person, one vote, section 2 has become increasingly wrapped up with partisan politics. For one recent example, consider *Page v. Bartels*, the first section 2 case to come out of the post-2000 redistricting. New Jersey's Apportionment Commission, composed of five Democrats, five Republicans, and one court-appointed neutral adopted a plan for the state General Assembly that tracked quite closely the Democrats' proposal. (The plan was adopted by a vote of 6-1, at a meeting where only one of the five Republicans was present and that member was the sole Ano vote.)

The plan substantially reconfigured four districts in northern New Jersey: Districts 27, 28, 29, and 34. Under the 1991 plan, the racial compositions of the district were as follows (WVAP is white voting age population; AAVAP is black voting age population; HVAP is Hispanic voting age population; and MVAP is minority voting age population).

District	WVAP	AAVAP	HVAP	MVAP
27	31.4%	52.8%	9.4%	68.6%
28	20.4%	57.4%	16.8%	79.6%
29	20.9%	48.2%	26.2%	79.1%
34	76.8%	3.9%	11.3%	23.2%

Under the 2001 plan, the districts' demographic compositions were:

District	WVAP	AAVAP	HVAP	MVAP
27	58.0%	27.5%	6.6%	42.0%
28	30.3%	48.3%	14.0%	69.7%
29	22.5%	39.2%	33.2%	77.5%
34	48.2%	35.3%	9.8%	51.8%

The plaintiffs in *Page* B several individual African-American registered voters and residents of Essex Country, several individual Hispanic registered voters and residents of Essex Hudson Counties, and the Republican members of the New Jersey Senate and General Assembly filed suit under section 2. They claimed that the reduction of the African-American voting age population in District 27 from 53% to 27% would deny African Americans in that district the ability to elect their preferred representatives and that new District 34, with a 35% African-American voting age population, would not afford sufficient opportunities for minorities to elect their preferred candidates in that district. (Each district elects two members of the General Assembly.) The plaintiffs also alleged that the interests of Hispanic and African Americans were so different they could not be considered members of the same voting bloc.

The defendants —various state officials and the six members of the Apportionment Committee who had voted in favor of the challenged plan— argued that voting within the assembly districts was not racially polarized and that minority representation would actually increase:

> "In essence, the defendants seem to suggest that, although the 'old' Districts 27, 28, and 29 have elected African-American representatives, some of these votes are being 'wasted' under the 1991 plan, because those representatives would have been elected in any event with a much diminished minority population. Hence, if the 'wasted' excess was diverted to the new districts (such as the new District 34), even more avenues for the election of minority representatives would be opened up."

The three-judge court agreed with the defendants and denied the plaintiffs' motion to enjoin use of the new districts. It credited testimony by Democratic state legislators that coalition building within the districts would lead to significant minority representation and testimony by defendants' expert witness that voting patterns within the districts, including white cross-over

voting and black and Hispanic voters' support for other-minority candidates, would enable minority voters to elect their preferred candidates. And it noted that the Supreme Court's decisions in *Gingles* and *Voinovich* do not require the creation of majority-black, majority-Hispanic, or majority-minority districts in the absence of a showing that otherwise minority voting strength will be diluted.

For all its trappings as a section 2 case, *Page v. Bartels* may really best be understood as a case pitting Republicans against Democrats: among other things, the plaintiffs included the Republican members of the state legislature and the defendants were represented by a law firm that generally represents the Democratic Party in redistricting litigation.

E. The Emergence of "Wrongful Districting" and the *Shaw* Cases

Prior to 1993, the conventional wisdom was that plaintiffs challenging a reapportionment plan had to show that their votes had been *diluted*, that is, that they were members of an identifiable group who had less opportunity to elect candidates of their choice. Plaintiffs in one person, one vote cases showed that their votes had been quantitatively diluted: as a matter of what Justice Stewart derisively called "sixth-grade arithmetic," their votes are worth less than the votes of citizens who live in less populous districts. Plaintiffs in section 2 cases or constitutional racial vote dilution cases or political vote dilution cases showed that their votes had been qualitatively diluted. In *Shaw v. Reno* (1993), however, the Supreme Court recognized a new "analytically distinct" claim:

[A] plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.

Plaintiffs in this kind of "wrongful districting" case were not required to prove either that they had been denied the right to vote or that their votes had been diluted. Plaintiffs in these cases —which mushroomed in the wake of *Shaw I*— did not challenge

election outcomes; rather, they challenged the process that produced majority-minority districts.

The key point about wrongful districting cases has to do with the test a court will apply to the challenged district. Normally, courts defer to the political branches' judgments about where district boundaries should be placed: as long as the state has *some* rational reason for the choices it made —protecting incumbents, preserving prior districts, allocating power among contending factions, respecting physical boundaries, and so on— the court will reject the plaintiffs' equal protection claim. But, once a plaintiff in a wrongful districting case shows that the district reflects "an effort to separate voters into different districts on the basis of race," a reviewing court will employ strict scrutiny: the district will survive only if it is "necessary" to a "compelling" state interest.

Shaw had seemed to be a case about district appearance. Justice O'Connor's opinion in *Shaw I* had remarked that "reapportionment is one area in which appearances do matter," and had repeatedly referred to North Carolina's Twelfth Congressional District's "bizarre" and "irregular" shape; she expressly declined to address the question whether the intentional creation of majority-minority districts, without more, necessarily raised problems under the equal protection clause.

Since *Shaw*, the Supreme Court has taken a somewhat circuitous approach to determining when race is the "predominant" factor. The Court does not require plan drawers to ignore race. The Court distinguished redistricting from other kinds of government decisionmaking on the grounds 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." And *Shaw v. Reno* suggested that "race consciousness does not lead inevitably to impermissible race discrimination." In 2001, in *Hunt v. Cromartie,* the Supreme Court affirmed a later North Carolina plan that also involved using race.

Much of the Court's discussion focused on the difficulty of teasing apart political and racial considerations in jurisdictions where voting behavior is strongly correlated with race. For present purposes, the most interesting part of the Court's discussion is its treatment of one of the pieces of direct evidence relied on by the district court. One

of the leaders of the redistricting process, State Senator Roy Cooper, testified before the legislative committee considering the plan that:

> "Those of you who dealt with redistricting before realize that you cannot solve each problem that you encounter and everyone can find a problem with this Plan. However, I think that overall it provides for a fair, geographic, racial and partisan balance throughout the State of North Carolina. I think in order to come to an agreement all sides had to give a little bit, but I think we've reached an agreement that we can live with".

The Supreme Court held that Senator Cooper's reference to the "racial balance" of the plan —its preservation of the 10-to-2 black/white balance in the State's twelve member congressional delegation— showed that the "legislature considered race, along with other partisan and geographic factors," but concluded that this "says little or nothing about whether race played a predominant role comparatively speaking."

Wrongful districting claims intersect with the Voting Rights Act in a peculiar way. Once the plaintiffs in a wrongful districting case show that race is the "predominant" factor motivating the creation of a particular majority-minority district —and this is often easy to show, either because courts simply look as the shape of a district and assume that it was drawn that way to construct a majority-minority district or because there are statements in the legislative history or the preclearance record regarding the district's racial composition— the burden shifts to the state to show that its districting legislation is "narrowly tailored to achieve a compelling interest".

At this "justification stage," the Voting Rights Act becomes critical. In *Bush v. Vera*, five Justices indicated that they considered compliance with the Voting Rights Act, properly construed, to be a compelling state interest. So the key question in *Shaw* cases becomes, first, whether the Voting Rights Act would have required the state to draw *some* majority-minority district and, second, whether *this* district is an appropriate Voting Rights Act response.

CONCLUSION

In the mythical village of Chelm in Eastern Europe, there was a man whose job was to watch for the Messiah. One day, a passerby asked him why he continued to sit there waiting, given that he received such low wages. "Sure, the pay is low," he replied, "but the work is steady." The lesson of the past forty years when it comes to redistricting is that the work is indeed steady, even relentless, and that it is unlikely that Congress, the states, or the courts will develop standards that cannot be manipulated or that can avoid wholesale litigation.

[The reader who is interested in a fuller treatment might wish to read: Samuel Issacharoff, Pamela S. Karlan, & Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* (rev. 2nd ed. 2002).]