THE IMPACT OF SHAW V. RENO ON SECTION 2 LITIGATION

By

Benjamin E. Griffith

GRIFFITH & GRIFFITH, Attorneys at Law

123 South Court Street, P. O. Drawer 1680, Cleveland, MS 38732

Phone No. (601) 843-6100, FAX No. (601) 843-8153

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We have involved the federal courts, and indeed the Nation, in the enterprise of systematically dividing the country into electoral districts along racial lines - an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of "political apartheid."

Holder v. Hall, (Thomas, J., concurring in the judgment).

Introduction

As the French put it, love takes time, but time takes love. Our national love affair with racial politics and affirmative action redistricting has soured, and the more extreme forms of race-conscious electoral districts are now constitutionally suspect under an analytical framework established by the United States Supreme Court in Shaw v. Reno.

Liability under §2 of the Voting Rights Act is based in part on the ability to create a "geographically compact" electoral district in which a politically cohesive minority group, otherwise excluded from the political processes by white racial bloc voting and other barriers to access, can elect the representative of its choice. Many jurisdictions, concerned about exposure to costly and withering §2 litigation, perhaps motivated by a desire to remedy perceived effects of historical discrimination, have crafted majority-minority districts during the decade following the 1982 Voting Rights Act Amendments. In some instances, the newly created majority-minority districts, whether the result of a remedial order after §2 liability was established, or the result of voluntary affirmative efforts to avoid §2 liability, or the product of efforts to win §5 preclearance for covered jurisdictions, have simply gone too far. Many of these jurisdictions are in the southern states, which have labored under the long shadow of the Voting Rights Act of 1965 and are now "fertile ground" for equal protection claims based on Shaw. Courts have found the leash which §2 and §5 necessarily place on race-based remedial practices in the voting sphere.

In the wake of Shaw v. Reno, the fate of many majority-minority districts created after the 1990 census hangs in the balance, amidst accusations of racial gerrymandering, minority vote maximization agendas and unjustified race-based redistricting. Three-judge courts in Louisiana, Texas and Georgia have invalidated "safe seats" created for minority interests, while a majority of the Shaw court on remand has upheld the constitutionality of districts including one described as resembling a "bug splattered on a windshield." In the wake of this "enigmatic decision" which some say "has created a cottage industry for its critics," we are witnessing a fascinating and as-yet unsettled interplay between liability and remedy issues in litigation under §2 of the Voting Rights Act, as amended by the 1982 Voting Rights Act Amendments.

Shaw v. Reno is having an impact upon §2 litigation. For example, when a court in a §2 case is presented by the Plaintiffs with an illustrative plan as a legally adequate demonstration that the Gingles precondition of "geographical compactness" could be met, it can ill afford to give only lip service to the "geographical compactness" requirement. If a jurisdiction's black population is simply too dispersed to permit creation of a geographically compact majority-black district, and if the proposed illustrative plan departs from traditional districting principles and is explainable only as an effort to segregate voters on the basis of explicit racial classifications, there can be no effective remedy and thus no §2 violation.

In this Litigation and Risk Management Workshop, I will deal with current legal trends in this controversial field of litigation, novel remedial alternatives which are being considered by some courts in an effort to avoid the consequences of racial gerrymandering, and recent U. S. Supreme Court and lower court developments, variously described as "devastating" and "intellectual bombshells".
**Attainable Goals of the Voting Rights Act**

Lyndon Johnson in 1965 called for the "Goddamnedest, toughest, voting rights bill" that his staff could devise. Described as "radical" and "unusual", the Act had as its goals racial fairness, equal access to the political and electoral process, and unimpeded opportunity on the part of minority citizens to participate in that process. Subsequent amendments in 1970, 1975 and 1982 purported to broaden the reach of the Act, while not intending to deviate from these goals. As Professor Lani Guinier has pointed out, however, Congress' concern in 1982 openly shifted from simply getting blacks the ability to register and vote to providing blacks a realistic opportunity to elect candidates of their choice.

In 1982 when Congress amended the Voting Rights Act of 1965, one of the most controversial amendments and the subject of the most heated debates was §2.

Section 2(a) of the Voting Rights Act prohibits any "voting qualification or prerequisite to voting or standard, practice or procedure...which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. §1973(a). Section 2(b) provides the operative definition of vote dilution:

A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered: provided, that nothing in this section establishes a right to have members of protected class elected in numbers equal to their proportion in the population.

**The Gingles Threshold Test**

In 1986, the United States Supreme Court established what has become the essential framework for proving vote dilution claims, initially applied to at-large, multi-member districts and later extended to single-member districts. In *Thornburg v. Gingles*, the Supreme Court set forth the "necessary preconditions" for plaintiffs to prevail in a vote dilution action under §2:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district....

Second, the minority group must be able to show that it is politically cohesive....

Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed,...usually to defeat the minority's preferred candidate.

The Court in *Gingles* recognized that there must be some causal connection between the challenged electoral practice and the alleged discrimination that results in a denial or abridgement of the right to vote, stating:

The essence of a Section 2 claim is that a certain electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.

Failure to establish any of these three "necessary preconditions" is fatal to a plaintiff's §2 claim.

**Senate Report Factors**

As the Supreme Court noted in *Gingles*, the Senate Judiciary Report which accompanied the 1982 Voting Rights Act Amendments elaborated on the nature of §2 violations and the proof required to establish those violations, specifying certain "objective factors" and enhancing factors which typically may be relevant to a §2 claim.

These fundamental principles were reaffirmed in *Growe v. Emison*. Justice Scalia spoke for a unanimous Court when he described the interrelationship between the *Gingles* preconditions:
The "geographically compact majority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district.... And, the "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population.... Unless these points are established, there neither has been a wrong nor can be a remedy.

**Shaw v. Reno**

In *Shaw v. Reno*, 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.

**Lower Court Proceedings**

Georgia's General Assembly, at the Attorney General's urging, enacted a revised reapportionment plan that created a second majority-minority district after a previous plan had drawn a §5 objection.

The Attorney General precleared this revised plan after which a group of five white registered voters filed an action for declaratory and injunctive relief, charging that the state had created an unconstitutional racial gerrymander, by deliberately creating

> two Congressional districts in which a majority of black voters was concentrated arbitrarily--without regard to any other considerations, such as compactness, contiguousness, geographical boundaries or political subdivisions [with] the purpose [to] create Congressional districts along racial lines [and] to assure the election of two black representatives to Congress.

The lower court dismissed the action against the state under Rule 12(b)(6), finding that there was no support for the contention that race-based districting is unconstitutional.

On June 28, 1993, the United States Supreme Court handed down its 5-4 decision in *Shaw v. Reno*. The reaction from various civil rights groups, the public and commentators was immediate and overwhelming. Even though this case was not brought under the Voting Rights Act, it has a clear impact on voting rights.

**Appearances Do Matter**

After tracing the history of vote dilution claims, the Court focused on the Plaintiffs-Appellants' claim that the State of North Carolina had engaged in unconstitutional racial gerrymandering:

> That argument strikes a powerful historical chord: It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past.

Drawing upon *Gomillion v. Lightfoot*, wherein a "tortured municipal boundary line was drawn to exclude black voters," under a plan considered so highly irregular that on its face it could not rationally be understood as anything other than an effort to segregate voters on the basis of race, the Court emphasized:

> [R]eapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.

**Traditional Districting Principles**

Throughout the majority opinion in *Shaw v. Reno*, the Court emphasized the need to adhere to traditional districting principles when engaged in the redistricting process, holding that the Plaintiffs-Appellants stated a claim upon which relief could be granted under the Equal Protection Clause where they objected to redistricting legislation.
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.

**Shaw on Remand: Shaw v. Hunt**

On remand to the three-judge United States District Court for the Eastern District of North Carolina, Raleigh Division, a majority of that court held that the North Carolina Congressional Redistricting Plan, while admittedly a racial gerrymander subject to strict scrutiny under Shaw, passed constitutional muster under that standard "because it is narrowly tailored to further the State's compelling interest in complying with the Voting Rights Act."

Turning its back upon the United States Supreme Court's condemnation of racial balkanization and political apartheid, the Shaw remand majority appeared to disregard the benchmark of traditional districting principles. It ignored the interrelationship between community, geography and effective representative government, glossing over the particularized dangers of racial classifications with respect to voting. Not only did the Shaw remand majority reinforce impermissible racial stereotypes, it gave judicial recognition to communities of interest based upon race and race alone. Its decision literally flies in the face of Shaw v. Reno, and is based on incorrect reasoning that the only factors pertaining to the shape and size of a district that bear upon "narrow tailoring" are constitutional limits, compliance with the one person-one vote principle and non-dilution. On the contrary, the United States Supreme Court in Shaw v. Reno emphasized the requirement that a racially constructed district must satisfy other neutral districting criteria, a point ignored by the Shaw remand majority. The United States Supreme Court observed in Shaw v. Reno that "a jurisdiction may deliberately create a majority-minority district to remedy past discrimination, and...such affirmative action is constitutionally permissible beyond the Voting Rights Act's framework, if the jurisdiction employs sound redistricting principles and the racial group's residential patterns permitted the creation of such districts." Under the reasoning of the Shaw remand majority, a bizarrely-shaped district that is not grounded in traditional districting criteria may nevertheless be "narrowly tailored" even though it could never pass the "geographical" prong of the Gingles test. As another court has remarked, the Shaw remand majority's reasoning for discounting the significance of compactness and contiguity for "narrow tailoring" amounts to "an expression of judicial restraint that is, frankly, hard to swallow."

**Concerns About Racial Gerrymandering**

Concerns have been expressed over the present enforcement policy of the Voting Section of the Civil Rights Division, as well as certain strained judicial constructions of §2 of the Voting Rights Act which appear inconsistent with the fundamental objectives of the Act. One of the first and perhaps the most eloquent shots across the bow came from Chief Judge Garnett Thomas Eisele in his dissenting opinion in the case which invalidated Arkansas' 1981 apportionment plan.

The Section 2 law in this "gerrymandering" (districting or redistricting) area developed as a negative proscription. The law prohibits "fragmenting" or "packing" cohesive political groups of black citizens with the effect of diluting their voting power. The law did not develop in the context of affirmative obligations to reach out and include larger numbers of black citizens in order to enhance black political power.

Drawing heavily upon Professor Abigail Thernstrom's Whose Votes Count?, Chief Judge Eisele concluded:

The courts have run amuck. They have ignored the clear language of Section 2 opting instead to search for some mandate in perceived legislative intent, improperly converting Section 2 into a mandate for proportional representation--directly contrary to Congressional intent. Apparently, there is no one willing to say, "No, stop!" or even, "At least, think before you proceed down this path."

A growing chorus of civil rights advocates, elected officials and concerned citizens are calling for a return of the Voting Rights Act to its original goals of fair access and opportunity, and one of the strongest voices advocating this return is Justice Clarence Thomas. In his 59-page concurring opinion in Holder v. Hall, infra, Justice Thomas surveyed 2-1/2 decades of voting rights case law and legislative action, summarizing the "current state of our understanding of the Voting Rights Act" by focusing upon the destructive effects of racial gerrymandering in vote dilution cases and race-drenched alternatives to racial gerrymandering as cumulative voting suggested by such far-left advocates as Professors Lani Guinier and Pamela Karlan and the Center for Voting and Democracy.

**Holder v. Hall**

In what has been described as a "seismic" intellectual bombshell in an otherwise yawner of a voting rights case, Justice Clarence Thomas has penned a controversial and far-reaching concurring opinion in Holder v. Hall, decided June 30,
1994. The majority opinion authored by Justice Kennedy held that the size of a governing authority is not subject to a §2 challenge, in this case a single-Commissioner form of government, since "a benchmark does not exist by definition in §2 dilution cases."

In a separate opinion, concurring in the judgment that the size of a governing body cannot be attacked under §2, Justice Thomas, joined by Justice Scalia, described the "destructive effects of our current penchant for majority/minority districts." Citing Shaw v. Reno, Justice Thomas decided it was time to tell the Emperor he had no clothes:

In response to judicial decisions and promptings of the Justice Department, the States themselves, in an attempt to avoid costly and disruptive Voting Rights Act litigation, have begun to gerrymander electoral districts according to race. That 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.

...As actions such as that brought in Shaw v. Reno...have already started to show, what might euphemistically be termed the benign "creation of majority-minority single-member districts to enhance the opportunity of minority groups to elect representatives of their choice" might also and more truthfully be termed "racial gerrymandered."

**Destructive Effects of Racially Gerrymandered Majority/Minority Districts**

Calling for a systematic reassessment of the Court's interpretation of §2, Justice Thomas castigated the Supreme Court for devising "a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success." He suggested that the high court had perhaps unwittingly taken part in the "racial balkanization of the nation".

In a pithy editorial on the Thomas concurrence, Paul A. Gigot recently noted in The Wall Street Journal's Potomac Watch column:

Supposedly a simple-minded conservative, Justice Thomas pulls a trick on liberals by reading them. He buttresses his argument in Holder with quotes from such liberal icons as former Justices Felix Frankfurter, John Harlan and even William O. Douglas... Justice Thomas is especially sly in quoting his old Yale Law schoolmate, Lani Guinier, who was appointed and then dumped by Mr. Clinton last year. Justice Thomas and she share some of the same criticism of today's racial gerrymanders, though her solution is to pursue even more race-drenched remedies.

Racial gerrymandering that results in a congressional district resembling a "bug splattered on a windshield" or a "Zorro" district that looks like Johnny Appleseed designed it or "a crazy-quilt of districts that more closely resembles a Modigliani painting than the work of public-spirited representatives," should certainly prompt strict scrutiny, "because it presumes a community of interest based on race, and in that way 'stereotypes' voters."

It reinforces the perception 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.

**DeGrandy: Rejection of the Maximization Principle**

On June 30, 1994, the United States Supreme Court decided Johnson v. DeGrandy, holding that

no violation of §2 can be found here, where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population.

Justice Souter speaking for the majority rejected the argument that a jurisdiction's failure to maximize minority voting strength wherever possible would subject it to a §2 attack. The District Court had found that the three Gingles preconditions of geographical compactness, white racial bloc voting and minority political cohesion had been satisfied and that the minority, in this case Hispanics, had suffered historically from official discrimination, "the social, economic and political effects of which they generally continue to feel." Justice Souter disagreed:
Without more, and on the apparent assumption that what could have been done to create additional hispanic supermajority districts should have been done, the District Court found a violation of §2. But the assumption was erroneous, and more is required, as a review of \textit{Gingles} will show.

In a broad yet characteristically subtle attack on the race-conscious efforts to create majority-minority districts as remedial devices, Justice Souter concluded:

If the lesson of \textit{Gingles} is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

\textbf{Hays v. State of Louisiana (Hays I)}

In \textit{Hays I}, 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:

\begin{quote}
In simplest form, the answer--largely supplied by the United States Supreme Court's opinion in \textit{Shaw v. Reno}, rendered during the pendency of this case--is "Yes, but only if the state does it right."
\end{quote}

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 \textit{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...." \textit{Shaw} primarily deals with the problem of proving racial gerrymandering indirectly or inferentially. Racial gerrymandering--says the Court in \textit{Shaw}--can be inferred when districts are so bizarrely shaped that they presumptively bespeak an impermissible purpose.

But racial gerrymandering may--\textit{a fortiori}--also be proved by \textit{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 \textit{Shaw}. The Court recognized in \textit{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 \textit{direct} trial evidence establishes racial classification, as it did here.

\textbf{Physical Appearance}

Colorful judicial prose describing the highly irregular appearance of Congressional District 4 matched the linguistic zingers in \textit{Shaw}:

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.

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

With regard to compactness, the Court in Hays I remarked that Congressional District 4 "snakes narrowly across
Louisiana soil from end to end for more than 600 miles."

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.

According to the Court, Congressional District 4 only hypertechnically and thus cynically was convicted 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.

With regard to the criterion of respect for political subdivisions, the Court found 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."

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

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 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 \textit{sine qua non} of preclearance.

**Strict Scrutiny and Compelling State Interests**

The Court in \textit{Hays I} 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.

**\textit{Hays II}**

During the pendency of the appeal from the judgment of the three-judge court to the United States Supreme Court, the Louisiana Legislature repealed the legislation which had been declared violative of the Equal Protection Clause under Shaw and enacted Act 1 in a special session, creating a new redistricting plan for the State's Congressional districts.

On June 27, 1994, the United States Supreme Court vacated the judgment in \textit{Hays I} and remanded to the three-judge district court for further consideration in light of the Louisiana Legislature's repeal of Act 42 and its creation of a new districting scheme in Act 1.

After a two-day trial, the three-judge District Court again struck down the Louisiana Redistricting Plan as an unconstitutional racial gerrymander and adopted by reference its opinion in \textit{Hays I}.

**\textit{Vera v. Richards}**

In \textit{Vera v. Richards}, a three-judge District Court invalidated Congressional Districts 18, 29 and 30 of the Texas Congressional Redistricting Plan, created by the Texas Legislature and given §5 preclearance from the Attorney General. In the 93-page opinion which included sharp criticism of the \textit{Shaw v. Hunt} remand majority opinion, the Court speaking through Fifth Circuit Judge Edith H. Jones set the tone for this significant ruling:

> The Voting Rights Act of 1965 at one blow demolished the obvious devices that southern states had used to disenfranchise African-American voters for decades. The Act marked the full maturity in American political life of the Founders' idea that "all men are created equal" and the Reverend Martin Luther King's hope that his children would be judged by the content of their character, not the color of their skin. The meaning of equality—as also enshrined in the Fourteenth Amendment's guarantee of "equal protection of the laws"—is the subject of this lawsuit.

Citing \textit{Shaw v. Reno}, the Court in \textit{Vera} began with the principle that "intentional racial discrimination is offensive to the Equal Protection Clause when it occurs as part of legislative redistricting."

It then turned to the essential holding of Shaw that race-conscious redistricting legislation is unconstitutional if it 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."
Recognition of a Racial Gerrymander

One of the illustrations given in Shaw, noted by Judge Jones in the Vera opinion, of how to recognize a racial gerrymander would be a case in which the governmental entity "concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions." Another illustration for recognizing a racial gerrymander was described as a "dispersed minority" hypothetical example, which "likewise condemns districts that bring together a dispersed minority population without regard for traditional districting criteria."

Dangers of Racial Gerrymandering

Quoting from Shaw v. Reno, Judge Jones eloquently described the constitutional offense created by such racial gerrymandering, the particularized dangers of which are antithetical to our system of representative democracy.

[D]istricts that have no logical boundaries except those dictated by race are perceived by voters within and without the districts as existing solely to afford racial representation.

Turning to the Texas Congressional Redistricting Plan, the Court in Vera observed that the borders of Congressional Districts 18, 29 and 30 "change from block to block, from one side of the street to the other, and traverse streets, bodies of water and commercially developed areas in seemingly arbitrary fashion until one recognizes that those corridors connect minority populations." Maps of these three districts appeared in an appendix to the Court's opinion.

Burden of Proof

Faced with the Texas Legislature's micro-manipulation of the racial composition of Texas Congressional Districts in 1991, the Court in Vera addressed the elements of proof requiring to establish an unconstitutional racial gerrymander under Shaw v. Reno. The Court noted that a Shaw claim must be proved by the method typical of equal protection analysis. Once the Plaintiffs present evidence in support of their racial gerrymandering claim as outlined in Shaw, the Defendants then have the burden to produce evidence that any districts found to be racially gerrymandered were dictated by a compelling state interest and are narrowly tailored to further that interest. Part of the Defendant/State's burden of production requires it to demonstrate that the appearance of the racially gerrymandered districts, as well as their existence, were narrowly tailored. The Court in Vera at this point was in full accord with Hays I and Hays II, but parted company with the Shaw Court remand majority.

Race-Based Community of Interest

The three-judge court in Vera rejected the argument that there was a "community of interest among African-American voters that should be regarded as a legitimate criterion for legislative districting." Judge Jones reasoned:

Because a large part of this argument is based upon similarities grounded in race, it is particularly vulnerable to the Fourteenth Amendment's proscription of racial classification in our society. Further, the intervenor's argument will not support the creation of districts that have no basis in traditional neutral districting criteria. To permit such districts would fly in the face of Shaw.

The Court concluded that the Plaintiffs carried their burden of proving Congressional District 30 was a racial gerrymander, the contours of which were unexplainable in terms other than race.

They have no integrity in terms of traditional, neutral redistricting criteria. Neighborhoods, VTD's (voter tabulation districts), and individual streets were split to achieve the district's racial mix. The district was carefully gerrymandered on a racial basis to achieve a certain number of African-American voters; in order to protect incumbents, other African-American voters were deliberately fenced out of District 30 and placed in other districts that are equally "untraditional."

The Court also rejected as "troubling" the argument that African-Americans and Hispanics in Harris County, Texas, belong to identifiable communities of interest that may be and were recognized for redistricting purposes.

Although the issue of minority cohesion is relevant to a Section 2 vote dilution claim, it is another matter entirely...for a racial or ethnic group to claim an award of representation based on race or ethnicity apart from traditional districting criteria.... Shaw does not permit districting to be based on race or ethnicity in conditions such as these, which violate traditional districting criteria.
Compactness As Relative Measure

The Court in *Vera* also rejected the State Defendants' contention that Districts 18 and 29 were sufficiently compact to pass muster because each included residents of similar socioeconomic background and lie fully within Harris County. Compactness, according to the Court, must be a relative measure for districts, and in a major urban county "it makes little sense if considered in terms of geographic sprawl alone, but it seems far more probative when viewed in terms of a city's or county's neighborhoods, geographical subdivisions, and business location. Adjusting the sense of compactness to the complexity and population density of the urban landscape demonstrates that Districts 18 and 29 are not compact at all. Their contorted shapes are the antithesis of compactness."

Regarding the allocation of the burden of production under *Shaw v. Reno*, the Court in *Vera* said that if the Defendants seek to defend a racial gerrymander by claiming that compliance with the Voting Rights Act and Voting Rights Act concerns are an "explanation" that justifies bizarrely-drawn racial districts,

> Plaintiffs must prove as part of their case that the districts did not comply with the Voting Rights Act. Because...the Plaintiffs' burden of production extends solely to the race-consciousness of the districts combined with the disregard of traditional districting criteria, then the state has the burden of producing evidence of narrowly tailoring to achieve its compelling state interest.

**DOJ-Endorsed Affirmative Action Redistricting**

The United States as *amicus curiae* in *Vera v. Richards*, *supra*, contended that the State of Texas not only had a compelling interest in complying with the Voting Rights Act but that Congressional Districts 18, 29 and 30 were "narrowly tailored" to further that interest. Relying upon *Richmond v. J. A. Croson*, the United States contended as a basis for minority districts--as to which no evidence was presented--that a jurisdiction might enact "affirmative action redistricting" if it had a compelling interest in eradicating particular instances of racial inequality. The three-judge court in *Vera* refused to consider this contention.

**Reasonably Necessary Avoidance of Retrogression**

The Court in *Vera* found it was not obvious that the State of Texas had justifiable feared potential liability under §2 or §5 of the Voting Rights Act if it failed to protect District 18 and set aside three new districts--Districts 28, 29 and 30--for minority Congressmen.

The Court likewise rejected the Defendants' "ritualistic invocation of Section 2" as simply proving too much:

> The possibility that some §2 claim might have prevailed against the state if H.B. 1 had not contained more minority districts than the base plan cannot justify these non-compact, non-contiguous districts.

"Narrowly Tailored" Inquiry

The Court in *Vera* disagreed with the *Shaw* majority remand decision which said only factors pertaining to the shape and size of the district that bear on narrow tailoring are constitutional limits, compliance with the one person/one vote principle and non-dilution. To these limits "must be added *Shaw's* emphasis on the requirement that a racially constructed district must satisfy other neutral districting criteria."

Judge Edith Jones criticized the *Shaw* remand majority's reasoning, under which "a bizarrely-shaped district that has no grounding in traditional districting criteria was held 'narrowly tailored,' although it is inconceivable that the same district could have been authorized under Section 2 and the first prong of the *Gingles* test." According to Judge Jones, the *Shaw* remand majority's reasons for discounting the significance of compactness and contiguity for narrow tailoring included denigrating the importance of those factors and issuing "an expression of judicial restraint that is, frankly, hard to swallow."

Again, distancing itself from the *Shaw* remand majority opinion, the Court in *Vera* concluded that "where obvious alternatives to a racially offensive districting scheme exists, the bizarre districts are not narrowly tailored."

**Exclusive Racial Identification**

Concluding that Districts 18, 29 and 30, as enacted in H.B. 1, were unconstitutional under the Fourteenth Amendment, the Court said that if these districts
tortuously constructed block-by-block and from one side of the street to another across entire counties to satisfy the desired racial goal--are unconstitutional, then the State could more easily hand each voter a racial identification card and allow him to participate in racially separate elections. The exclusively racial makeup of these districts harks back to the infamous "white primary," which was constitutionally condemned decades ago. Surely districts as race-specific as Districts 18, 29 and 30 have no place in our system of government.

**Post-Shaw Jurisprudence**

Pointing to *Hays I and II, Vera v. Richards* and *Johnson v. Miller*, civil rights advocates have expressed concerns that the minority protection purposes of the Voting Rights Act are being weakened by non-minority attacks based upon the Equal Protection Clause of the Fourteenth Amendment. The Assistant Attorney General for the Civil Rights Division of the United States Department of Justice, Deval Patrick, recently said that *Hays I* "turns thirty years of history on its head...a federal court retreated from history, reality, and the law." Third Circuit Court of Appeals Chief Judge Emeritus A. Leon Higginbotham, Jr. went even further in an impassioned critique of *Shaw*:

With Plaintiffs' urging, the Court has created law that could make *Shaw v. Reno* equivalent for the civil rights jurisprudence of our generation to what *Plessy v. Ferguson* and *Dred Scott v. Sandford* were for prior generations....

On the contrary, post-*Shaw* jurisprudence has not only begun to take shape, but it is clear that American politics is moving even closer to the democratic ideal than *Shaw*'s critics are willing to admit. Coupled with Assistant U. S. Attorney Deval Patrick's formation of a Special Task Force to intercede in *Shaw*-type litigation, which according to Mr. Patrick presents "very serious challenges for us in the Justice Department and for citizens," and Attorney General Janet Reno's commitment to protecting minority rights, the redistricting sky is not about to fall. A brief summary of illustrative cases relying upon *Shaw* makes this clear.

**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.

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.

**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*, 508 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.

**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." 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*.

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.

**Clark v. Calhoun County**

In *Clark v. Calhoun County, Mississippi*, the United States Court of Appeals for the Fifth Circuit vacated and remanded the District Court's decision in which a §2 challenge to a county's single-member election districts had been rejected. The Fifth Circuit held that the District Court's finding that a black majority district could not be created in the county because the black population was not sufficiently compact and that it would be necessary to group blacks from three distinct municipalities, each having diverse interests, was insufficient to permit review. The existing and proposed majority-minority district was set forth in an appendix to the opinion.

**Insufficient Finding of Compactness**

The District Court in *Calhoun County* had made a finding that the Plaintiffs had not established the first *Gingles* precondition of geographical compactness. Specifically, the District Court had made this finding, reported at 813 F. Supp. at 1197-98:
Although Plaintiffs have proved that the black population of Calhoun County is sufficiently large enough to constitute a majority in one district, they have failed to prove that this same minority group is geographically compact. Under Plaintiffs' proposed plan, blacks from three separate and distinct municipalities, each having diverse interests, were extracted to form District 1. This exercise results in extreme gerrymandering. Plaintiffs' proposed black district having been "drawn in an unusual or illogical manner to enhance the voting power of a particular...voting block at the expense of other individuals or groups who would be elected or help elect the candidates of their choice."... In this Court's opinion, under Plaintiffs' proposal, the voting strength of blacks not included in District 1 would be diluted to such an extent that they would have less opportunity to participate in the political process and to elect members of their choice.

Defendants/Appellees argued that Shaw v. Reno supported the District Court's finding that Plaintiffs had failed to establish geographical compactness, the first precondition under Gingles. The Fifth Circuit disagreed, stating that "the proposed district in this case...is not nearly as bizarre as the district under consideration in Shaw. We therefore need not decide whether a bizarrely-shaped district which would enable Plaintiffs to state a claim under the Equal Protection Clause would necessarily flunk the Gingles compactness test."

Concluding that the District Court's findings regarding the geographic compactness of the black population in Calhoun County were not sufficiently particularized, the Fifth Circuit vacated the District Court's judgment and remanded for further consideration consistent with its opinion.

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." The proposed majority-minority district submitted by Plaintiffs in an effort to satisfy the "geographical compactness" requirement was superimposed upon a map of Worcester County, showing numerous splits in municipal and election district boundaries and recognized communities of interest.

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.

The District Court found §2 liability and rendered judgment for the Plaintiffs, directing Defendants to submit a remedial plan within sixty days. Defendants thereupon submitted as a legally acceptable remedial alternative for use during the 1994 election cycle, the electoral system and form of government established under Bill 93-6, which had become effective in May 1993 and under which no elections have been held. Plaintiffs also submitted three remedial plans, two of which were racially gerrymandered single-member district plans under which a majority/minority district bisected two and three municipalities, respectively, disregarded local and state government policy requiring respect for municipal and other political subdivision boundaries, and linked pockets of black concentrations together to form an elongated single-member district running the length of Worcester County, in disregards of traditional districting principles and political policy choices reflected in the legislative history of Bill 93-6. The third plan submitted by Plaintiffs was a cumulative voting system which up until this point in American jurisprudence had been utilized in the context of corporate law and in a limited number of jurisdictions through Consent Decrees settling Voting Rights Act litigation. Under the cumulative voting system proposed by Plaintiffs, any group constituting more than 16.7 percent of the voters could elect a candidate if they cumulated their votes for that candidate, so that in an election for five positions on a county Board of Commissioners, each minority voter could aggregate his or her five votes and cast those for a single candidate.
The District Court in Cane v. Worcester County by Order dated April 4, 1994, rejected the Defendants' proffered Bill 93-6 plan as violative of §2 and ordered Defendants to change the electoral system of Worcester County to a cumulative voting system to be implemented within sixty days. The Court in so doing rejected Defendants' argument that Plaintiffs were required to introduce competent evidence demonstrating that Bill 93-6 was unacceptable and that it was improper to compare it to the old electoral system on the ground that such a review was impossible because there had been no elections under Bill 93-6.

CV: Proportional Representation

In his controversial concurring opinion in Holder v. Hall, supra, Justice Clarence Thomas cut to the heart of cumulative voting as a method for ensuring minority voting power and proportional representation:

In principle, cumulative voting and other non-district-based methods of effecting proportional representation are simply more efficient and straightforward mechanisms for achieving what has already become our tacit objective: roughly proportional allocation of political power according to race.

At least one court, in fact, has already abandoned districting and has opted instead for cumulative voting on a county-wide basis as a remedy for a Voting Rights Act violation. The District Court for the District of Maryland recently reasoned that, compared to a system that divides voters into districts according to race, "[c]umulative voting is less likely to increase polarization between different interests," and that it "will allow the voters, by the way they exercise their votes, to 'district' themselves," thereby avoiding government involvement in a process of segregating the electorate. Cane v. Worcester County, 847 F. Supp. 369, 373 (Md. 1994). Cf. Guinier, 14 Cardozo L. Rev., at 1135-1136 (proposing a similar analysis of the benefits of cumulative voting); Karlan 236 (same). If such a system can be ordered on a county-wide basis, we should recognize that there is no limiting principle under the Act that would prevent federal courts from requiring it for elections to state legislatures as well.

In their appeal to the Fourth Circuit, Defendants-Appellants in Worcester County challenged the District Court's finding regarding the Gingles preconditions of geographical compactness, minority political cohesion and white racial bloc voting as clearly erroneous, and challenged the District Court's remedial order directing the County to implement a cumulative voting system as a §2 remedy.

On August 1, 1994, the Fourth Circuit issued an Order granting Worcester County, Maryland's Motion for a Stay pending appeal of the Order of the District Court requiring the county to implement a cumulative voting system for its County Commissioners.

On September 16, 1994, the Court of Appeals affirmed in part, reversed in part and remanded to the District Court, affirming the District Court's conclusion that the at-large electoral system violated §2 of the Voting Rights Act but holding that the District Court "failed to rule on the legality of the scheme set forth in Bill 93-6--the electoral system in effect at the time the matter was pending before the Court and that the County was thus not advised that its current electoral system, Bill 93-6, violated §2 when it was directed to submit a proposed remedy."

With respect to the District Court's finding of a §2 violation, the Fourth Circuit was unable to conclude that the District Court was clearly erroneous in finding that use of the at-large residency district system for electing Commissioners impermissibly diluted the votes of African-Americans, stating:

With respect to the finding of a §2 violation by the district court, the County principally contends that Plaintiffs have failed to satisfy the first Gingles precondition of geographical compactness because the creation of a single-member majority African-American district would require district lines to be drawn solely on the basis of race--a practice condemned by the Supreme Court in Shaw v. Reno, 113 S.Ct. 2816, 2827 (1993), as "altogether antithetical to our system of representative democracy." However, the Court in Shaw upheld the intentional use of race in the redistricting process, recognizing that "redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." Id. at 2826. The Court concluded that race consciousness in the redistricting process constitutes impermissible race discrimination only when "traditional districting principles" are ignored and the resulting districts are so geographically bizarre that they are explainable only as an act of racial segregation. Id., at 2827-30.
The County asserts that the creation of a majority African-American district would ignore traditional districting principles because it would require the division of at least two municipalities. However, simply because district lines may be drawn "to maintain the integrity of political subdivisions," id. at 2826, does not mean that a proposed majority-minority district that would divide municipalities fails to comply with traditional districting principles, see Clark v. Calhoun County, Miss., 21 F.3d 92, 96 (5th Cir. 1994) (concluding that plaintiffs had not necessarily failed to prove the first Gingles precondition of geographical compactness solely because the creation of a majority-minority district would require the division of three separate municipalities). The undisputed evidence indicated that the single-member district plans proposed by Plaintiffs adhered to other traditional districting principles such as the historical north-south division of the County and the natural boundaries created by County waterways. In addition, the uncontradicted evidence before the district court revealed that the citizens within the proposed majority African-American district shared common socioeconomic and political concerns. See Shaw, 113 S.Ct. at 2827. Drawing districts based on such common interests is perhaps one of the most often invoked districting principles. See, e.g., Gaffney v. Cummings, 412 U.S. 735, 752-53 (1973). Finally, the shape of the proposed majority African-American district is not geographically bizarre. Rather, it is similar in appearance to one of the former residency districts under Bill 93-6 and the County's prior electoral scheme. Thus, we find meritless the County's assertion that the geographical compactness finding of the district court violates the dictates of Shaw.

Marylanders for Fair Representation v. Schaefer

Using an approach similar to that of the District Court in Cane v. Worcester County, 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 District Judge Smalkin, this oddly-shaped creation "is a 'geographically challenged' creation, not a geographically compact one." Id. at 1068 (Smalkin, dissenting). The legislative district plan at issue in Schaefer was included in an appendix to the opinion.

According to the majority in Schaefer at 1052-55:

Compactness is neither mentioned in the text of the Voting Rights Act nor required by the federal Constitution. See Shaw, 113 S.Ct. 2827.... In more recent cases, however, the Supreme Court has clearly indicated that the concept of compactness is not a hollow one. In Grove 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. Grove, 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).

[P]ut 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. 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.

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.

**Functional Test of Compactness**

In footnote 45 at page 1054 of its opinion, the three-judge court in *Schaefer* concluded that the Plaintiffs had met the functional test of compactness:

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).

**Effective Political Representation**

With regard to the factor of effective political representation, Judge Smalkin concluded at page 1070:

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.

**Criticism of Minority Districts**

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).

Johnson v. Miller

On September 12, 1994, the Three-Judge United States District Court for the Southern District of Georgia, in a Memorandum Opinion and Order by District Judge Dudley H. Bowen, Jr. and Chief District Judge B. Avant Edenfield, held that the Congressional Districting Plan for Georgia's Eleventh Congressional District violated the Equal Protection Clause of the Fourteenth Amendment, enjoined Congressional elections in Georgia's Eleventh Congressional District until further Order of the Court, and reserved decision and jurisdiction to reconfigure the Eleventh Congressional District.

Background of the Litigation

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 alleged 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."

In the three-judge Court's majority opinion of September 12, 1994, the Court noted at the outset that racial concerns are the DOJ's overriding criterion for giving §5 preclearance to a redistricting plan, but that if racial concerns are the overriding criterion for drafting a redistricting plan which includes dramatically irregular or bizarre district boundaries, the plan must be declared unconstitutional under Shaw unless is passes muster under a strict scrutiny/narrowly tailored analysis. "And therein lies the problem."

The Court took note of the DOJ's "policy of minority vote maximization" and its "maximization agenda". Describing the Eleventh Congressional District as "extending from Atlanta to the Atlantic," the Court observed that this district covered almost 6,784.2 square miles, "splitting eight counties and five municipalities along the way," in what was characterized as a "far-flung search for black voters." The Eleventh Congressional District contained "hooks, tails and protrusions" of several counties, including a "miniature polyp" of one county, a "tuft attached to the tail" extending to another county, and a "proboscis" extending into yet another county.

The Court noted that the "max-black plan" advanced by the Defendants and the Justice Department "reflected nothing but its drafters' concerns: race and technical contiguity." It was clear to the Court that the max-black plan "attempted to secure proportional representation for the black population." Addressing the Justice Department's maximization agenda, the majority of the three-judge court stated:

[W]e have been placed in the unenviable position of depriving black citizens of a privilege the Justice Department never had the right to grant: maximization of the black vote, whatever the cost.

The Court found that "the amount of evidence of the General Assembly's intent to racially gerrymander the Eleventh District is overwhelming, and practically stipulated by the parties involved." Land bridges and narrow appendages were obviously designed to maximize black voting strength, and reached out from the Eleventh Congressional District's core to rope in and grasp majority black population clusters in the cities of Atlanta, Augusta and Savannah, and the district soars eighteen stories over the water upon the spine of the suspension bridge at Savannah to spill itself over uninhabited Hutchinson Island.

The Eleventh Congressional District's boundaries circumvented the majority white areas of Savannah and, moreover, reflected a racially-motivated conception of "communities of interest," noting that the Defendants and the Intervenors faced a "Sisyphean task" in attempting to persuade the Court that "communities of interest" involving black populations of
Savannah and other majority-black areas could provide a non-racial justification for the current configuration of the district.

Initially, the desire to bolster amorphous "communities of interest" could not be sufficient justification for the drafting gymnastics involved in bringing the Eleventh District to Savannah. Second, we remain unconvinced that the poor black population of coastal Chatham County feel a significant bond to the black neighborhoods of metro Atlanta. Third, even if bonds between these grounds exist at certain levels, those links were certainly not the overriding motivation behind construction of a land bridge to Chatham County.

Finally, and most importantly, the Defendants and Intervenors spent much time outlining the racial community of interest shared by black citizens in Georgia. The problem with this tack is that, while partially convincing, such a community of interest is barred from constitutional recognition. To urge this racial identification as a justification for the shape of the Eleventh District is tantamount to simply admitting that race was the overriding consideration in its creation. We have no doubt that black citizens share concerns related to their condition as blacks, e.g., the unusually high crime rate in black communities or combatting racism. Reverend Mitchell presented evidence of religious networking among black congregations. A voting district, however, that is configured to cater to these "black" concerns is simply a race-based voting district. It is based on superficial, racially founded generalizations about what matters to black Georgians. That is, it trafficks in racial stereotypes. We find it ironic and troubling that the state and federal governments should expend such effort to convince the court "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. at 2827.

In its discussion of the Defendants' efforts to split political subdivision boundaries, including counties and municipalities, the Court noted that Georgia's black population is 26.96 percent but that the Eleventh Congressional District's black population was 64.07 percent, and nearly 80 percent of the District's minority population "comes from carefully divided counties on its distant fringes."

[If not for reasons of race, why split the counties of DeKalb, Wilkes, Richmond, Effingham, Chatham, Twiggs, Baldwin and Henry? Why split 26 counties at all? With the exception of Texas, Georgia has more counties than any other state in the union; one would think that such a proliferation would provide ample building blocks for acceptable voting districts without chopping any of those blocks in half. Avoiding such rough surgery did not seem such a herculean feat in any redistricting round before 1992. Any why excise Savannah--and just portions of Savannah--from its traditional economic place in the "coastal" region of Georgia? The Eleventh District could have been easily revised to include one or more whole counties while still meeting the one person-one vote requirement, and other traditional districting concerns would have been better served.

With regard to the Gingles precondition of geographical compactness, the Court found that the Eleventh Congressional District "is not compact for purposes of §2 of the Voting Rights Act."

The populations of the Eleventh are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties and narrow swamp corridors. Two-thirds of the population of the district is concentrated in urban DeKalb, Richmond and Chatham Counties. These communities are so far apart that DOJ's insistence that they are "compact" renders the term meaningless. The hooks, tails and protrusions of these counties reveals the true "shape" of the district: if it were graphically depicted and sized according to the density of population, the miniature polyp of south DeKalb County would become a large bulbous affair accounting for about 35 percent of the district's size; the narrow hook into Richmond County would be a rather uncouth polygon sporting about 16 percent of the district's girth; and the tuft attached to the tail extending to Chatham County would represent 12.4 percent of the district. Finally, the proboscis extending into Baldwin County would be another distant repository of Eleventh District population.

The Plaintiffs' expert presented compelling evidence of economic conditions, educational backgrounds, media concentrations, commuting habits and other aspects of life in this part of the state encompassed by the Eleventh Congressional District, "making it exceedingly clear that there are no tangible 'communities of interest' spanning the hundreds of miles of the Eleventh District." The Court continued:
Nor would your average citizen think there would be. Assertions to the contrary are the result of shallow and offensive thinking: blacks live in Savannah, blacks live in Atlanta, and so there must be some deep cultural bond between them since, after all, aren't they black?

The Court concluded that the "geographical compactness" precondition of *Gingles* was not satisfied by the Eleventh Congressional District:

As far as *Gingles* first precondition serves to minimize the effect of this assumption by requiring groups to reside in a compact area, it has done its work today. Blacks in Georgia did indeed rise from a common heritage of slavery and oppression, but with the shedding of those burdens they have begun to follow myriad, distinctive paths. They take their voting preferences with them.

Finding that there was no compelling interest other than VRA compliance evidence and that the current districting plan was not reasonable necessary to comply with §§2 or 5 of the Voting Rights Act, the Court concluded that the plan failed strict scrutiny under the Fourteenth Amendment and that the Eleventh Congressional District of Georgia was unconstitutional in its current composition.

**Need for Colorblind Approach**

It is simply wrong to assume that blacks cannot properly or adequately represent whites, just as it is wrong to assume that whites cannot properly or adequately represent blacks. It is wrong to assume that blacks need black officeholders to represent them properly, just as it is wrong to assume that blacks as a distinct group need their "own" representatives. Dense academic musings over the lack of "authenticity" of black officials who are elected in part with white votes implicitly let race define the content our character. Race-driven redistricting should not be allowed to lead to the creation of a system of "safe" or reserved seats for members of different racial or ethnic groups, thereby insuring proportionate representation. Such is the antithesis of a colorblind society and a colorblind constitution, and it leads to creation of a political system in which race is the only thing that matters.

**Undue Emphasis on Racial Division**

Our federal government, whether through District Court action or through the Justice Department's administrative interpretation and enforcement of the Voting Rights Act, should not substitute a rigid form of group rights for that of individual representation. As Professor Abigail Thernstrom has so ably pointed out, this is in effect pasting racial labels on voters and assuming only racial identity matters for purposes of districting and other electoral arrangements. Such race-conscious policies indeed have high costs. In its September 12, 1994, *per curiam* decision invalidating Georgia's Eleventh Congressional District as an unconstitutional racial gerrymander under *Shaw*, the three-judge Court, speaking through District Judge Bowen, observed that conscious construction of majority-minority districts

as entitlements for each racial group causes the societal damage against which we warn today. If efforts to require proportional representation of minorities in democratic institutions are not stopped with clarity and force, they will divide this country into a patchwork of racial provinces, and ensure that elected officials represent races before they represent citizens.... The VRA neither intends nor requires the devolution of voting rights into racial bargaining chips to be bickered over by special interests, and we will not support that cause.

**Risk Management Considerations**

From a risk management perspective, local government entities faced with the potential threat of *Shaw*-type racial gerrymandering claims aimed at pre-*Shaw* majority-minority districts may be able to engage in post-hoc rationalizations in an effort to persuade a court that the plan is based on articulated compelling justification, such as Voting Rights Act compliance, attainment of a goal of proportional representation, or eradication of the effects of past or present discrimination. The dissembling which occurred when Justice Department agents were called to testify in *Johnson v. Miller*, including sworn testimony of Justice Department attorneys who lacked any significant memory of important elements of the state's preclearance saga and who "don't recall" basic details of important meetings and the preclearance process, was not only distressing to the three-judge court, but prompted it to characterize the "professed amnesia" of these Justice Department attorneys as "less than credible." In the same vein, the Defendants who were responsible for the overtly race-based gerrymandering efforts which were twice condemned in *Hays I and II* and who, when faced with a *Shaw*-type equal protection claim, sought to retreat from an overwhelming record of race-conscious districting efforts,
provided yet another example of the existing legislative history and record providing the veritable hangman's noose for excessively race-based redistricting.

*Local government entities about to embark upon the redistricting process,* however, can certainly take a number of affirmative steps to minimize exposure to a claim of unconstitutional racial gerrymandering.

First, they should utilize traditional, objective districting criteria in developing single-member district plans. These criteria should include geographical compactness, respect for political subdivisions, contiguity, maintenance of communities of interest and other recognized, race-neutral criteria for redistricting and reapportionment, preferably grounded in the state Constitution or positive state law. These criteria should certainly be documented in the initial resolutions or ordinances establishing the process and timetable for redistricting.

Second, they should avoid creating boundaries which are dictated solely or predominantly by racial considerations. This same prohibition applies, of course, to boundaries which are created solely to advance one racial group's common interests.

Third, any districts which can be reasonably perceived as irrationally misshapen, highly irregular or bizarre in shape and thus within the definition of "racial gerrymander" as defined in *Shaw v. Reno,* must be supported by a compelling governmental interest and narrowly tailored to further that interest. The factual predicate for such governmental interest should be identified and documented before the redistricting process gets underway and should find consistent support in the public body's minutes and record of proceedings. These interests should be far more specific than generalized claims of societal discrimination or conclusory and perfunctory assertions of the potential threat of §2 liability or the potential threat of a §5 objection.

Fourth, particularly for jurisdictions covered under §5, they should identify the benchmark for purposes of avoiding retrogression, bearing in mind the twin concerns of avoiding a retrogressive effect on minority voting strength and avoiding having the redistricting plan exceed what is reasonably necessary to avoid retrogression. Otherwise, the plan may be characterized as designed to guarantee or secure proportional representation, not adhere to the Voting Rights Act.

Fifth, in order to ensure that a potentially racially gerrymandered plan is narrowly tailored to serve a compelling governmental interest or purpose, and is clearly linked to specific instances of past discrimination, they should develop a legislative history that tracks *Croson*-like constraints on racial classifications under that plan and accomplishes at least five objectives:

(a) The legislative history should demonstrate the clear need for such a drastic measure, i.e., through particularized findings of past discrimination which may provide the requisite "strong basis in evidence" for concluding that remedial action is necessary.

(b) The history should identify and evaluate the efficacy of, and should state the objective reasons for not utilizing, alternative race-neutral measures;

(c) The history should identify and evaluate the efficacy of, and provide objective reasons for not utilizing, alternative, more narrowly-tailored racial classifications;

(d) The history should evaluate and document the flexibility and duration of the proposed remedial racial classification; and,

(e) The history should expressly consider the impact of the remedy upon the rights of third parties.

**Conclusion**

Federal courts are being called upon by certain public interest groups and academicians to craft for minority voters a racial standard that harkens back to the days of *Gomillion v. Lightfoot,* in which Justice Frankfurter described the Court's contempt for racially divisive boundary drawing:

> While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights.

Redistricting efforts which ignore traditional districting principles and amount to nothing more than fencing black citizens into hypothetical majority-minority districts can and should be curbed after *Shaw.* Efforts which seek judicial recognition
of communities of interest based upon skin color can retard and even destroy coalition-building. They do not promote "civic inclusion".

From the standpoint of §2 remedies, it is especially true in voting rights litigation that "any federal decree must be a tailored remedial response to illegality." Moreover, federalism requires that a federal court exercise "the least possible power adequate to the end proposed." Devices such as cumulative voting, calculated to ensure proportional representation in direct violation of the §2 disclaimer, are race-drenched alternatives that should be relegated to the world of academia.

Just as the Fifteenth Amendment, and later the Voting Rights Act, interpreted by numerous judicial decisions, have all sought to "raze any enduring bastions" of officially-administered voter discrimination, so the Fourteenth Amendment's Equal Protection Clause as interpreted under Shaw v. Reno and as applied to racially gerrymandered electoral districts will help root out those excessively race-based voting units that resemble balkanized "homelands," "safe seats," and bizarrely constructed products of political apartheid.

To sum it up, Shaw v. Reno may best be viewed as a wake-up call for those who advocate and support the goals of access, inclusivity and diversity--political as well as racial--which lie at the heart of §2 of the Voting Rights Act, and as a sharp reminder for those who may have forgotten (or ignored) the fundamental Constitutional principle embodied in Justice Harlan's dissent in Plessy v. Ferguson:

Our Constitution is colorblind, and neither knows nor tolerates classes among citizens.... The law regards man as man, and takes no account of his surroundings or of his color when his civil rights guaranteed by the law of the land are involved.