REDISTRICTING AND VOTING RIGHTS:

IS SHAW VS. RENO THE DEATH KNELL FOR MINORITY DISTRICTS?


When the legislature of North Carolina generates districts as ugly as the Twelfth, it is in effect claiming, albeit by means of a heavily camouflaged circumlocution, that it has a right to make sure that blacks' electoral gains come largely at the expense of Republicans rather than fellow Democrats. If one were looking for a first principle upon which to found a jurisprudence of the ugly, one could find no better place to start.


The short answer to the question posed by the title of this paper is "Maybe not." The long answer appears below.

In Shaw vs. Reno, ____ U.S. ____, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), the United States Supreme Court held that Appellants stated a valid claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification.

113 S.Ct. at 2824.

To what extent are the minority protection purposes of the Voting Rights Act weakened by non-minority attacks based on the Constitution? The answer to this question may lie in a string of decisions emanating from U. S. District Courts, Three-Judge Courts and Courts of Appeals, as well as pending proceedings in North Carolina, Georgia and Texas. Post-Shaw jurisprudence is beginning to take shape.

These decisions are as follows:


The United States Department of Justice is now seeking to intervene in pending redistricting litigation in North Carolina and Georgia in Shaw v. Hunt, No. 92-202-CIV-5-BR, U. S. District Court, E.D. N.C., Raleigh Division, and Johnson v. Miller, C.A. No. CV94-008, U.S. District Court, S.D. Ga., Augusta Division. According to Attorney General Janet Reno, the Justice Department is "committed to protecting minority rights that were achieved through redistricting after the 1990 census," (Justice Joins Redistricting Flap, A.P. February 23, 1994).

Hines v. Mayor and Town Council of Ahoskie
In *Ahoskie*, black voters brought a §2 challenge against the Town's at-large system for electing Town Council members and proposed an election plan which would have created three out of five single-member--minority-controlled districts. Holding that the District Court improperly reduced the Town Council from five members to four and erred in refusing to accept the Town's proposal in its entirety, the United States Court of Appeals for the Fourth Circuit also concluded that the District Court properly rejected the election plan proposed by the black voters, stating at 1274:

Finally, a legislature may not devise a districting plan *solely* for the purpose of segregating citizens into separate voting districts on the basis of race without sufficient justification. *Shaw v. Reno*....

In the present case, we believe that the plan proposed by Hines would violate these principles. Specifically, a plan giving a minority group a majority of the single-member districts would effectively "cancel out the voting strength" of the majority,...and provide the minority with a vote of greater weight than the majority. Nothing in the Act requires a remedy imposing over-proportional representation. Moreover, because Hines acknowledged that the *only* motivation for such a districting plan would be racial concerns, i.e., providing blacks with another representative on the Town Council, and there is apparently no sufficient justification for such a plan, we believe such a districting plan would violate the equal protection rights of white voters. *Shaw*....

*Rural West Tennessee African-American Affairs*

**Council, Inc. v. McWherter**

On November 4, 1993, a three-judge district court held that Tennessee's Senate Reapportionment Plan violated §2 of the Voting Rights Act. One of the issues before the Court was the state policy underlying the redistricting plan. The Court noted that there were some practical problems with weighing state interests under the totality of the circumstances test under §2, namely, that the State's interests in an electoral scheme are only relevant to the extent that those interests are compromised by a possible §2 remedy. The Court stated at 465:

When potential remedies do not impinge on the State's interests, those interests need not be considered. We have before us only two of the numerous possible remedies, both of which were presented by the Plaintiffs. The first plan was presented primarily to demonstrate that the first *Gingles* precondition can be met. The second plan was submitted in response to concerns expressed by the Court and the State that Plaintiffs' plan ignored "traditional districting principles." *Shaw v. Reno*, ___ U.S. ___, 113 S.Ct. 2816, 2824, 125 L.Ed.2d 511 (1993). Specifically, one of the proposed majority-black districts split six counties. Plaintiffs' second plan demonstrated that a second district could be created by splitting only Shelby and Madison Counties. Under the current plan, some counties are split in forming Senate districts, but no district splits more than one county.

The Court in *McWherter*, upon finding a §2 violation, ordered the State of Tennessee to submit a new plan which complies with the Voting Rights Act and requested Plaintiffs to submit alternative plans, suggesting that the State consider the views of the Plaintiffs and all other interested parties when drawing a new plan. In this regard the Court made it clear that in fashioning a remedy the State would not be required to draw districts to achieve maximum possible black representation in the Legislature, stating:

The explicit rejection in the text of the statute of any right to *proportional* representation indicates that Congress did not intend to require *maximum* representation.... The evidence before us indicates that one more majority-black Senate district must be drawn in West Tennessee. A second majority black district would provide slightly more representation than the State's black voting age population require. It would create five black Senate districts in the state or more than fifteen percent of the districts when the black voting age population is 14.4 percent. The issue of creating a fifth black Senate district should be left to the political judgment of the legislature. It is not required by federal law. *Id.* at 467.

**Hayes v. State of Louisiana**

In *Hayes*, a three-judge court ruled in favor of the Plaintiffs who challenged the Louisiana Congressional Redistricting Plan, concluding that the plan in general and Congressional District 4 in particular were the products of racial gerrymandering and were not narrowly tailored to further any compelling governmental interest, and that the Plaintiffs' right to equal protection was violated by the plan. As posed by the three-judge court, the question before it was "does a state have the *right* to create a racial majority-minority Congressional district by racial gerrymandering?" The Court answered its own question:
In simplest form, the answer--largely supplied by the United States Supreme Court's opinion in Shaw v. Reno, rendered during the pendency of this case--is "Yes, but only if the state does it right." (Slip Op. at 2.)

The Court found overwhelming evidence, both indirect and direct, that the redistricting plan was the product of racial gerrymandering, stating:

We have already noted the narrow holding of Shaw: a plaintiff may state a claim under the Equal Protection Clause by alleging that the reapportionment scheme adopted by his state is so irrational on its face "that it can only be understood as an effort to segregate voters into separate voting districts because of their race...." Shaw primarily deals with the problem of proving racial gerrymandering indirectly or inferentially. Racial gerrymandering--says the Court in Shaw--can be inferred when districts are so bizarrely shaped that they presumptively bespeak an impermissible purpose.

But racial gerrymandering may--a fortiori--also be proved by direct evidence that a legislature enacted a districting plan with the specific intent of segregating citizens into voting districts based on their race. If everyone--or nearly everyone--involved in the design and passage of a redistricting plan asserts or concedes that design of the plan was driven by race, then racial gerrymandering may be found without resorting to the inferential approach approved by the Court in Shaw. The Court recognized in Shaw that "[n]o inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute." The same is equally true when virtually unanimous, essentially uncontroverted direct trial evidence establishes racial classification, as it did here. (Slip Op. at 12-13.)

Physical Appearance

Shaw has generated somewhat colorful judicial prose with regard to the physical appearance of allegedly racially gerrymandered districts, and Hayes provides yet another example, wherein the Court discussed the highly irregular appearance of Congressional District 4:

Like a fictional swordsman Zorro, when making his signature mark, District 4 slashes a giant but somewhat shaky "Z" across the state, as it cuts a swath through much of Louisiana. It begins north of Shreveport--in the northwestern corner of Louisiana, just east of the Texas border and flush against the Arkansas border--and sweeps east along that border, periodically extending pseudopods southward to engulf small pockets of black voters, all the way to the Mississippi River. The district then turns south and meanders down the west bank of the Mississippi River in a narrow band, gobbling up more and more black voters as it goes. As it nears Baton Rouge, the district juts abruptly east to swallow predominantly black portions of several more parishes. Simultaneously, it hooks in a northwesterly arc, appropriating still more black voters on its way to Alexandria, where it selectively includes only predominantly black residential neighborhoods. Finally, at its southern extremity, the district extends yet another projection--this one westward towards Lafayette--adding still more concentrations of black residents. On the basis of District 4's physiognomy alone, the Plan is thus highly irregular, suggesting strongly that the Legislature engaged in racial gerrymandering. (Slip Op. at 23-24.)

Even The Wall Street Journal got into the act, describing the Fourth Congressional District as looking

as if it was designed by Johnny Appleseed. It begins life north of Shreveport on the Arkansas border, wanders east all the way to the Mississippi River, and then heads south, helter-skelter, toward the Gulf of Mexico.


Traditional Redistricting Criteria

The Court in Hayes also noted that the subject plan cavalierly disregarded traditional redistricting principles and criteria, including compactness, contiguity, respect for political subdivision, and commonality of interests.

Compactness

With regard to compactness, the Court in Hayes noted that Congressional District 4 "snakes narrowly across Louisiana soil from end to end for more than 600 miles." (Slip Op. at 25.)
A rectangle superimposed on the Z-shaped figure formed by District 4 would overlay two-thirds of the state. Additionally, as it winds along its erratic path, District 4 projects myriad diverticulae to encapsulate small sacs of otherwise widely dispersed black voters. No one could claim that District 4 is compact, at least not with a straight face. (Slip Op. at 25-26.)

**Contiguity**

The Court stated that Congressional District 4 only hypertechnically and thus cynically was confected to satisfy the traditional districting criterion of contiguity:

When displayed on a map of the state, the district's boundaries seem several times to narrow to a single point. This impression reflects reality, for at some places along its attenuated path, District 4 is no more than 80 feet wide. Such tokenism mocks the traditional criterion of contiguity. (Slip Op. at 26.)

**Respect for Political Subdivisions**

With regard to the criterion of respect for political subdivisions, the Court noted that of the 28 parishes touched by Congressional District 4, only four whole parishes were included, but the district annexed only "shards" of 24 other parishes, usually incorporating only the predominantly black fragments of those shattered regions and fragmenting all major municipalities except one into more than one Congressional district, "thereby destroying the common representation historically enjoyed by residents of the same municipality." (Slip Op. at 26-27.)

**Commonality of Interest**

With regard to the traditional redistricting criterion of commonality of interest, the Court found that Congressional District 4 with its irregular boundaries "subsumes bits of every religious, ethnic, economic, social and topographical type found in Louisiana."

**Non-Racial Factors**

Finally, the Court disagreed with the Defendants' assertion that they could defeat a racial gerrymandering claim under *Shaw v. Reno* if any factor other than race played any cognizable role in the creation of the challenged redistricting plan, stating:

The defendants evidently base their belief--that the presence of any non-racial motivating factor will excuse racial gerrymandering--on language found at the end of the *Shaw* opinion. There the Court indicates that the plaintiff states a claim under the Equal Protection Clause by alleging that a reapportionment plan is so irrational on its face "that it can be understood only as an effort to segregate voters...." This emphatically does not mean that if any other factor influenced the legislature, the Plaintiff is unable to establish a racial gerrymander. Rather, it means that if the contours and content of a redistricting plan can be wholly explained to be the product of one or more factors other than race, then the Defendants have created a competing inference. The Court must then weigh the competing inferences--as indeed it usually must--to decide whether the Plaintiff has proved his inference by a preponderance of the evidence. Thus, accurately stated, the question posed by *Shaw* is whether a redistricting plan can be reasonably conceived as the product of non-racial factors. In this case the plan cannot.

**Direct Evidence of Racial Gerrymandering**

In addition to indirect or inferential proof of racial gerrymandering, the Court in *Shaw* found that direct evidence clearly and forcefully demonstrated that the redistricting plan was the product of racial gerrymandering.

Virtually every witness who testified at the trial (all without the benefit of a retrospective, self-serving view of *Shaw*) either affirmatively stated or accepted as gospel that the Plan was drawn with the specific intent of ensuring the creation of a second, safe, black majority congressional district: namely, District 4. The Defendants' witnesses either stated or conceded that the districts created by Act 42 were racially gerrymandered. Indeed, those witnesses, both lay and expert, spent most of their time at the trial discussing how large the percentage of registered black voters needed to be in the new majority black district to guarantee the efficacy of their racial gerrymander--an efficacy they view as the sine qua non of preclearance. (Slip Op. at 35.)

**Strict Scrutiny and Compelling State Interests**

The Court in *Hayes* noted that the core principle underlying the *Shaw* decision was that racially gerrymandered redistricting plans were subject to the same strict scrutiny that applies to other state legislation classifying citizens on the basis of race, and in this case the Court rejected the four possible compelling state interests advanced by the Defendants to justify their racial gerrymandering, including

(1) conformity with §2 of the Voting Rights Act;

(2) conformity with §5 of the Voting Rights Act;

(3) proportional representation of Louisiana blacks in Congress; and,

(4) remedying the effects of past racial discrimination.

The Court concluded that uncontroverted evidence demonstrated that the plan was "not narrowly tailored to satisfy any of the supposedly compelling state interests advanced by the Defendants." (Slip Op. at 42).

We reached that conclusion first because the plan entails considerably more segregation than is necessary to satisfy the need for a second black majority district--even assuming arguendo that such a second district were itself justified--and second because the plan excessively burdens a variety of third party interests--dramatically so. (Slip Op. at 42).

The Court reasoned that voters have an equal protection right not to be segregated by their state legislatures or local governments into various voting districts on the basis of race, and that a plan will survive constitutional scrutiny only when it segregates "to no greater extent than is reasonably necessary to further a compelling governmental interest...." (Slip Op. at 43).

The same can be said for a plan that supersaturates a majority-minority district, while concomitantly depleting adjacent majority-majority districts of minority voters. In this case, we find that the plan entails more constitutionally suspect segregation than necessary, and is therefore not narrowly tailored. Continuing to assume arguendo that some state interest has been identified which could justify the creation of a second black-majority district, this plan would have to be rejected as insufficiently narrowly tailored. It packs more black voters into District 4 than are reasonably necessary to give blacks a realistic chance to determine the outcome of elections there, provided that they exercise their right to vote. Also, the boundaries of the district violate traditional districting principles to a substantially greater extent than is reasonably necessary.

**Plan Not Narrowly Tailored**

In concluding that the subject redistricting plan was not narrowly tailored, the Court identified a variety of factors germane to this analysis:

(1) the necessity of the measure;

(2) the efficacy of alternative race-neutral measures;

(3) the availability of more narrowly tailored (less intrusive) measures;

(4) the flexibility and duration of the measure; and,

(5) the impact of the measure on the rights of third parties.

The Court also reasoned that a plan was not narrowly tailored if it adversely affected more interests, "if it generally wreaks more havoc, than it reasonably must to accomplish the articulated compelling state interest." (Slip Op. at 45-46). In so concluding the Court noted that the plan embraced considerably more racial gerrymandering and thus more segregation than was needed to satisfy any advanced state interest, that it unnecessarily violated a host of historically important redistricting principles, thereby adversely affecting countless third party interests, and

These several and varied interests--some constitutionally protected and others merely important--may not be callously sacrificed on the altar of political expediency, particularly when less broadly tailored plans are conceivable. (Slip Op. at 48).
**Barnett v. Daley**

In *Barnett*, the U. S. District Court for the Northern District of Illinois dismissed separate challenges to the redistricting of Chicago's aldermanic wards following the 1990 census, holding that districts which provided blacks with a sufficient majority to select the candidate of their race in 19 out of 50 wards (38 percent), roughly corresponding to a 38.6 percent citywide black population, did not violate §2 of the Voting Rights Act or the Fourteenth or Fifteenth Amendments. Plaintiffs' central premise was that they were entitled to 22 African-American super-majority wards "simply because the creation of that number of wards is demographically feasible." *Id.* at 1068. The Court noted that one type of state voting practice that could give rise to a constitutional claim "is the new type recognized in *Shaw*." *Id.* at 1070.

In *Shaw*, the Supreme Court held that appellants stated a valid claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification. (Citation omitted.) The plaintiffs here make no such allegation of bizarre, irrational district configurations. Rather, they merely allege city-wide vote dilution. As a result, they do not have a claim under the Fourteenth or Fifteenth Amendments. Ironically, however, the plaintiffs' proposed remedy might provide white and Hispanic voters with a cause of action under *Shaw*. After all, by demanding maximum representation, the plaintiffs are requesting an intentional racial gerrymander in favor of African-Americans. *Id.* at 1070.

**Cane v. Worcester County**

In a January 7, 1994, Memorandum Opinion, the U. S. District court for the District of Maryland upheld a §2 challenge to Worcester County's at-large system of electing Commissioners, finding in part that the *Gingles* geographical compactness requirement "is a relative concept which must be interpreted in light of Section 2's `laudatory national mission' of opening the political process to minorities." (Slip Op. at 7). Despite objections that a majority-minority district could be created only through blatant racial gerrymandering and by fracturing of three separate municipalities, and without regard to substantial evidence of the County's governmental justification for maintaining an at-large system of county government, and without regard to provisions of the Maryland Constitution clearly indicating a preference for maintaining political subdivision boundaries and in particular municipal boundary lines in the redistricting process, the Court concluded that the Plaintiffs had satisfied the geographical compactness requirement, stating:

The plaintiffs' proposed Plan 1 is not unreasonably irregular in shape, considering the population dispersal within the county. The plan merely affirms the existing racial divisions in the county. While the plan does entail running the newly created districts across other voting district lines and through towns, this is unavoidable because of the heavily white population and the need to achieve a majority African-American population in one of the districts. The districts may not be symmetrical, but they are compact. They do not rely on districts that run through several "tentacle-like corridors" nor are the district's boundary lines so unreasonably irregular, bizarre or uncouth as to approach obvious gerrymandering. They are in line with the configurations of electoral districts that have been approved in other cases. (Slip Op. at 7).

**NAACP v. Schaefer**

In a similar manner, the three-judge court in *Schaefer* rejected a racial gerrymandering challenge leveled against District 54-9, despite objections that the proposed district was bizarrely shaped, lacked geographical compactness and violated traditional districting principles. In the words of dissenting Judge Smalkin, this oddly-shaped creation "is a `geographically challenged' creation, not a geographically compact one." (Smalkin, dissenting, Slip Op. at 6).

According to the majority in *Schaefer*:

Compactness is neither mentioned in the text of the Voting Rights Act nor required by the federal Constitution. See *Shaw*, 113 S.Ct. 2827. . . . The majority opinion in *Gingles*, from which the compactness requirement flows, unfortunately provides little guidance. Justice Brennan's opinion for the court explained that the compactness requirement was designed to bar §2 suits where no majority-minority district can be drawn because the plaintiff minority group members are "substantially integrated" or "spread evenly" throughout the challenged district. See 478 U.S. 50 and n. 17. Thus, as originally described by Justice Brennan, *Gingles* compactness requirement simply precluded a finding of liability under §2 where no
remedy was possible. In more recent cases, however, the Supreme Court has clearly indicated that the concept of compactness is not a hollow one. In *Growe v. Emison*, Justice Scalia referred to a State Senate District that "stretch[ed] from South Minneapolis, around the downtown area, and then into the northern part of the city in order to link minority populations" as an "oddly shaped creation" of "dubious" geographic compactness. *Growe*, 113 S.Ct. 1083, 1085 (Dicta). And, although its holding was granted in the Equal Protection Clause rather than the Voting Rights Act, the court in *Shaw v. Reno* certainly focused its attention on the non-compactness of North Carolina's 12th Congressional District. See *Shaw*, 113 S.Ct. 2822-31. But see *Id.* at 2831. (Expressly reserving the question whether the district at issue was "geographically compact" within the meaning of *Gingles*).

From these recent cases we discerned two guiding principles. First, courts should be reluctant to order the creation of voting rights districts of "bizarre" or "dramatically irregular" shape. *Id.* at 2820, 2825, 2831. Second, although a state can - and at times must - place great weight on race when redistricting, it may not do so to the exclusion of all traditional, non-racial redistricting principles, leaving a district that rationally can be understood only as "an effort to classify and separate voters by race." *Id.* at 2828. [. . .] Put differently, the case law suggests that we must pay attention to both geometric and substantive criteria when testing for compactness under *Gingles*. . . . we are not, however, completely lacking in objective measurements that can serve at least as a proxy for the more sophisticated methods. The essence of defendants' argument is that the NAACP's proposed district takes two distinct pockets of dense black population - one in Salisbury, the other in Cambridge - and strings them together with a narrow rural corridor. The argument, however, cannot withstand scrutiny. District 54-9 is only 32 miles long at its greatest span. Under the state's plan, however, 14 delegates and 9 senators from around the state will be forced to serve constituents who are spread over a greater distance than District 54-9's 32 miles. Cf. *Jeffers v. Clinton*, 730 F. Supp. 196, 207 (E.D. Ark. 1989) (three-judge court) ("[plaintiffs'] alternative districts are not materially stranger in shape than at least some of the districts contained in the present apportionment plan"); aff'd mem., 498 U.S. 1019 (1991); Legislative Redistricting Cases, 31 Md. at 591-92, 629 A.2d 654-55 (noting that a challenged district's "shape, while unusual, is no more odd than the rest of the districts. . . in the whole state"). The Defendants also complained that the NAACP's proposed districts use attenuated "corridors" - sometimes only two miles across - to link non-contiguous pockets of denser population. However, voting rights case law indicates that there is nothing extraordinary about this technique. See, e.g., *Neal v. Coleburn*, 689 F. Supp. 1426, 1435 (E.D. Va. 1988) (holding that plaintiffs satisfied *Gingles* geographic compactness criterion even where "a number of fairly small pockets [of black population had to] be connected to create two election districts"). Indeed, the state apparently used a similar technique when drawing its own plan, as seven of its districts contained corridors less than half a mile wide. One passageway in the state plan's District 18 is less than 200 yards across.

In short, if District 54-9 is not sufficiently compact, then the same can be said of many districts in the state's new legislative redistricting plan. That plan, however, has already withstood a challenge brought specifically on the ground of non-compactness. Only a few months ago, the Maryland Court of Appeals heard - and rejected - a claim that the state's plan violated Maryland's constitutional requirement that legislative districts "be compact in form." Md. Const. Art. III, §4; see Legislative Redistricting Cases, 331 Md. 580, 590-92, 629 A.2d 648, 654-55. We see no reason to reach a different result. Therefore, we conclude that plaintiffs have met the burden of proving that proposed District 54-9's shape and appearance are unobjectionable under *Gingles*. Next, we turn to the question of whether District 54-9's shape rationally can be understood only as "an effort to classify and separate voters by race." *Shaw*, 113 S.Ct. 2828. As an initial matter, we note that the NAACP drew many illustrative single-member districts on the Shore that had a significantly greater black population than District 54-9. The NAACP drew one district that contained 25% more voting-age blacks than District 54-9. Thus District 54-9 could not have been merely the result of an effort to maximize the number of black voters and to minimize the number of white voters in the proposed district. Other considerations must have come into play.

Indeed, upon closer inspection, District 54-9 evidences considerable regard for traditional, non-racial redistricting criteria. See *Shaw*, 113 S.Ct. 2822-32 (repeatedly invoking "traditional districting principles").


Third, District 54-9 gives "[d]ue regard...to natural boundaries." Md. Const. Art. III, §4. In interpreting this constitutional provision, the Maryland Court of Appeals has stated that it is preferable to avoid water
crossings where there is no bridge or ferry. See In Re: Legislative Districting, 299 Md. 682, 475 A.2d 440. District 54-9 straddles the Wicomico River through much of Wicomico County, but the river presents no travel difficulties, as the district encompasses both the Upper Ferry crossing to the west of Salisbury and the Route 50 crossing in Salisbury itself. District 54-9 also crosses the Nanticoke River, as it must, since that river constitutes the entire border between Dorchester and Wicomico Counties, and the district was drafted to incorporate the Route 50 bridge that crosses the Nanticoke at Vienna.

Functional Test of Compactness

In footnote 45 at page 70 of its opinion, the three-judge court in NAACP v. Schaefer stated:

In any event, since plaintiffs have proved their submergence claim, it is the responsibility of defendants to redraw the district lines in a manner that best accommodates the State's interests while remedying the Voting Rights Act violation. We also note that if the State decides to create a single-member district that is the same (or similar to) proposed District 54-9 and to leave the remainder of District 37 as an at-large, two-member district, the constituents in the remainder will be represented substantially as they would have been under the State's plan. As a practical matter, delegates can travel across District 54-9 to meet with constituents in District 37 just as they did before. The critical functional test of compactness clearly can be met. See Dillard v. Baldwin County Board of Education, 686 F. Supp. 1459, 1466 (M.D. Ala. 1988).

In his dissenting opinion, Judge Smalkin made the point that the fact that delegate District 20, located in Montgomery County outside the D.C. city line, had a "shape, while unusual, [that] is no more odd than the rest of the districts...in the whole state," "does not excuse the irregular shape of District 54-9, located in the rural counties on the Eastern Shore. Id. at 4 (Smalkin, Dissenting Opinion). Judge Smalkin also differed with the majority's interpretation of Neal v. Coleburn, supra, stating:

Although it is true that the Neal opinion states that there is nothing impermissible about connecting small pockets of black population to create a majority-minority single-member district, that district must, based on its shape and appearance, still satisfy the Gingles compactness requirement. There are a substantial number of decisions that have found that attempts to connect pockets of black population with attenuated corridors did not satisfy the Gingles' compactness requirement. See, e.g., Clark v. Calhoun County, 813 F. Supp. 1189, 1197-98 (N.D. Miss. 1993) (extraction of blacks from three separate distinct municipalities, each having diverse interests, did not satisfy compactness requirement); Burton v. Sheheen, 793 F. Supp. 1366 (rejecting districts that slice and splice towns and counties or run "a thin snaking line back and forth across the county" as not geographically compact); Clark v. Roemer, 777 ______ 445, 455 (M.D. La. 1990) (districts spread over three parishes not geographically compact).

With regard to traditional districting principles, Judge Smalkin also cited Clark v. Calhoun County and Clark v. Roemer for the proposition that many lower federal courts have expressly considered adherence to traditional districting principles to determine whether a particular district is geographically compact, stating:

I do not believe that the district can be said to respect the boundaries of political subdivisions when it divides the three largest cities it touches - Salisbury, Cambridge and Fruitland.... Thus, far from respecting or adhering to the boundaries of political subdivisions, District 54-9 simply ignores those boundaries in order to carve out the predominantly black communities and connect them through narrow rural corridors to other, distinct and distant such communities. Id. at 7-8.

With regard to the factor of effective political representation, Judge Smalkin relied upon Shaw, 113 S.Ct. 2827, for the proposition that a court should also consider whether individuals who live in the district share sufficient interests-cultural, economic and political - that they can be effectively represented by a single delegate, noting that the Supreme Court in Shaw had expressed discomfort with a district comprised of individuals with nothing in common but their race, noting that because of the district's strange and irregular shape,

it might be difficult for that delegate (in proposed District 54-9), in making his or her rounds, to know which Eastern Shore residents are his or her constituents, without employing a sophisticated navigational system such as GPS, or, at least on clear nights, celestial navigation. Id. at 9-10.

Smalkin concluded at page 11:
It will be extremely difficult for a single delegate to represent effectively the diverse populations that are combined in District 54-9. The district combines the black populations of two distinct and distant municipalities.

**Houston v. Lafayette County**

In a Superseding Memorandum Opinion dated November 5, 1993, the U. S. District Court for the Northern District of Mississippi rejected a §2 challenge brought by minority plaintiffs who alleged that the existing single-member district plan operative in Lafayette County, Mississippi, resulted in minority vote dilution. In a county with a 26.4 percent black population, the minority plaintiffs contended that the present district scheme prohibited blacks residing within the county from electing a black candidate of their choice to hold the office of County Supervisor in any of the five single-member supervisory districts, and advocated creation of a majority black minority voting age population district for the county to enhance their chances of electing a black supervisor. Citing the fundamental purpose of the Voting Rights Act to eradicate impediments designed to deny blacks and other protected groups the right to vote and participate in the political process, the Court stated:

By no means was the landmark legislation enacted to ensure the success of black or other minority candidates by carving the political terrain into irregularly and artificially shaped designs and patterns that result in the deliberate creation of "safe" majority-minority districts reserved exclusively for minority candidates to represent. The Supreme Court recently rejected this practice in the case of *Shaw v. Reno*,

Through a majority opinion offered by Justice Day O'Connor, the Court expressed its extreme distaste for racial gerrymandering, stating, "Racial gerrymandering exacerbates the very patterns of racial bloc voting that a majority-minority district is sometimes said to counteract. ... The practice bears an uncomfortable resemblance to political apartheid." *Shaw*, 113 S.Ct. at 2827. When race supersedes such relevant and natural factors as political and geographical boundaries and becomes the driving force behind the creation of legislative districts, the result is an "impermissible racial stereotype" that "members of the same racial group--regardless of their age, education, economic status, or the community in which they live--think alike, share the same political interests and will prefer the same candidates at the polls. *Shaw*, 113 S.Ct. 2827. (Slip Op. at 28-29).

The Court in *Lafayette County* also took note of the criticisms of Professor Lani Guinier wherein she scrutinized the worthiness of electoral districts custom-designed for minorities, stating:

Prior to the recent Supreme Court decision in *Shaw*, voting rights legal scholars already had begun to scrutinize the worthiness of electoral districts custom-designed for minorities. One of the most vocal critics has been University of Pennsylvania Law School Professor Lani Guinier. Professor Guinier, who has written extensively about the subject of voting rights, has raised questions concerning the inherent value of deliberately drawing districts exclusively for blacks and other minority groups. By desultorily separating blacks from white voters under their perceived auspices of the Voting Rights Act, the process of subdistricting becomes detrimental to blacks as well as whites by severely limiting their voting choices. When blacks are funneled into a majority-minority district, they effectively become segregated from white voters. Thus, they are deprived of any opportunities for formulating voting coalitions with moderate white voters who, in turn, have similarly been "submerged" into a racially homogenous white district on the assumption that white voters too are an indistinguishable "mass" of humanity. Such "districting strategies often promote non-competitive election contests, which further reduce voter participation and interest.... [S] afe, minority seats discourage political competition and thus further diminish [voter] turnout." Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 Va. L. Rev. 1413, 1455 (1991).

The Court in *Lafayette County* noted that Professor Guinier's criticisms should come as no surprise:

Minority districts often foster complacent attitudes in the minority representative elected to hold the seat. Once elected to a safe seat, a minority representative can easily ignore constituents' needs. Perceived as heirs apparent by themselves and their constituencies, minorities elected to racially gerrymandered districts enjoy the security and comfort of knowing they hold relatively secure seats and are largely immune from attack. Indeed, "incumbents enjoy extraordinary leverage in self-perpetuation through gerrymandering." Guinier, *supra*, at 1454. A seated minority representative in a legislative district purposely tilted with an abundant minority population holds a strong advantage that is often insurmountable, even to a minority challenger. Politicians elected to office from so-called "safe" minority districts ironically possess an unfair advantage over their constituents. The degree of accountability to voters is substantially diminished, and minority voters become casualties of the notion that "members of the same racial group...think alike, share
the same political [views], and prefer the same candidates..." *Shaw*, 113 S.Ct. at 2818. Relegating blacks to majority-minority districts ultimately isolates them from the overall political process, and insulates the minority representative from voter dissatisfaction.

### Shaw v. Hunt

On June 28, 1993, the United States Supreme Court in *Shaw v. Reno* held that the complaint stated a cause of action under the Fourteenth Amendment against the state defendants and remanded the case. On September 7, 1993, the three-judge court granted Defendant-Intervenor status to Ralph Gingles and other black North Carolina residents. Following the close of discovery, the Plaintiff-Intervenors moved for a preliminary injunction seeking to enjoin the use of the North Carolina Congressional Redistricting Plan for the 1994 elections and sought a temporary restraining order to extend the candidate filing period. The TRO application was denied on February 7 by the three-judge court.

Trial was scheduled for March 28, 1994, and the primary elections were scheduled for May 3, 1994.

On February 22, 1994, the United States filed a Motion for Leave to Participate as *Amicus Curiae* in opposition to the Plaintiff-Intervenors' Motion for a Preliminary Injunction, arguing in its supporting memorandum that the balance of the hardships did not favor Plaintiff-Intervenors and that it was in the public interest to allow the election schedule to proceed until a ruling after the trial. In Brief for the United States in Opposition to the Plaintiff-Intervenors' Motion for a Preliminary Injunction, the United States recognized that the Supreme Court in *Shaw* had defined an "analytically distinct" Fourteenth Amendment claim for challenging racial gerrymanders, limited to exceptional cases where a redistricting plan is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification" (Brief for the United States, p. 16, citing *Shaw*, 113 S.Ct. at 2826, 2832).

The United States in its brief also noted that the Plaintiff-Intervenors will be relying upon *Hayes v. State of Louisiana*, supra, to prove their *Shaw* racial gerrymandering claim, based on evidence that the legislature intended to create majority-minority districts. The U.S. took the position that the *Hayes* decision "is a substantial expansion of *Shaw* and would subject virtually all redistricting plans with majority-minority districts to strict scrutiny" (Brief for the United States, supra at 16-17). The United States took the position that that such an approach eliminates the *sine qua non* of *Shaw*, namely, districts that are geographically bizarre and explainable only as an act of racial segregation, and urged the three-judge court not to follow it, and that some consideration of race in redistricting is permissible. It is thus for the Court to determine whether race was such an overriding consideration "that race, and not the other factors, produced a plan that departs significantly from 'traditional districting criteria' and thus constitutes the functional equivalent of an explicit racial classification" (Brief for the United States, supra at 22).

The United States also took the position that the North Carolina Congressional Districts could be rationally viewed in ways other than as an effort to segregate the races for purposes of voting, an argument apparently supported by evidence that the districts have distinct socio-economic and demographic characteristics and reflect communities of interest which mirror the demographic differences among the districts.

The United States thus took the position that proof of an intent to take race into account to draw a majority black district is not all that is necessary to subject a redistricting plan to strict scrutiny, and that a *Shaw*-type racial gerrymandering claim must be limited to plans in which the districts' bizarre shapes are so linked to race that they are the equivalent to an explicit racial classification (Brief for the United States, supra at 17-18).

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The United States also pointed to three possible justifications for drawing two majority-minority districts in North Carolina:

1. considerations of race justified by §5 preclearance requirements;
2. considerations of race justified by §2; and,
3. considerations of race justified as a remedial measure to eradicate effects of past discrimination (Brief for the United States, supra at 22-23).

### Johnson v. Miller

On January 13, 1994, Plaintiffs filed a Complaint challenging the 1992 redistricting of the Georgia delegation to the United States House of Representatives as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, alleging that the Eleventh Congressional District "is so irrational on its face that it can only be
understood as an effort to segregate voters into separate voting districts because of their race." The Complaint also alleges that the Eleventh Congressional District "was created without regard to other considerations customarily considered in redistricting, such as compactness, contiguity, geographical boundaries, economic interests and respect for political subdivisions."

The Congressional District at issue in Johnson was configured in large part in response to objections by the United States Department of Justice based on §5 of the Voting Rights Act, to two earlier reapportionment plans that had created two as opposed to three majority black Congressional districts (Fulton County Daily, February 24, 1994, pp. 5-6). Plaintiffs in their Complaint alleged that the §5 objections interposed by the Justice Department to Georgia's two proposed Congressional redistricting plans "represented an effort by individuals within the Justice Department to use the Voting Rights Act as a tool to forcibly implement their own redistricting policies rather than apply the Act according to its own terms" (Complaint at 8, paragraph 20). A bi-racial group of Eleventh District residents filed an Application for Intervention on February 7, 1994, asserting in their proposed Answer that the "State's consideration of race in its Congressional redistricting plan was proper and necessary in order to comply with §§2 and 5 of the Voting Rights Act" (Answer in Intervention, at 3). The Defendants-Intervenors are represented by the ACLU Foundation, Inc., the Georgia ACLU, and the NAACP Legal Defense and Education Fund, Inc. They take the position that the critical question is whether the sole motivation for reapportioning Georgia's Congressional districts was to segregate voters on the basis of race, and that a key factor in that inquiry is whether the State of Georgia likely would violate §2 of the Voting Rights Act if it had not created majority-black districts. The Defendants-Intervenors further assert that the state is not likely to raise, much less vigorously advocate, defenses of the Georgia apportionment along these lines and "the state cannot be expected vigorously to argue, if at all, that voting in Georgia continues to be racially polarized, that existing structures, such as the statewide majority vote requirement, contribute to the dilution of minority voting strength, that elections have been characterized by subtle or overt racial appeals, or other factors probative of vote dilution which would justify the adoption of the existing Congressional districting plan." The Defendants-Intervenors also take the position that the Plaintiffs are seeking to advance interpretations of the Fourteenth and Fifteenth Amendments "that are hostile to black political opportunity and racial diversity in the Congressional delegation."

On February 22, 1994, the United States filed an Application to Intervene, noting that the Plaintiffs had asserted that the United States Department of Justice had improperly administered §5 as part of the grounds for their claims that the challenged Georgia Congressional Redistricting Plan violated the Fourteenth and Fifteenth Amendments to the United States Constitution, and, in its Memorandum of Points and Authorities in Support of the Application of the United States to Intervene, stated:

The Attorney General is charged with the primary responsibility for the administration and enforcement of the Voting Rights Act. In this action, the Attorney General's administration and enforcement of §5 serves as a basis for both Plaintiffs' claims, the expected defenses of the Defendants and the defenses asserted by the would-be Defendant-Intervenors. In addition, the Plaintiffs' allegations implicate the propriety and constitutionality of the Attorney General's administration of §5. Therefore, the Attorney General has a substantial interest in the subject matter of this case.

(Memorandum of Points and Authorities in Support of the Application of the United States to Intervene, at 1-2).

In its Memorandum of Points and Authorities, the United States, noting that it had precleared the challenged plan, took the position that the plan was constitutional because it is not so bizarre or irregular as to be unexplainable on grounds other than race. Moreover, even if plaintiffs can prove that the challenged plan does constitute a "racial gerrymander," as defined in Shaw v. Reno, 113 S.Ct. at 2826-28, the United States believes that the plan is narrowly tailored to serve the state's compelling interests in complying with the Voting Rights Act and in remedying the effects of past discrimination.

(Memorandum of Points and Authorities, supra, at 5-6).

The United States noted also that this case would be one of the first to interpret the equal protection claim outlined by the Supreme Court in Shaw v. Reno:

The United States has a strong interest in participating in litigation that will shape the development of this area of the law and define the relationship between the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment. The United States also is in a unique position to provide the Court with the
benefit of our extensive involvement in redistricting litigation throughout the country and our experience with the administrative review of redistricting plans.

(Memorandum of Points and Authorities, supra, at 6).

Conclusion

The primary goal of §2 of the Voting Rights Act of 1965, as amended and extended by the 1982 Voting Rights Act Amendments, is to assure minority voters an equal opportunity to participate in the political process and equal access to that process. The key focus in §2 litigation is the ability of minority voters to elect representatives of their choice. The Act guarantees the individual right to vote, not a group right to elect, and race should not become the basis for distributing voters in the redistricting and reapportionment process. Racial gerrymandering, unfortunately, has become a by-product of the redistricting process, and its roots are found in the same impermissible racial stereotypes that, over thirty years ago, excluded black voters from the city limits of Tuskegee, Alabama.

Race-based redistricting should be confined to redistricting plans which are narrowly tailored to the goal of avoiding retrogression in minority voting strength or similar sufficient justifications, and then only where proper regard is had for traditional districting principles such as compactness, contiguity and respect for maintaining the integrity of political subdivisions. Any other resort to racial gerrymandering or any other form of race-based redistricting will irreconcilably conflict with the democratic ideal embodied in our system of representative democracy.

It may well be, as some commentators have concluded, that Shaw v. Reno inadequately instructs the lower courts on how they should review subsequent racial gerrymandering claims and that "it is, in short, Bakke all over again." T. Aleinikoff and S. Issacharoff, Race and Redistricting: Drawing Constitutional Lines after Shaw v. Reno, 92 Mich. L. Rev. 588, 651 (December 1993).

In any event, the precise contours of racial gerrymandering claims predicated on Shaw may be revealed in the relatively near future as the above pending cases and appeals are concluded.