Redistricting in the Post-Shaw World

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"The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level." Davis v. Bandemer, 478 U.S. 109, 145 (1986)(O'Connor, J., concurring in the judgment).

Introduction

Who will be the principal architects of state legislative redistricting plans after the results of Census 2000 are in? Will it be the federal courts or the legislatures? Redistricting is the "most intensely partisan and self-regarding of all political acts," North Carolina’s Brief on the Merits, at 27, in Hunt v. Cromartie, No. 98-0085, and it is a daunting task for any state legislature in a state with a substantial minority population, a demonstrated record of voting overwhelmingly for one party, and a divided legislature. This presentation focuses on the difficult decisions facing the courts when they are thrust into this complex context and are called upon to decide the role of race and whether race has predominated over traditional districting principles. Following a brief introduction to the basic principles of vote dilution and a survey of the Justice Department’s maximization agenda that spawned the Shaw litigation in 1992, we will review the subsequent caselaw and judicial refinements that took place in the lengthy but necessary process of curtailing and undoing the mischief of race-predominant redistricting at the state and local government level. Then we will take a look at the developing jurisprudence in the field of racial gerrymandering litigation, from the standpoint of liability as well as remedy issues. We will evaluate how these post-Shaw developments might affect state legislatures as they approach the daunting task of redistricting following Census 2000, gearing up to evaluate new census data and existing legislative redistricting plans for compliance with the constitutional mandate of one person, one vote. This will be followed, finally, with a review of several important Shaw-based decisions at the district court and appellate level that may eventually reach the Supreme Court.

It is my hope that this material and our panel discussion today will be of some assistance to many of you who may be about to enter upon this legislative redistricting field for the first time. Fasten your seatbelts, take a deep breath and welcome to real time.

The Genesis of Race-Based Redistricting: An Overview of Overkill

Beginning with the United States Supreme Court’s 1993 decision in Shaw v. Reno, the Court has handed down a number of decisions curtailing race-based redistricting and other forms of racial gerrymandering. It will likely refine the Shaw doctrine even further with the third Supreme Court decision arising from the Shaw case, Hunt v. Cromartie, anticipated at the end of the present term. State legislatures will then have before them at least nine Supreme Court decisions and over two dozen appellate court decisions as essential guidance for redistricting of state legislatures in compliance with the demands of Sections 2 and 5 of the Voting Rights Act of 1965, as amended. Like leaping from darkness to light, the rules for redistricting and reapportionment for the decade beginning January 1, 2000, will differ significantly from the ones applied during the 1990 round of redistricting: they will be understandable. Though the old guard may grouse that the pendulum has swung to the right, nonetheless a clearly articulated set of legal principles applicable to the redistricting process on the state level will now be available well in advance of Census 2000. The battle over excessive race-consciousness and race-based redistricting has not ended, but we are now equipped with legal standards that reflect a more balanced, moderate judicial perspective, albeit one that may be hanging by the thread of a 5-4 majority.

Litigation Climate Leading to Shaw: Majority-Minority Districts

Following the 1980 census, a process of racial maximization through creation of majority-minority districts was commenced in many jurisdictions covered under Section 5 of the Voting Rights Act of 1965. A system of "political apartheid" was prompted by a seemingly unbridled coterie of Voting Section attorneys and administrative specialists within the Justice Department’s Civil Rights Division, aided and abetted by civil rights plaintiffs and a tight group of scholarly experts with impressive track records in the federal judicial arena. No bashful bunch, the proponents of the maximization agenda wielded the blunt instrument of Section 5 preclearance authority against city and county governmental entities and ultimately browbeat a number of states into creating bizarrely shaped, racial gerrymandered electoral districts in order to avoid the cost and disruption of Voting Rights Act litigation. Faced with the demand to create majority-minority districts wherever possible, and held administratively hostage if they did not, covered state and local government entities had two options in obtaining preclearance of redistricting plans and other electoral changes: make a formal submission to the Justice Department in Washington, D.C., or, in lieu of that administrative procedure, file a suit for declaratory judgment in the United States District Court for the District of Columbia, not exactly a cheap stroll in the park with a d. j. litigation price tag averaging well over $200,000.

The Justice Department’s racial maximization policy was justified by many on the basis of the low numbers of black elected officials in these covered jurisdictions, most of whom were in the southern states that comprised what was once the Confederacy. Implemented with a fervor rooted in the unspoken battle cry of "payback time," this maximization process entailed deliberate, vigorous collaboration between various civil rights organizations and minority leaders working in conjunction with the Justice Department. The racial gerrymandering frenzy accelerated dramatically following the 1990 census, leading to such extreme examples of "ugly" districts and government-sanctioned segregation of the races that Justice Clarence Thomas was provoked to label them "political homelands" in his concurring opinion in Holder v. Hall, 114 S.Ct. 2581, 2598 (1994). At a time when Bosnia and Kosovo were not exactly familiar locales to Joe Sixpack, Justice Thomas stepped up to the plate and described the practice as "balkanization." He gave this prophetic warning:
The practice now promises to embroil the courts in a lengthy process of attempting to undo, or at least to minimize, the damage wrought by the system we created.

Proportional Representation: Doling it Out

We have to digress a little bit to appreciate the full impact of what was really going on in "our federalism," and how things got so out of control. Following the 1982 Amendments to the Voting Rights Act, litigation under expanded Section 2 began to be driven by a race-based goal of proportional representation. A trickle followed by a steady stream and then a raging torrent, this litigation trend was contrary to assurances provided by key Senators (including one Presidential aspirant who now hawks Viagra in television ads). Added to the Voting Rights Act during the tense debate over amended 2, the "Dole Compromise" - that nothing in Section 2 established "a right to have members of the protected class elected in numbers equal to their proportion of the population" - was fast becoming a hollow promise.

Gingles All The Way

In the first §2 vote dilution case decided after the 1982 Voting Rights Act amendments, *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court set out three "necessary preconditions" for plaintiffs to prevail in a vote dilution case:

1. Geographical compactness,
2. Minority political cohesion, and
3. Legally sufficient white racial bloc voting.

Senate Report Factors and Totality of Circumstances

The Senate Report specifies factors which typically may be relevant to a Section 2 claim:

1. the history of voting-related discrimination in the State or political subdivision;
2. the extent to which voting in the elections of the State or political subdivision is racially polarized;
3. the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting;
4. the exclusion of members of the minority group from candidate-slating processes;
5. the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and
6. the extent to which members of the minority group have been elected to public office and the jurisdiction.
The Report also notes that the following evidence may have probative value in determining the substantiality of a Section 2 claim:

(7) evidence demonstrating that elected officials are unresponsive to particularized needs of the members of the minority group, and

(8) evidence that the policy underlying the State’s or the political subdivision’s use of the contested practice of procedure is tenuous.

Proving all three *Gingles* preconditions does not automatically establish a §2 violation, but the Court must also consider the Senate Report factors and other relevant evidence under the "totality of circumstances." As required by 42 U.S.C. §1973, plaintiffs are also required to show that "based on the totality of circumstances...the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected minority] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

**Post-1990 Census: The Noose Tightens**

Following the 1990 census, as states and local government entities evaluated census data for purposes of one person, one vote compliance, the Department of Justice and private plaintiffs through Section 5 preclearance proceedings and Section 2 litigation routinely demanded maximization of the number of majority-minority districts in order to achieve proportionality. As the Dole Compromise went limp, racial gerrymandering emerged as a by-product. Majority-minority districts were boldly created by relying predominantly upon race and less upon non-racial traditional redistricting principles, with the Justice Department knee deep in the ill-begotten maximization agenda. But these contorted and racially homogenous electoral monstrosities soon faced equal protection-based challenges in North Carolina, Georgia, Louisiana, Texas, California and Florida. Virginia and New York weren’t far behind. Ironically, the first and ultimately successful challenge began in the state that gave us *Gingles*.

**Shaw v. Reno**

The distortion of the Voting Rights Act and its deliberate misuse to create bizarrely-shaped racial enclaves eventually gave rise to a constitutional challenge to North Carolina’s First and Twelfth Congressional Districts. Suit was filed on March 12, 1992. The two districts had been created pursuant to North Carolina’s 1992 redistricting plan in order to provide for effective black voting majorities. The Plaintiffs, five residents of Durham, North Carolina, were led by a former federal military judge and law professor, Robinson Everett. They mounted an Equal Protection argument in their challenge to these racially gerrymandered districts, but a three-judge court rejected it in a 2 to 1 ruling. Often referred to as the father of racial gerrymander litigation, Judge Everett and his talented legal team ultimately persuaded a majority of the United States Supreme Court to recognize their cause of action as a valid one, namely, that a facially neutral electoral districting plan could, in certain
exceptional circumstances, be a racial classification subject to strict scrutiny under the Equal Protection Clause.

In *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511(1993), the Supreme Court held that a district violates the Equal Protection Clause of the Fourteenth Amendment if it is "so extremely irregular...that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles."

The Court concluded that "reapportionment is one area in which appearances do matter," and a district that includes voters who are individuals of the same race, but are "widely separated by geographical and political boundaries," suggests the possibility of a racial gerrymander which the Court has "rejected ...elsewhere as [an] impermissible racial stereotype."

Speaking through Justice Sandra Day O'Connor, the Court suggested that drawing race-conscious districting lines may widen the racial divide rather than get us beyond race.

*Shaw* and its progeny have given birth to the constitutional principle that impermissible race discrimination occurs where race for its own sake, and not other traditional districting principles, was the legislature’s dominant and controlling rationale in drawing its district lines. Several specific harms have been identified as harms that can be caused by the excessive use of race in districting, including

- "representational" harm: where elected officials in a district that is obviously created solely to effectuate the perceived common interests of one racial group are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole, as a result of which certain voters suffer representational harm, *U.S. v. Hays*, 515 U.S. 737, 744 (1995); *Shaw v. Reno*, 509 U.S. at 648.

- "expressive" harm: by conveying the message that political identity is, or should be, predominantly racial, *Bush v. Vera*, 517 U.S. at 1053, 116 S. Ct. 1941 (1996).


- The resulting trilogy, *Shaw v. Reno*, followed on remand by *Shaw v. Hunt*, 517 U.S. 899 (1996), and (soon) *Hunt v. Cromartie*, has had and is continuing to have a profound effect on the volatile mix of race and politics in the redistricting arena.

### Shaw’s Underpinnings

To understand *Shaw*, one must start with the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), and its rejection in *Brown v. Board of Education*, 347 U.S. 483 (1954). A scant six years after *Brown* came *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) and its rejection of the concept that political power can be allocated constitutionally on the basis of race. Just as it was wrong to gerrymander the black population of Tuskegee, Alabama, out of the city limits and thereby remove their fundamental right to vote in *Gomillion*, and just as it was wrong for racial segregation policies and laws institutionalizing blatant racism to be used to keep black schoolchildren out of white schools in *Brown*, it was just as wrong, divisive and disruptive for race-predominant redistricting and its singular emphasis on racial separatism to be foisted on state and local governments in the 1990's.
Indeed, over forty years after *Brown*, at the urging of the Justice Department and the organized civil rights community, state and local governments had become embroiled in precisely the same wrong-headed efforts to separate blacks into their own "majority-minority districts" so as to enable blacks to elect the "authentic" black candidate of their choice, leaving in the aftermath an overwhelmingly racially identifiable assortment of elected officials supposedly beholden to those voters of their own racial or ethnic cleavage.

**Johnson v. DeGrandy**

In *Johnson v. DeGrandy*, 512 U.S. 997, 1011-12 (1994), the Supreme Court held that proof of the Gingles preconditions alone is not sufficient to establish §2 liability, and that is necessary for other evidence to be examined in the totality of circumstances, "including the extent of the opportunities minority voters enjoy to participate in the political process."

The Court further held that, in determining whether equality of opportunity exists, a court should not ask whether it is physically possible to draw additional black majority districts, because a state is not required to maximize the number of majority-minority districts. *DeGrandy*, 512 U.S. at 1009, 1016-17. Instead, to assess the totality of circumstances, courts should use the factors identified in the legislative history of §2. *Id.* At 1010-12.

**Effect of Racial Separatism**

It is against this backdrop of racial separatism, which unfortunately has been nurtured by the Civil Rights Division of the United States Department of Justice, that *Shaw v. Reno* and the decisions of the U.S. Supreme Court in *Miller v. Johnson, Vera v. Bush, Shaw v. Hunt (Shaw II)* and other post-*Shaw* cases must be viewed and understood.

**Miller v. Johnson**

On June 29, 1995, the Supreme Court invalidated Georgia’s Eleventh Congressional District on equal protection grounds, holding in *Miller v. Johnson*, 515 U.S. 900 (1995), that where race was the predominant factor motivating the legislature’s decision to place a significant number of voters inside or outside a district, and where the legislature subordinated traditional race-neutral districting principles to racial considerations, such a district, unexplainable on grounds other than race, would be
subject to the same strict scrutiny as applies to other state laws that classify citizens by race, and can be sustained only if it is narrowly tailored to serve a compelling governmental interest.

*Bush v. Vera: The O'Connor Guidelines*

In *Bush v. Vera*, 116 S.Ct. 1941 (1996), the Supreme Court affirmed 5-4 a three-judge court’s finding that race was the predominant factor in the drawing of three congressional districts and rejected the proffered compelling governmental interests. Texas had sought to draw new congressional districts after the 1990 census and was entitled to three additional congressional seats due to population growth. The state legislature drew District 30 as a black-majority district in the Dallas area, District 29 as a Hispanic-majority district in the Houston area, and reconfigured District 18 as a black-majority district in the Houston area adjacent to District 29. To say these three districts were bizarre and contorted in shape is an understatement. Plaintiffs alleged that Districts 18, 29 and 30 were racially gerrymandered, and a three-judge court agreed and held them unconstitutional. Although the Supreme Court affirmed, no majority opinion emerged.

In her concurring opinion in *Bush v. Vera*, Justice Sandra Day O’Connor recognized that the process of reconciling the VRA’s requirements with those of the Equal Protection Clause "sometimes requires difficult exercises of judgment." Justice O’Connor’s guidance for state and local government entities was outlined in the following manner:

First, as long as states do not subordinate traditional criteria to race, they may intentionally create majority-minority districts without coming under strict scrutiny.

Second, a state may have to create majority-minority districts where the three *Gingles* preconditions (reasonable compactness, minority cohesion, and white bloc voting) are satisfied.

Third, the state’s interest in avoiding Section 2 liability is a compelling governmental interest.

Fourth, a district drawn to avoid Section 2 liability is narrowly tailored so long as it does not deviate substantially, for predominantly racial reasons, from the sort of district a court would draw to remedy a Section 2 violation.

Fifth, districts that are bizarrely-shaped and non-compact and that otherwise neglect traditional principles and deviate substantially from the sort of district a court would draw are unconstitutional, if drawn for predominantly racial reasons.

These "bright line" principles make it clear that a state or local government entity may intentionally draw majority-minority districts and that the Voting Rights Act itself may constitute a compelling governmental interest justifying such action. Further, Justice O’Connor’s guidelines inject flexibility and a much-needed discretion for a state or local government entity as it seeks to draw a constitutionally and statutorily sound district, even though it may not be a perfect one, the most compact one or one as compact as a court would draw as a remedial district.

Justice O’Connor’s guidelines in *Vera*, however, do not answer the question, first raised in *Shaw v. Reno*, of whether a district is necessarily unconstitutional if it looks "ugly" or if it does not measure up to certain concepts of geographical compactness, whether "functional compactness" as approved in *DeWitt v. Wilson*, 856 F. Supp. 1409, 1414, or compactness determined through a mathematical measure, as described in R. Pildes and R. Niemi, *Expressive Harms, "Bizarre Districts" and Voting*

**Lawyer v. Department of Justice**

To the extent that a state or local government body chooses to engage in race-conscious redistricting, it may be able to do so through use of a more informed legislative process, and perhaps through judicious use of mediation and other means of Alternative Dispute Resolution, as demonstrated in the mediated redistricting settlement agreement which was the subject of Lawyer v. Department of Justice, 117 S.Ct.2186, 138 L.Ed. 2d 669 (1997). That process is one which entails clear identification of compelling governmental interests justifying creation of a race-conscious district, and, when viewed through the lens of Miller, Vera and Shaw II, provides the necessary safeguards to assure that the district is narrowly tailored to achieve such compelling governmental interests. Lawyer, decided on the last day of the 1997 term, demonstrates that a district can be so narrowly tailored that it can achieve a compelling governmental interest and that the United States Supreme Court will approve such districts under strict scrutiny.

**Abrams v. Johnson**

In Abrams v. Johnson, 117 S.Ct. 1925, 138 L.Ed. 2d 285, 1997 U.S. Lexis 4034 (June 25, 1997), the United States Supreme Court rejected constitutional challenges to a redistricting plan for Georgia’s congressional delegation drawn by the District Court after the Georgia Legislature could not reach agreement on drawing a new plan, following remand in Miller v. Johnson. Appellants, various minority organizations and the United States, challenged the District Court’s redistricting plan on several grounds, all of which were rejected by the Supreme Court.

Appellants in Abrams argued that the court-ordered plan contravened Section 2 of the Voting Rights Act, a position which the Supreme Court rejected as based on the premise the impermissible vote dilution resulted from the failure to create a second majority-black district. The Section 2 findings of the District Court were entitled to deference, including its findings that the black population was not sufficiently compact for a second majority-black district, as well as its findings that minority political cohesion and white racial bloc voting had not been established in light of evidence of significant white crossover voting. The District Court’s findings were upheld by the Supreme Court, which noted that the minority group failed to meet the Gingles preconditions, and the mere fact that the District Court did not hold a separate hearing on whether the remedial plan violated Section 2 did not alter that result. In affirming the District Court’s judgment, the Supreme Court concluded:

> The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies. Here, the legislative process was first distorted and then unable to reach a solution. The district court was left to embark on a delicate task with
limited legislative guidance. The court was careful to take into account traditional state
districting factors, and it remained sensitive to the constitutional requirement of equal
protection of the law.

Double Standard or Curtailment of a Morally Bankrupt Practice?

This new constitutional doctrine that has in genesis in Shaw has been attacked by some academics as
creating a double standard for minority voters while setting the stage for the systematic ouster of
black and Hispanic elected officials. Does it do that? The race-predominant standard developed and
refined by the Court from Shaw v. Reno in 1993 to Abrams v. Johnson in 1997, while not completely
free of a few doctrinal rough edges, has moved our multi-cultural and pluralistic society closer than
ever to the ideals of representative, colorblind democracy. To be sure, the Court's invalidation of
racially gerrymandered Congressional districts in North Carolina, Florida, Texas, Georgia and
Louisiana has given rise to cries of "unprecedented judicial activism," disregard of historical
discrimination, "a return to the days of all-white government," and wholesale dismantling of majority-
minority districts. But those cries have been necessarily tempered by the fact that blacks and other
minorities have achieved electoral success in growing numbers:

(1) In Georgia, after Congresswoman Cynthia McKinney’s 12th District was redrawn following Miller, McKinney complained of impending "extinction," but was reelected with a solid crossover vote from white voters in her 65% white district.

(2) Georgia Congressman Sanford Bishop ran and won in a 35% black district.

(3) In Texas, Sheila Jackson Lee and Eddie Bernice Johnson were both elected to Congress from majority white districts.

(4) In Indiana, black Democrat Julia Carson was elected to Congress from a 69% white district.

(5) In Oklahoma, Congressman J. C. Watts, a black Republican, was elected from an overwhelmingly white district, and before him, Andrew Young, Allan Wheat, Ron Dellums, Harold Ford and Gary Franks were elected to the House of Representatives from majority-white districts.

(6) Illinois Senator Carol Moseley-Braun and Virginia Governor Douglas Wilder were both elected from majority white state electorates.

(7) Mississippi has witnessed the election of Reuben Anderson and Fred Banks to the state Supreme Court, both receiving substantial support from white voters.

(8) Mel Watts has been reelected to Congress from a revised North Carolina congressional district with a substantial white voting age majority.

Indeed, whether racial gerrymandering is done to exclude blacks from the city limits of Tuskegee,
Alabama, as in Gomillion v. Lightfoot, 364 U.S. 339, 340, 81 S.Ct. 125 (1960), or to segregate races
into "political homelands" for the purpose of voting, without regard to traditional districting principles
and without sufficient compelling justification, as in Shaw v. Reno and its progeny, it is a morally
bankrupt practice.

Relationship Between Section 2 and Section 5
In *Reno v. Bossier Parish School Board*, 65 U.S.L.W. 4308 (U.S. May 12, 1997), the United States Supreme Court held that §5 preclearance of a covered jurisdiction's voting standard, practice or procedure may not be denied solely on the basis that it violates §2 of the VRA. Rejecting the Attorney General’s long-held position that §2 is effectively incorporated into §5, the Court nonetheless concluded that §2 evidence of a plan’s dilutive impact may be relevant although not dispositive of a §5 inquiry. In conducting an inquiry into a covered jurisdiction’s motivation in enacting voting changes and in considering such evidence according to the majority, the analytical framework of *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1978), should be looked to for guidance.

The opening line of Justice O’Connor’s majority opinion promised much: "Today we clarify the relationship between §2 and §5 of the Voting Rights Act of 1965...." The Court rejected the Justice Department’s position that §2 violations may form the basis for denying §5 preclearance, a position which "would inevitably make compliance with §5 contingent upon compliance with §2." Slip Op. at 5. The Court further held that "Section 2 evidence" may be relevant to prove that a covered jurisdiction had retrogressive intent and that it enacted a redistricting plan or other electoral change with a discriminatory purpose:

The fact that a plan has a dilutive impact therefore makes it "more probable" that the jurisdiction adopting that plan acted with an intent to retrogress than "it would be without the evidence." To be sure, the link between dilutive impact and intent to retrogress is far from direct, but "the basic standard of relevance...is a liberal one" and one we think is met here.

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**Reno v. Bossier Parish School Board (II)**

*Bossier Parish* has come back for another visit to the high court. The Supreme Court has recently noted probable jurisdiction in two cases of great interest to state and local governments, *Reno v. Bossier Parish School Board* and *Price v. Bossier Parish School Board*. In these two cases, which were consolidated because they present the same issue, the Bossier Parish, Louisiana School Board sought approval for its redistricting plan from the Department of Justice. The Department objected to the plan under Section 5 of the Voting Rights Act of 1965 on the grounds that the School Board had failed to meet its burden of proving that the redistricting plan was enacted without a racially discriminatory purpose. As it frequently does, DOJ asserted that the School Board had failed to provide adequate non-racial explanations for the absence of black majority school board districts in the plan. DOJ also relied on hearsay evidence to the effect that School Board members did not favor creation of such districts. In addition, the Department asserted that the School Board’s plan would clearly violate Section 2 of the Voting Rights Act and therefore, under Department regulations, would violate Section 5 as well.

A three-judge court in the District of Columbia held that DOJ should have approved the plan. The court reasoned that the Department had no authority under Section 5 to object to redistricting plans that it believed violated Section 2. The court further reasoned that evidence that a plan violated Section 2 was not admissible in a proceeding under Section 5 to prove the existence of a discriminatory purpose.
On appeal, as noted above, the United States Supreme Court vacated and remanded, agreeing that DOJ could not object to plans under Section 5 merely because it believed they violated Section 2, but remanding on the question of whether Section 2 evidence may be offered to prove discriminatory purpose under Section 5.

On remand, the three-judge court again ruled in favor of the School Board. The court held that Section 5’s prohibition on plans enacted with a discriminatory purpose basically proscribed only those plans adopted with a "retrogressive" intent (i.e., an intent to decrease the political power of protected minority groups). The Department of Justice and minority intervenors filed separate appeals to the Supreme Court and, as noted above, the Supreme Court has noted probable jurisdiction and consolidated the two appeals.

This case presents a question of great significance for state and local governments subject to Section 5 of the Voting Rights Act. If the Supreme Court affirms the three-judge court and finds that Section 5’s purpose requirement applies only to plans adopted with a retrogressive intent, the state and local governments will have a much easier time complying with Section 5 than they have had previously. If, on the other hand, the Supreme Court reverses and adopts the Department’s position, state and local governments will continue to be subject to pressure from the Department to create additional minority districts.

**Hunt v. Cromartie**


In this third installment of *Shaw v. Reno*, a three-judge district court granted summary judgment for the Plaintiffs in this racial gerrymandering claim that challenged North Carolina’s revised 12th Congressional District, over the dissent of Fourth Circuit Judge Sam J. Ervin, III. The Supreme Court noted probable jurisdiction on September 29, 1998, and heard oral argument on January 20, 1999. A decision is expected before the end of the term. The questions presented in this case are as follows:

1. In a racial gerrymandering case, is an inference drawn from the challenged district’s shape and racial demographics, standing alone, sufficient to support summary judgment for the Plaintiffs on the contested issue of the predominance of racial motives in the district’s design, when it is directly contradicted by the affidavits of the legislators who drew the district?

2. Does a final judgment from a court of competent jurisdiction, which finds a state’s proposed congressional redistricting plan does not violate the constitutional rights of the named plaintiffs and authorizes the state to proceed with elections under it, preclude a later constitutional challenge to the same plan in a separate action brought by those plaintiffs and their privies?

3. If a state congressional district subject to strict scrutiny under the Equal Protection Clause simply because it is slightly irregular in shape and contains a higher concentration of minority voters than its neighbors, when it is not a majority-minority district, it complies with all of the race neutral districting
criteria the state purported to be following in designing the plan, and there is no direct evidence that race was the predominant factor in its design?

Background of Cromartie

Following the mandate from the Supreme Court in Shaw v. Hunt, 517 U.S. 899 (1996), the North Carolina legislature redrew its congressional district boundaries, including a revised version of the Twelfth District with approximately 50% black population. The Cromartie Plaintiffs challenged the shape and racial demographics of the Twelfth District, arguing that the legislature had subordinated compactness and other districting principles to considerations of race, in violation of the Equal Protection Clause. They argued that revised Twelfth District was an attempt to perpetuate racial gerrymanders in North Carolina, that the district’s twists and turns through various urban areas and its racial demographic showed that the predominant motive in creating the district was race. The lower court granted summary judgment against the legislature on the ground that the uncontroverted material facts established that the legislature had used race as the predominant factor in drawing the Twelfth District.

North Carolina’s Argument on Appeal: Politics, Not Race

The State of North Carolina argued that the predominant basis for the challenged district was partisan voting patterns and not race, and that the district was drawn to create a Democratic stronghold, regardless of its appearance as having been carved along racial lines. Walter Dellinger in arguing for the State said that a politically gerrymandered district could not be declared unconstitutional just because "it happens to correlate with race.”

The State also argued that the boundaries of the challenged district were drawn on the basis of actual voting patterns in order to create a redistricting plan that would preserve the existing partisan balance in the state’s congressional delegation, that race was anything but a predominant factor in the design of District 12, and that the State has selected and used a number of traditional, race-neutral factors and districting criteria in constructing the redistricting plan, including contiguity, respect for political subdivisions, respect for voters’ needs and interests, preservation of the partisan balance in the State’s congressional delegation, avoidance of contests between incumbents, and, to the extent possible while curing constitutional defects, preservation of the cores of prior districts.

Siding with the State, the Justice Department also acknowledged that "racial fairness" played a part in the legislature’s revision of the Twelfth District, but that partisan politics was the overriding factor.

Shape and Demographics: Insufficient Basis for Inference of Racial Motivation?

In its Brief on the Merits, the State of North Carolina sought to distinguish Miller v. Johnson, Bush v. Vera and Shaw v. Hunt (Shaw II), contending that the lower court did not base its finding of race-predominance on any direct evidence of legislative motivation, but ruled the district unconstitutional based on an inference it drew from the shape and racial demographics of the district, namely, that

- the district was unusually shaped,
it was the most geographically scattered of the state’s twelve congressional districts,

- its measures for dispersion and perimeter compactness were lower than the mean for the twelve districts in the plan,

- it included nearly all of the precincts with black population proportions of over 40% which lie between Charlotte and Greensboro, and

- when it splits cities and counties, it did so along racial lines.

According to the lower court, these facts sufficed to establish as a matter of law that the North Carolina legislature had disregarded traditional districting criteria and utilized race as the predominant factor in designing the Twelfth District. Moreover, the lower court chose not to credit the State’s evidence that partisan political preference rather than race was the predominant factor in the district’s design, because “the legislators excluded many heavily Democratic precincts from District 12, even though those precincts immediately border the District.”

**Summary Judgment On Race Predominance Issue**

The State of North Carolina challenged the lower court’s finding that race had been the predominant factor in the design of the redistricting plan and argued that summary judgment was accordingly improperly granted, citing five grounds:

1. **Burden of Proof Misplaced.** The burden of persuasion at trial for proving that race was the predominant factor in the design of the Twelfth District clearly rested with the Plaintiffs and should not have been placed on the State for summary judgment purposes,

2. **Insufficient Evidence of Race as Predominant Factor.** The legal evidentiary standard for race-predominance required more evidence than the Plaintiffs had presented to impugn the legislature’s considered choices, and the evidence here fell far short of what was held to be sufficient in other racial gerrymandering cases,

3. **Presumption of Good Faith and Honesty Disregarded.** The testimony of the legislators should have been given a presumption of good faith and truthfulness, as recognized in *Miller*, rather than being subjected to the lower court’s "unfounded second-guessing of their motives," whereas the lower court attributed unconstitutional motivations to the legislators and assumed the legislators had lied under oath in order to hide a racial agenda,

4. **Actual Election Results Used.** The legislature designed the plan, including the Twelfth District, to preserve the existing partisan balance in the state’s congressional delegation, using actual election results and not voter registration data to accomplish this purpose, and

5. **Exclusion of Democratic Majority Precincts.** The lower court relied on voter registration data and on "limited information about a handful of isolated precincts rather than carefully and fully examining the design of the district as a whole." The problem here was that the State was claiming it has drawn the boundaries of the Twelfth District to keep it a Democratic district, but 32 Democratic majority precincts bordering the district were not included in it. In other words, the lower court felt that since the State has bypassed 32 Democratic voter-registration majority precincts in drawing the Twelfth District, it was not drawn on the basis of political identification, but rather was drawn based on racial identification and with a predominantly racial purpose.
Evidence Bearing on Race Predominance

In an effort to place more distance between the facts of this case and *Miller, Bush* and *ShawII*, the State of North Carolina emphasized that there was nothing in the record to support the Plaintiffs’ assertion and the lower court’s finding that race was the predominant factor - the "overarching motivation" - for the design of the district.

First, the District was not the product of the Justice Department’s invalid "black maximization" policy, as in *Miller*.

Second, the State has made no concessions of racial motivations, as in *Miller* and *Bush*.

Third, there were no race-based admissions indicating legislative motive or intent as racial, and no indication of such racial intent in the sources and places one would expect to find it if indeed it existed, such as

- the plain language of the legislation,
- the committee hearings,
- the committee reports,
- the floor debates,
- the State’s Section 5 Submissions, and
- post-enactment statements by those who participated in the drafting or enactment of the plan that race was a motivating factor.

Affidavits from Legislators

With respect to this latter factor of statements from legislators, the State even introduced affidavits of legislators who headed the legislative committees that drew the 1997 Plan and shepherded it through the General Assembly, in which they addressed four basic points in an effort to establish that race was not the tail wagging the dog:

(1) the State’s lawful, non-racial motivation,

(2) their awareness of the constitutional limitations imposed by the Supreme Court’s decisions in *Shaw* and its progeny,

(3) their conscious efforts to ensure that race was not the predominant, or even a significant, factor in the design of any of the districts, and

(4) their overarching goal of preserving a six-to-six Democratic-Republican electoral balance in the context of a Democratic-controlled Senate and a Republican-dominated House.

*Cromartie* may provide the vehicle for the Supreme Court to further clarify the race-predominant standard. At a minimum, it appears that several of the Justices may be leaning toward giving the State of North Carolina its day in court rather than upholding summary judgment, particularly in view of
Justice O’Connor’s remark during oral argument that the State may have had "sufficient evidence to avoid summary judgment" being rendered against it.

**Davis v. Chiles**

A panel of the Eleventh Circuit in *Davis v. Chiles*, 139 F. 3d 1414(11th Cir. 1998), *cert. denied*, recently rejected a §2 challenge to two at-large judicial systems in the State of Florida, upholding the district court’s finding that the state’s interest in preserving its judicial election system outweighed its interest in a remedy for racially polarized voting in judicial elections. While the Eleventh Circuit disagreed with the District Court’s finding that a proposed modified subdistricting plan would involve unconstitutional racial gerrymandering and inject race into the state’s judicial administration, it nonetheless concluded, under *Nipper* and *SCLC*, that Florida’s interests in maintaining its constitution’s judicial election model and preserving linkage between its judges’ jurisdictions and electoral bases, considered together, outweigh [the plaintiff’s] interest in the adoption of her proposed remedy. As a result, we hold that [the plaintiff] has not proven a violation of §2.

**Addy v. Newton County, Mississippi**

In *Addy v. Newton County, Mississippi*, 2 F. Supp.2d 861 (S.D. Miss. 1997), a racial gerrymandering claim targeting a majority-minority Supervisor District 1 created for the purpose of remedying a §2 violation in accordance with a 1989 consent decree was rejected by the District Court following a non-jury trial. The evidence showed that the county’s 1989 and 1991 redistricting plans, as well as its earlier 1982 redistricting plan, had divided and split two major towns in the county among two or more supervisor districts. The plaintiffs charged that the plans had failed to respect defined communities of interest.

The District Court reasoned that it could not conclude that traditional districting principles has been subordinated to race. It rejected the plaintiffs’ contention that the county "needlessly split legitimate communities of interest in creating District 1," since (1) the prior plans dating back to 1982 did not indicate that the county saw these towns as having any "community of interest" relative to county government and (2) "there was substantial evidence presented that those persons comprising the black populations from each of the towns that were included in the county’s 1989 and 1991 plans as District 1 have a community of shared political interests which warranted their collective inclusion in a single district." Moreover, equalization of road mileage among the supervisor districts as a districting goal was "obviously not subordinated to racial considerations any more than was reasonably necessary," even though the challenged District 1 ended up with less road mileage than other districts, since adoption of the Plaintiffs’ proposed plan would have resulted in another district having even less road mileage than the remaining districts.

The Court also found that while the county may have to an extent sacrificed a degree of compactness by selecting a north-south district instead of an east-west majority-minority district location, "it did so
exclusively for political, not racial reasons." Citing *Clark v. Calhoun County*, the Court concluded that any deviation from a hypothetical court-drawn §2 district drawn to remedy the §2 violation was not "predominantly attributed to gerrymandering that was racially motivated and/or achieved by the use of race as a proxy," ...but was instead "a case of predominantly non-racial, political manipulations."

*Chen v. City of Houston*

*Chen v. City of Houston*, 9 F. Supp. 2d 745 (S.D. Tex. May 6, 1998), appeal pending, No. 98-20440 (5th Cir.) was a *Shaw-Miller-Bush* racial gerrymandering claim in which the district court addressed the concept of "functional compactness." In concluding that the City of Houston presented sufficient relevant and probative evidence that it had considered and balanced traditional districting principles in developing and adopting its 1997 redistricting plan, the District Court held that the City avoided summary judgment on the Plaintiffs’ Fourteenth and Fifteenth Amendment claims of racial gerrymandering.

**City Resolution on Functional Compactness**

In the City’s resolution adopting its redistricting plan, the City provided that the district should be compact and composed of contiguous territory, but that compactness and contiguity "involve a functional as well as a geographic dimension. Dysfunctional dimension may take on added weight in situations in which geographic compactness may not be possible in light of the fact that some areas are attached to the remainder of the city only by relatively long and narrow strips of land. Functional compactness and contiguity includes, but is not limited to, consideration of factors such as

- the availability of transportation and communication
- the existence of common social and economic interests
- the ability of citizens of a council district to relate to each other and to their representative on the council and the ability of the council member to relate effectively to his or her constituency
- the existence of shared interests." *Id.* at 756.

Citing the three-judge district court decision in *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), which was summarily affirmed by the U. S. Supreme Court, 515 U.S. 1170 (1995), the District Court in *Chen* stated at 756 n.10:

The court is persuaded...that the concept of functional compactness is an appropriate districting principle to be considered by legislators in developing districting plans in situations, such as presented in this case, in which true geographical compactness is not feasible because of the configuration of the area being districted.

**Legislative Immunity**
Unlike the legislators in *Cromartie* who readily submitted affidavits touching on the issue of racial motivation in drawing the revised redistricting plan for the State of North Carolina, the Houston City Council members in *Chen* were not as forthcoming. Plaintiffs in *Chen* sought to subpoena one of the City Council members, Wong, who in turn filed a motion to quash the subpoena and invoked her legislative immunity. The District Court rejected the Plaintiffs’ argument that the decision by this council member and other council members who voted in favor of the adopted redistricting plan to invoke legislative immunity was evidence that their testimony would have been detrimental to the city’s position and would have supported the plaintiffs’ position, stating:

> Legislative immunity exists to protect the workings of the legislature from intrusion by the judiciary.... Council member Wong’s decision to invoke legislative immunity can be considered evidence of her intent to protect the legislative process as easily as it can be considered evidence of detrimental testimony.

9 F. Supp.2d at 762.

**Race as Predominant Factor**

The District Court in *Chen* followed a line of reasoning that would have fit neatly within Judge Sam Ervin III’s dissent in *Cromartie*, concluding that while Plaintiffs had presented significant probative evidence that the City considered race an important factor in adopting its 1997 redistricting plan, they failed to satisfy their burden under *Shaw v. Hunt* to produce evidence raising the genuine issue of material fact regarding their claim that race was the predominant factor to the subordination of traditional districting principles. According to the Court, Plaintiffs had not presented evidence from which a reasonable jury could conclude that race was the criterion that in the city’s view could not be compromised, citing *Shaw v. Hunt*, 116 S.Ct. at 1901. 9 F. Supp.2d at 763. Thus, while race was without dispute a consideration, the City presented evidence to the Court that race was not the predominant factor, and the Court also had before it the City’s evidence that the 1997 plan was the result of careful consideration and balancing of traditional districting principles, and that "the district shapes and the lack of precise geographical compactness are an unavoidable result of the shape and lack of compactness of the city itself." *Id.* at 762.

*Chen v. City of Houston* has been fully briefed and is now before the Fifth Circuit, awaiting scheduling of oral argument. In the meantime, it is anticipated that the Supreme Court’s decision in *Cromartie* by the end of the present term will have a significant impact on the outcome of *Chen*.

**Theriot v. Parish of Jefferson**

In *Theriot v. Parish of Jefferson*, 966 F. Supp. 1435 (E.D. La. 1997), appeal pending (5th Cir.), the Court upheld Jefferson Parish’s Council redistricting plan and rejected a racial gerrymandering challenge brought by registered voters and a civic association. Plaintiffs predicated their claim on *Shaw v. Reno* and *Miller v. Johnson*, and focused their attack on the majority-minority District 3. Following a bench trial the District Court held that the parish redistricting plan was primarily motivated by political incumbency and traditional redistricting considerations that included one person/one-vote concerns, the geographic realities of the parish and communities of interest, and that Plaintiffs had failed to carry their burden of proving that racial considerations predominated in the
configuration of the challenged district, the configuration for which was driven primarily by politics. The Court in so ruling remarked that "while race, through the force of Section 2 of the Voting Rights Act, provided the genesis for the majority-minority district, it did not dictate the eventual boundaries of District 3." *Id.* at 1447. With respect to District 3, the Court rejected the Plaintiffs’ contention that the shape of this district was so bizarre as to be inexplicable on grounds other than race, finding that the district’s shape was not "so horrific as to demonstrate circumstantially that race motivated the form of the district." *Id.* The Court then took a verbal stroll through the zoo of racial gerrymander metaphors, noting that this district did not resemble "a sacred Mayan bird," it did not wind in a serpentine fashion, it was neither a "Rorschach ink - blot test" nor a "bug splattered on the windshield," did not have the kind of narrow land bridges that were condemned in *Miller* and did not have the obvious visual indices that were apparent in *Hays, Miller* and *Shaw*.

Further, the District Court in upholding the challenged parish redistricting plan noted that it had been specifically approved by the Fifth Circuit and precleared by the Attorney General under Section 5, prompting the Court to state that

The parties have not cited to the Court any reapportionment case where any court, applying *Shaw I* and its progeny, has overturned a districting scheme adopted pursuant to a United States Appellate Court decision.

Finally, the District Court held that in the exercise of its discretion it would apply *Shaw* and its progeny retroactively, discounting the parish defendants’ claim that such retroactive application of the construction of the Equal Protection Clause and the Voting Rights Act in *Shaw I* and its progeny would produce substantial and inequitable results and would expose the parish to the penalty and burden of redistricting in addition to the possible taxing of attorney’s fees and costs of the plaintiffs against it as its "remedy" for its previous compliance with the remedy ordered by this very court in the *East Jefferson Coalition* case. The Court reasoned that since it had already held that strict scrutiny did not apply in this case, "there has been no constitutional violation [and] no harm has resulted in reevaluating the situation in light of *Shaw I* and its progeny." *Id.* at 1449.

*Theriot* is now before the Fifth Circuit, with oral argument scheduled for March 1, 1999.

**Goosby v. Hempstead**

In *Goosby v. Hempstead*, 956 F. Supp. 326, 981 F. Supp. 751 (S.D. N.Y. 1997), the district court in this case held that the Town of Hempstead, New York’s at-large voting system used to elect members of the Town Board violated Section 2 of the Voting Rights Act, and directed the Board to submit a remedial plan that divided the town into six single-member voting districts. 956 F. Supp. at 356. The Town Board submitted two proposals, one of which was a two-district plan which contained one majority-minority district identical to the majority-minority district proposed by the Plaintiffs at trial, with the rest of the town being a single multi-member district for the election of the remaining five members of the Town Board. In the event, the Court were to reject the first proposed plan, the Town also submitted a second proposed plan which was the six district plan substantially similar to that proposed by the Plaintiffs at trial. The Court rejected the two-district plan as violative of the Fourteenth and Fifteenth Amendments to the United States Constitution and Section 2 of the Voting Rights Act, stating:

There is no view of race conscious districting that would fail to subject the two-district plan proposed here to strict scrutiny. I also conclude that even if a legislature’s effort to
remedy an actual violation of Section 2 entitles it to greater leeway in considering race, the two-district plan must be rejected as unconstitutional.

981 F. Supp. at 757.

Race as Only Factor: Out of India?

The Court reasoned that the sole basis for the extraordinary system embodied in the two-district plan, a formal political division of the people in the Town of Hempstead, was race, and that "there has been no attempt to justify it by reference to a single traditional districting principle." Id. at 759. According to the Court, strict scrutiny had to be applied to the two-district plan because race was not merely the predominant factor motivating the classification of voters, "it is the only factor." Id. at 759. The Court noted in passing that the Town Board does not even deny Plaintiff’s claims that the two-district plan evokes images of apartheid, and resembles India’s reserved seats for scheduled castes.

Instead, it places the blame for this on Plaintiffs: "If the plan smacks of apartheid, or resembles the ‘set aside’ seats of India, it is because District 1 was drawn along racial lines, at Plaintiffs’ insistence, and not because there is only one other district instead of five."

Divisive Proposal

After rejecting this "bizarre hybrid two-district electoral plan" proposed by the Town Board, the Court noted that

It is difficult to fathom why the Town Board would strain so hard to create such a divisive proposal. In any event, the unusual characteristics of the two-district plan defeat any claim that the proposed plan is narrowly tailored to remedy the Section 2 violation. I reject it as violative of the Fourteenth Amendment.

Remedying Violation Only to Extent Necessary

With regard to the City’s alternate six-district plan, the Court concluded that this did not require application of strict scrutiny, that the proposal created six reasonably compact single-member districts that were not bizarre in shape, that the proposal respected local community boundaries in accordance with traditional districting principles, and that although race naturally played a role in the crafting of the six-district plan, it was not the predominant factor, and even if the plan were subject to strict scrutiny, the Court concluded it was narrowly tailored to the goal of remedying the Section 2 violation created by the current at-large election system and that this proposal substantially addressed and in fact achieved the avowed purpose of remedying that violation but did not go beyond what was necessary to accomplish that result, citing Shaw v. Hunt, 116 S.Ct. at 1905, and Shaw v. Reno, 113 S.Ct. at 2831.

Perez v. Pasadena Independent School District

In Perez v. Pasadena Independent School District, 958 F. Supp. 1196 (S.D. Tex. 1997), the District Court rejected a Section 2 claim by Hispanic and Mexican-American citizens who were challenging Pasadena’s at-large voting system for electing members of the school board, primarily on the ground
that the Plaintiffs failed to establish the Gingles precondition of geographical compactness since the
Plaintiffs could not satisfy the first Gingles precondition using 1990 census data, they asked the Court
to determine the feasibility of creating a majority-minority district by using projected estimates for the
1995 to 1998 Hispanic voting age and citizen voting age population in the school district.

Hobson’s Choice Between Two Unsatisfactory Alternatives

The Court noted that it was not confined to U. S. census data in deciding whether a sufficiently large
and geographically compact majority-minority single member district could be created to satisfy the
first Gingles precondition, but that census figures are presumed accurate until proven otherwise, and
the Court had not been presented with the requisite clear, cogent and convincing evidence to override
this presumption of correctness of the prior decennial census, mandating that the federal census data
be used unless there is more reliable data. In this regard the Court refused to find that the projected
population growth estimated by the Plaintiffs was sufficiently reliable to overcome the presumption of
census accuracy, and that if the Plaintiffs’ estimate of the population trends was correct, then "the
Plaintiffs in this case may have a strong argument based on the 2000 census. However, using the 1990
census, the most reliable estimate available to this Court, Plaintiffs failed to meet Gingles I." 958 F.
Supp. at 1213. The Court characterized its decision as one involving "a Hobson’s choice between two
unsatisfactory alternatives.... The choice is between an outdated actual count and an estimated
projection based in part on that count and in part on assumptions and arithmetic." Id. at 1212. Since
the Plaintiffs could not establish that it was possible to create a single-member district in which the
majority of voting age citizens was Hispanic, based upon the 1990 census which was the most reliable
data before the Court, the Plaintiffs had not met the necessary preconditions set out in Thornburg v.
Gingles, requiring a finding in favor of the Defendants.

Cleveland County Association for Government vs. Cleveland County

In Cleveland County Association for Government by the People v. Cleveland County Board of
Commissioners, 142 F.3d 468 (D.C. Cir. 1998), a consent decree establishing a 7-member
redistricting plan for the Board of Commissioners of Cleveland County, North Carolina, came largely
as the result of a settlement of a voting rights suit initiated by the NAACP. The consent decree
incorporating a limited voting plan was challenged as race-based in violation of the Equal Protection
Clause of the 14th Amendment and violative of the 15th Amendment because it abridged the right of
plaintiffs to vote on account of their race by denying them the right to vote for the two appointed
board members. The electoral plan at issue increased the county board’s size from 5 to 7 members,
provided that voters would be permitted to cast only four votes for the 7 positions, and also provided
that until elections could be held to fill the two additional positions on the board, these positions were
to be filled by appointees "representative of the black community." After the district court’s consent
decree incorporating the settlement agreement was entered, an unincorporated association of voters in
the county and six individual plaintiffs sued the county board and the NAACP, challenging the
adoption of the limited voting plan as unconstitutional and contrary to state law. The district court
granted summary judgment in favor of the county board and the NAACP.

Race-Conscious Limited Voting Plan

At the district court level, the plaintiffs argued that Shaw I and Shaw II were controlling precedents
for the case, and contended that the Equal Protection Clause and controlling legal precedent required
the limited voting plan to be subject to strict scrutiny, and that to survive strict scrutiny it was required
to be narrowly tailored to serve a compelling governmental interest. The district court held that the
limited voting plan in the consent decree was not constitutionally impermissible and that "it does not
guarantee any seats on the Board of Commissioners to blacks, nor does it give black voters any more voting power than other voters." The district court reasoned that while the limited voting plan was race-conscious, "race-consciousness alone does not necessarily trigger strict scrutiny," and that so long as sound non-discriminatory principles were used to implement methods to afford fair representation to minorities in order to prevent racial minorities from being repeatedly outvoted, those methods did not trigger strict scrutiny. The district court also held that the consent decree "does not contemplate any racial classifications among voters. It does not separate voters or distinguish among voters or candidates along racial lines. It treats all voters in the county--black or white--in precisely the same way. Voting occurs countywide, with no separation of candidates or voters only geographic or otherwise, and each voter has the same number of votes. The fact that limited voting provides a greater opportunity to elect minority candidates more readily does not render this election feature constitutionally suspect. A limited voting plan is not an unusual voting procedure at odds with traditional principles of voting."

**Disregard of State Law**

The D.C. Circuit Court of Appeals reversed, holding that (1) the plaintiffs had standing and were not estopped from challenging the consent decree, (2) their challenge to the consent decree was not moot simply because 1998 campaigns for the two seats for which interim appointment provisions had been made had already begun, and (3) the county board’s adoption of the electoral plan as set forth in the consent decree had disregarded applicable state law, rendering the consent decree invalid as a matter of law. Specifically, the North Carolina Constitution reserved to the voters of the county the authority over the structure and method of election of county boards, and state law required any subsequent changes in the structure and election of any board to be made only according to a specifically prescribed statutory procedure initiated by the adoption of a resolution, and the calling of a special referendum on the question of the adoption of the alterations or changes. These statutorily mandated requirements were not followed. The D.C. Circuit also noted that these provisions of state law may be superseded if necessary to remedy a federal law violation or by an act of the state legislature, neither of which circumstances was present in this case. In this regard the Court noted that the consent decree specifically provided that no violation of the Voting Rights Act was to be inferred, and that in the absence of a violation of federal law necessitating a remedy barred by state law, "principles of federalism dictate that state law govern."

Notwithstanding the district court’s reluctance to "tinker" with the consent decree, which it viewed as constitutionally permissible and not as a race-based measure subject to strict scrutiny, the D.C. Circuit Court of Appeals invalidated the consent decree on state law grounds and did not reach the constitutional claims.

**Harvell v. Blytheville School District No. 5**

A racial gerrymandering challenge against a school district was rejected by the Eighth Circuit in *Harvell v. Blytheville School District No. 5*. Following dismissal of her §2 challenge to a school board’s at-large electoral scheme which required majority vote for election to office, the Eighth Circuit reversed and remanded, following which the district court against dismissed the complaint and the Eighth Circuit en banc found a §2 violation and remanded for entry of an appropriate remedial decree. The District Court then entered the remedial decree but refused to order a special election under the remedial "five-two plan," under which the school board would have seven members with five single-member districts and two at-large. While the Eighth Circuit in its earlier en banc opinion
had cautioned the district court to "steer clear of the type of racial gerrymandering proscribed in *Miller v. Johnson,*" the school board in this appeal alleged that race was the overriding criterion used in drawing the district boundaries of the eight school board districts. The Eighth Circuit held that the district court did not clearly err in making its findings that the districts created under this remedial plan had not been drawn in such a bizarre manner as to constitute impermissible racial gerrymandering and that the districts were generally compact in nature and followed natural boundaries, streets and neighborhoods. Moreover, even though the remedial plan clearly took race into account, it did not reject traditional, non-racial districting criteria, and the circumstances surrounding the drawing of the remedial plan were not akin to the situations in *Miller* and *Shaw v. Hunt,* where the Justice Department had exerted pressure to maximize majority-minority districts and that pressure had been the sole and predominant reason for drawing boundary lines as they were, nor was it similar to the situation in *Bush v. Vera* where race predominated over traditional districting criteria, even though mixed motives were involved. Finally, the Eighth Circuit concluded that this case was unlike *Abrams v. Johnson,* where the district court in devising a remedial plan had found that a second majority-minority district could not be drawn unless race was the only factor used in drawing the district lines.

**Stabler v. County of Thurston**

Another Eighth Circuit panel upheld a racial gerrymandering challenge to proposed remedial plans following a §2 violation in *Stabler v. County of Thurston,* 129 F.3d 1015 (8th Cir. 1997), cert. denied, 118 S. Ct. 1796 (1998). The District Court had earlier held that the districting plans for the election of members to the Board of Supervisors of Thurston County, Nebraska, violated Section 2 and ordered the county to create an additional majority-minority single-member district for supervisor elections; however, it upheld the districting plans for the school board and village board. Since the plaintiffs had failed to establish a §2 violation with respect to the latter and were unable to prove the *Gingles* precondition of geographical compactness with respect to the Native American population of that district, and since they could not prove that Native Americans were sufficiently large and geographically compact to constitute a majority in a single-member district that was regularly drawn and non-bizarrely shaped, there could be no §2 violation.

**Not Workable Remedies**

Proposed districting plans for the school board and village board offered by the plaintiffs were rejected by the district court because they were not "workable remedies" and also because of the proposed districts’ fragile composition. The Eighth Circuit affirmed, noting that under the rejected plans,

> if four or five Native Americans moved from the proposed majority-minority districts created for the school board and village board, respectively, and they were replaced by non-Native Americans, the majority-minority composition would be destroyed.... Therefore, plaintiffs failed to prove that Native Americans are geographically compact to form an effective voting majority in a single-member district as required under *Gingles.*

**Unconstitutional Racial Gerrymandering**

As an alternative basis for its affirmance, the Eighth Circuit held that lower court correctly found the proposed plans constituted unconstitutional racial gerrymandering violative of the Equal Protection Clause and that "[a]ny remedy drawn in order to correct a §2 violation should steer clear of the type of racial gerrymandering proscribed in *Miller.*"
Because the plaintiffs had failed to establish a §2 violation in that they could not prove the Native American population was sufficiently large and geographically compact to constitute an effective majority in a single-member district, nor could they prove that Native Americans were politically cohesive and that whites voted as a bloc to defeat Native Americans’ preferred candidates, the proposed gerrymandered districts cannot survive strict scrutiny."

Cumulative Voting and Other Remedial Alternatives: McCoy v. Chicago Heights

Many of the cases discussed above point out the frustrations that confront the federal judiciary in its efforts to navigate without a rudder through the morass of §2 precedent. Indeed, federal judges rank voting rights litigation very high on the scale of complexity, difficulty and undesirability. Decisions on liability and remedy, while ostensibly based on a frank assessment of the political landscape of a particular jurisdiction, oftentimes are made with little or no guidance on how to balance the Gingles preconditions, much less the "totality of circumstances" or the myriad considerations that bear on equal electoral access and participation in the political process. In the remedy context, some district judges have looked beyond single-member districts to cumulative voting and other alternative electoral systems to avoid the "paradox of fashioning a voting rights remedy based on districts," most recently in McCoy v. Chicago Heights, 1998 WL 299825 (N.D. Ill. June 3, 1998).

After finding the at-large electoral system for the City and its Park District violated Section 2 of the Voting Rights Act, the District Court requested remedy proposals from the parties, rejected them and then ordered into effect a 7-member structure for conducting at-large elections using cumulative voting. In fashioning this remedy and rejecting the proposals of the parties, the court acknowledged that it was a "complicated undertaking" to draw district boundary lines in such a way that would completely remedy the §2 violation while not making race a predominant factor and thereby running the risk of a racial gerrymandering challenge. The court drew on precedent from District Judge Myron Thompson’s Dillard consent decree cases, the since-vacated cumulative voting remedy decision of Senior District Judge Joseph Young in Cane v. Worcester County, Maryland, and the scholarly writings of Professor Lani Guinier among others. Under this cumulative voting system, seven aldermen and seven Park District Board members would be elected at large in this manner:

Each voter would be allocated seven votes to use as he or she chooses. Thus, the voter could use all seven votes to elect one candidate, or distribute the votes among the several candidates. The seven candidates with the highest number of votes would be elected to office.

CV Advantages

The advantages to this cumulative voting system, according to the court, were many.

(1) First, it lets voters "draw their own jurisdictional boundaries" instead of "using race as a proxy for voting preference".

(2) Second, not just racial minorities but "all minority groups" have the potential to benefit from this system, which lets voters aggregate or "plump up" their votes to reflect the intensity of their preferences, form coalitions cutting across racial lines, and "find confidence-building measures that build trust and overcome antagonism."

(3) Third, minority voters are able to elect candidates of choice "without creating race-conscious lines that would be subject to constitutional challenge."
Fourth, this system "does not compartmentalize voters according to their race."

Finally, this modified form of "minority representation plan" as the court described it was further justified on the basis of Illinois’ traditional voting principles in corporate law, the current use of cumulative voting as a firmly established statutory form of aldermanic government, as well as historical legislative enactments of cumulative voting systems dating back to post-Civil War efforts to assure that minorities were represented in the legislature, although such legislation was repealed in 1980.

Deference to Policy Choices

The fate of 
McCoy
 may turn on whether due deference was given to the legitimate interests and policy choices underlying the local governing body’s desired form of government. Failure to accord such deference was held an abuse of discretion by the Fourth Circuit when the district court ordered a cumulative voting system to be implemented in Cane v. Worcester County, supra. With no federal court mandate for cumulative voting having survived appellate scrutiny, this unique remedy decision may nonetheless survive the appellate process if it is ultimately found to be a narrowly tailored judicial response that completely cures the §2 violation while not intruding upon local government policy "any more than necessary."

Moon v. Meadows

Direct and circumstantial evidence of race-predominance was considered in racial gerrymandering challenges to congressional districts in cases arising in Virginia and New York. In Moon v. Meadows, a three-judge court held that Virginia’s Third Congressional District was unconstitutionally racially gerrymandered. The district in its present configuration was "an amalgamation principally of African-American citizens contained within the legislatively determined boundaries for the obvious purpose of establishing a safe black district." With overwhelming evidence that creation of a "safe black district" predominated in the drawing of the boundaries of this district, the court described how the congressional district relied on racial classifications and subordinated traditional districting principles:

[T]he district...slices through the City of Hopewell, including only those areas where blacks predominate, before terminating some 30 miles away in the City of Petersburg, which it also divides racially. To the east, the District takes in part of rural southeastern Henrico County before reaching the more built up and heavily black eastern suburbs of Richmond, racially dividing the capital city nearly in half before terminating in a small black neighborhood in northern Henrico County.

Strict Scrutiny Without Substance: Dillard v. City of Greensboro

In Dillard v. City of Greensboro, the City of Greensboro pursuant to a 1987 consent decree had conceded that its at-large system violated §2 of the Voting Rights Act, and the District Court in response to a §2 challenge to the city’s at-large system issued an injunction requiring that the city use the §2 plaintiffs’ proposed redistricting plan. The Eleventh Circuit vacated the injunction and remanded the case. The District Court then drew on current racial gerrymandering precedent and
required certain legal standards and criteria to be used by a special master in drawing up a districting plan for the city, including the following constitutional constraints that the Court felt would "completely and with certitude cure the §2 violation."

The District Court prescribed guidelines for the Special Master to follow in order to assure faithful adherence to the race-predominant standard of *Miller-Shaw-Bush*, with a three-stage model "in an effort to comply with both the letter and spirit of recent holdings from the Supreme Court":

**Stage One:** First, the special master must try to fashion a redistricting plan that fully and completely addresses the §2 violation solely by applying "race-neutral traditional districting principles, and electoral districts must comply with the one-person-one-vote principal of the equal protection clause, with not more than a total ten percent population variation.

**Stage Two:** Second, if the special master finds that race must be employed as a factor in fashioning a redistricting plan to cure the §2 violation, he then has to go to the next stage, under which race may be employed, but not as the dominant factor, and race-neutral traditional districting considerations must predominate over racial ones.

**Stage Three:** This third stage is reached only if race must be considered and given dominant consideration in order to cure the §2 violation. The plan thus fashioned must be narrowly tailored to achieve a compelling state interest in order to survive strict scrutiny.

After constructing definitions of "race neutral" and "race predominant", the District Court turned to "strict scrutiny," acknowledging that "at first blush, it might appear that the strict scrutiny concept is without real substance," and that with the exception of §2's compactness requirement "traditional race-neutral principles can be subordinated or even sacrificed in favor of race considerations to the extent necessary to remedy the §2 violation."

Armed with these guidelines and multi-stage procedural mandate, the special master was then called upon to fashion a districting plan for the City of Greensboro that would violate neither §2 nor the Fourteenth Amendment despite its central feature of an intentionally created majority-minority district entailing an express use of racial classifications and created because of racial demographics. What he returned with and what the District Court approved and ordered to be implemented as a court-drawn plan that satisfied the requirements of §2 and the Equal Protection Clause and also met with full approval of all parties, was a 5-district plan containing three majority-minority single-member districts with black voting age populations of 79.8%, 66.4% and 76.4%, respectively.

**A Financial Footnote: Pope v. Hunt**

The 4th Circuit upheld a Section 1988 fee award to successful plaintiffs, in *Pope v. Hunt*, ____ F.3d. ____ (4th Cir. August 24, 1998). The Plaintiffs were permissive intervenors in a racial gerrymandering challenge to North Carolina's First and Twelfth Districts, which included *Shaw v. Reno* and *Shaw v. Hunt*. The fee award was upheld despite the Plaintiffs’ lack of standing under *Hays* since they played a significant role in the litigation. The Court held that the absence of *Hays* standing did not deprive the original intervenors-plaintiffs of their right to qualify for Section 1988 fees as prevailing parties, interpreting *SEC v. U. S. Realty*.

**Conclusion**
Shaw has begun the process, alluded to by Justice Clarence Thomas, of leading us back to a more balanced enforcement of the Voting Rights Act's guarantee of equal electoral opportunity. Equal opportunity means a level playing field. And equal electoral opportunity means equal access and participation. It does not mean a guarantee of electoral success, a stacked deck, or a "safe" district. Nor does it exempt any group from the obligation, in the rough and tumble of politics, to "pull, haul and trade" in the marketplace of political ideas.

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ENDNOTES