SHAW v. RENO AND THE REAL WORLD OF REDISTRICTING AND REPRESENTATION

J. Morgan Kousser[*]

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[*] Professor of History and Social Science, California Institute of Technology. B.A., 1965, Princeton; M.Phil., 1968, Yale; Ph.D., 1971, Yale.

I. INTRODUCTION

Justice Sandra Day O'Connor's majority opinion in *Shaw* v. Reno[1] has been widely seen as a radical departure from precedent—an indication that strengthening minority voting rights is no longer the only achievement of the Second Reconstruction safe from congressional or judicial attack.[2] It is true that the abstract, deeply ambiguous, and often unreflective opinion suggested only vague and unworkable standards that have led to much-heightened judicial intrusion into the political process,[3] and that it has encouraged a cruelly ironic interpretation of the Fourteenth and Fifteenth Amendments, an interpretation surely unintended by the Framers, that aims to undermine the sharpest minority gains in politics since the First Reconstruction.

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1. ___ U.S. ___, 113 S. Ct. 2816 (1993).

2. *See generally* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588 (1993); Anthony Q. Fletcher, Recent Development, 29 HARV. C.R.-C.L. L. REV. 231 (1994); A. Leon Higginbotham, Jr. et al., Shaw v. Reno: *A Mirage of Good Intentions With Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593 (1994); Kimberley V. Mann, Note, Shaw v. Reno: *A Grim Foreboding for Minority Voting Rights*, 5 MD. J. CONTEMP. LEGAL ISSUES 147 (1993/1994); Laughlin McDonald, *Voting Rights and the Court: Drawing the Lines*, S. CHANGES, Fall 1993, at 1; Jonathan M. Sperling, Comment, *Equal Protection and Race-Conscious Reapportionment:* Shaw v. Reno, 17 HARV. J.L. & PUB. POL'Y 283 (1994); Pamela S. Karlan, *End of the Second Reconstruction?*, NATION, May 23, 1994, at 698-700.

3. *Shaw* has also damaged a Department of Justice administrative oversight procedure under Section 5 of the Voting Rights Act, that, along with private litigation, has been working rather smoothly to foster the rights of discrete and insular minorities. The procedure has also been reasonably free of partisanship, and has become, over the years, quite efficient. *See* Drew S. Days III, *Section 5 and the Role of the Justice Department, in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 52-65 (Bernard Grofman & Chandler Davidson eds., 1992) [hereinafter VOTING RIGHTS PERSPECTIVE]. Conservative judicial activism, in this instance, is poor administration, needlessly expensive and time-consuming.

In this paper, I will argue that the fears of liberals and the hopes of opponents of the voting rights revolution have been exaggerated. Many of the problems of the Shaw opinion stem from the inadequate factual and legal record before the Court in 1993, particularly from its departure from the reality of redistricting and representation, past and present.[4] The way to avoid the extreme consequences that have sometimes been predicted to flow from *Shaw* is to restore a dose of that reality. Once reality is restored, *Shaw*'s apparent separate and unequal standard, a standard that gives whites rights that blacks and browns[5] do not equally enjoy, may be reconsidered and the race and redistricting issue may be folded back again into the main line of vote dilution cases.

After offering an interpretation of O'Connor's opinion in Section II, I will turn in Section III to the recent history of redistricting in North Carolina. In both sections, I will draw on my research for the NAACP Legal Defense and Education Fund in the remand case of *Shaw v. Hunt*[6] and research for the U.S. Department of Justice in the analogous Texas case, *Vera v. Richards*.[7]

This excursion into political reality has three purposes. The first is to test the validity of various "stylized facts"[8] that undergird Justice O'Connor's opinion. The Justice seems to assume that the beliefs and opinions of African-Americans are generally the same as those of whites, or, if not, that white members of Congress from districts with large proportions of blacks so closely represent black attitudes that there is no need for black representation. If black and white attitudes are indistinguishable, or if white members of Congress vote similarly to

4. *See* Aleinikoff & Issacharoff, *supra* note 2, at 612.

5. The conventions on racial designations are in flux. To avoid repetition, I will use the terms "African-American" and "black" interchangeably, and likewise, the terms "Latino," "Hispanic," and "Mexican-American."

6. 861 F. Supp. 408 (E.D.N.C.), *appeal filed*, 63 U.S.L.W. 3439 (Nov. 21, 1994) (No. 94-923). The discussion of the facts of historical discrimination, on which Judges Phillips and Britt partially relied in upholding the 1st and 12th Congressional Districts, is very briefly summarized in the opinion. *Id.* at 461-63.

7. 861 F. Supp. 1304 (S.D. Tex.), *appeal filed*, 63 U.S.L.W. 3388 (Nov. 2, 1994) (No. 94-806), *and appeal filed*, 63 U.S.L.W. 3476 (Dec. 1, 1994) (No. 94-988). The version of this paper printed here does not include a section on Texas. The full paper is available from the author.

8. Economists use the term "stylized facts" to mean the characteristic features or fundamental facets of reality, at least as some group of people, such as neoclassical economists, see them. One economist noted about the "facts" asserted by the originator of the term, "it is possible to question whether they are facts." LAWRENCE A. BOLAND, STYLIZED FACTS, 4 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 535 (1987).

black members, then enabling black voters to elect their own candidates has merely symbolic importance. Black interests would not be different from white interests or at least they would not need to be represented by black faces, in the words of a recent book by a conservative political scientist.[9]

Another stylized fact, this one alleged by the North Carolina plaintiffs, is that voting is no longer racially polarized, that whites in these states freely and frequently cast ballots for black candidates when they are adequately funded and qualified, and that campaigns are not marred by racial appeals.[10] If experience shows the political system was not previously biased against blacks, then drawing districts in a race-conscious manner in 1991-92 granted them an unnecessary special privilege, unnecessary because blacks could compete equally anyway, special because no white politician needed or received districts tailored for them. Color-blind districts would then be appropriate for a color-blind state.

A third stylized fact, apparently embraced by O'Connor, is that each state has previously followed what the *Raleigh News and Observer* in 1991 called the "basic criteria [that] haven't changed in 200 years: to make each district as compact as possible, as contiguous as possible, and as reflective as possible of common interests."[11] Have compactness, contiguity, the recognition of all "communities of interest" (including those of minority ethnic groups), non-partisanship, and indifference to the protection of incumbents been the "traditional districting principles" in North Carolina? Did the 1991-92 line-drawings represent radical changes from past practices, unprecedented corruptions

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9. *See* CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS 211-16 (1993).

10. Appellants' Brief on the Merits at 62-63, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357) [hereinafter Appellants' Brief], *available in* Westlaw, 1993 WL 476412; Mark Horvit & Jay Root, *Suit Challenges Congressional Districts*, HOUS. POST, Jan. 28, 1994, at A25.

O'Connor repeats, but does not endorse, these factual claims. *See Shaw*, 113 S. Ct. at 2831. If no black candidate had run because everyone recognized the chances of a black winning were infinitesimal, the system would be even more discriminatory than if some African-Americans ran and lost. It is sometimes possible to verify this state of affairs through statements by potential candidates or knowledgeable political observers. *See infra* part III.B.6; Williams v. City of Dallas, 734 F. Supp. 1317, 1324, 1396 (N.D. Tex. 1990).

11. *A Map to Boggle Minds*, RALEIGH NEWS AND OBSERVER [hereinafter RN], June 1, 1991, at A12.

of a previously unbroken devotion to the principles of civics textbooks? If so, then the evil would stand out; it would condemn itself. There would be no reason for the state to remedy past discrimination or to fear that a court might overturn a continuation of the same districting policies that the state had always used, because there would have been no discrimination, and thus no excuse for a remedy—no compelling state interests, just special interests.

This contrast of real with idealized "traditional districting principles" will fulfill the second major purpose of the paper: to examine whether North Carolina had two "compelling state interests" for race-conscious districting—to remedy its history of discrimination and to avoid potential law suits under the Voting Rights Act or the Constitution. Rather than being concerned with some vague "societal discrimination"[12] or with events primarily of the remote past, this paper is an inquiry into the particularized and usually recent history of racial discrimination *in redistricting*.

A third purpose of the historical analysis is to consider whether the 1991-92 redistricters had undiluted racial motives that can be identified by comparing district maps with those showing racial percentages of the population. Do shapes tell all, or all we need to know?

Social scientists, as well as judges, have long realized that redistricting in America is a mixture of the general and the particular. General motives and constraints are the same everywhere: redistricters try to protect incumbents or design districts for particular candidates; to help friends and harm enemies; to maximize the strength of their parties or ideological factions; or to inhibit or promote the representation of various groups, especially racial and ethnic groups.[13] Often they provide high-sounding justifications for their actions that are factually misleading or incorrect, or which are so illogical as to be transparently pretextual.[14] They seek to achieve their ends within a certain legal

12. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 497-99 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (both stating that societal discrimination alone does not justify racial classification).

13. *See generally* BRUCE E. CAIN, THE REAPPORTIONMENT PUZZLE (1984).

14. A Republican redistricting consultant in California defended a decision to decrease the Latino percentage in a marginally Latino congressional district on the grounds that preserving the high Latino percentage would require splitting the unincorporated "Koreatown" area in the City of Los Angeles. He failed to note that his plan split Koreatown in half, and that the percentage of Koreans who lived there and were registered to vote was negligible—much less than the proportion of Latinos that the plan cut out of the district. See J. Morgan Kousser, Reapportionment Wars: The Beginning and

framework[15] and are also constrained by the technical capabilities of the time.[16]

Every redistricting story differs so crucially, however, in particular, often subtle, details that superficial glances at the shapes and demographic statistics of districts may be quite misleading, whether performed by expert witnesses, attorneys, law clerks, or judges. To paraphrase Justice O'Connor's opinion in *Shaw v. Reno*, shapes are one area in which details do matter.[17]

In a short final section, I will argue that "race blind" or absolute or partial compactness standards are unworkable, unrealistic, and/or racially unequal in their effects and propose a return to traditional dilution case standards, a return that the Supreme Court appeared to be heading toward in its June, 1994 decisions of *Johnson v. De Grandy*[18] and *Holder* v. *Hall*.[19]

End of Politics in California? 64 n.120 (Aug. 1993) (unpublished manuscript, on file with the author) (citing Don T. Nakanishi, *The Next Swing Vote? Asian Pacific Americans in California Politics*, *in* RACIAL AND ETHNIC POLITICS IN CALIFORNIA 25 (Bryan O. Jackson & Michael B. Preston, eds. 1991)).

15. Such legal frameworks include state and national constitutional and statutory requirements, such as population equality and the Voting Rights Act.

16. For example, the specificity of census compilations and the capacities of tabulating hardware and software make the tasks of insiders and outsiders more or less difficult.

17. *Shaw*, 113 S. Ct. at 2827 ("[R]eapportionment is one area in which appearances do matter.").

18. 114 S. Ct. 2647 (1994). There are four very important things to note about this case. First, the majority opinion by Justice Souter, who dissented in *Shaw*, treats vote dilution law as if *Shaw* did not exist, remarking, for instance, that "the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity". *Id.* at 2661. Note that he does not say that such districts can never be drawn, or that they must fit some definition of compactness. Second, he does not cite *Shaw* at all, which is particularly noticeable because *Shaw* pervades Justice Kennedy's concurrence. Third, Rehnquist and O'Connor, two members of the *Shaw* majority, joined part of Souter's opinion, and not just his judgment. If they had agreed with the outcome, but wished to associate themselves with *Shaw* to a greater extent, they could have signed on to Kennedy's concurrence. Fourth, Justice Thomas, joined by Justice Scalia, wrote a radical and remarkable concurrence in Holder v. Hall, ___ U.S. ___, 114 S. Ct. 2581 (1994), which he incorporated in a short dissent in *De Grandy*, that repudiated 25 years of the history of the Voting Rights Act by claiming that it should not apply to electoral structures at all, only to ballot access. If Thomas and Scalia were sure that a stable *Shaw* majority took the radical view of that opinion that some lower courts and lawyers for white plaintiffs in *Shaw*-type cases have, there would be no necessity to engage in a blatant falsification of legislative history in an opinion that has a desperate and despairing edge to it.

II. A HARMLESS SUIT

A. *Shaw Barred*

The *Shaw* saga began after North Carolina, which had not sent an African-American to Congress since 1898, drew two bare-majority black congressional districts in 1991-92. The rural First District sprawled over a good deal of eastern North Carolina, while the urban Twelfth tracked Interstate-85 for 160 miles from Charlotte to Durham. Led by plaintiff Robinson Everett,[20] five whites from Durham[21] filed suit in federal court charging that the legislature, under pressure from the United States Department of Justice, had perpetuated a "racial gerrymander" that infringed upon their right "to participate in a process for electing members of the House of Representatives which is color-blind and wherein the right to vote is not abridged on account of the race or color of the voters."[22] They also claimed to speak for all North Carolinians of every race.[23]

Judges J. Dickson Phillips, Jr., and W. Earl Britt dismissed claims against both federal and state defendants on the grounds that the plaintiffs had neither proven a discriminatory purpose nor a discriminatory effect and that, therefore, they had failed "to state a claim

19. ___ U.S. ___, 114 S. Ct. 2581 (1994).

20. A Duke University law professor, Everett was also the chief attorney in the case.

21. Three of these five people lived in neither the First or the Twelfth Districts. Appellants' Brief, *supra* note 10, at 12.

22. *Id.* at 15 (citation omitted).

23. Shaw v. Barr, 808 F. Supp. 461, 470 (E.D.N.C. 1992).

In a classic "kitchen sink" brief, the plaintiffs challenged the action under the Equal Protection Clause of the Fourteenth Amendment; the Fifteenth Amendment; the Privileges and Immunities Clause of the Fourteenth Amendment; Article I, Section 2; and Article I, Section 4. *Id.* at 468. They claimed that mention of "the people" in Article I, Section 2, implied that "the people" could not be divided on racial grounds. *Id.* at 468-69. Further, they averred that Article I, Section 4 grants control over the "times, places and manner of holding elections" to state legislatures, and that this implied that all federal control was illegal. *Id.* Finally, they argued that color-blind voting was a "privilege" guaranteed by the Privileges and Immunities clause. *Id.*

Such unprecedented, quirky arguments have typified plaintiffs' attorneys, none of whom is experienced in voting rights law, in this whole series of cases. For example, in Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994), attorney Paul Hurd averred that taking *political* consequences into account in a redistricting was unconstitutional. Plaintiffs' Post-Trial Brief at 5 n.4, Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994) (No. 94-0277) This suggestion could only have brought derisive laughter from two centuries of politicians.

under which relief can be granted."[24] Not only did *United Jewish Organizations, Inc.* v. *Carey* ("*UJO*"), in Phillips's view, squarely decide the issue,[25] but the fact that blacks comprised only a small

24. *Shaw*, 808 F. Supp. at 473.

25. 430 U.S. 144 (1977) In a 7-1 decision, with Justice Marshall taking no part in the case, the Supreme Court in *UJO* squarely rejected the sorts of contentions raised by the plaintiffs in *Shaw*. Allegations, but not, apparently, extensive proof of racial bloc voting and past purposeful racial discrimination against African-Americans in drawing lines in the Bedford-Stuyvesant area of New York City were enough to convince every judge except Chief Justice Burger to reject the claim of Hasidic Jews that their community had been unconstitutionally split by the New York legislature, in response to a Section 5 ruling by the U.S. Department of Justice, in order to create new state legislative districts for African-Americans and Puerto Ricans. In the prevailing opinion in *UJO*, Justice White, who harshly dissented in *Shaw*, recognized the reality of racial bloc voting and the consequent likelihood of representation by a member of the race that is in a majority in a particular district, held that the purposeful use of race in redistricting was legal unless it was used to stigmatize members of a particular group, and noted that whites who were in the majority nonwhite districts still enjoyed an equal right to vote. *Id.* at 165-68.

Concurring opinions by Justices Brennan and Stewart emphasized that a desire to comply with the Voting Rights Act shielded the state legislative action from attack as a purposefully discriminatory action. *Id.* at 171, 180. Only Chief Justice Burger's single dissent accepted the propositions (without citing any evidence) that racial bloc voting was a thing of the past and that a political melting pot was constitutionally required (except in the case of Hasidic Jews, whom he thought had a right not to be split between districts). *Id.* at 186-87.

Only one sentence in White's opinion links the *UJO* majority to that in Shaw v. Reno:

> [W]e think it also permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority."

Id. at 168. Although he did not specifically refer to that sentence in *Shaw*, White did reject it by implication when he remarked that "district irregularities . . . have no bearing on whether the plan ultimately is found to violate the Constitution." *Shaw*, 113 S. Ct. at 2841.

O'Connor's attempt in *Shaw*, to distinguish *UJO* on the basis of White's sentence and the fact that the North Carolina plaintiffs claimed that the legislature's sole purpose was to "segregate" voters is especially ironic. The degree of segregation in the New York districts was greater than in those of North Carolina—65% and 67.5% nonwhite in New York, compared to 57% in North Carolina. Moreover, by traditional rules of standing, Hasidic Jews, surely a socially distinctive community, had a much better claim than the plaintiffs in *Shaw*, since the New Yorkers asserted that they were damaged by the district lines.

proportion of the legislature virtually foreclosed a case of invidious racial intent. Furthermore, the fact that even if they won two of the twelve seats, African-Americans would have less than proportional statewide representation in Congress, made it impossible to demonstrate a discriminatory effect.[26]

Although agreeing with the majority that the case against the federal defendants should be dismissed and that race-conscious districting was not *per se* unconstitutional, Judge Richard Voorhees thought that *UJO* allowed such districting only if lines followed what he characterized as the "[t]ime-honored, constitutional concepts . . . such as contiguity, compactness, communities of interest, residential patterns, and population equality."[27] Plaintiffs, he thought, might be able to prove at trial there had been discrimination against black voters who had not been included in the First or Twelfth Districts or against white voters who had not been excluded from them.[28] Operating fully within the tradition of vote dilution litigation, Voorhees called for a trial to give plaintiffs a chance to prove "invidious discrimination against majority race voters."[29] According to Voorhees, the rough statewide proportionality between the percentage of blacks in the population and the percentage of "minority opportunity districts"[30] in Congress had to be balanced against what he asserted to be the facts that blacks and whites who lived in the same areas "share the same interests and concerns,"[31] and that there was no racially polarized voting, enabling

26. *Shaw v. Barr*, 808 F. Supp. at 473.

27. *Id.* at 476 (Voorhees, J., concurring in part, and dissenting in part).

28. *Id.* at 480. In light of O'Connor's emphasis on "segregation" in *Shaw*, it is noteworthy that Voorhees's criticism here was that there was *too little* segregation, *not enough* apartheid in the districts as drawn.

29. *Id.* at 476.

30. This is a term of art, not used in Voorhees's or O'Connor's opinions. It emphasizes that minorities may not be able to elect the candidate that they prefer and even if elected, the candidate herself is not guaranteed to be a member of the minority. Depending on the degree of other minority and Anglo crossover voting, the district need not contain any particular percentage of minority voters, adults, or total persons. In some circumstances, 50% may be more than enough; in others, 70% may be too little for a particular minority community to have an equal opportunity with Anglos to elect a candidate of choice. *See* J. Morgan Kousser, *Beyond Gingles: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551 (1993).

31. Shaw v. Barr, 808 F. Supp. at 478 (Voorhees, C.J., concurring in part, and dissenting in part).

them to "elect a mutually agreeable Representative, irrespective of race."[32]

B. An Appealing Fantasy

Because the three-judge panel held no factual hearings, the *Shaw* appellants were free to construct a fictitious, false, "colorblind" picture of the state's politics and redistricting and to make utterly unevidenced assertions about social psychology, and the Supreme Court had no concrete reason to doubt any of it. *Shaw v. Reno* was thus argued and decided in a storybook atmosphere in which the Justices' inclinations were given free sway because they were not restrained by any considerations of reality. The Court even seemed unaware of the proportion of African-Americans in the First and Twelfth Districts. There were 57% in the whole population, 53% in the voting age population, and 51-54% among the registered voters.[33]

Thus, in his appeal brief, Robinson Everett claimed that "[n]o court or agency has determined that racial discrimination has ever occurred in the creation of congressional districts in North Carolina. Indeed, it is clear that none has taken place; and so there was no constitutional violation to be remedied by establishing two majority-minority districts."[34] As section III, *infra*, discusses, both factual assertions are false,[35] and since several plaintiffs were longtime political activists in the state, they must have known them to be false at the time of the appeal. Furthermore, Everett asserted that whites suffered an "impression of injustice"[36] because the Twelfth District was drawn to

32. *Id.*

33. The Appendix of North Carolina's brief and Appendix D of the Justice Department's brief had the correct figures for the population and the voting-age population. *See* State Appellees' Brief at 19a-23a, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357), *available in* Westlaw, 1993 WL 476425 [hereinafter State Appellees' Brief]; Federal Appellees' Brief at 15aaaa-16aaaa, Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. 1992), *rev'd and remanded sub nom.* Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357), *available in* Westlaw, 1993 WL 547226 [hereinafter Federal Appellees' Brief]. O'Connor's opinion avoided all mention of the matter and White's dissent only reported the black proportion of registered voters in the Twelfth District. Shaw v. Reno, 113 S. Ct. at 2840 n.7 (White, J., dissenting).

34. Appellants' Brief, *supra* note 10, at 19. *See also id.* at 58-59 (making similar assertions).

35. *See infra* part III.

36. Appellants' Brief, *supra* note 10, at 43-44. Everett made no effort to determine how widespread such an "impression" was, how important it was to each person, or

allow black voters to elect a candidate of choice who, he claimed, without any evidence whatsoever, would "consider his primary duty to be the representation of blacks."[37] Yet in a curious racial double standard, he contended that African-Americans would gain no benefit from having a responsive representative. Indeed, the action "was an implicit affront to blacks because it implied that they are incapable of organizing coalitions to elect favored candidates of whatever race"—another statement widely known to have been false because of the nationally-watched campaigns during the 1980s in the Congressional districts containing the plaintiffs' Durham homes.[38]

Naturally, Everett did not suggest that all of his amateur psychology could be reversed by substituting the opposite race in each statement. Rather, he merely asserted that any districts drawn "because of compactness, contiguousness, geographical boundaries, community of interest, or other factors" could not have had a discriminatory intent, whatever the racial effects of the lines.[39] Any evidence of legislators' motives for drawing such districts was apparently not only presently absent from the record, it was presumptively irrelevant even if, say, legislators admitted and the media reported that they drew such districts with a racially invidious intent. In other words, facts could be invented as needed or dismissed if inconvenient.

Everett believed that the Constitution prohibited any race-conscious districting at all, whether performed by the state on its own or under the

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exactly what caused it, if it existed. And he never attempted to weigh it against any analogous impression that African-Americans may have had at previously or prospectively being denied any congressional representation at all by persons of their race. This might be contrasted with the new industry that has sprung up since 1989 to perform excruciatingly detailed "*Croson* studies" to justify affirmative action programs.

37. *Id.* at 44.

38. *Id.* at 42-43. After extensive evidence to the contrary had been presented in *Shaw* v. *Hunt*, *see* Post Trial Brief of the United States at 35-37, Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994) (No. 92-202) (citing statistics provided by Dr. Richard Engstrom), the plaintiffs continued to maintain that African-American candidates could be elected from overwhelmingly majority-white districts in contemporary North Carolina. Even if there were any justification for this wishful thinking, it confuses the preferences of the voters, which is the object of constitutional concern, with the race of the candidates, which is important only as a reflection of the electorate's preferences. *See* Plaintiffs' Memorandum In Support of Response in Opposition to the Motion of the United States for Leave to Participate as Amicus Curiae at 6, Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994) 861 F. Supp. 408 (E.D.N.C. 1994) (92-202) [hereinafter Plaintiffs' Memorandum in Support].

39. Appellants' Brief, *supra* note 10, at 42-45, 75-76.

rubric of the Voting Rights Act.[40] An amicus brief by the Republican National Committee ("RNC")[41] took a contradictory stance, one that continues to bedevil "conservatives" in this controversy. Simply put, the RNC favors race-conscious districting if it hurts Democrats, but opposes it if it hurts Republicans. Thus, Everett's "color blind" principle would have prohibited the use of racial statistics to aid in drawing minority opportunity districts. He would also have imposed a compactness requirement only on those districts because he believed that only a *racially*-based criterion offended the Constitution. Republicans, who unsuccessfully challenged the North Carolina and Texas congressional redistrictings as *partisan* gerrymanders[42] in which Democrats had allegedly only paraded a concern with racial minority interests to cover their real, partisan motives, favored allowing some race-conscious districting. As their actions in Ohio made clear, they were also willing to pack blacks into majority/minority districts.[43] What bothered them was allocating minority voters who were not necessary for control of a district to nearby districts in order to increase the number of legislators that minorities could influence and Democrats could control.[44] In other words, the RNC was interested in electing Republicans.[45] Thus, in their *Shaw* briefs, the RNC recycled the

40. *Id.* at 15, 27. *cf.* Shaw, 113 S. Ct. at 2824 (giving a softer impression of the ambiguities of Everett's brief).

41. The RNC later gained representation as plaintiff-intervenor in the remand case of Shaw v. Hunt.

42. Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd*, ___ U.S. ___, 113 S. Ct. 30 (1992); Terrazas v. Slagle, 789 F. Supp. 828, 834-35 (W.D. Tex. 1991).

43. *See* Voinovich v. Quilter, ___ U.S. ___, 113 S. Ct. 1149 (1993); Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 24 SUP. CT. REV. 245, 264-70 (1993).

44. Section III, *infra*, shows that Republicans in North Carolina were more than willing to draw a second sprawling district with a high proportion of minorities so long as it had the net effect of eliminating two Democratic seats.

45. Analogously, what Professors Polsby and Popper are interested in, by favoring a constitutional compactness standard for all districts, is the election of racial "moderates" and white Republicans. *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652, 671, 682 (1993), In the South, of course, those "moderates" would be white and they would not be very moderate. Since 1964, white Republicans throughout the country have been increasingly adverse to the interests of minorities. *See infra*, Section III; *see generally* EDWARD G. CARMINES & JAMES A. STIMSON, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS (1989); ROBERT R. HUCKFELDT & CAROL W. KOHFELD, RACE AND THE DECLINE OF CLASS IN AMERICAN POLITICS (1989). Polsby and Popper's revolutionary suggestion, then, could only adversely affect African-Americans and Latinos.

political gerrymandering claims from the earlier case and reused the arguments with which the Bush Administration had previously failed to convince Congress to pass a mandatory compactness bill to apply to the 1990s round of redistricting.[46] Unlike Everett, the RNC wanted compactness imposed on every congressional district, whatever its racial proportion, and whether or not racial considerations played a role in setting its boundaries.[47]

Containing no more facts than the RNC's had, the amicus brief for the Washington Legal Foundation ("WLF"), the Equal Opportunity Foundation, and North Carolina Senator Jesse Helms, whose 1990 campaign against African-American Harvey Gantt was the most notoriously racist of the season,[48] straight-facedly purported to embrace egalitarianism: "Racial gerrymandering," it intoned, "by placing the state's stamp of approval on the notion that people of different races are inherently different from one another—is a giant step backward from our goal of a color-blind society."[49] Whites who lived in black-majority districts, the WLF declared, "have effectively been disenfranchised,"[50] and since the number of congressional districts that the State's white voters could control had dropped from eleven to ten, whites throughout the state had also been damaged. Nor could the State legally claim to have drawn majority-minority seats on the grounds that otherwise, it would have faced a Section 2 or equal protection clause suit. Even if the state had knowingly drawn twelve majority-white districts, under *Personnel Administrator of Massachusetts v. Feeney*,[51] the WLF

46. *See* CONGRESSIONAL QUARTERLY, JIGSAW POLITICS: SHAPING THE HOUSE AFTER THE 1990 CENSUS 42-43 (1990).

47. Appeal Brief Amicus Curiae of the Republican National Committee in Support of Appellants at 17-18, 22-24, 23-24, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357) [hereinafter RNC Brief]. Although there has never been a good empirical study on the subject, Republican and Democratic redistricting experts agree that because the most loyal Democrats (blacks, Hispanics, Jews, and lower income voters in general) seem to be more geographically segregated than Republican voters are, compact districts would tend to minimize the number of seats Democrats win. *See, e.g.*, Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1 (1985).

48. MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS 6 (1994).

49. Appeal Brief of Washington Legal Foundation, U.S. Senator Jesse Helms, and the Equal Opportunity Foundation as Amici Curiae in Support of Appellants at 2, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357) [hereinafter WLF Brief].

50. *Id.* at 15-16.

51. 442 U.S. 256 (1979).

asserted, potential opponents would still have to prove it had done so "because of" race. Any compact district, they believed, would be "largely immune" to such a challenge.[52] Whatever its effect on blacks, "color blindness," as the WLF employed it, certainly seemed to protect against any decrease in the power of whites.

The states of North Carolina and Florida, the Justice Department, the Democratic National Committee, and a group of liberal legal organizations, as amici, neither contested nor added to the factual record of *Shaw* on appeal.[53] Rather, they discussed principles and precedents, which they believed, with considerable justification, supported the district court's position. They focused on injury to whites and racial equality before the law. Reading *Feeney* as imposing a "racial animus" standard, they contended that since it had not meant to hurt whites by drawing two majority/minority districts, whites had no basis for an equal protection claim. Moreover, whites could dominate elections in ten out of twelve seats, which was more than their population percentage in the state (83% vs. 77%).[54] Complying with the Voting Rights Act or trying to insure equal opportunities for minorities were legitimate reasons for race-conscious districting. However, imposing a burden of special justification on minority opportunity districts would not only contradict numerous lower federal and Supreme Court decisions, but would also undermine the Voting Rights Act, impose a racial double standard, and treat racial groups differently from other "communities of interest."[55]

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52. *See* WLF Brief, *supra* note 49, at 20-21.

53. A brief filed for the Lawyers' Committee on Civil Rights Under Law, the ACLU, MALDEF, and the NAACP did refer generally to the history of racial discrimination in the state as a justification for drawing minority opportunity districts. Appeal Brief of Amici Curiae Lawyer's Committee for Civil Rights Under Law, the American Civil Liberties Union, the Mexican American Legal Defense and Education Fund, and the National Association for the Advancement of Colored People in Support of Appellees at 12-13, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357) [hereinafter Lawyer's Committee Brief].

54. *See* State Appellees' Brief, *supra* note 33, at 7, 17, 49.

55. *Id.* at 44-45; *See also* Lawyers' Committee Brief, *supra* note 53, at 5-9; Appeal Brief Amici Curiae of Bolley Johnson, Speaker of the Florida House, and Peter R. Wallace, chairman of the Florida House Reapportionment Committee of the Florida House of Representatives, in Support of Appellees at 5-6, 17, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357) [hereinafter Johnson Brief]; Federal Appellees' Brief, *supra* note 33, at 22-23, 26; Appeal Brief Amicus Curiae in Support of Appellees of the NAACP Legal Defense Fund, Inc. at 3, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357) [hereinafter NAACP-LDF Brief]; Appeal Brief Amici Curiae on Behalf of the Democratic National Committee,

From *Roberts* v. *Boston*,[56] the nation's first well-documented school segregation case, through the present, civil rights cases have been fact-intensive, inquiring into the specifics of whether schools, public accommodations, job opportunities, the chances of being convicted of crimes, or the possibilities of registering, voting, or attaining office were actually inferior for African-Americans or other historically disadvantaged minorities. [57] Not *Shaw v. Reno*. *Shaw* was decided in a factual vacuum.

C. *"Classifications of Citizens Solely on the Basis of Race"*[58]

For a case that was argued on the basis of few facts, many of them wrong, *Shaw* was surprisingly dependent on empirical assertions, and it pointed lower court judges toward much more intensive attention to factual details in future cases. Logically, the opinion may be divided into four parts: a consideration of precedents, an analysis of legislative decisionmaking on redistricting, a public policy/constitutional argument about the evils of "racial gerrymandering," and a rather vague guide to further judicial decisionmaking on the issue.

1. A New Cause of Action

Implicitly recognizing that white plaintiffs could not prove the sort of discriminatory effect that had been required in vote dilution cases[59]

Democratic Legislative Leaders Association, Democratic Congressional Campaign Committee, and Democratic Governors' Association in Support of the Appellees at 22-23, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357) [hereinafter DNC Brief].

56. 59 Mass. (5 Cush.) 198 (1849); *see* J.Morgan Kousser, *'The Supremacy of Equal Rights': The Struggle Against Racial Discrimination in Ante-bellum Massachusetts and the Foundations of the Fourteenth Amendment*, 82 NW. U. L. REV. 941 (1988).

57. *See e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) (schools); Morgan v. Virginia, 328 U.S. 373 (1946) (public accommodations); Griggs v. Duke Power, 401 U.S. 424 (1971) (jobs); McCleskey v. Kemp, 481 U.S. 279 (1987) (crimes); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (registering and voting); Thornburg v. Gingles, 478 U.S. 30 (1986) (attaining office).

58. *Shaw*, 113 S. Ct. at 2824.

59. In majority vote dilution cases, specific groups of individuals, especially white suburbanites, were under-represented, compared to whites who lived in certain rural areas. Those who were harmed brought the cases and the injuries to them and the possibilities of judicial remedies for those injuries dominated the discussions in the cases. *See* Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962). In minority vote dilution cases plaintiffs went to considerable lengths to prove racially discriminatory effects. *See* Thornburg v. Gingles, 478 U.S. 30 (1986); White v. Regester,

and could not demonstrate that they had been harmed,[60] much less singled out for injury because they were white,[61] O'Connor recognized

412 U.S. 755 (1973); Allen v. State Bd. of Elections, 393 U.S. 544 (1969). The focus of the Senate controversy over amending Section 2 of the Voting Rights Act in 1982 was on whether to write into the law a specific standard, proportionality, against which to measure those effects. Even where the crux of the case has been racially discriminatory intent, rather than effect, courts have required *some* showing of effect. *See* Garza v. County of L.A., 756 F. Supp. 1298 (C.D. Cal.), *aff'g in part, vacated in part and remanded*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). O'Connor explicitly distinguishes *Shaw* from other vote dilution cases on the grounds that those cases did not involve "racial gerrymanders." *Shaw*, 113 S. Ct. at 2828.

60. To Justice Scalia and three of the other four Justices in the *Shaw* majority, a plaintiff must demonstrate as an "irreducible constitutional minimum of standing," that he has "suffered an 'injury in fact'—an invasion of a legally-protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations omitted).

> [The Court has] consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Id. at 2143.

In a case in which African-American parents challenged I.R.S. tax exemptions for private segregated schools, Justice O'Connor, for a six-person majority, denied the parents standing because they merely claimed what she called an "abstract stigmatic injury." Allen v. Wright, 468 U.S. 737, 755 (1984).

In the affirmative action cases relied upon in *Shaw*, white plaintiffs have always demonstrated injury—loss of jobs or contracts. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). In this sense, *Shaw* does not "Crosonize" voting rights law. On the contrary, it reinterprets *Croson* to make it stand for the proposition that every contractor has a right to participate in a colorblind contracting process, a right that anyone could claim, even if she won a contract, got a job, or gained admission to a law or medical school.

During the 1970's, some legal scholars on the left criticized the Court for denying standing "as a surrogate for disposition on the merits" and for inconsistencies in applying the doctrine. *See* Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 699 (1977); Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698 (1980). In *Shaw*, the Court majority blatantly ignored their own broadly stated standards on standing to get to an issue that they wanted to decide.

61. In Whitcomb v. Chavis, 403 U.S. 124 (1971), the Supreme Court ruled that black plaintiffs had not proved that their under-representation was the effect of their race. Black candidates lost, the Court decided, because they were Democrats. *Id.* at 163. *Compare* Justice O'Connor's stress on injury in her dissent in Metro Broadcasting, Inc., v. FCC, 497 U.S. 547, 609 ("To the person denied an opportunity or right based on race,

a new, "analytically distinct claim," a generalized injury to the political system itself, a "lasting harm to our society"[62] that apparently anyone could assert: that the way that the state had drawn district lines amounted to a "racial classification."[63] The Equal Protection Clause, as she glossed it, prevented "discrimination *between* individuals on the basis of race," not merely discrimination *against*[64] individuals or members of a group.[65] Under this new cause of action, plaintiffs could proceed if there was a correlation between racial and district lines in

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the classification is hardly benign."), *overruled by*, Adarand Constructors v. Peña, ___ U.S. ___, ___, 63 U.S.L.W. 4523, 4530 (June 13, 1995).

In Irby v. Fitz-Hugh, 692 F. Supp. 610 (E.D. Va. 1988), *aff'd*, 889 F.2d 1352 (4th Cir. 1989), *cert. denied*, 496 U.S. 906 (1990), the district court decided that since blacks were proportionately represented on Virginia school boards, a law that was arguably adopted with a discriminatory intent had become legitimate. *Id.* at 618-20. The authoritative Senate Report on the 1982 renewal of the Voting Rights Act stressed proof of a racially discriminatory effect. *See* S. REP. NO. 417, 97th Cong., 2d Sess. 28-29 (1982).

62. *Shaw*, 113 S. Ct. at 2832.

63. *Id.* at 2824, 2830 (stating that this claim could be brought by "white voters (or voters of any other race)").

64. In dissent, White considered the issue "whether the classification based on race discriminates *against* anyone by denying equal access to the political process." Shaw, 113 S. Ct. at 2836 (White J., dissenting). Note that White had joined the majorities (which also always included Justice O'Connor), in four recent "colorblind" cases that formed the precedential foundation for *Shaw v. Reno*. *See* Holland v. Illinois, 493 U.S. 474 (1990); *Croson*, 488 U.S. at 469; *Wygant*, 476 U.S. at 267; Batson v. Kentucky, 476 U.S. 79 (1986). The fifth vote in each case except *Batson*, White certainly did not believe that *Shaw* necessarily followed as a logical implication of these precedents.

65. *Shaw*, 113 S. Ct. at 2824 (emphasis added). Although voting is an individual right, it is exercised in a way that is fundamentally different from the social processes that underlie judicial decisions in school segregation or employment discrimination. From the time of Charles Sumner's brief in Roberts v. Boston, 59 Mass. (5 Cush.) 198 (1849) to the present, critics of school segregation have decried treating individuals differently because of a fact that was irrelevant to their educational ability or learning styles, their race. Thus, to deny an individual admission to a particular school on the basis of ability might be reasonable, but to assume that her ability was lower just because she was African-American was arbitrary, a deprivation of due process. Exactly the same propositions underlie employment discrimination law. On the Roberts case and the arguments that swirled around it, see Kousser, *supra* note 56.

In contrast, voting and redistricting are inherently group-oriented processes. Success depends not only on your own vote, but on the votes of people like you, not only on what district you are in, but on who else is in your district. In an electorate where opinions and behavior are sharply divided on the basis of race, to fail to take race into account in districting is to deny any particular member of a minority group the opportunity to have her views represented. In other words, to deny group representation is to deny individual representation.

minority opportunity districts and if the boundaries of such districts were "bizarre."[66]

O'Connor admitted that it might be difficult to determine "from the face of a single-member districting plan that it *purposefully* distinguishes between voters on the basis of race,"[67] but an irregular shape was a tangible and immediate indication of such purpose.[68] To be sure, not every irregularity raised constitutional suspicions. Despite pleas from the RNC, the only sitting Justice to have been a member of a state legislature during a redistricting[69] refused to overturn strong precedents and read compactness into the Constitution.[70] Nor did she

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66. To the extent that O'Connor's opinion stresses compactness, it is much less clearly grounded in constitutional language than, for instance, Brennan's stress on population equality in Kirkpatrick v. Preisler, 394 U.S. 526 (1971). In this respect, Brennan and his allies were constitutional conservatives, constraining judicial latitude, while O'Connor and the other members of the *Shaw* majority were loose constructionists, tending toward untethered judicial discretion.

67. *Shaw*, 113 S. Ct. at 2826 (emphasis added).

68. *Id.* at 2826-27. In her discussion of Gomillion v. Lightfoot, 364 U.S. 339 (1960), O'Connor seems to distinguish between "purpose," which she treats as a Fourteenth Amendment concern, and "motivation," which she appears to associate with the Fifteenth Amendment only. She also appears to mean "effect" when she says "purpose." *Shaw*, 113 S. Ct. at 2826 ("*Gomillion* thus supports appellants' contention that district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption.").

This usage, if followed consistently, would throw equal protection law into utter chaos. In voting rights law, for example, the intent requirement of *Mobile v. Bolden*, 446 U.S. 55 (1980), and the "totality of the circumstances" effect test discussed in White v. Regester, 412 U.S. 755 (1971), would become indistinguishable. Presumably, the incidental effect standard of Whitcomb v. Chavis, 403 U.S. 124 (1971), would have to be abandoned entirely as well. Washington v. Davis, 426 U.S. 229 (1976) and all its progeny, several of which were cited favorably by O'Connor, *Shaw*, 113 S. Ct. at 2824-26, would be difficult to justify because they stand for the principle that a statute that impacts people of different races or genders differently—i.e., has a racially discriminatory effect—is unconstitutional under the Fourteenth Amendment only if its purpose or motivation or intent (the Court has not consistently differentiated between these terms) is racist or sexist. Since O'Connor cannot have meant to throw out so much settled precedent so casually, I conclude that her distinction between purpose and motivation in *Shaw v. Reno* has no significance.

69. O'Connor was appointed to the Arizona Senate in 1969. Peter W. Huber, *Sandra Day O'Connor*, *in* THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1993, at 506-10 (Claire Cushman, ed. 1993).

70. *Shaw*, 113 S. Ct. at 2827. For precedents, *see, e.g.*, Gaffney v. Cummings, 412 U.S. 735, 752 n.18 (1973); Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969). In Shaw v.

grant Everett's prayer for race-unconscious districting: "This Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances."[71] But O'Connor did agree with Justice Stevens's view in *Karcher v. Daggett*,[72] that "dramatically irregular shapes may have sufficient probative force to call for an explanation."[73] The presence of "bizarre," heavily minority districts in a plan merely created a rebuttable, *prima facie* case of "racial gerrymandering." The explanation to be offered was of racial *intent*, not effect. Effect was irrelevant because Justice O'Connor was concerned with discrimination *between*, not *against*, with what she viewed as a general societal evil, not with the deprivation of rights of a person or group.[74]

Hunt, 861 F. Supp. 408 (E.D.N.C. 1994), the plaintiffs averred without any evidence in actual experience that compactness was implicit in the notion of single member districts because "[t]here would have been no logic in requiring single-member districts if there were no principle of compactness to help assure that representatives in Congress would have a reasonable opportunity to know their constituents and that voters would have a reasonable opportunity to know incumbents and learn about challengers." Plaintiffs' Memorandum in Support *supra* note 38, at 5 n.4. If such considerations did not compel politicians in the 19th century, when transportation and communication were much more difficult and when the population of each district was considerably smaller, it would be bizarre to make them controlling, for the first time in American history, in the 1990s.

71. *Shaw*, 113 S. Ct at 2824.

72. 462 U.S. 725 (1983).

73. *Shaw*, 113 S. Ct. at 2827 (quoting Karcher v. Daggett, 462 U.S. 725, 755 (1983) (Stevens, J., concurring)).

74. I am of course not the first to notice this distinction in O'Connor's opinion. *See* Thomas C. Goldstein, *Unpacking and Applying Shaw v. Reno*, 43 AM. U. L. REV. 1136, 1154 (1994); *The Supreme Court, 1992 Term Leading Cases*, 107 HARV. L. REV. 194, 200-04 (1993). The importance of the distinction is easily illustrated in the classic school segregation cases. *See* Brown v. Board of Educ., 347 U.S. 483 (1954); Plessy v. Ferguson, 163 U.S. 537 (1896).

The argument in *Plessy* between Justice Brown, who wrote the majority opinion, and Justice Harlan, who dissented, was in effect over whether the Louisiana legislature had meant to make a discrimination *between* railroad passengers on the basis of race also a discrimination *against* passengers whom a conductor did not consider white. Segregation, Justice Brown disingenuously concluded, stamped "the colored race with a badge of inferiority . . . . solely because the colored race chooses to put that construction upon it." *Plessy*, 163 U.S. at 551. But the Kentuckian Harlan would have none of this charade: "Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons." *Id.* at 557 (Harlan, J., dissenting). In other words, recognizing that in this instance, a discrimination *between* persons amounted to a purposeful discrimination *against* some of them, Harlan

2. Three Stages in Drawing a Minority Opportunity District

The Supreme Court's implicit understanding of legislative decisions that result in an irregularly shaped, heavily minority district actually models the decisions in North Carolina fairly accurately. O'Connor's opinion recognized a sequence of three decisions or stages: 1) to take race into account; 2) to draw a minority opportunity district at all; and 3) to draw it in the place that it was drawn with the shape that it finally had.

The first decision, O'Connor agreed, was inevitable and therefore surely constitutional: "[R]edistricting 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."[75] Since they will always have the information and since the knowledge may be crucial to their political careers and policy goals, it would be naive to assume that redistricters will avoid using it and pointless to spend time and effort proving that they do.

The second decision is whether to establish such a district. Four pieces of evidence suggest that the majority recognized this as a distinct stage, and that they found no constitutional infirmity here. First, the Court, in granting *certiorari*, directed the attention of attorneys to:

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found a violation of equal protection. *See* CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 172, 192 (1987).

In *Brown*, the associated cases decided with it, and a myriad of previous "separate but unequal" cases at the state, district, and Supreme Court levels, the NAACP-LDF spent an incalculable amount of time trying to show that school facilities and expenditures were unfairly distributed or that African-American children were psychologically damaged by being treated as inferiors, or both. That is, of course, the reason for the famous footnote 11, based on extensive evidence presented by social psychologists at trials, which showed that the Court had what was thought to be sound empirical evidence for the view that for blacks, segregation was "inherently unequal." If courts had believed that a simple enunciation of a "colorblind principle" was all that was necessary to win a segregation suit, it certainly would have saved a great many plaintiffs a great deal of trouble. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 315-45 (1976). To suggest now that those and other cases stand for no more than that slogan is to falsify the history of that struggle.

75. *Shaw*, 113 S. Ct. at 2826. Justice O'Connor did not explain *how* the legislature became aware of race. But politicians and technicians did not need all the very latest census figures in order to know, in a general sense, what types of people lived where. *See infra* section part III. B.4.

> Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own.[76]

As complicated as the question was, it certainly focused not on the adoption of such a district *per se*, but on the establishment of a district *different than* the Department of Justice had mentioned in its Section 5 objection letter. That district O'Connor casually termed "reasonably compact" without having been presented with any detailed evidence about the district or giving any definition whatsoever of compactness.[77] Second, O'Connor approvingly discussed the division of Manhattan in the 1960s into one overwhelmingly minority and three white congressional districts, which had withstood legal accusations of racial gerrymandering.[78] Third, she stated explicitly that "we express no view as to whether 'the intentional creation of majority-minority districts, without more' always gives rise to an equal protection claim."[79] Fourth, the Court and numerous lower courts have approved drawing minority opportunity districts, as the Supreme Court did unanimously in the *Quilter* case during the same term.[80]

A comparison between the packing of blacks into Ohio state House districts by the Republican-majority State Apportionment Board that was at issue in *Quilter* and the situation in *Shaw* underlines the point. In both cases, apportioners admitted their color-conscious intention to draw majority black districts; in both, they claimed to have been acting

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76. Shaw v. Barr, ___ U.S. ___, ___ 653, 113 S. Ct. 653-54 (1992). Despite the fact that attorneys' arguments were supposed to be directed solely to this question, none of the nine Justices directly addressed the question in *Shaw v. Reno*.

77. *Shaw*, 113 S. Ct. 2832. In fact, although Justice O'Connor had no reason to know it, the Republican-drawn district referred to by the Justice Department was thirty miles longer and more difficult to traverse than the Twelfth District that the legislature finally adopted. It also did not contain a majority of African-Americans. *See infra* part III.C.3,

78. *Id.* at 2826 (citing Wright v. Rockefeller, 376 U.S. 52 (1964)). Adam Clayton Powell's district was 86.3% black and Puerto Rican, and plaintiffs had challenged its lines as ones that "ghettoized" non-whites. *Wright*, 376 U.S. at 54. The Supreme Court, 7-2, rejected the challenge, as had the district court. *Id.* at 58.

79. *Shaw*, 113 S. Ct. at 2828 (quoting *Shaw*, 113 S. Ct. at 2839 (White, J., dissenting)).

80. *See* Voinovich v. Quilter, ___ U.S. ___, 113 S. Ct. 1149 (1993).

to satisfy commands of the Voting Rights Act; in both, it was so widely understood that partisan, as well as racial motives played a role in the drawing of the majority-minority districts that judges took judicial notice of the fact; in both, the effect of their actions was to draw districts that black candidates could carry.[81] What separated the two cases was that because the Ohio redistricters had more districts to work with,[82] the North Carolina districts could not be so geographically compact as those in Ohio. Thus, *Shaw* should not be taken to rule that minority opportunity districts can never be created, that the equal protection clause somehow dictated that every district be majority-Anglo, no matter what.[83]

The Court's focus on irregular[84] shapes, as well as its apparent approval of the two earlier stages of legislative decisionmaking, indicate the *Shaw* majority thought that the key choice that needs explanation is the third stage, the reasons for the final outline of the district. If that is what has to be explained, and if the *real* reasons,[85] not the public relations justifications for the shape count, then, as the detailed analysis of North Carolina redistricting below will show, race may have been only a fairly minor contributing factor at that stage of the process.[86]

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81. In fact, most of the Ohio districts were more heavily black, more nearly "segregated" in the *Shaw* opinion's phrase than the racially quite balanced North Carolina districts.

82. In Ohio, there were 43 state House districts in the 6 counties where blacks were mostly concentrated, as opposed to 12 congressional districts in North Carolina. Brief for the United States at 3-4 n.1, Voinovich v. Quilter, ___ U.S. ___, 113 S. Ct. 1149 (1993) (No. 91-1618).

83. Nonetheless, plaintiffs in the Mississippi case of Thornton v. Molpus, (No. 2:74 CIV 357 PS) (S.D. Miss., filed Oct. 11, 1994), at para. V., come close to making this contention.

84. Justice O'Connor uses or quotes the word "irregular" four times, "bizarre" three, and "egregious" once.

85. Richard H. Pildes and Richard G. Niemi argue, instead, that *Shaw v. Reno* should be read as constitutionalizing a "district appearance claim," that it will ultimately be seen as merely a constraint on objectively non-compact minority opportunity districts, and that courts may disregard the real reasons for a district's shape. *See* Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts", and Voting Rights: Evaluating Election-District Appearances After* Shaw, 92 MICH. L. REV. 483, 523-24 (1993). Although this may be the best strategy for cabining *Shaw*, it is one that, as they realize, potentially threatens many minority seats. *Id.* at 526. It is also difficult to reconcile with vote dilution and affirmative action law, making *Shaw* much more revolutionary and original than it purports to be.

86. The majority opinion in Shaw v. Hunt, 861 F. Supp. 408, 459 n.54 (E.D.N.C. 1994), seems to suggest that O'Connor believed that any district in which racial and

3. Why "Racial Gerrymandering" Harms Society: *Shaw*'s Contradictions

O'Connor justified the radical break with precedent in *Shaw* by three assertions about what are, in essence, empirical questions that can be answered by social science, but on which she was neither provided with any evidence by the parties nor sought systematic evidence herself.[87] Non-compact minority opportunity districts, she said, in a public policy argument that might well have been addressed to a legislature, reinforce the 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."[88] They also "may exacerbate . . . patterns of racial bloc voting."[89] Finally, they make elected officials "more likely to believe their primary obligation is to represent only the members of that group, rather than their constituency as a whole."[90] Putting all three together in a quotable conclusion, O'Connor suggests that "racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions . . . ."[91]

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district lines were highly correlated was suspect, whatever the actual legislative purpose. The Louisiana court in Hays v. Louisiana, 839 F. Supp. 1188, 1195 (W.D. La. 1993), does so more clearly, though it confuses what I have called the second and third stages of decisionmaking. *See id.* at 1202. Thus, a *prima facie* case would allow plaintiffs to jump immediately to strict scrutiny. This interpretation of O'Connor's opinion ignores both its language and its logic.

87. For all of the emphasis on compactness in *Shaw v. Reno* and its successors, O'Connor nowhere discussed the chief alleged benefit of compactness, to which empirical evidence would also have been pertinent: that compact districts facilitate communication between a representative and her constituents. *See* Appellants' Brief, *supra* note 10, at 44-45 & n.11. One might compare, e.g., the volume of constituent requests to members of Congress in districts with different compactness levels, allowing for differences due to the representative's seniority. If proponents of compactness are correct, there ought to be many fewer requests directed to the representative of a "funny-shaped" district than to one of a more regular district. Other social scientists could no doubt think of other relevant evidence.

88. Shaw, 113 S. Ct. at 2827.

89. *Id.*

90. *Id.*

91. *Id.* at 2832. O'Connor's peroration continues with two other essentially factual assertions that I believe are incorrect, although it would require virtually a complete history of Reconstruction and of contemporary public opinion on racial matters to demonstrate these points conclusively: "it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and

This is the heart of O'Connor's opinion.[92] If the assertions are wrong or unsupported by evidence or unreflective, or if other potentially beneficial real-world consequences balance them, then there is no rationale for the majority's new cause of action, no compelling reason to disregard the conservative tradition of judicial self-restraint. But what social scientific research there is on the first two assertions, which will be cited in Section III, *infra*, lends O'Connor very little support. The vast majority of African-Americans are driven toward unity because they are still discriminated against, and racial bloc voting is already a stark reality.[93] Indeed, creating minority opportunity districts may *reduce* racially polarized voting if they replace districts where blacks or Latinos are present in proportions slightly below those that allow them to elect candidates of their choice. This was, indeed, the case in both North Carolina and Texas.[94]

Fifteenth Amendments embody, and to which the Nation continues to aspire." *Id.* On the contrary, I believe that the framers of the Reconstruction Amendments strove primarily to protect minorities against discrimination, a discrimination that they had fought against too long to expect to evaporate. *See* Kousser, *supra* note 56, at 977-78. And I think that the nation continues to be deeply split on whether colorblindness is a desirable public policy. *See* PAUL M. SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE 128-135 (1993). The practical effect of O'Connor's assumption of a consensus on such still far-off goals is to impede their attainment, as the post-*Shaw* "racial gerrymandering" cases, which threaten to eliminate at least half of the minority members of Congress, so clearly show.

92. The NAACP-LDF asserted that plaintiffs had to prove the last two assertions true in particular instances in order to have standing to sue. Brief for Gingles Defendant-intervenors at 3-5, Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994) (No. 92-202); Brief for Lawson Defendant-intervenors at 6, Vera v. Richards 861 F. Supp. 1304 (S.D. Tex. 1994) (No. 94-0277). There is no evidence for this gloss in O'Connor's opinion, and it surely contradicts the notion of a "new cause of action" that did not require proof of discrimination *against* anyone, which was the focus of the White and Souter dissents.

93. It seems especially odd that Chief Justice Rehnquist would join O'Connor in this assertion because of his statement in *Batson*: "The use of group affiliations, such as age, race, or occupation, as a 'proxy' for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State's exercise of peremptory challenges." Batson v. Kentucky, 476 U.S. 79, 138 (1986).

94. Although there were racially polarized Democratic primaries in the North Carolina 1st District and the Texas 29th in 1992, the primary elections in North Carolina's 12th and the Texas 28th and 30th were not polarized. In all five of the general election contests in new minority opportunity districts in these two states, the Democratic candidates won so overwhelmingly (receiving from 65% to 87% of the vote) that there could not have been much racial polarization. The contrast between this election and those in North Carolina's 2nd district in 1982 and 1984 is very striking. *See infra* part III.B.6-7.

As to the third assertion, it is doubtless true that all representatives of any race pay special attention to the constituents who support them or whose votes they might be able to win in the future. White members of Congress from North Carolina before 1993, objective measures will show, were largely unresponsive to the policy preferences of their African-American constituents. For instance, despite the fact that it was over 20% black, the Charlotte congressional district before 1992 sent to Washington uniformly conservative Republican congressmen who completely ignored the policy views of their African-American constituents. Justice O'Connor's implicit assertion that *white* representatives pay attention to their "constituency as a whole" is simply not true, especially if some of their constituents are black.

It is also worth noting that the three assertions contradict each other. If there already is racial bloc voting, then treating members of each racial group as having systematically different preferences is facing reality, not creating stereotypes.[95] The proposition that an African-American or Latino member of Congress may feel herself responsive only to members of her group, and not to whites, *presumes* that the group has distinctive preferences, again contradicting the stereotype argument. Finally, if the stereotypes are not true, then racial bloc voting will not occur, no member of Congress will think herself particularly beholden to any group, and no constituent will be left out.

Whatever their factual or logical status, these alleged consequences of racial gerrymandering make clear that the majority opinion in *Shaw* should not be extended, as the Texas court imagined, to ban the conscious placing of blacks or Latinos into majority-Anglo districts to buttress or create Democratic majorities.[96] First, such an extension would contradict the stereotype argument because minority group members would be assumed to have the same preferences as large numbers of Anglos in the majority-Anglo district, joining them to vote for a presumably Anglo Democrat. Second, racial bloc voting could not increase in such a case, because it is assumed that minorities would join many whites in supporting a candidate for Congress. Third, although the winning Democrat might be responsive mostly to Democrats, by assumption, those Democrats would come in all colors, contradicting the third assertion. Placing overwhelmingly Democratic African-

95. *Shaw*, 113 S. Ct. at 2845 n.2 (Souter, J., dissenting).

96. *See* Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994).

Americans or predominantly Democratic Latinos in Anglo Republican districts might dilute the minorities' votes, but would not increase segregation or, on the evidence from North Carolina, change the way that the Republicans voted. It would therefore not be illegal under *Shaw*. What O'Connor believes are the bad consequences of racial gerrymandering, then, serve also to confine the application of the decision to minority opportunity districts alone.

4. Unsettled and Unsettling Issues: *Shaw*'s Ambiguities

It is useful to divide *Shaw's* many ambiguities into two major parts, depending on which side of the "strict scrutiny" line they fall. That is, are they part of the argument on whether the legislature has made a forbidden classification? Or do they apply to the phase of a case in which a court has decided that the classification is tainted, and it requires the legislature to come up with extremely good reasons for it ("compelling interests") and to have used means of putting the classification into effect that have the fewest bad consequences ("narrow tailoring")?[97]

a. Before Strict Scrutiny

There are five crucial issues in determining whether a boundary constitutes a "racial gerrymander" on which O'Connor's opinion is deeply ambiguous. First, did she really mean to exclude any

97. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986). It is extremely ironic that the strict scrutiny/compelling state interest/narrow tailoring triad should be said to derive from the Japanese exclusion cases. *See* Korematsu v. United States, 323 U.S. 214 (1944). Not only did the Court in those cases allow that massive deprivation of rights to proceed, but the United States government could have proven, on the basis of information that it chose to make public then, *see* PETER IRONS, JUSTICE AT WAR (1983), that it had a compelling interest and that its actions were narrowly tailored. The compelling interest was in preventing a potential Japanese invasion from being assisted by what the government claimed to be suspicious persons. The action was tempered, the government contended, by being aimed only at Japanese-Americans on the West Coast, where such an invasion would have been most likely. That is, the test by itself would not even have outlawed the paradigm case it was aimed at, unless the Court had been willing to contest the government's presentation of facts. Thus, the classic formulation of equal protection law rests not on a formal theoretical structure, but on the judiciary's willingness to get at the underlying facts, which accords with the overall argument of this paper.

consideration of effect, as dissenters White and Souter charged?[98] If so, how would the case fit into any line of previous civil rights or affirmative action cases and who could claim the right to vindicate the public interest in avoiding racial classifications? Does anyone living anywhere in the state—or anywhere in the country, for that matter—merit standing to represent the public interest against what he claims is a racial gerrymander? If liberal judges had suddenly announced a new, far-reaching right, such as a "right to participate in a 'color-blind' electoral process,"[99] that emerged from no particular section or even penumbra of the Constitution, the cries of outrage and derision from conservative critics would have been deafening.[100]

Second, how high does the correlation between racial percentages and district lines have to be to constitute a *prima facie* case of racially discriminatory intent? Playing the language game by Humpty Dumpty's rules, O'Connor repeatedly described the issue as one of "segregat[ing] voters."[101] But what level of "segregation" is suspect? The First and Twelfth districts in North Carolina are the most racially balanced in the state—i.e., the closest to 50% of the predominant ethnic group. Why does this amount to "segregation"?[102]

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98. *Shaw*, 113 S. Ct. at 2834, 2836, 2841 (White, J., dissenting); *id.* at 2847 (Souter, J., dissenting).

99. *Id.* at 2824.

100. One imagines Robert Bork's stern denunciations of this breakdown of judicial self-restraint, George Will's shorter, but more polysyllabic version of Bork's line, and endless snide *Wall Street Journal* editorials. When a "conservative" court acts in this way, however, the erstwhile critics of judicial overreaching are strangely silent, and the news media almost uniformly fail to emphasize the case's potential doctrinal significance.

101. Shaw v, Reno, 113 S. Ct. at 2824.

> "'When *I* use a word', Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.'
>
> "'The question is', said Alice, 'whether you *can* make words mean so many different things.'
>
> "'The question is', said Humpty Dumpty, 'which is to be master—that's all.'"

Lewis Carroll, *Through the Looking Glass, in* THE COMPLETE WORKS OF LEWIS CARROLL 214 (Modern Press 1936).

102. The asserted connection and analogy between Gomillion v. Lightfoot, 364 U.S. 339 (1960), and *Shaw v. Reno* are very inexact. In 1960, Macon County, Alabama had the highest proportion of black population of any county in the country, 84%. To avoid the consequences of rising black voter registration, a state senator redrew the previously square boundaries of the city of Tuskegee to exclude all but about a dozen African-Americans. This was, indeed, segregation because blacks were "fenced out" of the most

Third, how is compactness to be measured and what level of the twenty-odd indices proposed is constitutionally suspect?[103] If no objective measure[104] is to be employed, how are courts to avoid inconsistent, unprincipled, or even biased or partisan decisions?[105] How are they to avoid the appearance and the reality of instituting racial double standards if they apply 'strict compactness standards' to minority opportunity districts, but not to majority-white districts? Moreover, does O'Connor seriously believe that compactness is a "traditional districting principle,"[106] or should courts that are trying to

important decisions in the county. The evidence for the racial discrimination was not merely the 28-sided figure of the resulting boundaries, but also the percentages of people of each race in the county who were inside and outside of the Tuskegee city limits before and after the change. In fact, plaintiffs could easily have offered much more extensive qualitative evidence of discriminatory intent. In stark contrast, those in or out of the minority opportunity districts drawn in the 1990s could still vote in equally important congressional elections and were not placed in districts that were nearly so overwhelmingly composed of members of one race as in Alabama in the late 1950s. *See* ROBERT J. NORRELL, REAPING THE WHIRLWIND: THE CIVIL RIGHTS MOVEMENT IN TUSKEGEE 92, 101-03 (1985) (showing these and other pertinent facts).

103. *See* Richard G. Niemi et al., *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. POL. 1155, 1161-62 (1990) (showing a list of indices).

104. O'Connor referred to compactness, contiguity, and respect for political subdivisions as "objective factors." *Shaw*, 113 S. Ct. at 2827. But contiguity is trivial, political subdivisions must be cut to satisfy the Court's population equality decisions, and no post-*Shaw* court has applied any objective or precise measure of compactness in its decision. Indeed, every judge in the post-*Shaw* cases, as well as O'Connor in *Shaw* itself, assumed that they knew noncompactness when they saw it. Why should such measures be considered better or more objective indications of the intent of a legislature than statements by legislators or extensive analyses of the facts by observers?

105. After the first decision in Hays v. Louisiana, 839 F. Supp. 1188 (W.D. La. 1993), the State legislature constructed a new minority opportunity district consciously patterned after a district drawn in the 1970s. VOTING RTS. REV., Summer 1994, map at 25. Nonetheless, the three-judge panel, in a ruling from the bench, threw it out without hearing any evidence from plaintiffs about its compactness and substituted its own plan, which contained no minority opportunity district and a new open seat that former Klan leader and current Republican David Duke described as "tailor-made" for him. *After Modigliani*, ECONOMIST, Aug. 27, 1994, at 21; Elaine R. Jones, *Black Lawmakers*, N. Y. TIMES, Sept. 11, 1994, at E19.

106. *See Shaw*, 113 S. Ct. at 2827. In Karcher v. Daggett, 462 U.S. 725 (1983), a majority opinion in which O'Connor joined, the Court considered that several reasons (*not* compelling state interests) might justify population variances between districts: "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Id.* at 740. In

determine whether a particular districting arrangement requires extraordinary justification first determine what past practices in the state have been, and then compare the process and outcomes in the instance at issue? Suppose that irregular boundaries and racial discrimination against minorities typified past practices, and that the difference this time was that minorities won. Would this constitute a constitutional violation, if some judge did not like the shape of a resulting district?

Fourth, how much does race have to count in the decisions about boundaries? O'Connor states that it must be the single reason *fifteen times*:

> What appellants object to is 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 . . . .[107] Classifications of citizens *solely* on the basis of race . . . .[108] 'unexplainable on grounds other than race'. . .[109] could not be explained on grounds other than race. . . .[110] '*solely* concerned with segregating white and colored voters . . . .'[111] obviously drawn for *the* purpose of separating voters by race . . . .[112] could 'be explained *only* in racial terms.' . . .[113] not so bizarre as to permit of *no other* conclusion. . . .[114] *anything other* than an effort to 'segregat[e] . . . voters' on the basis of race. . . .[115] When a district obviously is created *solely* to effectuate the perceived common interests of one racial group . . . .[116] rationally cannot be understood as *anything other* than an effort to separate voters into different districts on the basis of race . . . .[117] cannot be understood as *anything other* than an effort to classify and separate voters by race . . . .[118] rationally could be understood *only* as an effort to

Karcher, compactness was merely one of a number of legitimate redistricting principles, which included incumbency protection. *Id.* at 740-41.

107. *Shaw*, 113 S. Ct. at 2824 (emphasis added).

108. *Id.* (emphasis added).

109. *Id.* at 2825 (emphasis added) (citing Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977)).

110. *Id.*

111. *Id.* (emphasis added) (quoting Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960)).

112. *Id.* at 2826 (emphasis added).

113. *Id.* (emphasis added) (quoting Wright v. Rockefeller, 376 U.S. 52, 59 (1964)).

114. *Id.* (emphasis added).

115. *Id.* (emphasis added) (quoting *Gomillion*, 364 U.S. at 341).

116. *Id.* at 2827 (emphasis added).

117. *Id.* at 2828 (emphasis added).

118. *Id.* (emphasis added).

> segregate voters by race. . . .[119] rationally cannot be understood as *anything other* than an effort to segregate citizens into separate voting districts on the basis of race . . . .[120] a reapportionment scheme so irrational on its face that it can be understood *only* as an effort to segregate voters into separate voting districts because of their race . . . .[121]

Did the Justice really mean that unless race remained the *only* reason for drawing lines the way they were, there was no constitutional violation?[122] If partisanship, incumbent protection, or the myriad compromises necessary to meet the often eccentric demands of politicians explain many of the twists and turns on a map, and if but for such reasons the districts would have been much more compact, is there still an equal protection violation?[123] Or did O'Connor, as the Louisiana court imagined, mean the opposite of what she said—that if race played *any* role at all in shaping a district, the lines were illegal?[124] Or perhaps

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119. *Id.* at 2829 (emphasis added).

120. *Id.* at 2830 (emphasis added).

121. *Id.* at 2832 (emphasis added).

122. Compare Justice O'Connor's majority opinion in *Croson* condemning "a rigid rule erecting race as the *sole* criterion in an aspect of public decisionmaking." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (emphasis added). In *Croson*, race *was* the sole threshold qualification for gaining 30% of city contracts. *Id.* at 507. In Marylanders for Fair Representation, Inc., v. Schaefer, 849 F. Supp. 1022, 1054 (D.Md. 1994), the district court interpreted *Shaw* to mean that race had to be the legislature's *sole* consideration in order for a challenge to a reapportionment to succeed. *Shaw* comes into play, Pildes and Niemi assert, only "[w]hen race becomes the single dominant value." "Under *Shaw*, race is not an impermissible factor that corrupts the districting process—as long as it is one among many factors that policy-makers use." Pildes & Niemi, *supra* note 85, at 501.

123. The task of weighing competing values is surely one that is more fit for a legislature than for a court. Legislators are *supposed* to represent different values and interests, are *supposed* to compromise and have to live with their deals, and are subject, if they perform badly, to rejection at the polls. Judges' roles are much more circumscribed—too circumscribed to hand over the whole business of reapportionment to them, as some possible extensions of *Shaw* make certain. *E.g.*, Polsby & Popper, *supra* note 45, at 679 (requiring judicial intervention in every redistricting to guarantee selection of the "most compact" plan proposed).

124. This notion was originally espoused in Hays v. Louisiana, 839 F. Supp. 1188, 1202 (W.D. La. 1993) ("The standard for defendants to prevail under *Shaw* is that the challenged redistricting plan must be able to be explained *entirely* without reference to racial gerrymandering" (emphasis added)). But *Hays* also inconsistently held that "*Shaw* requires only that race be an important factor." *Id.* at 1202 n.46.

race had to be the *predominant* reason for a boundary.[125] But how would one weigh various reasons? Should the weights be similar in "racial gerrymandering" and intent-based vote dilution cases? Surely O'Connor did not think that the mere shape of a district or its racial composition is the only sort of evidence relevant to determining whether a plan is a "racial gerrymander," for she invited a test, a further attempt at accounting for the lines: "[I]f appellants' allegations of a racial gerrymander are not contradicted on remand, the District Court must determine whether the General Assembly's reapportionment plan satisfies strict scrutiny."[126] "If the allegation of racial gerrymandering remains uncontradicted, the District Court further must determine whether the North Carolina plan is narrowly tailored to further a compelling governmental interest."[127]

Fifth, what would count as alternative explanations of district shape that would block the road to strict scrutiny by undermining the view that redistricting amounted to a racial classification? O'Connor mentions only "traditional districting principles such as compactness, contiguity, and respect for political subdivisions."[128] But since contiguity is trivially attained, at least in a mathematical sense,[129] and since it was the lack of apparent compactness and observance of municipal boundaries that made out a *prima facie* case of racial gerrymandering in the first place, why remand the case and allow the state to rebut the racial classification thesis at all if these are the only acceptable reasons for drawing lines? Clearly, the implication of O'Connor's opinion is that the civics textbook principles are not the only valid ones, even before one gets to strict scrutiny.[130]

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125. *See* Johnson v. Miller, 864 F. Supp. 1354, 1372 (S.D. Ga.), *stay granted*, 115 S. Ct. 36 (1994), *and prob. juris. noted*, 115 S. Ct. 713 (1995).

126. *Shaw*, 113 S. Ct. at 2830.

127. *Id.* at 2832. In Shaw v. Hunt, 861 F. Supp. 408, 427-34 (E.D.N.C. 1994), Judges Phillips and Britt treated these apparent invitations to gather more evidence of the legislature's purposes before assessing compelling interests as meaningless, although plaintiffs pressed the issue forcefully and presented plentiful evidence of other purposes. By excluding this evidence from their opinion, Phillips and Britt made it difficult for the Supreme Court to determine whether it existed or not, and in effect conceded the issue, rather than taking the Supreme Court at its word.

128. *Shaw*, 113 S. Ct. at 2827.

129. Katerina Sherstruk, How to Gerrymander: A Formal Analysis 18-20 (July 1993) (Caltech Social Science Working Paper 855, on file with the author).

130. Justice White implied that incumbent protection and partisanship are two reasons that would obviate the necessity of imposing strict scrutiny. *Shaw*, 113 S. Ct. at

b. After Strict Scrutiny

If no other explanation suffices and particular boundaries are ruled to be enough of a racial gerrymander to meet a court's standards, what constitutes a compelling state interest and what is narrow tailoring in the redistricting context? O'Connor distinguished three possible compelling state interests, although she did not explicitly foreclose others.

First, a state could be attempting to comply with Section 5 of the Voting Rights Act.[131] She cautioned, however, that according to *Beer v. United States*,[132] compliance cannot justify going farther than preserving the racial status quo. "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression."[133] In this instance, since North Carolina in 1990 contained no minority opportunity districts, it would appear that, under O'Connor's analysis, Section 5 of the Voting Rights Act would not require the state to draw any at all, even if such a district were maximally compact. Her interpretation would, therefore, freeze white supremacy and black exclusion in place and force the Justice Department to preclear electoral changes even if they patently violated Section 2 of the Voting Rights Act or the Fourteenth or Fifteenth Amendments. Surely this was not what the Act's framers in 1965, or the amenders in 1982 had in mind.[134]

2841 n.10 (White, J., dissenting). It is instructive that White, who began the Court's recent plunge into intent analysis in Washington v. Davis, 426 U.S. 229 (1976), should dissent so strongly in *Shaw v. Reno*, which was decided on the basis of intent.

131. 42 U.S.C. § 1971 (1988). This section requires that changes in electoral rules in the Deep South and certain other areas of the country be precleared by the Justice Department, a requirement that was emphasized as a compelling state interest in Shaw v. Hunt, 861 F. Supp. 408, 474 (E.D.N.C. 1994).

132. 425 U.S. 130 (1976).

133. *Shaw*, 113 S. Ct. at 2831.

134. Department of Justice regulations prohibit preclearance under these circumstances. 28 C.F.R. §§ 51.52, 51.55 (a)(2) (1994). *See* Days III, *supra* note 3, at 52-65 (showing the reasoning behind the preclearance ban). The *Hays* court concluded that unless a plan were retrogressive, it could not have a discriminatory effect. Hays v. Louisiana, 839 F. Supp. 1188, 1195-96 n.21 (W.D. La. 1993). This holding would constrain Section 2 and the Fifteenth Amendment to the narrowest interpretation of Section 5.

Second, a state could be attempting to comply with Section 2, which, according to *Thornburg v. Gingles*[135] requires that plaintiffs meet three conditions: that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district", that there is racially polarized voting, and that minority-preferred candidates generally lose.[136] Whether these conditions prevailed in the particular case, O'Connor announced, were empirical questions that could be answered on remand.[137]

Third, under *Croson*[138] and other cases, states have "a significant state interest in eradicating the effects of past racial discrimination."[139] The only past discrimination that O'Connor seemed to have in mind was racial bloc voting, and she specifically reserved the question of whether drawing a minority opportunity district would be the most precisely tailored way of remedying such discrimination.[140] What she did not consider at all is that this interest might arise because of a state's desire to avoid a lawsuit under the Reconstruction Amendments because of past discrimination in redistricting itself.[141] If pre-1991 state action on redistricting that clearly violated the Constitution's equal protection clause and the Fifteenth Amendment could be demonstrated, then such

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135. 478 U.S. 30 (1986).

136. *Id.* at 50-51. Note that all three of these are factual, not theoretical questions, typifying the fact-intensive nature of voting rights jurisprudence before *Shaw v. Reno.*

137. Although O'Connor did not mention other "Senate factors", *see* S. REP. NO. 417, 97th Cong., 2d Sess. 28-29 (1982), that Congress suggested were relevant in a "totality of the circumstances" inquiry under Section 2, the *Shaw* defendants did develop these on remand. The opinions of the three-judge panel, however, largely ignored this argument.

138. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

139. *Shaw*, 113 S. Ct. at 2831 (citing *Croson*, 488 U.S. at 491-93, 518 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280-82, 286 (1986)).

140. *Id.* at 2832.

141. O'Connor's dissent in Metro Broadcasting, Inc., v. FCC, 497 U.S. 547, 609-10 (1990), *overruled by*, Adarand Constructors v. Peña, ___ U.S. ___, ___, 63 U.S.L.W. 4523, 4530 (June 13, 1995), calling for justification by "narrowly confined remedial notions," rather than reliance on general societal discrimination, suggests that the Justice generally favors a factual, historical approach to the question of past discrimination, an approach that the defendants provided in the North Carolina, Texas, and Louisiana cases of Shaw v. Hunt, Vera v. Richards, and Hays v. Louisiana. *See also* O'Connor's majority opinion in *Croson*, 488 U.S. at 508 (1989). Justice Scalia agreed that states could adopt race-conscious remedies to overcome past discrimination. *Id.* at 524 (Scalia, J., concurring).

an interest should count much more heavily than the private discriminatory actions of white voters. It would be bizarre for the Court to rule that a state could remedy this sort of constitutional violation only if it followed "sound districting principles,"[142] principles that are themselves nowhere mentioned in the Constitution or in federal law and that have never been consistently followed by the states in question.[143]

O'Connor nowhere clarified what "narrow tailoring" means when applied to redistricting, and parties on each side of subsequent cases have offered starkly different definitions.[144] On the one hand, plaintiffs have claimed that narrow tailoring requires the adoption of the most compact districts feasible,[145] or perhaps the most compact and the most politically and ethnically competitive.[146] Since as argued above,[147] only minority opportunity districts are challengeable under O'Connor's holding in *Shaw*, the plaintiffs' position erects a blatant double standard: Anglo districts can be as gangling and politically safe as convenient, while districts in which African-Americans or Latinos have a dominant voice must have extremely tidy shapes, and perhaps, their representatives can never be politically comfortable.

On the other hand, some defendants suggest that any plan that creates an equal or smaller proportion of minority opportunity districts than their proportion in the population, that is not overly "packed" with minorities, and that is not unnecessarily irregular, is narrowly tailored.[148] This would bring an effect standard back into *Shaw* and at least partially reconcile it with minority vote dilution law.

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142. *Shaw*, 113 S. Ct. at 2832.

143. *See infra* part III.B.

144. In his dissent in *Shaw*, White posed a series of questions and dilemmas in order to show that the notion of narrow tailoring is unworkable when applied to redistricting. Shaw, 113 S. Ct. at 2842 (White, J., dissenting).

145. RNC Brief, *supra* note 47, at 10. Judge Voorhees in Shaw v. Hunt, 861 F. Supp. 408, at 476-80, 485 (E.D.N.C. 1994), uses non-compactness for three purposes: to trigger strict scrutiny, to deny narrow tailoring, and to rule out a potential Section 2 suit as a compelling state interest, the last because an undefined compactness notion is part of the "first prong" of the *Gingles* test. *See* Thornburg v. Gingles, 478 U.S. 30, 50 (1986).

146. Plaintiff's Post-Trial Brief at 5 n.4, 9, 17, Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994) (No. 94-0277); *id.*, Proposed Conclusions of Law at ¶¶ 20, 22, 34.

147. *See* Section II.C.3, *supra*.

148. Brief for the United States at 34-35, United States v. Hays, Nos. 94-558 and 94-627 (S. Ct. filed January 30, 1995); Post-Trial Brief for the United States at 63-65, 64 n.22, Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C 1994) (No. 92-202) [hereinafter Post-Trial Brief for the United States (No. 92-202)]; Pretrial Brief for Gingles Defendant-

Other defendants and even the three-judge Louisiana panel in *Hays v. Louisiana* suggest that districts not overly packed with minorities are narrowly tailored,[149] an interpretation that certainly gains support from the Supreme Court's *De Grandy* decision.[150] For example, if it were possible to draw equally compact districts where one was 90% black and another was 55%, and 55% black was enough, given the normal level of majority and minority registration, turnout, and cross-over votes, to allow the African-American community a fair opportunity to elect candidates of its choice, then the 55% district, but not the 90% district might be narrowly tailored. Such a definition would be consonant with O'Connor's emphasis on the evils of "segregation," but to the extent that *Shaw* is taken to reflect simply a judicial preference for compactness, even the 55% district might not pass muster.[151]

Plaintiffs and defendants differ, as well, about the significance of more geographically compact alternatives that have similar minority percentages. Plaintiffs view them as evidence that the defendants'

Intervenors' at 49-50, *Shaw v. Hunt* (No. 92-202) [hereinafter Pretrial Brief for Gingles Defendant-Intervenors].

149. Post-Trial Brief for the United States, *supra* note 148, at 3-4, Shaw v. Hunt; PreTrial Brief for Gingles Defendant-Intervenors, *supra* note 148, at 49-50; Shaw v. Hunt, 861 F. Supp. at 475; Hays v. Louisiana, 839 F. Supp. 1188 (W.D. La. 1993), *vacated as moot and remanded*, 114 S. Ct. 2731, *on remand*, 862 F. Supp. 119 (W.D. La.), *prob. juris. noted sub nom.* United States v. Hays, 115 S. Ct. 687 (1994). *See* State's Post-Trial Legal Memorandum at 38, Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994) (No. 94-0277).

If the problem with minority opportunity districts is that they burden whites, then the greater the packing of each race, the smaller the statewide proportion of whites "hurt" by being represented by minority candidates. Thus, such an interpretation of narrow tailoring, which seems consistent with the usage in affirmative action cases, would lead to *more*, not less segregation. Packing minorities into a small number of districts would risk a minority vote dilution case because it would reduce their chances for political influence.

150. Johnson v. De Grandy, 114 S. Ct. at 2658-62.

151. In *Shaw*, the State claimed that minority opportunity districts were narrowly tailored as remedies because no districts containing smaller percentages of African-Americans would give them an equal chance to elect candidates of their choice. In other words no "race neutral means" would work. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989). *See* State Appellees' Brief, *supra* note 33, at 48. As in Justice Brennan's long recitation of Congress's attempts to promote programming diversity through race-neutral means in Metro Broadcasting v. FCC, 497 U.S. 547, 572-79 (1990), *overruled by*, Adarand Constructors v. Peña, ___ U.S. ___, ___, 63 U.S.L.W. 4523, 4530 (June 13, 1995), North Carolina could be viewed as having experimented with means less favorable to electing the choices of the black community in a series of elections from 1968 through 1990. *Id.* at 579-590. *See infra* part III.B.

districts are not narrowly tailored, because they could have adopted more compact ones, and they ask courts to do so.[152] Defendants consider them proof that they acted not out of a desire to isolate minorities or insure safe districts for them, but for other reasons, such as partisanship.[153]

Finally, plaintiffs often consider a plan narrowly tailored if it allows minority voters a fair chance to choose candidates of their choice, while at the same time serving other legitimate state interests traditionally protected in redistricting, such as preserving communities or interest and protecting incumbents.[154] Defendants tend to believe those state interests illegitimate.[155]

Although O'Connor's many ambiguities in *Shaw* have bedeviled lower court judges and invited local authorities who wish to retain or revert to lily-white rule to file suits and resist compromises with voting rights forces, the Court's muddiness also affords it relatively painless escapes from the difficulties the decision poses.[156] It also increases the importance of factual inquiries into questions that the opinion raises, but does not answer. To twist an old saying, when the law is unclear, we have no alternative but to argue the facts.

152. Memorandum of Law in Support of Plaintiff-Intervenors' Motion for Preliminary Injunction to Enjoin Further Election Proceedings for the United States House of Representatives from North Carolina Under the Existing Congressional Redistricting Plan at 24-26, Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C.) (No. 92-202); Post-Trial Brief for Plaintiff at 6-7, Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994) (No. 94-0277); *id.*, Plaintiff's Proposed Conclusions of Law, at ¶ 22; Hays v. Louisiana, 839 F. Supp. 1188, 1208-09 (W.D. La. 1993).

153. Post-Trial Brief of Lawson Defendant-Intervenors at 14, Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994) (No. 94-0277).

154. Post-Trial Brief for the United States (No. 92-202), *supra* note 148, at 3-4; Brief for Gingles Defendant-Intervenors, *supra* note 148, at 49-50.

155. Post-Trial Brief for the Plaintiff at 5 n.4, Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994) (No. 94-0277).

156. *See infra* part IV.

III. A SHORT HISTORY OF RACE, REPRESENTATION, AND REDISTRICTING IN NORTH CAROLINA

A. How Well Do Whites Represent Blacks In North Carolina?

1. Congressional Roll Call Behavior

Although there may be some symbolic value to choosing a person of a particular gender, ethnic group, or occupation, and although elected officials put much of their time and effort into particularized constituency services,[157] the principal purpose of electing a representative is to insure that one's views are represented. Have white and black members of Congress from North Carolina voted in the same way? Have whites reflected black interests so well that blacks do not need other blacks to represent them?[158] Is the black electorate, as such conservative pundits like Clint Bolick suggest, much less liberal than the black elite, in which case differences between the voting records of black and white members of Congress would prove that black interests would be better represented by white faces?[159]

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157. Every elected official, but perhaps particularly members of Congress, provide "casework" or "constituency services" for virtually anyone in their districts, whether or not they supported the member in the last election. *See* BRUCE CAIN ET AL., THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE (1987). In this sense, most officials may be responsive to almost anyone, and the shape of the district, or the party, ideology, or race of the representative may not systematically matter to voters.

A survey of constituent contacts during 1993, for instance, showed that whites were approximately twice as likely to contact newly elected North Carolina members of Congress Mel Watt and Eva Clayton, who are black, than African-Americans were. Allan J. Lichtman, Report on Congressional Districts in North Carolina 66 Table 43 (March 1994) (report created for Shaw v. Hunt, on file with the author). If constituency service is what O'Connor had in mind when she warned that elected officials from deliberately created majority-minority districts "are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole," *Shaw*, 113 S. Ct. at 2827, then the evidence from North Carolina seems to refute her speculation.

158. Professor Carol Swain has suggested this is sometimes true in the nation as a whole. *See* SWAIN, *supra* note 9. Much of Swain's book is based on interviews with members of Congress, in which they apparently told her what she wanted to hear, and she believed them. When more quantifiable or systematic data disagrees with her interview impressions, as in the section on North Carolina Congressman Tim Valentine, Swain trusts her impressions. *See id.* at 159-68.

159. Clint Bolick, *Ask the Tough Questions on Civil Rights*, L.A. TIMES, Feb. 22, 1993, at B5.

The most easily accessible and comprehensive index of ideological patterns of behavior in congressional roll calls is Conservative Coalition Scores,[160] which are based on 30-100 roll calls per session on a wide range of subjects and are published annually. The scale varies from 0 to 100, with 100 being the most conservative, as the *Congressional Quarterly* determines it.[161] Figure 1, which succinctly summarizes 24 years of data, demonstrates that black and white members of Congress from North Carolina do *not* vote similarly.

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160. *See, e.g.*, CONGRESSIONAL QUARTERLY INC., 1992 CONGRESSIONAL QUARTERLY ALMANAC, Vol. XLVIII, 20B-21B (1993) [hereinafter CQA].

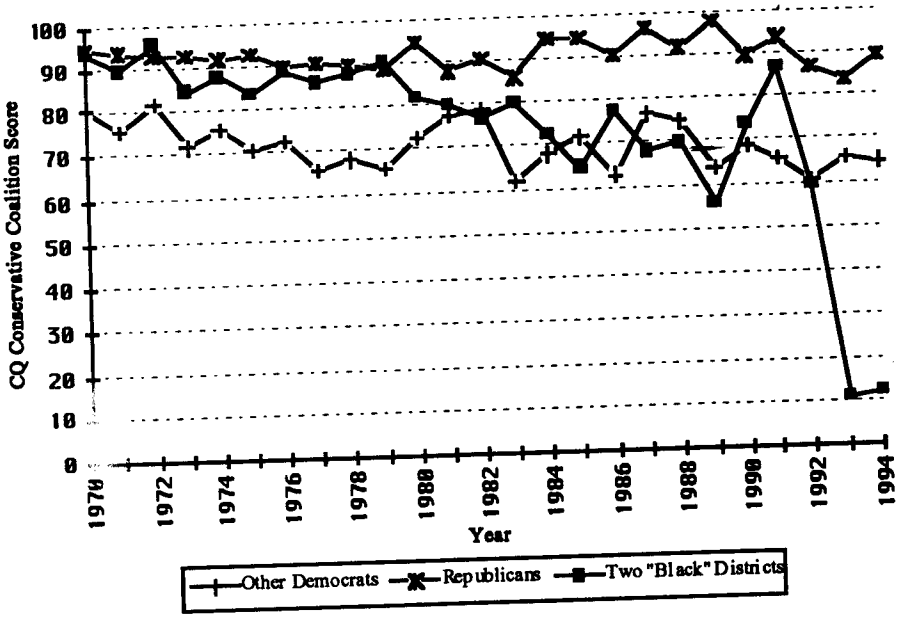
161. The advantages of the Congressional Quarterly ("*CQ*") index over those of the AFL-CIO Committee on Political Education, the Americans for Conservative Action, the Americans for Democratic Action, or the Leadership Conference on Civil Rights, etc., are that it contains more roll calls on a larger range of issues. A few deviant votes will have little effect on the *CQ* index. Its advantage over an index that is invented especially for a particular piece of research is that the inventor might consciously or unconsciously bias her index to fit the needs of the moment, or make some error in calculating it. Anyone can recheck the *CQ* scores.

To test whether the Conservative Coalition ("CC") scores of members of Congress from North Carolina were similar to those on interest group indices, I correlated the Conservative Coalition scores for 1987, 1988, 1990 and 1992 for the 11 North Carolinians with their ratings from the Americans for Democratic Action ("ADA"), the AFL-CIO ("AFL"), the U.S. Chamber of Commerce ("CCUS"), and the American Conservative Union ("ACU"). The matrix of Pearson's r's below indicates that the indices are generally rather closely related.

Index	ADA	AFL	CCUS	ACU
CC, 1987	.66	.78	.81	.76
CC, 1988	.75	.58	.71	.77
CC, 1990	.83	.83	.69	.78
CC, 1992	.85	.92	.93	.89

For the Conservative Coalition Scores of members, see 1992 CQA Vol. XLVIII 20B-21B; 1990 CQA Vol. XLVI 44-45; 1988 CQA Vol. XLIV 50B-51B; 1987 CQA Vol. XLIII 46C-47C. For the other ratings, see 1992 CQA Vol. XLVIII 10F-11F; 1990 CQA Vol. XLVI 28B-29B; 1988 CQA Vol. XLIV 64B-65B; 1987 CQA Vol. XLIII 60C-61C.

Figure 1: Do White and Black Congressman Differ in North Carolina



The members of Congress from the state have been grouped into three categories and the scores for each category have been averaged:[162] Republicans, Democrats from the two most heavily black districts (the First and Second until 1993, then the First and Twelfth), and Democrats from other districts. The pattern is striking. Republicans consistently scored about 90% conservative. Other Democrats averaged around 70%, but varied from the low 60th percentile to the low 80th percentile in particular years. The two white Democrats from Districts One and Two acted like Republicans until 1980, and then somewhat more like other Democrats.[163] The huge anomaly in the figure came when two

162. Because some members were present for different numbers of the relevant roll calls, I divided each member's Conservative Coalition Score by the sum of his conservative and anti-conservative scores. For instance, a congressman who joined the conservative coalition on 80% of the total roll calls, opposed it on 5%, and was absent on 15% would be credited with a score of 94 (80/85 = 94). I then averaged these scores over the number of members who fell into the category.

163. In particular, Tim Valentine's Conservative Coalition Score from his first election in 1982 was very similar to that of his predecessor, L.H. Fountain. *Compare, e.g.,* 1982 CQA Vol. XXXVIII 39C (providing Fountain's score in 1982) *with* 1983 CQA Vol. XXXIX 41C (providing Valentine's score in 1983).

black Democrats, Eva Clayton and Mel Watt, replaced whites in the two "black districts" after the 1992 election. Suddenly, a conservative index that had been nearly 90% in 1991 and 60% in 1992 became 11%.[164] In North Carolina, the color of its members of Congress seems to make a major difference in roll call voting. To repeal the 1992 redistricting is to exclude the voice of the black community from Congress.[165]

In her opinion in *Shaw*, O'Connor suggested that representatives from majority-minority districts may be "more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole."[166] Blacks who have run for Congress in North Carolina have often denied this uncharitable presumption. To take merely one example, in a 1983 article with the title "Black lawmakers don't want to be just spokesmen for minority group," Kenneth Spaulding, then head of the Black Caucus in the state legislature, declared that "[t]he benefit minorities have in the General Assembly is they can express views for people, black or white, who have not had opportunities to be a part of the American dream .... When you represent a district, you represent everyone in that district."[167] But even if this was mere rhetoric, even if aspiring African-American politicians in a state that was three-fourths white catered only to their small minority constituency, Figure 1 suggests that O'Connor's statement would apply at least as strongly if one substituted "majority-majority" for "majority-minority" and white representatives for black. That is, white politicians in North Carolina have overwhelmingly considered their "primary obligations" to be to whites, while they have

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164. This was not just an effect of a new Democratic administration and two first-term members of Congress. The 1993 scores of Mel Watt and Eva Clayton are almost identical to the average of the Conservative Coalition Scores of all other African-Americans elected to Congress from the eleven ex-Confederate states for every session since 1972. This implies that if districts in which African-Americans had an opportunity to elect candidates of their choice had been drawn earlier in North Carolina, the people elected would have voted differently from other state representatives. The same general pattern of votes continued in the 1994 congressional session for all groups.

165. O'Connor has suggested that individual members of traditionally protected minority groups could be protected as group members against political discrimination if "the racial minority group can prove that it has 'essentially been shut out of the political process.'" Davis v. Bandemer, 478 U.S. 109, 151-52 (1986) (O'Connor, J., concurring) (quoting majority opinion of White, J.). Figure 1 would seem to constitute such proof.

166. *Shaw*, 113 S. Ct. at 2827.

167. Gene Wang, *Black lawmakers don't want to be just spokesmen for minority group*, RN, Jan. 30, 1983, at 28A.

largely ignored the opinions of the black parts of their constituencies, opinions which the following section shows are very different from those of the white electorate.

2. Attitudes of the Electorate

But was the difference in congressional roll call behavior a reflection merely of the actions of white and black elites, which might differ markedly from the beliefs of the masses of white and black voters? Drawing on the University of Michigan National Election Studies, as well as on the most extensive survey of black political opinion yet made, the National Black Election Study, Katherine Tate documents the marked divergences in beliefs and opinions between blacks and whites and the relatively few systematic differences on these opinions within the black community.[168] In 1988, for instance, nationally, 55% of whites, but only 28% of blacks opposed a guaranteed jobs program; 54% of whites, but only 26% of blacks opposed federal aid to minorities; 34% of whites, but only 15% of blacks believed social services spending should be cut.[169] In 1984, blacks were substantially more liberal than whites on the issues of jobs, food stamps, Medicare, federal aid to education, capital punishment, and defense spending.[170]

Blacks also differ significantly from whites in their perceptions of the degree of prejudice and discrimination in American society and in their beliefs about the causes of inequality, perceptions and beliefs that have a profound influence on the political programs people favor. Seligman and Welch have catalogued a series of disturbing and profound divergences between blacks and whites.[171] For instance, in 1989, 26% of blacks thought that over half of the whites in America "personally share the attitudes of groups like the Ku Klux Klan." Only 4% of whites considered the KKK mainstream.[172] In the same year, the percentages of blacks and whites who perceived the existence of

168. KATHERINE TATE, FROM PROTEST TO POLITICS: THE NEW BLACK VOTERS IN AMERICAN ELECTIONS (1993); *cf.* DAWSON, *supra* note 48, at 183-84 tbl. 8.1

169. *Tate*, *supra* note 168, at 34.

170. *Id.* at 36-39. The relatively slight divisions among African-Americans could only rarely be explained by differences in incomes, genders, or regions. Middle class and working class, male and female, southern and non-southern blacks largely shared the same attitudes with each other, but not with whites. *Id.* at 38-45.

171. LEE SIGELMAN & SUSAN WELCH, BLACK AMERICANS' VIEWS OF RACIAL INEQUALITY: THE DREAM DEFERRED 53 (1991).

172. *Id.* at 53.

discrimination against blacks in education were 37% and 11%, respectively; in housing, 52% and 20%; in getting unskilled labor jobs, 49% and 10%; in getting skilled labor jobs, 53% and 15%; in getting managerial jobs, 61% and 23%; in wages, 57% and 14%.[173] In other words, the vast majority of whites do not perceive that there is much racial discrimination in any area of American life, while the majority of blacks see it everywhere.[174]

A 1993 survey on racial attitudes in North Carolina suggests that citizens of the state mirror national trends.[175] In Table 1, I have excerpted a few of the answers to the large number of questions asked in the survey, divided them into four categories, and listed the percentages of each race holding the indicated attitudes. Panel A shows that whites and blacks differed in their beliefs about the extent of prejudice and racial discrimination in North Carolina in 1993. One in five blacks, but only one in twenty whites considered race relations or discrimination one of the most important problems facing the State. More than twice as many blacks as whites considered racial discrimination in the State very serious and increasing. Nearly twice as high a percentage of blacks as whites agreed very strongly that most whites in the State are prejudiced, and nearly three times as many thought most whites "want to keep blacks down."

173. *Id.* at 57 (figures for unskilled labor jobs were unavailable for 1989, so figures for 1981 were substituted).

174. Not surprisingly, such divergences in perceptions lead to differences in policy preferences. In 1984, 49% of blacks, but only 9% of whites, thought that past discrimination against blacks justified giving blacks preferences in getting jobs over equally qualified whites. *Id.* at 129.

175. *Whites and Blacks In N.C. View Different Realities But Agree That Race Relations Are Serious Problem in State.* This survey was sponsored by the Z. Smith Reynolds Foundation, Inc. of Winston-Salem.

TABLE 1:
Differences in Racial Attitudes in North Carolina, 1993

Item	Percent With Attitude	
	White	Black
PANEL A: GENERAL BELIEFS ABOUT PREJUDICE		
race relations/discrimination an important problem	5	20
racial discrimination and prejudice today in N.C. very serious	17	37
prejudice and discrimination against blacks in N.C. more prevalent in 1993 than in 1980	17	36
agree very strongly that most whites in N.C. have prejudiced views	38	70
most whites in N.C. want to keep blacks down	13	40
PANEL B: DEGREE OF PRIVATE DISCRIMINATION TODAY		
whites have better chance in N.C.		
to get any job qualified for:	19	70
any housing can afford:	13	54
good education:	9	38
blacks often treated more slowly or less politely in N.C. restaurants or retail stores	8	45
qualified blacks are denied jobs, scholarships	20	74
qualified whites lose out on jobs, scholarships	40	6

Table 1 continues on the following page

Item	Percent With Attitude	
	White	Black
PANEL C: GENERAL BIAS IN GOVERNMENT PROGRAMS		
local governments in N.C. favor whites over blacks	13	52
law enforcement in N.C. tougher on blacks	19	64
equal justice for minorities in N.C. is major problem	15	65
federal and state governments have done too much to help blacks achieve equality in the past 10 years	30	1
--too little	23	76
PANEL D: POLICY PREFERENCES		
prefer local housing ordinances that permit discrimination	44	15
strongly oppose giving blacks preferred treatment in college admissions or employment	52	24
strongly favor busing schoolchildren for racial integration	4	26

Source: September-October, 1993 telephone sample of 403 whites and 409 blacks in North Carolina by Howard, Merrell and Partners of Raleigh, sponsored by Z. Smith Reynolds Foundation.

Panels B and C demonstrate even wider racial differences concerning the degree of private and public discrimination in contemporary North Carolina. African-Americans were three to four times as likely as whites to believe that there is discrimination against blacks in jobs, housing, education, public accommodations, scholarships, local government, and law enforcement. Whites were more likely than blacks to perceive discrimination against *whites* in jobs and scholarships by nearly a seven to one margin and whites were thirty

times more likely than blacks to think that the federal and state governments have done "too much to help blacks achieve equality." Five times as high a proportion of blacks as whites considered "equal justice for minorities in North Carolina" a major problem. Panel D shows that members of the two races differed markedly on important governmental policies: banning housing discrimination, affirmative action in college admissions or employment, and busing schoolchildren for integration. In sum, in North Carolina, as in the nation as a whole,[176] whites and blacks see entirely different worlds. In the white view, there is little remaining prejudice or public or private discrimination, and there is consequently little need for government programs to do something about it. In the black view, prejudice and discrimination are pervasive, and governments at all levels should act to remedy this serious plight. It is not a large inferential leap to connect constituents' attitudes revealed in these surveys with the congressional voting patterns portrayed in Figure 1.

While the black and white communities generally agreed on issues such as crime and, in 1993, whites rarely assented to statements that exhibit traditional white supremacist or segregationist attitudes, the gulfs between blacks' and whites' perceptions of discrimination and bias and the resulting wide differences in policy preferences are dramatic. Observers, including legislators and judges, may decry the separation of attitudes and deplore or disagree with the differences in perception, but it is surely not irrational to act as if the differences existed.[177] These are not stereotypes, but very real disparities of view. Even if legislators in 1991-92 did not know the exact results of the 1993 survey, they must be assumed to be generally aware of their constituents' opinions through personal contacts, the news media, and their own experiences. Unless districts are drawn with an eye to reflecting the opinions of the 22% of North Carolinians who are black, those opinions, which deviate so markedly from those of the white majority, will be under-represented or even silenced in legislative bodies.

176. *See* national surveys discussed *supra* notes 168-75.

177. *Shaw*, 113 S. Ct. at 2845 n.2 (Souter, J., dissenting). In *Batson v. Kentucky*, Justice Marshall explained carefully that "the Equal Protection Clause prohibits a State from taking any action based on crude, *inaccurate* racial stereotypes"—not accurate generalizations. 476 U.S. 79, 104 (1986) (Marshall, J., concurring) (emphasis added).

B. *Discriminatory Districting and Electoral Practices Before 1991*

1. The "Black Second," 1872-1901

Racial and partisan gerrymandering of congressional districts in North Carolina did not begin in 1991, nor were the 1990s the first time that the shape of congressional districts in the state has attracted widespread adverse comment. In fact, less than two years after the ratification of the Fifteenth Amendment in 1870, the Democrats, who had attained a majority in the legislature through extensive violence and intimidation against black and white Republicans, packed African-Americans into the "Black Second."[178] The compact southeastern Second District drawn by the Republicans in 1867 contained a small white majority, a total population that was eight percent below that of the ideal in the state, and had only twenty percent more black citizens than could be expected if the state's black population had been divided equally in the nine congressional districts.[179] From the Democratic reapportionment of 1872 until disfranchisement in 1900, the district contained substantial black majorities, from ten to eighteen percent more total population than the average district in the state and, most important, it had approximately twice the number of blacks that an equal division would have dictated. Since the other districts were "stacked" to insure that there was no black majority, the apportionment effectively confined black control in a state that was approximately a third African-American to a maximum of one district in eight or nine (depending on the total population in the decade), and minimized black influence and Republican representation in all the other congressional districts.

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178. ERIC ANDERSON, RACE AND POLITICS IN NORTH CAROLINA, 1872-1901: THE BLACK SECOND (1981). The Black Second was the only congressional district in the South during the era to have its own published biography. *Id.* Other notorious discriminatory racial gerrymanders of congressional districts in the South after Reconstruction included the "shoestring district" in Mississippi, the Black Belt Fourth District in Alabama, and the "boa constrictor" Seventh District in South Carolina. On these districts, see J. Morgan Kousser, *How to Determine Intent: Lessons from L.A.*, 7 J.L. & POL. 591, 598-606 (1991).

179. *See* STANLEY PARSONS ET AL., UNITED STATES CONGRESSIONAL DISTRICTS AND DATA, 1843-1883 (1986); STANLEY PARSONS ET AL., UNITED STATES CONGRESSIONAL DISTRICTS, 1883-1913 (1990). Congress enfranchised southern blacks in 1867 in the Reconstruction Act. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 276-77 (1988).

Republican Governor Tod Caldwell described its shape as "'[e]xtraordinary, inconvenient and most grotesque.'"[180]

It was only after the violently racist "White Supremacy Campaign" of 1898 and the fraudulent passage in 1900 of the disfranchisement amendment, with its literacy test, poll tax, and temporary grandfather clause, that the vast majority of blacks were excluded from politics and from a fairly equal share of the benefits that the state and local governments provided.[181] At that point, it was safe for the Democrats to reduce the Second District's population, and especially the number of blacks in it, to a more compact size and a population more nearly equal to that of the state's other congressional districts.

What distinguished the redistricting of 1991-92 was not that it was motivated by race or partisanship, for these motives had determined the composition of districts 120 years before. What was different in 1991-92 was that, for the first time in the long history of racial and partisan gerrymandering in North Carolina, blacks, not whites benefited, and some whites concluded that now the rules needed to be changed.

2. Racial Suppression, 1900-1968

For a state in the "Rim" or "Border" South with a cherished progressive self-image, North Carolina suppressed black political activity thoroughly during the period of the "nadir" of race relations in the first half of the twentieth century and only slowly, grudgingly, and partially liberalized thereafter. Only 15% of the state's blacks were registered to vote in 1948, and only 36% in 1962.[182] While Tennessee elected its first black of the century to the General Assembly in 1964 and abolished multimember districts in urban counties in 1965 because they discriminated against blacks,[183] North Carolina did not elect a

180. ANDERSON, *supra* note 178, at 3. Nineteenth century transportation and communication made the district much less accessible than any district in North Carolina today.

181. J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, at 182-95 (1974).

182. Because of low overall voter registration and the continued use of a literacy test, 40 of the state's counties were subject to Section 5 of the Voting Rights Act in 1965. A year later, black registration finally surpassed 50% for the first time since 1900.

183. *See* J. Morgan Kousser, Was Memphis's Electoral Structure Adopted or Maintained for a Racially Discriminatory Purpose? 45-47 (1992) (Caltech Social Science Working Paper 807, on file with author).

black state legislator until 1968, and it refused at that time to abolish multimember districts for the state legislature, even though it was advised that they might be challenged in court on the grounds of racial discrimination. North Carolina passed a numbered post system with an anti-"single shot" provision, subsequently outlawed as racially discriminatory, over the protests of blacks and white Republicans who charged that it would have a discriminatory impact. The same legislature that adopted the multimember district/numbered post system also refused to add black activist Durham County to the Second Congressional District, reportedly to prevent a rise in black influence in that district. [184]

3. Clayton and Lee Run for Congress

In 1968, Henry Frye of Greensboro became the first African-American elected to the State General Assembly, Dr. Reginald Hawkins, a black Charlotte dentist, received 129,808 votes for the Democratic nomination for governor, and Eva Clayton became the first black since 1898 to run a serious campaign for Congress.[185] When Clayton, who had never previously held public office, began her campaign, blacks made up approximately 40% of the population of the Second District, but only 11% of the voters. Although her poorly financed and rather amateurish campaign lost 70%-30% to eight-term incumbent L.H. Fountain, the most conservative Democrat in the state's congressional delegation, Clayton and her cadre of black activists managed to raise black registration to 26% of the district's voters.[186]

Four years later, in 1972, Howard Lee, an impressive speaker with an ability to appeal to whites, became Fountain's second and much more serious black challenger.[187] Expecting to capitalize not only on

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184. Harry Watson Testimony, Gingles v. Edmisten (1983) 242, 255, 300-07; Plaintiff-Intervenor's Ex. 25 in *Shaw* v. *Hunt.* The anti-single-shot law was declared unconstitutional in *Dunston* v. *Scott*, 336 F. Supp. 206 (E.D.N.C. 1972).

185. *This Political Hint No Surprise*, Raleigh Times [hereinafter RT], Sept. 4, 1970, at 4; Baran Rosen, *Mayor Howard Lee Campaigning Hard to Unseat Rep. Fountain*, RN, Mar. 13, 1972, at 5.

186. Rosen, *supra* note 185 at 5.

187. *This Political Hint No Surprise, RT*, Sept. 4, 1970, at 4. The son of a Georgia sharecropper, Lee had come to Chapel Hill to attend graduate school in social work at the University of North Carolina in 1961 and stayed on in a job at Duke University. *Wide Margin Re-Elects Lee as Mayor of Chapel Hill*, RN, May 5, 1971, at 20, He had been narrowly elected to the largely ceremonial office of mayor of the majority-white town of

increased black registration, but on an appeal to white youths newly able to register after the institution of the 18-year-old vote, Lee hoped that whites would look beyond his race.[188] Optimistically, Lee proposed a budget of $75,000 in his campaign and aimed at raising black registration from 26% to 35% of the total eligible to vote in the district.[189] For the first time since his initial election in 1952, Fountain appointed campaign managers in every county, ran radio and television advertisements, and handed out bumper stickers.[190] Despite his vigorous campaign, which represented the "toughest challenge"[191] of Fountain's career, Lee raised the black registration percentage to only 30%,[192] and he lost in the primary, 59% to 41%.[193] According to Daniel C. Hoover of the *News and Observer*, "Although [Lee] got some white votes, especially in his own traditionally liberal Chapel Hill area, the balloting generally was along racial lines."[194] Being "a highly skilled campaigner with strong appeal not only to blacks but to liberal urbanites as well"[195] was not enough to win an overwhelmingly rural

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Chapel Hill in 1969, *Under The Dome: Lee, Futrell said eyeing lieutenant governor Race—Is Lee using threat to run as lever to get party post?*, RN, Sept. 6, 1970, at 1, and reelected in 1971, *Under The Dome: Chapel Hill's Howard Lee may run against Fountain* RN, Sept. 21, 1971, at 1, and as the first black mayor in the state during the twentieth century, had been named vice-chairman of the state Democratic party in 1970. *This Political Hint No Surprise*, *supra* at 4; *Party Names Lee as Vice Chairman*, RT, Nov. 16, 1970, at 30.

188. Baran Rosen, *Mayor Howard Lee Campaigning Hard to Unseat Rep. Fountain*, RN, Mar. 13, 1972, at 5; Baran Rosen, *Youth, Black Voters Boost Lee's Race*, RN, Feb. 20, 1972, at 4. Blacks in politics, he declared, needed to be "concerned about people on the basis of character rather than skin color." *Mayor Advises "People Power,"* RN, Apr. 29, 1970, at 5. "I have been working awfully hard," he said on another occasion, "to establish a relationship between myself and members of the white community." Baran Rosen, *Mayor Howard Lee Campaigning Hard to Unseat Rep. Fountain*, RN, Mar. 13, 1972, at 5.

189. Baran Rosen, *Lee Announces 2nd District Bid*, RN, Jan. 11, 1972, at 1.

190. Termed by Tom Wicker of the *New York Times* "an archetypical Southern conservative, whose large black constituency has had little if any effect on his unyielding position on racial and social issues, Tom Wicker, *Lee vs. Fountain in Second District*, RN, April 19, 1972, at 4, Fountain still wore white linen suits and white shoes on the floor of Congress in 1972, *id.*, and had no blacks on his staff. Baran S. Rosen, *Rep. Fountain Is Running Hard*, RN, Apr. 9, 1972, at 12-I.

191. *Rep. Fountain weathers toughest challenge*, RT, May 8, 1972, at 10A.

192. *Fountain Victorious in Stiff Fight*, RN, May 8, 1972, at 9A.

193. *Id.*

194. Daniel C. Hoover, *Lee Hints Sanford Support*, RN, May 11, 1972, at 5.

Second District in which voting was widely understood to be markedly racially polarized. [196]

4. The 1981 Redistricting: Fountain's Fishhook

The 1981 congressional redistricting is worth studying in detail because it illustrates four important facts. First, before 1991, white congressmen openly manipulated redistricting to buttress their positions against candidates who might appeal to black voters. Second, racial, partisan, and incumbent-protecting goals interacted, often producing unlikely coalitions because of the "ripple effects" of changes in one district on the shape of another. Third, the Voting Rights Act, as interpreted at the time by the Department of Justice, constrained racially discriminatory legislative actions—but not very much. Fourth, although committees paid lip service to the value of compactness, legislators did not hesitate to sacrifice it for what they obviously considered the more important ends of protecting racial, partisan, and incumbent interests. This represented no change in previous *de facto* state policy.[197] During the 1950s and 60s, the state's congressional district were derided as "bacon strips" with "tortuous" boundaries. The Fourth District in 1966 was contiguous only at a pinpoint.[198]

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195. *Under the Dome: Lee slates announcement of entry into No. 2 contest*, RN, Mar. 2, 1976, at 1.

196. Hoover, *supra* note 194, at 5. In 1976, a black former World Bank official, Elbert G. Rudasill, joined two other challengers to Fountain and received only 9% of the vote in a minor campaign. Fountain's chief opponent, six-term state legislator J. Russell Kirby, nearly managed to force the incumbent into a runoff. Martin Donsky, *Fountain Faces Unusual Competition, RN*, July 22, 1976, at 10.

197. As Republican Congressman James T. Broyhill commented: "One only has to look at the outline of the North Carolina congressional districts to know that compactness has not been a consideration in the past." Congressional Redistricting: Public Hearing, April 13, 1981 (statement of J.A. Dalpinz, 10th District, reading Letter from James T. Broyhill to Senator Helen Marvin & Representative J.P. Huskins (Feb. 20, 1981)), *in* files of the North Carolina Joint Redistricting Committee [hereinafter "JRC files"]. The committee's files contain a copy of a 1981 congressional bill that sought to mandate that districts be "compact in form." It is instructive to note that the bill, which did not pass and which the North Carolina representatives took no recorded action on, states in paragraph (h) that "Nothing in this section shall be construed to supersede any provision of the Voting Rights Act of 1965." H.R. 2349, 97th Cong., 1st Sess. (h) (1981).

198. DOUGLAS MILTON ORR, JR., CONGRESSIONAL REDISTRICTING: THE NORTH CAROLINA EXPERIENCE (1970), 55, 63-64, 69-70.

Unless the standards of redistricting, the population distribution, partisan control, or the number of seats in the body shift markedly from one decade to the next, redistricting begins with the status quo and generally ends close to it. It was a sign of how much was at stake in relatively small changes that it took six months to reach agreement on how to revise the state's eleven districts.[199] Basically, the controversy involved three districts: In the Second District, L.H. Fountain's friends sought to protect him against adding activist blacks and some liberal whites in Durham to his rural district, and even sought to reduce the black percentage in order to diminish any potential challenge from someone whose political views resided in the ample space to Fountain's left.[200] In the Sixth District, Richardson Preyer's allies wanted to overturn his 1980 upset by Republican Eugene Johnston and return the state's most liberal congressman to Washington. But since increasing the proportion of Democrats in Preyer's district would inevitably reduce the proportion of Democrats in the Fifth, where Stephen Neal never had an easy contest, Neal's backers attempted to forge an alliance with Republicans to bolster the Democratic majority in his district by shifting Republican areas into the Sixth and Democratic counties into the Fifth.[201] The desperate Preyer ended up trying to arrange a tacit agreement with Fountain, the state's most conservative Democrat.[202]

The principal controversy in 1981 was over whether to move Durham county into Fountain's Second District or to remove Orange County from the Second and combine Durham, Orange, and Wake counties into a new "Research Triangle" district. Although there was no legal necessity to keep counties intact in drawing congressional districts,

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199. During the bitter protracted conflicts, a joint committee collapsed, a "super subcommittee" came to nothing, an agreement on a plan by five Democratic congressmen was ignored, committees of both houses stalled and reversed themselves, a committee-endorsed proposal was shelved on the floor, the majority party lost control of the process, and the final plan was then vetoed by the Department of Justice. For a bare bones overview of the process, see Memorandum from Terrence D. Sullivan, Director of Research, North Carolina General Assembly, to Alex K. Brock, Executive Secretary-Director North Carolina Board of Elections, Legislative Process Resulting in Enactment of Congressional Redistricting Act (Sept. 11, 1981), *in* JRC files, *supra* note 197.

200. A.L. May, *Backers of Fountain want districting tradition ended*, RN, May 20, 1981 at 25; A.L. May, *Fountain backers stall redistricting plan*, RN, June 4, 1981, at 44.

201. *Political protectionism*, RN, July 10, 1981, at 4.

202. A.L. May, *Most redistricting plans seen as hurting Fountain*, RN, May 16, 1981, at 5-B; *Under the Dome: Redistricting forcing strange alliances*, RN, May 31, 1981, at 1.

the state had done so by convention before 1981. Nearly every time Durham's name came up during newspaper discussions of redistricting, which was in nearly every story for several months, the papers' writers reminded readers, who naturally included congressmen and state legislators, that (to take a typical example) "[t]he likely political impact would be to assure Fountain of tough Democratic primary opposition from Durham Democrats, including black candidates."[203]

The first preference of black leaders who testified in hearings, as well as two of the three black legislators who served on the large committee, Daniel T. Blue, Jr.(D-Wake), Kenneth Spaulding (D-Durham), and Henry E. Frye (D-Forsyth), seems to have been to keep Orange county in the Second District and add Durham.[204] When Willie C. Lovett and Lavonia Allison of Durham testified in favor of such an arrangement, *Raleigh News and Observer* capital correspondent A.L. May noted that "While Lovett and Ms. Allison didn't mention it, black leaders have said that a new district with Durham and liberal-voting Orange might give blacks a good chance to elect a black congressman."[205] Spaulding drew up a map with both Durham and Orange, but not Fountain's home county, Edgecombe, in the Second District. [206]

Many white legislators and congressmen agreed with the move to add Durham to the Second District because of the ripple effects elsewhere. In fact, four of the first five major plans that the Joint Committee on Redistricting considered placed Durham in Fountain's bailiwick.[207] Putting Durham in the Second would necessitate shifting rural territory to Walter Jones's First District, a prospect that he liked, and it would probably pull the Sixth District east or south, enabling Stephen Neal's Fifth District to pick up Democratic areas, especially Rockingham county, from the Sixth. Early attention centered on a plan by Neal ally Rep. Ted Kaplan (D-Forsyth), which gained the

203. A.L. May, *5 officials back plan on districts*, RN, May 14, 1981, at 35.

204. Frye presented a map that put Durham into the Second District, but deleted Orange. Frye appears to have been more concerned with making the Sixth District, where he lived, winnable by a liberal Democrat than with the exact composition of the Second District. Senate Congressional Redistricting Committee, Minutes (June 1, 1981), *in* JRC files, *supra* note 197; *Under the Dome*, *supra* note 202, at 1. For Blue's preference, see Steve Tomkins, *Triangle district appears certain*, RT, July 2, 1981, at 13A.

205. A.L. May, *Wake, Durham voting split urged*, RN, April 17, 1981, at 38.

206. Working Subcommittee on Congressional Redistricting, Minutes attachment 5 (May 15, 1981), *in* JRC files, *supra* note 197.

207. May, *supra* note 202, at 5-B.

endorsement of Jones and Neal and picked up three more southeastern congressmen, Bill Hefner, Charles Rose, and Charles Whitley, by changing their districts as little as possible.[208] "From the outset," noted the *News and Observer*'s capital insider column, "Kaplan's purpose was to protect the interest of his congressman, Stephen L. Neal, a Winston-Salem Democrat."[209] To break the momentum of the Kaplan Plan, which reportedly had solid commitments from majorities of both the Senators and House members on the Joint Committee, Sen. Dallas L. Alford, Jr. (D-Nash) proposed to join Durham, Orange, and Wake in a Research Triangle district and to stretch Fountain's Second halfway across the top of the state from Caswell county in the middle to Dare county on the coast. Kenneth Spaulding protested that this violated one of the subcommittee's criteria, compactness. As A.L. May noted, "Alford is one of several lawmakers from Fountain's district who is trying to protect the congressman's interests. The major fight is over whether to put Durham in the [Second] and probably placing strong Democratic primary opponents, including black candidates, against the conservative Fountain."[210]

As the Joint Committee on Redistricting and its various subcommittees sputtered, Fountain's staff drew up a proposal to abandon the state's long tradition of not splitting counties, and Preyer and his allies joined in the effort. When the Co-chair of the Joint Committee, Sen. Helen Marvin (D-Gaston) submitted a plan liberalizing the Sixth District by adding Orange to it, thereby increasing Preyer's chances to regain the seat, even the Republicans, who controlled 20 percent of the seats in the legislature, began considering alliances with the different Democratic factions.[211] With Kaplan's plan drawing support from Republicans and from Democrats outside the Second and Sixth Districts, House Speaker Pro-Tem Allen C. Barbee (D-Nash), a

208. Letter from Walter Jones, Charles O. Whitley, Stephen L. Neal, Charles Rose, and W.G. Hefner to Sen. Helen Marvin and Rep. J.P. Huskins (May 13, 1981), *in* JRC files, *supra* note 197; A.L. May, *5 officials back plan on districts*, RN, May 14, 1981, at 35.

209. *Under the Dome: supra* note 202, at 1.

210. May, *Panel tosses out 2nd District plan*, RN, May 19, 1981, at 23.

211. *Dividing counties may break deadlock over redistricting*, RT, May 21, 1981, at 5A; A.L. May, *Backers of Fountain want districting tradition ended*, RN, May 20, 1981, at 25; A.L. May, *Proposed plan on redistricting splits counties*, May 27, 1981, RN; Paul T. O'Connor, *Plan would put townships in 2nd district*, RT, May 27, 1981, at 1-C; *Under the Dome: supra* note 202, at 1; William M. Welch, *Dealing: GOP lurking in shadows of redistricting fight*, RN, May 25, 1981; Letter from Richardson Preyer to Sen. Helen Marvin (May 29, 1981), *in* JRC files, *supra* note 197.

Fountain supporter, took advantage of the illness of the committee chairman to adjourn a May 28 meeting before Kaplan's plan could be voted on, thereby so angering the Senate members that they completely abandoned the Joint Committee, leaving each house to draw its own plan.[212]

Five days later the Senate committee approved the Kaplan plan over the objection of Fountain ally Alford.[213] On the Senate floor, Majority Leader Kenneth C. Royall, Jr. (D-Durham), another Fountain friend, blocked acceptance of the committee proposal.[214] As the newspaper stories, based on interviews with often unidentified legislators, make clear, race, partisanship, incumbent protection, and preserving a rural community of interest inspired Royall and Barbee to propose a plan removing Orange from the Second District, keeping Durham out, and moving more Republican voters into the Sixth District to attract Republican legislators and followers of Fifth District Congressman Neal.[215] Explicitly noting that their scheme reduced the black population proportion in the Second to 37%, Royall contended that such a change was not large enough to count as retrogressive. [216]

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212. *Committee OKs plan to split Wake, Durham*, RT, June 2, 1981, at 11A; *Congressional redistricting decision derailed*, RT, May 28, 1981, at 14A. A.L. May, *Redistricting panel split by walkout*, RN, May 29, 1981;

213. The *Raleigh Times* explained:

> Fountain's supporters in the House want counties split so the [Second] can avoid being lumped in with Durham's large black population. Legislators from the area have said privately that they're afraid a black candidate could defeat Fountain in the Democratic primary. They say that would lead to defeat in the general election, however.

Committee OKs plan to split Wake, Durham, RT, June 2, 1981, at 11A. Apparently torn between his desires to have the Sixth District tailored to Preyer's interest and to make it more likely that a candidate favorable to blacks would be elected in the Second, Sen. Henry Frye abstained on the roll call. A.L. May, *Proposal to shift Durham to Fountain's area advances*, RN, June 2, 1981.

214. "Not only would urban Durham disturb the rural nature of the [Second] District," A.L. May remarked in the *News and Observer*, "but the Fountain supporters are worried the county would present Fountain with serious Democratic primary opponents, including strong black candidates." A. L. May, *Fountain backers stall redistricting plan*, RN, June 4, 1981, at 44.

215. *Id.*; A.L. May, *Consensus grows for Triangle District*, RN, June 5, 1981, at 1; untitled story, RT, June 5, 1981.

216. A.L. May, *Senator says plan violates guidelines*, RN, June 6, 1981, at 7. A directly parallel process took place in the House: After a long deadlock and a rejection of several split-county plans, the Redistricting Committee rejected a plan that put Durham into the Second District and buttressed Democratic support in the Sixth District, only to

Since the Second District favored by Fountain's defenders curved around Durham and picked up Alamance and Chatham counties, it became known as the "fishhook" district. Rotated ninety degrees, the Second bore a striking resemblance to the original 1812 Massachusetts district that made Elbridge Gerry's name notorious, as the *News and Observer* pointed out in an editorial criticizing the district as "clearly not compact. It shows that in drawing districts for a specific political purpose, 20th century North Carolina legislators are not much different from their counterparts in 19th century Massachusetts."[217] "The Legislature," the paper noted in another editorial, "has given the state districts that are hooked, humped, and generally ungainly—in a word, gerrymandered—to protect incumbents."[218] But the solons, especially the Republicans, rejected calls from House members Patricia S. Hunt (D-Orange) and Daniel T. Blue to create more compact districts that crossed county lines.[219] They also voted down Hunt's plan to do so in a manner that would assist Richardson Preyer in regaining his

be overcome on the floor by a coalition of supporters of Democratic Congressmen Fountain, Neal, and Hefner and all the Republicans. The final proposal was similar enough to that of the Senate that slight compromises in a conference committee brought the six-month struggle to what legislators hoped was an end. A.L. May, *House is key to redistricting compromise*, RN, June 7, 1981, at 30A; untitled story, RT, June 10, 1981, at 12-B; A.L. May, *Panel abandons county-splitting boundary plan*, RN, June 12, 1981, at 40; House Subcommittee on Congressional Redistricting, Minutes, June 15, 1981, JRC Files, *supra* note 197 (adopting recommendation); House Committee in Congressional Redistricting, Minutes, June 17, 1981, *in* JRC Files, *supra* note 197 (rejecting the plan); A.L. May, *Proposal would split 5 counties*, RN, June 16, 1981, at 1; *House panel rejects split-county district proposal*, RT, June 17, 1981, at 8A; A.L. May, *House panel rejects county-splitting redistricting plan*, RN, June 18, 1981, at 26; A.L. May, *Splintered counties, Triangle district in new plan*, RN, June 19, 1981, at 26; *Redistricting plan rejected in House unit*, RT, June 23, 1981, at 6A; A.L. May, *Panel rejects proposal to split counties*, RN, June 24, 1981; A.L. May, *After redistricting drafts, pressured panel backs plan*, RN, June 26, 1981, at 14; *Congressional district proposal voted down*, RT, June 26, 1981; A.L. May, *Four plans ordered in search for district realignment*, RN, June 27, 1981, at 6; *Panel OKs plan to cut Durham from 4th*, RT, June 30, 1981, at 1A; A.L. May, *House panel breaks redistricting deadlock*, RN, July 1, 1981, at 8; Steve Tomkins, *Triangle district appears certain*, RT, July 2, 1981, at 13A; A.L. May, *Redistricting plan OK'd by House keeps Durham out of 2nd District*, RN, July 2, 1981, at 1; *Senate dashes Congressional redistricting plan*, RT, July 3, 1981, at 9A; *Conferees OK Triangle district*, RT, July 8, 1981, at 1A.

217. *1812 Critter Resurfaces*, RN, June 6, 1981, at 4.

218. *Political protectionism*, RN, July 10, 1981, at 4.

219. *Redistricting plan rejected in House unit*, RT, June 23, 1981, at 6A.

congressional seat.[220] As finally passed, the bill was a bipartisan gerrymander which, the *News and Observer* noted, "helped [Eugene] Johnston, a conservative Republican, and Fountain, an old-time conservative Democrat who frequently votes contrary to the Democratic majority in the House."[221] In a report on redistricting in 32 states, Common Cause named the North Carolina Second District as one of the two "infamous gerrymanders" of the year.[222]

5. Removing the Fishhook

The NAACP-Legal Defense Fund ("LDF") sued the State and lobbied the Department of Justice.[223] In the name of Ralph Gingles, LDF local counsel Leslie Winner charged the legislature with adopting a congressional plan that had both the purpose and the effect of diluting black political strength.[224] In addition, the suit challenged the degree of population inequality in both the congressional and legislative plans and the continued use of multimember districts on the state level.[225] Asked why the body had allowed population variations of up to 24% between the largest and smallest districts in the General Assembly, Daniel T. Liley (D-Lenoir), co-chair of the House Legislative Redistricting Committee, replied that "We were simply hoping nobody would challenge it."[226]

In December, 1981, before the suit could be heard by a three-judge panel, the U.S. Department of Justice rejected the congressional plan.[227] In his Section 5 letter to Alex K. Brock, Director of the State Board of Elections, Asst. Attorney General for Civil Rights William Bradford Reynolds declared that the Justice Department "received allegations that the decision to exclude Durham County from Congressional District

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220. A.L. May, *Splintered counties, Triangle district in new plan*, RN, June 19, 1981, at 26; *Redistricting plan rejected in House unit*, RT, June 23, 1981, at 6A.

221. *Political protectionism*, RN, July 10, 1981, at 4.

222. *Under the Dome: Group cites 2nd District gerrymandering*, RN, Sept. 13, 1981, at 1.

223. A.L. May, *Suit seeks to invalidate districting plan*, RN, Sept. 17, 1981, at 1.

224. *Id.*

225. *Id.*

226. *Info on N.C. redistricting asked*, RT, Sept. 9, 1981, at 10A; A. L. May, *Legislative leaders OK new session on districts*, RN, Oct. 10, 1981, at 1; A.L. May, *Legislature may need to redraw districts*, RN, Oct. 9, 1981, at 1.

227. Paul T. O'Connor, *Justice nixes N.C. Senate, Congress map*, RT, Dec. 8, 1981, at 1A.

No. 2 had the effect of minimizing minority voting strength and was motivated by racial considerations—that is, the desire to preclude from that district the voting influence of the politically-active black community in Durham."[228] Reynolds found "particularly troublesome the strangely irregular shape" of the Second District.[229]

Editorially chiding the legislature for its long record of racial discrimination in redistricting, the *Raleigh Times* remarked:

> From here on, legislators will be prudent to include, among their standards for drawing districts, not only fair population representation but a fair chance for racial representation. That change is overdue. Until now, districting plans' impact on minority political clout and vice versa has been a behind the scenes concern of the powerful people who draft the plans—but rarely an on-the-record one.
>
> For example, legislative protectors of 2nd District Congressman L.H. Fountain said privately they backed a 'fishhook' district (now thrown out) because they feared a more compact one including heavily black Durham County would boost black candidates' chances. In public, they merely said they wanted to keep the 2nd District rural.[230]

Rejecting calls to sue the Justice Department to overturn its denial of preclearance, the legislature decided to redraw its plans. The all but formally declared black candidate Mickey Michaux, according to the *Raleigh Times*, "has drawn a map that puts Durham and Orange into the 2nd District. It's a district he believes he'd win."[231] Black leaders in Durham constructed three other, similar maps, which were introduced,

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228. *Id.* (quoting Letter from William B. Reynolds, Asst. U.S. Attorney General for Civil Rights, to Alex K. Brock, Director N.C. State Board of Elections (Dec. 7, 1981)).

229. *Id.* Reynolds was also disturbed by the pattern of decreasing black population in the Second District, from 43% in 1970 to 40.2% after the 1971 reapportionment to 36.7% in the plan submitted—this despite a rise in the black population percentage over that period in the state as a whole. *Id.* For comments, see editorial, *Legislators On the hook*, RN, Dec. 10, 1981, at 4. A week earlier, the Department had ruled that the 1968 amendment to the state constitution requiring that whole counties be used in state legislative districts was illegal under the Voting Rights Act. A.L. May, *Ruling due on N.C. redistricting plans*, RN, Dec. 8, 1981, at 7.

230. *District change coming*, RT, Dec. 14, 1981, at 4A.

231. Paul T. O'Connor, *Politicians don't know where to run*, RT, Dec. 28, 1981, at 1-C.

along with Michaux's, by Rep. Kenneth Spaulding.[232] But the legislature rejected Spaulding's efforts and his repeated attempts to require single member districts in urban areas that contained large black populations.[233] Spaulding correctly predicted that the federal courts would reject the legislature's refusal to remedy the discrimination completely.[234]

Although it did not go as far as black leaders wanted—it did not keep Orange county in the Second District or eliminate Edgecombe county—the legislature did add Durham county and eliminate the ungainly projection through Alamance and Chatham counties.[235] As House Redistricting Committee Co-chair J.P. Huskins put it, "We have taken the hook off the fishhook."[236] But the struggle was not easy. As *News and Observer* reporter Daniel C. Hoover noted,

> white, conservative eastern legislators fought tenaciously to preserve the traditional 2nd district. . . . Unspoken publicly by some of the legislators were these fears:
>
> That when Fountain retires, a black Democrat will be nominated, triggering a white backlash that will deliver the 2nd to the Republicans and form the nucleus for gradual erosion of the Democratic power base there.
>
> That Durham's black political activists will fan out over the district and begin registering heretofore apathetic rural blacks, kindle their political awareness and upset the district's grassroots sociopolitical balance.[237]

In other words, even if it were unsuccessful, a black campaign for Congress might result in the overthrow of the racial and political status quo. The stakes in the redistricting decision could hardly have been higher.

Why, then, did the legislature, which after all numbered only four blacks elected through single-shot voting and apparent private

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232. A.L. May, *2nd, 4th districts to undergo change in congressional redistricting plan*, RN, Feb. 4, 1982, at 39.

233. *Id.*

234. *State lawmakers expect approval of redistricting plan*, RT, Feb. 6, 1982, at 8A.

235. *Last chance for legislators*, RN, Feb. 9, 1982, at 4A.

236. Daniel C. Hoover, *Pleas fail to keep Durham from 2nd*, RN, Feb. 11, 1982, at 1A.

237. Daniel C. Hoover, *Districting woes may have cost Democrats chance to oust GOP*, RN, Feb. 14, 1982, at 32A.

agreements on slates,[238] and 34 Republicans among its 170 members, take the action it did? Pressed explicitly by the Justice Department either to justify its decision to exclude Durham or modify its plan, legislators had no choice, since they knew that a working majority of them had intended to keep Fountain safe from a challenge, and since they had so often been reminded of the racial effect of their plan for the Second District. Because changes could be made to Fountain's district without affecting other incumbents' chances significantly, it was easier and potentially less disruptive to comply than to fight. Some were also angry at the tactics of Fountain's confederates.[239]

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238. Referring unmistakably to Rep. Daniel T. Blue's election to the House in 1980, the *RT* remarked that "Wake and other big multi-seat counties have elected black legislators partly via swapped-support agreements among white and black candidates." *District change coming*, RT, Dec. 14, 1981, at 4A.

239. As Joint Redistricting Committee Co-chair Helen Marvin put it, "Time after time it was Congressman Fountain who was trying to dictate to us." A.L. May, *Legislative panels back plan to shift Durham to 2nd*, RN, Feb. 10, 1982, at 18A.

Although the Department of Justice precleared the new plan, Daniel C. Hoover, *Congressional districting plan OK'd*, RN, March 12, 1982, at 6-C, which met the criticisms of the fishhook scheme that were specifically raised in Reynolds' objection letter, the LDF did not immediately move to dismiss the congressional portions of the *Gingles* suit. *Id.* "It's a lot better," commented Leslie Winner, "but it's not good enough." *Congressional district plan gets Justice Department OK*, RT, Mar. 12, 1982, at 6-C. The plan, the LDF said in papers filed with the federal court, perpetuates "the effects of past discrimination against black citizens." *Fight renewed against redistricting plan*, RN, Mar. 18, 1982. Only reluctantly did the LDF drop its challenge to the Second District two months later, contending that although "the districts as apportioned do not allow the black citizens of North Carolina to select representatives of their choosing," the plan "does not appear to violate the United States Constitution or the Voting Rights Act as currently construed." Motion for Partial Voluntary Dismissal at 1, Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984) (No. 81-803-CIV-5) (filed April 22, 1982). The principal Section 5 precedent at the time would have denied relief unless there was demonstrable "retrogression" in potential black political influence, and the legislature had carefully designed the Second District to have the exact same percentage of blacks, to a tenth of a percentage point, in its population in 1982 as in 1971. Beer v. United States, 425 U.S. 130 (1976). The 1980 *Bolden* plurality opinion, under strenuous attack in 1982, but not formally modified as of April, required plaintiffs in Voting Rights Act or constitutional challenges to prove that the statute in question had been adopted with a racially discriminatory motive and, more important, seemed to adopt an incoherent approach to evaluating evidence of such intent. City of Mobile v. Bolden, 446 U.S. 55 (1980). *See* Kousser, *supra* note 178, at 699-703. The renewed Voting Rights Act with its anti-*Bolden* amendment to Section 2 was signed into law only on June 29, and the Supreme Court's opinion in Rogers v. Lodge, 458 U.S. 613 (1982), which sidestepped *Bolden*, was issued on July 1. In April, 1982, however, the statutory and judicial

6. Michaux, Valentine, and the "Bloc Vote"

Asked for comment about the Justice Department's rejection of the "fishhook" plan in December, L.H. Fountain's spokesman Ted Daniel denied that the Congressman had exercised much influence on the legislative decision.[240] For a month and a half after the legislature turned down his desperate followers' final move to suspend the new plan for thirty days and ask the Department of Justice to reconsider the old one again, Fountain continued to go through the motions of running.[241] Six days after the formal announcement of what promised to be a vigorous and well-funded campaign by Mickey Michaux and the Durham Committee on the Affairs of Black People, however, the fifteen-term congressman announced his retirement.[242]

After a brief shakeout of prospective candidates, the contest settled down to a two-white-man race to determine who would face Michaux in the runoff. Former state House Speaker James E. Ramsey positioned himself in the middle, between the liberal Michaux and Tim Valentine, who had been a state legislator in the 1950s and state chairman of the Democratic party in the 1960s and who won most of the Fountain supporters. Neither Ramsey nor Valentine raised race as an issue in the first primary.[243]

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precedents were considerably less promising. Therefore, dropping the congressional redistricting from the first *Gingles* case is no sign either that the LDF approved the 1981 districts or that they believed them in accord with the Voting Rights Act and the Constitution. Rather, their decision was a matter of legal strategy that might well have been different if it had been taken 75 days later.

240. Paul T. O'Connor, *Justice nixes N.C. Senate, Congress map*, RT, Dec. 8, 1981, at 1A. "The congressman said repeatedly that he would have been happy with any district—including Durham or not." *Id.*

241. *Legislature approves congressional remap*, RT, Feb. 11, 1982, at 1A; A.L. May, *Michaux to announce plans today to challenge Fountain in primary*, RN, Mar. 22, 1982, at 1A; A.L. May & Rob Christensen, *Fountain says he won't seek re-election*, RN, Mar. 28, 1982, at 1A; *Under the Dome: Fountain may face two primary foes*, RN, Feb. 20, 1982, at 1; *Under the Dome: Labor aids Michaux in quest for funds*, RN, Mar. 18, 1982, at 1.

242. A.L. May & Rob Christensen, *Fountain says he won't seek re-election*, RN, Mar. 28, 1982, at 1A. An unidentified colleague of Fountain's summed up his reasons: "He sort of felt he was let down by (the Legislature) putting Durham County in his district, which he had a lot of apprehension about . . . ." *Id.*

243. *Id.* May and Christensen suggested in their story on Fountain's retirement that Michaux would finish first in the primary, but would be forced into a runoff. *Id.* at 21A. *See also* A.L. May, *Candidates seek runoff, second shot at Michaux*, RN, June 27,

Michaux, who said that he hoped race would not be an issue, acted as though he knew better, deciding not to use billboards with his picture on them and putting most of his early effort into a drive to register black voters.[244] With blacks running for local offices in every county in the Second District, the percentage of the registered voters who were black rose from 27.6% to 30%.[245] Highly visible and personable, experienced in campaigning among and cooperating with whites, Michaux was as promising a candidate as black North Carolina could produce. To the vast majority of whites in the Second District, however, only one of his characteristics—his race—made any difference.

Turnout in the first primary was high, and the voting was racially polarized.[246] Although noting that Michaux's campaign had been geared not only to register more blacks, but to "appeal to white liberals and moderates," A.L. May of the *News and Observer* suggested that the candidate received "a share of the white vote" only in Durham.[247] Statistical analysis by Prof. Richard Engstrom substantiates contemporary newspaper accounts. According to Engstrom, Michaux received 88.6% of the black vote, but only 13.9% of the white vote in the first primary. [248]

1982, at 27A; William M. Welch, *Turnout may decide 2nd District runoff*, RN, July 19, 1982, at 4C.

244. A.L. May, *Democrats gird for dogfight in new 2nd District*, RN, May 23, 1982, at 29A-30A; A.L. May, *Michaux to announce plans today to challenge Fountain in primary*, RN, Mar. 22, 1982, at 1C; A.L. May, *Washington Notebook*, RN, Nov. 26, 1983, at 1C.

245. A.L. May, *Democrats Gird for dogfight in new 2d district*, RN, May 23, 1982, at 1C. The son of an affluent businessman from a well-known Durham family, Michaux had run for the legislature three times in "liberal" Durham county from 1964 to 1968 before finally winning a seat in 1972. *Michaux tends to keep race out of the campaign*, RN, Jun. 27, 1982, at 38A. After three terms in the legislature, he was rewarded for his early support for Jimmy Carter for President with appointment as U.S. Attorney. *Id.* Raising more money from labor unions than any other congressional candidate in the state and eventually loaning his own campaign $69,000, Michaux had a sizable staff, as well as assistance in preparing speeches from such notables as Duke political scientist James David Barber. Daniel C. Hoover, *Michaux reports strong financing by labor committees*, RN, July 16, 1982, at 12D; *PACs pumped $1.8 million into North Carolina races*, RT, Feb. 14, 1983.

246. A.L. May, *Michaux, Valentine runoff appears likely*, RN, June 30, 1982, at 1A.

247. *Id.*

248. Post-Trial Brief for the United States, (No. 92-202), *supra* note 148, at Ex. 13 (reproducing Engstrom's figures in a Table). As became well known all across the country during Jesse Jackson's presidential campaign in 1984, Michaux finished first with 44.1% of the vote, to 32.9% for Valentine and 23% for Ramsey. A.L. May, *Michaux says*

There was only one issue in the runoff. "The veteran politicos tell it simply," A.L. May reported. "Get a black candidate against a white in a runoff primary in rural Eastern North Carolina, and the white will win every time."[249] But the conservative Valentine, who had pledged on the evening of his first primary victory not to make race an issue in the runoff, left nothing to chance. [250] Using the code words "bloc vote,"[251] Valentine sent a letter to white voters, over his own signature, that warned: "If you and your friends don't vote on July 27, my opponent's bloc vote will decide the election for you."[252] Whites got the message. As one said, leaving the polls, "There wasn't but one choice, Valentine, because he is white."[253]

With turnout at 57%, even higher than in the first primary, Valentine won by a 53.8%-46.2% margin, the voting "strongly following racial lines," according to the *News and Observer*.[254] Professor Engstrom's statistical analysis confirms newspaper impressions of "widespread bloc voting," as he estimates that 91.5% of blacks, but only 13.1% of whites voted for Michaux. [255]Angered by his opponent's resort to a racial

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chances in runoff "about even," RN, July 1, 1982, at 20A. Overall Democratic turnout in the Second District was 53%, quite high for a primary. *Id.*

249. A.L. May, *Racial support expected to decide 2nd District runoff*, RN, July 11, 1982, at 25A. A dozen Democratic leaders whom he interviewed told May that "the July 27 runoff will boil down to racial bloc voting throughout the district." *Id.* A Wilson County Democratic leader, who, according to May, asked not to be identified, told May that "it's going to be straight down racial lines." *Id.*

250. Ferrel Guillory, *North Carolina still not color-blind—2nd District candidates run as symbols*, RN, July 23, 1982, at 4A; A.L. May, *Turnout widely considered deciding factor in race*, RN, July 25, 1982, at 25A; A.L. May, *Valentine wins in 2nd District*, RN, July 28, 1982, at 1A; *More blacks move into city jobs*, RT, Feb. 20, 1984, at 7A.

251. Georgia's Herman Talmadge made this phrase famous throughout the South during his 1948 gubernatorial campaign.

252. A.L. May, *Turnout widely considered deciding factor in race*, RN, July 23, 1982, at 25A. Another target-mailed letter, employing another code word, coyly noted that "[m]y opponent will again be busing his supporters into polling places." *Id. See More blacks move into city jobs*, RT, Feb. 20, 1984, at 7A.

253. A.L. May, *Valentine wins in 2nd District*, RN, July 28, 1982, at 1A, 7A.

254. *Id.* at 1A. *Valentine gets 2d District nod in surprisingly strong turnout*, RT, July 28, 1982.

255. Post-Trial brief for the United States (No. 92-202), *supra* note 148, at 36. *See* Daniel C. Hoover, *Write-in vote suggests action in future races, Michaux says*, RN, Nov. 4, 1982, at 24A; A.L. May, *Valentine seeks unity in party*, RN, July 29, 1982, at 1-C; A.L. May, *Valentine Wins in 2nd District*, RN, July 28, 1982, at 1; *Race a key in runoff*, RN, July 29, 1982, at 4A.

appeal, Michaux grudgingly endorsed him a month after the runoff, remarking that Valentine's "only single qualification is that he's a Democrat."[256] Even less conciliatory, the Durham Committee on the Affairs of Black People urged its supporters to write Michaux's name in on the November ballot, rather than voting for the Democratic nominee.[257] Michaux received 14.6% of the votes.[258]

7. Polarized Encore: Valentine Beats Another Black Candidate

In the legislature in 1973, Michaux had cosponsored an unsuccessful bill to eliminate runoff elections as costly for the state and unfair to blacks.[259] In the wake of Michaux's loss in 1982, Representative Kenneth Spaulding, another young black lawyer from a prominent Durham family, renewed the effort in a way that was typical of his more moderate and conciliatory stance. Instead of trying to abolish the runoff completely, which he favored, but was sure wouldn't have a chance of passing, Spaulding proposed to require a candidate to obtain only 40%, instead of 50%, to become the nominee for a statewide or federal office.[260] When a subcommittee killed this bill, he modified it again and again, requiring in one version that any first-place finisher who got less than 50% had to beat the second-place finisher by more than five percent to avoid a runoff, and then that the winner had to get 41% and beat his closest opponent by three percent. Both of these measures also died.[261] It was symbolic of Spaulding's fate. No matter

256. *Under the Dome: Michaux reluctant to back Valentine*, RN, Aug. 11, 1982, at 1A; A.L. May, *Michaux backs Valentine because "he's a Democrat,"* RN, Aug. 28, 1982, at 4-C; *Michaux endorses Valentine*, RT, Sept. 18, 1982, at 5-B. *See* Daniel C. Hoover, *Marin win would defy voting pattern*, RN, Oct. 31, 1982, at 42A; Daniel C. Hoover, *Write-in vote suggests action in future races, Michaux says*, RN, Nov. 4, 1982, at 24A; *Michaux write-in votes urged by Black Caucus*, RN, Oct. 5, 1982, at 3C.

257. Daniel C. Hoover, *Write-in vote suggests action in future races, Michaux Says*, RN, Nov. 4, 1982, at 24A.

258. *Id.*

259. A.L. May, *Racial support expected to decide 2nd District runoff*, RN, July 11, 1982, at 25A.

260. *Valentine hits bill to cut primaries*, RT, Feb. 22, 1983, at 15A.

261. *Bill on primary election law turned aside by House panel*, RN, Mar. 18, 1983, at 14A; *Hunt offers compromise on computer authority proposal, Primaries*, RN, Mar. 25, 1983, at 6-B; Sherry Johnson, *Legislation would restrict runoffs, pare vote share to win Primaries*, RN, Feb 10, 1983, at 20A; *Legislation would eliminate need for most runoff primary elections*, RT, Feb. 10, 1983; A.L. May, *Racial support expected to decide 2nd District runoff*, RN, July 11, 1982, at 25A; *Minority Contract Bill Draws Praise,*

how moderate he tried to become, no matter that he was not as flamboyant as Michaux, no matter that he stressed "fiscal conservatism" in his legislative career and his 1984 congressional campaign, to most whites in the Second District, he was merely another black candidate.

When he opened his campaign against the freshman Valentine in November, 1983, Spaulding made "a plea for biracial support. . . . Minorities side by side with non-minorities should lead this state in a meaningful, open manner."[262] By March, 1984, he was still pushing an appeal to whites to ignore color: "I think the voters, black and white, have moved forward, beyond flesh tone."[263]

A markedly smaller proportion of blacks than whites registered to vote in both the First and Second Congressional Districts up through 1982. Although the proportion of blacks in the population in the Second District in 1972 was 40.1%, the African-American population was disproportionately young, so that the percentage of the voting age population that was black was only 34.2%. Whether because of the lingering effects of past discrimination or apathy, the estimated proportion of blacks among registered Democrats was even lower—30.5%.[264] Over the years, the proportion of blacks who were registered

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Blame, RN, Mar. 16, 1983, at 4-C; *Restrictions on landfills pass preliminary House vote*, RN, Apr. 1, 1983, at 4-D; *Support solicited for elimination of second primaries*, RT, Feb. 18, 1983, at 2A; *Valentine opposes bill to reduce runoff races*, RN, Feb. 22, 1983; *Valentine hits bill to cut primaries*, RT, Feb. 22, 1983, at 12-C.

262. Ginny Carroll, *Spaulding launches bid for Valentine's House seat*, RN, Nov. 30, 1983, at 1C.

263. A.L. May, *Increase in black voters makes primary a tussle for Spaulding, Valentine*, RN, Mar. 19, 1984, at 1A. But like Michaux, Spaulding knew that he could not expect to get many white votes, and that the keys to success lay in registering and turning out blacks. Less well known and less well financed than Michaux and facing an incumbent, instead of running for an open seat, Spaulding had one huge advantage that Michaux had not had: he was on the same ballot as Jesse Jackson. *Id.* The first black candidate for President in American history with any chance to win a major party nomination, Jackson made a prodigious effort to register enough new black voters to carry the North Carolina primary, especially emphasizing the Second District. Elizabeth Leland, *New black voters in 2nd District outnumber whites nearly 2-to-1*, RN, Apr. 18, 1984, at 1A. White Democrats in the state were less enthusiastic than blacks in choosing between Jackson, Walter Mondale, and Gary Hart.

264. Although it keeps some records of registration cross-classified by both race and party, the state of North Carolina does not make them available for all counties. My estimates are based on the figures for 53 North Carolina counties in 1993, supplied as part of the supplementation to Thomas Hofeller's deposition in *Shaw v. Hunt*. In these counties, the proportion of black registrants who were Democrats was 94%. Deposition of Thomas Hofeller, Supp. (December 9, 1993), Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C.

slowly increased and the proportion of whites who were Democrats slowly declined, but the largest jump before 1992 took place in 1984, especially in the Second District. During Michaux's campaign, only an estimated 32.9% of the Democrats in the Second District were black; during Spaulding's, 40.6%.

The major effort that went into registering 13,000 new black voters moved Spaulding only 1.7% closer to Valentine than Michaux had been. With no third candidate in the contest, Valentine's 52.1% to 47.9% victory was enough to guarantee his nomination and easy election in November. The first sentence of the *News and Observer*'s election story emphasized racial bloc voting: "U.S. Rep. I.T. 'Tim' Valentine, in voting that generally followed racial lines, turned back a strong challenge from state Rep. Kenneth B. Spaulding . . . ." Again, Engstrom's statistical analysis confirms observers' reports. He estimates that Spaulding received 89.7% of the black vote and 14.1% of the white, percentages that are nearly identical to Michaux's two years earlier.[265] As Raleigh business lobbyist V.B. "Hawk" Johnson summed it up, "[t]hat's the story, there are still more whites than blacks."[266]

With considerable foresight, *News and Observer* reporter Daniel C. Hoover predicted as soon as the 1984 primary results became known that "[t]he latest victory could serve to deter future black opponents, leaving Valentine generally secure from serious primary challenges."[267] Announcing that he would not challenge Valentine in 1986, Michaux echoed Hoover, saying that "many black voters have

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1994) (No. 92-202). Other, scattered mentions of the party affiliations of blacks in the newspapers are very similar. To arrive at the partisan percentages in the text, I simply multiplied the total black registration in each district by 0.94 and divided the result by the number of Democrats.

265. Post-Trial Brief for the United States (No. 92-202), *supra* note 148, at 36-37.

266. Daniel C. Hoover, *Valentine holds off Spaulding in tight 2nd District race*, RN, May 10, 1984, at 9A. In a much less heated contest for the Democratic nomination in the Fourth Congressional District, incumbent Ike Andrews held off Howard Lee and John Winters, a minor black candidate, in the first primary. Lee raised only $8,195, compared to Andrews's $24,042, Spaulding's $72,585, and Valentine's $188,781. Ginny Carroll, *Cobey Outspends Democrat Opponents 2-1 in 4th District race*, RN, Apr. 21, 1984, at 5C. Engstrom estimates that Lee received 24.3% of the white vote in the nearly invisible contest. My textual discussion reflects the focus of the media and the voters, as indicated by their increased registration and turnout, on the Spaulding-Valentine race.

267. Daniel C. Hoover, *Valentine holds off Spaulding in tight 2nd District race*, RN, May 10, 1984, at 9A.

lost their enthusiasm for another primary challenge against Valentine after having worked hard in losing causes in 1982 and 1984."[268] Valentine had no primary opponents from 1986 through 1992.

8. The Record on the Eve of the Reapportionment of the 1990s

If members of the North Carolina legislature in 1991 had contemplated drawing voting districts that were essentially similar in racial composition to those of the 1980s, they could not have expected to prevail if an intent case were filed against them under Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.[269] The discriminatory racial and partisan concerns that so notoriously underlay the formation of the "Black Second;" the well-known history of other discriminatory electoral devices such as the poll tax, the literacy test, at-large voting for the state legislature, and the anti-single shot law; the immediate historical context to the 1981 redistricting;[270] the lines of the 1981 redistricting, particularly the fishhook, and the diminution of the black percentage in the Second District, which was noted both on the floor of the legislature and by the Justice Department in its Section 5

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268. *Id.*; *Under the Dome: Valentine may skate through primary*, RN, Dec. 27, 1985, at 1A.

269. In his opinion in *Shaw* v. *Hunt*, Judge Voorhees rejected the contention that blacks could have won a Section 2 *effects* case because, in his view, they could not prove the second part of the "first *Gingles* prong"—that they were geographically compact enough to form a majority of a congressional district. Shaw v. Hunt, 861 F. Supp. 408, 482 (E.D.N.C. 1994) (Voorhees, C.J., concurring in part and dissenting in part). Whatever the validity of Voorhees's informal eyeball standard of compactness, it is irrelevant to a hypothetical challenge on the basis of intent, which Voorhees conveniently ignored even though it was repeatedly and explicitly raised as a possibility in various papers that defendants submitted to his court.

My analysis here is patterned on the nine "intent factors" that I identified in my testimony in Garza v. County of L.A., 756 F. Supp. 1298 (C.D. Cal.), *aff'd in part, vacated and remanded in part*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991) (discussed more fully in Kousser, *supra* note 178, at 704-14.) The proof of intent in *Garza* involved much more than quick glances at maps, and, unlike whites in North Carolina, Latinos in Los Angeles were clearly injured. They had not been able to elect a Latino supervisor since 1874.

270. Howard Lee's surprising showings in the 1972 congressional and 1976 Lieutenant Governor's primaries suggested that a better funded black candidate might be a threat, especially if Durham were added to the Second District. In 1981, Michaux had all but declared for Congress when the legislature was considering redistricting. *See Michaux is likely candidate*, RT, July 21, 1980, at 32; Beverly Shepard, *Michaux may run for public office*, RN, July 21, 1980.

objection letter; the widely noted failure of black political candidates for Congress in the state since 1900;[271] the universally understood pattern of racial bloc voting in election campaigns; the actions of the legislature on other racial issues, such as the continuation of at-large elections for the state legislature in 1981, in the face of charges of racial discrimination; and the deviation in 1981 from the traditional state policy of not splitting counties, which was not forced by population equality concerns, but by the desire to preserve L.H. Fountain from challenge by a candidate of the black community—all these factors would have established an overwhelming case of racially discriminatory intent. North Carolina spent half of the 1980s in an unsuccessful effort to stave off racial change in the state legislature.[272] The almost certain prospect of losing another such case gave the state a clear and compelling interest in remedying past discrimination[273] by drawing a district in which African-Americans would have a fair opportunity to elect a candidate of their choice.[274]

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271. *Under the Dome*, RN, Jan. 12, 1972, at 1, cited Congressman George White's farewell address in 1901 as the last southern black (until 1973) to serve in Congress.

272. *See* Thornburg v. Gingles, 478 U.S. 30 (1986).

273. In his opinion in Shaw v. Hunt, 861 F. Supp. at 488, Judge Voorhees asserts that Judges Phillips and Britt found that "the State has failed to demonstrate any basis in evidence for a conclusion that such remedial action was necessary." *Id.* What they in fact found was that the number of North Carolina legislators who acted purely from a motive of remedying past discrimination did not constitute a majority of both houses. *Id.* at 482. The majority's rather casually drawn conclusion would perhaps have been more difficult for Judge Voorhees to misstate if their opinion had discussed the evidence for that conclusion in more detail. This paper supplies that missing discussion. Moreover, since in any legislative body, most issues are decided by coalitions of legislators, the intentions of any large or important subgroups are hardly irrelevant to the final outcome of a bill. Thus, the motives of African-American and liberal white legislators, many of whom no doubt sincerely wished to redress past discrimination in redistricting, are quite pertinent to determining whether such redress constituted a compelling state interest.

274. The repeated efforts by highly qualified black candidates in the Second Congressional District served, in effect, as experiments about the conditions under which black candidates could be elected to Congress in North Carolina. Clayton's and Lee's campaigns against Fountain in 1968 and 1972 proved that blacks could not beat an entrenched incumbent; Michaux's, against Valentine in 1982, that they could not win an open seat; Spaulding's, in 1984, that they could not win with the aid of a massive registration effort, even if the candidate were running at the same time as a primary campaign by the first serious African-American candidate for President in history. After 1984, it was clear that blacks needed more, probably considerably more than 40% of the population in a congressional district in North Carolina to be able to elect a candidate who was their first choice.

C. Redistricting in the 1990s: A Partisan Circus

1. A Changed Context

Legally and politically, the context for redistricting in North Carolina in 1991 differed a great deal from that of 1981. Nationally, the 1982 amendment to Section 2 of the Voting Rights Act,[275] as elaborated in the Supreme Court's decision in *Gingles*, had been interpreted to mandate the drawing of majority-minority districts wherever possible, but the definition of "possible" was vague and unsettled.[276] Furthermore, the Supreme Court in *Rogers* v. *Lodge*[277] and lower federal courts in such cases as the remand decision in *Bolden*[278] and the mixed motive case of *Garza*[279] had shown that it was possible to prove a racially discriminatory purpose to the satisfaction of many judges. Even before the 1990 elections, then-North Carolina House Speaker Josephus L. Mavretic (D-Edgecombe) warned his colleagues of the likelihood of legal challenges to the upcoming redistricting, including suits under the Voting Rights Act, and indicated his desire to avoid them if possible.[280] In part, no doubt, to circumvent such litigation, the House Redistricting Committee hired Leslie Winner, the *Gingles* lawyer, as its consultant. Along with her brother, State Senator Dennis Winner (D-Asheville), Chair of the Senate Redistricting Committee, Leslie Winner would be inside the tent this time.[281]

Not only had the *Gingles* litigation cost the state money and pride, it had also added to the number of African-American and Republican legislators, as at-large systems in several counties gave way to single-member districts.[282] Blacks occupied important leadership positions in

275. Voting Rights Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988 & Supp. V 1993)).

276. CONGRESSIONAL QUARTERLY, CQ'S GUIDE TO 1990 CONGRESSIONAL REDISTRICTING, PART 2 xiii (1993).

277. 458 U.S. 613 (1982).

278. City of Mobile v. Bolden, 542 F. Supp. 1050 (S.D. Ala. 1982).

279. Garza v. County of L.A., 756 F. Supp. 1298 (C.D. Cal.), *aff'd in part, vacated and remanded in part*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

280. *Under the Dome: Mavretic maps '91 redistricting*, RN, Oct. 14, 1990, at C1.

281. *Under the Dome: Legislature's legal bills near $60,000*, RN, Jan. 8, 1992, at B1; Van Denton, *House, Senate district plans advance—Partisan splits mark debates on proposals*, RN, Jan. 14, 1992, at A1.

282. In 1981, only 20% of the legislators were Republicans; whereas, in 1991, 31% were—14 of the 50 state senators and 39 of the 120 members of the House. While in 1981, there had been only 4 blacks in the legislature, by 1991, there were 19, a full 11%

the legislature, as Dan Blue ascended to the Speakership in that year and Milton F. "Toby" Fitch became one of three co-chairs of the House Redistricting Committee. But with power came partisan responsibility, as Blue, Fitch, and the others owed their positions to the support of a predominantly white party, with the good fortune of which their own fortunes were inextricably intertwined. Moreover, any aspirations that they had for higher office were subject to the will of an electorate that was three-quarters white. Their positions eliminated any possible use of the "balance of power" strategy that members of minority groups have often been urged to employ, particularly, in the recent past, in redistricting.[283] As people who shared power in the Democratic party, they could not make deals with Republicans or use the threat of doing so to pressure white Democrats for more black seats.[284] Thus, until the Justice Department's refusal to pre-clear their first plan, Speaker Blue and the other black legislators firmly supported a proposal to create only one black-majority congressional seat out of twelve.[285]

2. Partisan Warfare

From the beginning to the end of the 1990s cycle of redistricting in North Carolina—indeed, continuing into the *Shaw* v. *Hunt*[286] suit—the partisan strife was bitter and brutal.[287] Every redistricting plan produced on the legislature's computer instantaneously linked partisan registration data, as well as returns from three recent statewide elections, to

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or half of their proportion in the state's population—larger, but much too small to dictate to anyone.

In her majority opinion in *Croson*, Justice O'Connor stressed that the majority of the Richmond City Council was African-American. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989).

283. Van Denton, *Party loyalty, black gains clash in redistricting*, RN, Jan. 7, 1992, at A1.

284. *Id.*

285. *Id.*

286. 861 F. Supp. 408 (E.D.N.C. 1994).

287. At one of the first meetings of the House Redistricting Committee, Republican members proposed a guideline that "would prohibit the drawing of new districts that would dilute the voting strength of political parties or that [were] designed to protect incumbent legislators"—a rule so obviously impossible to achieve that its suggestion could only have been meant to embarrass the majority party. Van Denton, *Parties squabble over redistricting—Panel can't agree on ground rules*, RN, May 2, 1991, at B3.

population and racial percentages for each district, giving unmistakable cues to all participants and observers about the partisan and racial consequences of any plan or changes in it. Newspaper articles pointed out that the first Democratic proposal decreased Republican percentages in four districts, possibly endangering one or two Republican incumbents and strengthening Democrat David Price in the Fourth District.[288] When the plan was made fully public, the *News and Observer* summarized the purposes of its authors as "to simultaneously equalize district populations, turn 11 districts into 12, protect incumbent Democrats, inflict maximum carnage on most incumbent Republicans, and construct one district with a black majority."[289]

Republicans retaliated by playing the race card differently than the famous Jesse Helms "white hands" television commercial of 1990.[290] State House member David Balmer proposed a plan with two districts that, he contended, contained a majority of minorities, not in an effort to convince his colleagues to adopt it, but in an attempt to get a court to intervene.[291] Even before the legislature officially adopted a plan, the state's four Republican congressmen sent a letter to Assistant Attorney General for Civil Rights John Dunne asking the Department to intervene in the process on the grounds that the legislature had not adopted the Balmer plan. A skeptical Mickey Michaux, now returned to the state legislature, remarked "I ain't never known no Republican trying to help anybody black," while African-American State Senator Frank W. Ballance, Jr. (D-Warren) commented that "When people who have been kicking me all over town propose a plan, it raises questions."[292]

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288. Van Denton, *GOP, Black Congressional districts proposed—redistricting plan to be presented to panels today*, RN, May 29, 1991, at B1.

289. *A Map to Boggle Minds*, RN, June 1, 1991, at A12.

290. The notorious spot pictured the hands of a white male tearing up a letter rejecting him for a job for which he allegedly was qualified, but which he lost because the job had to be given to an anonymous and dehumanized "minority."

291. As he said on the floor of the House when he offered it, "[w]e would hope that if it is possible to draw two congressional districts with high minority percentages that the federal courts would come in and encourage the North Carolina legislature to draw two minority congressional districts. This district simply shows that it can be done." Van Denton, *Redistricting plan defended, derided*, RN, May 30, 1991, at B3.

292. *Id.*; Van Denton, *GOP congressmen blast Democrats' redistricting plan*, RN, June 14, 1991, at B3; *Under the Dome—black legislators cool to district idea*, RN, June 19, 1991, at B1.

3. Communities of Interest and Power

Both the rise in the number of Republicans in the legislature and the expectations of African-Americans that the amended Voting Rights Act and the increased power of black legislators would make black voices more audible than in 1981 simplified and structured the redistricting process. No longer would intraparty strife such as that between L.H. Fountain and five more moderate Democratic congressmen determine the agenda and endlessly deadlock the legislature. Democrats could afford few defections, because the Republicans might take advantage of them to force through one of their own plans. Just as important, it was no longer possible to insist on preserving county, city, town, township, or even precinct boundaries, because the absolute population equality interpretation of *Karcher* v. *Daggett*[293] required that all of these give way.[294] This development gave more power to the technicians who had to fix up every plan in order to reduce population deviations to nearly zero, and it prevented people from adamantly refusing to transfer a well-recognized entity, a whole county, from one district to another. Taken together, these two developments shifted the focus of redistricting from geography and local attachments to partisan politics and social groups that transcended localities. In this sense, 1991-92 was the first modern redistricting in the history of North Carolina.

A process run by lawyers seeking to avoid legal missteps or obvious bias, the redistricting effort of 1991 was comparatively short and predictable. There were public hearings at which everyone could speak and where perhaps the most notable calls were those from black citizens and representatives of the NAACP and ACLU for more seats for minorities, including one or two in Congress.[295] Computers with

293. 462 U.S. 725 (1983), *aff'd*, 467 U.S. 1222 (1984).

294. Redistricting Criteria For Congressional Seats, JOINT SENATE AND HOUSE COMMITTEES ON CONGRESSIONAL REDISTRICTING, Apr. 17, 1991, reproduced in Plaintiff's Brief, at Ex. 14, Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994) (No. 92-202).

295. Reverend Sidney Locks, Testimony at the North Carolina Senate Redistricting Committee Public Meeting (Mar. 18, 1991), *in* Plaintiff's Exhibit 29, Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994) (No. 92-202) (NAACP member urging redistricting to allow for fair representation for African-Americans); Testimony of Reverend Alonzo Mills, Pitt County Concerned Citizens for Justice, Remarks at the North Carolina Senate Redistricting Committee (Mar. 18, 1991), in Plaintiff's Exhibit 29, Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994) (No. 92-202) (calling for creation of districts that will yield two black congressmen); Remarks Reverend Thomas L. Walker, Edgecombe County Commissioner, Remarks at the North Carolina Senate Redistricting

efficient redistricting software were made available to all members, along with training on how to use them.[296] Both Republicans and African-Americans were well represented on the redistricting committees and at the hearings. Plans were developed quickly and offered for public discussion. Within a few weeks of its public unveiling, "Congressional Base Plan #1" ("CB1"), had evolved into CB6 and been passed by both houses of the legislature, which rejected proposals by Republican Representatives David Balmer of Charlotte and Larry T. Justus of Hendersonville. Balmer's 6.2 plan, which contained one black majority district and another approximately equally divided between blacks and whites of voting age, with Lumbee Indians holding the balance of power, attracted the most attention of any of the non-Democratic plans.[297] CB6 contained a single black majority district in the northeast rural and small-town section of the state, but stretching into the city of Durham.[298]

The addition of a twelfth congressional seat and the announcement of the retirement of the 77-year-old Walter Jones of the First District allowed CB6 to fulfill two goals without inconveniencing any Democratic incumbents. Territory from the current First and Second Districts could be joined to create a district with a small majority of African-Americans, 51.3%, in the voting age population.[299] The new

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Committee (Mar. 18, 1991), in Plaintiff's Exhibit 29, Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994) (No. 92-202) (requesting "at least two majority black congressional districts"). *See* Deposition of Gerry F. Cohen 56-58 (Nov. 12, 1993), Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994) (No. 92-202) (on file with author) [hereinafter Cohen Deposition].

296. Cohen Deposition, *supra* note 295, at 45-55.

297. Van Denton, *ACLU asks government to reject state redistricting*, RN, Sept. 28, 1991, at B4; Van Denton, *Congressional district plan advances in House*, RN, June 26, 1991, at B3; Van Denton, *New congressional districts enacted—Plan still faces legal hurdles*, RN, July 9, 1991, at B3; Van Denton, *Remap takes odd twists—Redistricting aids blacks, incumbents*, RN, June 27, 1991, at B1. On the day the House took its final vote, Balmer introduced another plan, known as Balmer 8.1, which did not rely on black-Indian cohesion for a majority, but the legislature never fully considered this proposal. Cohen Deposition, *supra* note 295, at 198; Van Denton, *GOP congressmen blast Democrats' redistricting plan*, RN, June 14, 1991, at B3.

298. 1991 N.C. Sess. Laws, ch. 601.

299. Legislative opinion reflected the widely-shared belief among voting rights lawyers that states and localities that could create majority-minority districts had the legal responsibility to do so, and that the indicator of such a district in the minds of judges was the presence of a voting-age population majority. Cohen Deposition, *supra* note 304, at 75-77.

district, which could be conceded to the Republicans and located in the Piedmont, could be made useful to the Democrats if it absorbed troublesome Republicans from marginally Democratic districts in the area. The only district with a majority of registered Republicans in the state, the CB6 Twelfth was in fact a landslide Republican district, since Republican percentages typically ran 15-30% ahead of the party's registration in congressional contests.

The Department of Justice on December 18 rejected the state's congressional plan and suggested the possibility of drawing a second majority-minority district in the southeast. The Democrats' first reaction was, as Speaker Blue put it, that "[t]he entire thing is political" which was reinforced when Republican State Chairman R. Jack Hawke, Jr. boasted that any new plan would give Republicans a majority of the congressional delegation.[300] Within a week, five Democratic congressmen urged Blue and the state to file a Section 5 case in Washington.[301] But before the end of the year a Rose aide, John Merritt, was in Raleigh shopping a new plan that he hoped would avoid both court and a party debacle, particularly for his boss. Starting from the Republican "Balmer 8.1," the scheme had been modified by Democratic state legislative and congressional staff members and the liberal National Committee for an Effective Congress, and finally introduced by Mary Peeler, a North Carolina NAACP activist.[302] These

300. Van Denton, *GOP teamed up for victory—Redistricting ruling debated*, RN, Dec. 20, 1991, at A1; Van Denton, *House, Senate leaders produce similar redistricting proposals*, RN, Jan. 20, 1992, at A1.

301. Ferrel Guillory and Van Denton, *Assembly urged to fight—Democrats want state in court over districts*, RN, Dec. 31, 1991, at A1.

302. Deposition of John Merritt 21-34 (Dec. 22, 1993), Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994) (No. 92-202) [hereinafter Merritt Deposition] (on file with author). Rep. Thomas C. Hardaway, a black Democrat from Halifax county, brought the modified Balmer 8.1 plan, renamed "Optimum II-Zero," to Merritt's attention in Washington, and Merritt immediately took the concept to the nearby office of the National Committee for an Effective Congress, a liberal political action group with a well-known competence in the technical aspects of redistricting and politics, where a complete map was drawn over a weekend with the help of people from the staffs of other Democratic congressmen. Merritt, who had good contacts in the legislature, then took 30 copies of the plan to Raleigh, where he met with Leslie Winner and Gerry Cohen, as well as a number of legislators. He also talked in person and by phone with state and national leaders of the NAACP in an ultimately successful effort to interest them in the plan. On Jan. 8, ten days after Merritt had come to Raleigh, Mary Peeler of the NAACP presented something very close to Merritt's plan at a legislative hearing. Van Denton, *2 black districts urged—Proposal favors N.C. Democrats*, RN, Jan. 10, 1992, at A1; Ferrel Guillory, *GOP seeks*

changes made the originally pro-Republican plan much more attractive to Democratic incumbents.

Reaction to the new plan was often harsh. Utterly forgetting the state's long history of racial and partisan gerrymandering, discrimination, and disfranchisement, the *News and Observer* denounced every congressional plan that contained a majority black district as based on a "profoundly un-American principle" that would "radically change our system of government." Republican Chairman Hawke more simply charged the Democrats with "trying to get rid of Republicans and protect Democratic incumbents."[303] Although some Democrats referred to the proposed Twelfth as "the urban black district," one that would have "a strong urban agenda," the media seemed to favor a new plan proposed by the League of Women Voters ("LWV").[304] The LWV plan's districts looked compact on a map, but would almost certainly not have had a large enough black population to elect a black candidate.[305] State President Claudia Kadis' comments in a newspaper column pushing the LWV plan make clear how far fair representation for African-Americans was from her organization's concerns. The proposed First District, she sneered, "consists mainly of rural areas with little in common but minority populations and poverty." Such groupings did not amount to "communities of interest," deserving of representation, in her view. In fact, the only examples of communities of interests that she gave were "television markets, newspaper delivery

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change in district map—Congressmen want no action in court, RN, Jan. 9, 1992, at B1; Cohen Deposition, *supra* note 295, at 171, 198, 211-212; Merritt Deposition *supra*.

303. Van Denton, *Plan could cost GOP—New seat would be Democratic*, RN, Jan. 17, 1992, at B1; *I-85 No Route to Congress*, RN, Jan. 13, 1992, at A8.

304. Van Denton, *House Democrats offer districting plan—Map similar to congressional proposal*, RN, Jan. 19, 1992, at A1; *Under the Dome: Gantt ally eyeing U.S. House seat*, RN, Jan. 21, 1992, at B1.

305. The LWV northeastern district had approximately a 45% black population, and no doubt a smaller proportion of the voting age population and registered voters. The Michaux and Spaulding contests proved that racial bloc voting was too strong to elect a black candidate in such a district. Although the LWV claimed that 40% would be sufficient, because the majority-vote requirement had been relaxed to allow a winner to be declared if she got 40% or more of the vote, the organization ignored the fact that 50% was still required in a two-person contest like the Valentine-Spaulding race. The LWV proposal was also quite technically flawed, lacking contiguity in some areas, failing to assign others to any district at all, and consequently not properly balancing the census population figures. Cohen Deposition, *supra* note 295, 270-76. The LWV's southeastern district, with a combined black and Indian population of 43.7%, was even farther from offering minorities an opportunity to elect candidates of their choice.

areas, highway and rail networks, [and] chambers of commerce."[306] While the *News and Observer* endorsed the LWV proposal and denounced the legislators for being "driven by wrongheaded determination to protect incumbent Democratic congressmen," it did not go so far as to argue that the LWV plan gave blacks a fair opportunity, only that it "improves blacks' victory chances."[307]

There were two motives behind the relatively minor, but numerous changes in the Merritt/Peeler plan before it was adopted as CB10 (or "Chapter 7", in the official parlance of state law): the first was to make District 12 more consistently urban, and, therefore, more of a homogeneous community of interest, and the second was to accommodate various political and idiosyncratic wishes of influential politicians.[308] The legislature voted largely along party lines to adopt the plan. Before the vote, Senator Frank W. Ballance, Jr., endorsed CB10 as a "remedial piece of legislation. There may come a time when we can come back here and do away with these black districts and elect people based on their qualifications."[309] But that time, as the history of black attempts to elect candidates of their choice to Congress in the 1980s proved, had not yet arrived.

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306. Claudia Kadis, *Let sound principles shape new districts*, RN, Jan. 23, 1992, at A15.

307. *Rule, redistrict and ruin*, RN, Jan. 24, 1992, at A16.

308. As Gerry Cohen, the legislative technician who actually performed the changes noted, parts of two cities, Winston-Salem and Gastonia, were added to District 12, and rural parts of four counties were deleted in a successful attempt to raise the proportion of the population in that district who lived in places of greater than 20,000 from 60% to 80%. Cohen Deposition, *supra* note 295, at 177-84. Politically, modifications were made in District 1 that aimed, Cohen said, at "improving the chances of incumbent congressmen in the Second, Third and Eighth Districts to be elected." *Id.* at 171. John Merritt simply sent Cohen faxes of precincts to be moved. *Id.* In the Piedmont, Cohen received a similar list from a staffer of Congressman Steve Neal regarding allocations of precincts in the Fifth and Tenth Districts, *id.* at 219-223, and he moved Republican Randolph County from the Fourth to the Sixth District in an effort to benefit both Fourth District Democrat David Price and Sixth District Republican Howard Coble. *Id.* 215-18, 230. Other alterations improved the re-election chances of Eleventh District Republican Charles Taylor, moved the home of Representative Walter Jones, Jr., who wished to succeed his father in Congress, into the new First District, and shifted lines marginally to put staff aides or campaign managers of various members of Congress in their bosses' districts. *Id.* at 211-24, 240.

309. Van Denton, *Senate enacts new district plan—Vote tracks party lines*, RN, Jan. 25, 1992, at A1; Van Denton, *House OKs new districts—Congressional plan has two black seats*, RN, Jan. 24, 1992, at B3.

4. A Partisan Scorecard

Despite the fact that participants in the North Carolina reapportionment of 1991-92 were uncommonly candid in discussing their partisan handiwork, they disagreed publicly about the effects of the many proposed plans. To make sense of the process, it is useful to have a standardized and objective means of assessing their partisan effects. Although predicting future elections is a somewhat inexact process for a variety of reasons,[310] it is possible to make fairly precise estimates based on recent historical patterns.[311]

Essentially, one performs an "ordinary least squares regression" of the percentage of the total vote for each party on the percentage of the total number of voters who are registered with each of the major parties, or with some other indicator of core partisan voting strength. The resulting estimates can be used for two purposes. First, by multiplying the registration proportions in each district by the coefficients from the regression equations, a hypothetical winner can be determined. A simple comparison of the hypothetical and actual winners will show how well the model predicts winners and losers. Second, once the method is validated, it can be applied to minority districting plans that were not put into effect to determine the likely outcomes if those plans had been adopted. The advantage of using data based on congressional elections to predict the results of future congressional elections ought to be plain. There may be different political dynamics operating in elections for different offices. Naturally, as with any index, there are problems with this one, the most important of which is that it assumes that voters from each party defect to the other party at the same rate throughout the state. The index does, however, give outsiders a sense of the political consequences that insiders know of, but seldom discuss in public in full candor.

Table 2 presents the equations for most North Carolina congressional elections from 1980 through 1992. The R^2's for the equations, or percentages of the variances in the voting percentages

310. For example, voters may shift their behavior, economic and other socioeconomic conditions may change, and different candidates may run for office.

311. J. Morgan Kousser, Estimating the Partisan Consequences of Redistricting Plans—Simply, (unpublished mimeo., revised July, 1994, on file with author) (showing that this very simple statistical technique, least squares regression, can account for about 90% of the outcomes in congressional and state House elections in California from 1970 through 1992).

explained by the registration percentages, are quite respectable, although not very many of the individual coefficients are statistically significant at conventional levels. Graphs not shown here indicate no striking nonlinearities in the relationships. Table 3 shows how well the equations do at predicting winners for each party. The row for 1980, for example, shows that the separate equations for Democrats and Republicans for that year correctly predicted 8 of the 11 outcomes. In other words, Democrats won one seat that statewide trends predicted they would lose, while Republicans won two seats that statewide trends suggested they would lose. Overall, the equations predict about 80% of the contests correctly, generally missing only in the marginal contests in the Fifth, Sixth, and Eleventh Districts. In 1992, the equations predicted 11 of the 12 contests correctly. The flaws arose from slightly underestimating Democratic strength in the Fifth District in a very good year for Democrats.

TABLE 2: Statistics for Party Registration Regressions

Year	*Intercept*	*Dem.*	*Rep.*	R^2
PANEL A: PERCENTAGE OF VOTE FOR DEMOCRATS				
1980	-0.53(-1.41)	1.43(3.53)	0.25(.54)	.72
1982	-3.09(-.91)	3.91(1.15)	3.53(.91)	.49
1984	0.36(.47)	0.45(.61)	-0.60(-.59)	.70
1986	-1.06(-.68)	1.94(1.24)	1.11(.62)	.91
1988	1.05(.29)	-0.12(3.61)	-1.48(-.36)	.65
1990	0.01(.00)	0.92(.45)	-0.22(-.01)	.62
1992	3.81(2.93)	-3.00(-2.26)	-4.53(-3.03)	.88
PANEL B: PERCENTAGE OF VOTE FOR REPUBLICANS				
1980	1.53(3.93)	-1.43(3.43)	-0.24(-.51)	.71
1982	3.41(1.36)	-3.31(-1.31)	-2.57(-.90)	.72
1984	0.63(.83)	-0.45(-.61)	0.60(.59)	.70
1986	2.06(1.33)	-1.94(1.24)	-1.11(-.62)	.91
1988	-0.05(-.01)	0.12(.03)	1.50(.36)	.65
1990	0.99(.49)	-0.92(-.45)	0.22(.10)	.62
1992	-2.66(-1.71)	2.81(1.78)	4.35(2.44)	.85

Notes: t statistics in parentheses. Regressions are computed only for contested districts, which numbered 10 in 1980, 10 in 1982, 11 in 1984, 9 in 1988, and 11 in 1986, 1990, and 1992.

Sources: Votes from Richard Scammon, *et al., America Votes,* relevant years. Registration computed from data provided by North Carolina Dept. of State and North Carolina General Assembly.

TABLE 3: Predicted and Actual Winners from Party Regressions

Election	*Democratic Winners*		*Republican Winners*		*% Correc*
	Predicted	*Additional*	*Predicted*	*Additional*	
1980	5	1	3	2	73
1982	9	0	1	1	91
1984	4	2	4	1	73
1986	6	2	2	1	73
1988	5	3	3	0	73
1990	5	2	4	0	82
1992	7	1	4	0	92

Source: Computed from Table 2

Table 4 applies the same technique used in Table 3 to nineteen plans that were never put into effect and to one that was, CB10. In order to indicate what legislators, members of Congress, and their staffs expected the partisan effects of their plans to be, predictions from equations relating to two immediately preceding elections, one a presidential year and one an off-year, are included. The last column suggests what might have happened under the conditions of the 1992 election.

The table demonstrates most notably that the partisan effects of a plan are easy to predict, once the political party of the plan's designers is known. The nine Republican plans, including the first one Republican consultant Tom Hofeller drew for *Shaw v. Hunt*,[312] almost uniformly split the congressional delegation in half, regardless of which party is favored by overall trends in a particular election year. In fact, the vast majority of the districts in the Republican plans are, by this measure, uncompetitive.[313]

312. *See supra* note 302.

313. For example, if the Flaherty Plan had been in place in 1992, the smallest predicted margin of victory in any district would have been by 6.5% of the vote. Under the same conditions, only three of the elections in Hofeller's proposed districts would be closer than 10%, with the closest of them a 4.7% Republican victory.

TABLE 4:
Partisan Effects of Redistricting Plans Proposed in 1991 & 1992

Plan Name	*Predicted Democratic Seats Based on Regressions from Election of:*		
	1988	*1990*	*1992*
PANEL A: DEMOCRATIC PLANS			
Cong. Base Plan 1 (CB1)	7	9	7
CB2	7	8	7
CB3	7	8	7
CB4	7	7	7
CB5	7	7	7
CB6#(1991 Final)	7	9	7
Merritt/Rose/NAACP	8	8	8
CB7	7	7	7
CB8	7	7	7
CB9	7	8	7
CB10 (1992 Final)	7	8	7
PANEL B: REPUBLICAN PLANS			
Justus, 1991	6	6	6
Justus, Compact 2-minority	6	6	6
Balmer 6.2	6	6	6
Balmer 7.8	6	6	6
Balmer 8.1	6	6	6
Balmer 9.1	6	7	6
Balmer 10.1	6	7	6
Flaherty	6	6	6
Hofeller	6	6	6

Source: Computed from Regressions in Table 2 and registration data from state Section 5 Submissions

By contrast, all of the Democratic plans were estimated to produce seven to nine Democrats in the twelve-person delegation, and more of the contests would be expected to be somewhat closer.[314] Looking at the table and imagining that the Democrats projected the most recent patterns, those from 1990, into the future, it is easy to see why they

314. Had CB9 been adopted in 1992, the estimate is that two of the races would have been decided by less than 4% of the vote.

were dismayed when the Department of Justice rejected CB6,[315] why Republicans, who hoped that the rejection would force the legislature to adopt one of their partisan plans, were jubilant, and why Democrats welcomed the proposal worked out by Merritt and presented to the legislature by Mary Peeler.[316] This table suggests more graphically than any district map possibly could why the Democratic majority in the legislature responded to the Justice Department's call to establish two majority-minority districts by adopting CB10, instead of a Republican alternative: two Congressional seats were at stake.[317]

5. Intention in 1991-1992

North Carolina legislators in 1991-92 adopted the districts they did for many reasons. First, they wanted to satisfy an extremely precise definition of the equal population standard that legislators believed was implied by *Karcher v. Daggett* and its progeny.[318] Second, they tried to satisfy the Department of Justice's interpretation of the Voting Rights Act. Third, they attempted to protect Democratic incumbents and more generally, the interests of the Democratic party.[319] Fourth, the redistricting was intended to make it possible for African-Americans, for the first time this century, to elect one or two candidates of their choice to Congress from the state, an action that would remedy nine decades of discrimination. Fifth, legislators tried to avoid litigation that they knew would otherwise certainly ensue, litigation similar to that which had embroiled the state in a half-decade of turmoil, expense, and embarrassment during the 1980s.[320] Sixth, in the case of what became

315. *See supra* notes 298-302 and accompanying text.

316. *See supra* note 298-304 and accompanying text.

317. For an identical estimate by Republican State Chairman R. Jack Hawke, Jr., see Van Denton, *GOP Teamed up for victory—Redistricting ruling debated*, RN, Dec. 20, 1991.

318. If the solons had believed that districts only had to be within five percent of the ideal population size, as they believed was the standard for state legislatures, they could have drawn much more compact districts with similar political effects.

319. As Gerry Cohen commented during the *Shaw v. Hunt* trial, "[a]ll lines drawn in this case were politically driven." *Redistricting's soft underbelly is exposed*, GREENSBORO NEWS AND RECORD, Mar. 30, 1994, at F2. Or as the Co-Chair of the Redistricting Committee, Toby Fitch, put it, politics is "what . . . redistricting is all about." Dennis Patterson, *Lawmaker Says Ugly Districts Serve a Purpose*, RN, Apr. 1, 1994, at 3A.

320. Gerry Cohen testified during committee meetings that he heard three reasons for drawing majority/minority districts in North Carolina in 1991-92:

the Twelfth District, they tried to construct an urban district that would share similar problems and proclivities and would be relatively easy to traverse. Just as in 1981, the motives of the legislature were mixed.

The state openly acknowledged that the First and Twelfth Districts were drawn with a consciousness of race. But a desire to comply with federal court and Justice Department decisions, in a manner that obviously does not disadvantage protected minorities, can hardly be seen to have a racially discriminatory intent, although it obviously does take race into account. As I have argued above, taking race into account for remediation and compliance is compatible with Justice O'Connor's *Shaw* opinion,[321] and it is the central holding of the majority in *Shaw v. Hunt*.[322] If the shape or placement of districts is of particular importance, then the principal question is why the legislature chose to draw the First, and particularly the Twelfth, as it did, and not elsewhere or in a manner that some might consider more aesthetically pleasing. And the answer, as Table 4, comments at the time, John Merritt's deposition, the Republican suit in *Pope* v. *Blue*, and a good deal of comment in journals and news articles all agree, is partisanship and incumbent protection. If the legislature could have drawn the Twelfth District in other ways that would have made it possible for blacks to elect a candidate of choice, and it chose this way because the I-85 district hurt no Democrats, then the decision to draw the "ugly" Twelfth District could not logically have been taken for racial reasons at all.

IV. RESTORING REALITY TO REDISTRICTING LITIGATION

The redistricting process of the 1990s, the fairest to ethnic minorities in the history of the United States, resulted in the largest increase ever in minority representation in Congress.[323] At the local, as well as at the

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> One was that the Voting Rights Act required it; second, that it was the right thing to do. The third was that districts had been deliberately drawn in the 1980 plan so as to reduce the ability of minorities to be elected, and . . . that the legislature in response to a past pattern of discrimination had some duty to remedy this wrong.

Cohen Deposition, *supra* note 295, at 254-55.

321. *See supra* notes 139-52 and accompanying text.

322. *See supra* note 127.

323. The number of African-American members of Congress rose from 28 to 41 (counting the delegate from Washington, D.C., and the two black Republicans, who represent heavily white districts). The number of Latinos rose from 9 to 14. VOTING RTS. REV., Spring 1993, at 1-5, 17-19.

federal level, only the constraints of the Voting Rights Act have allowed the growth of representation by candidates who are the first preferences of the vast majority of African-American and Latino voters.[324] The Supreme Court decision in *Shaw*, at least as interpreted by some, threatens to reverse those gains, returning discrete and insular minorities to a condition of blatant inequality with whites, a condition in which whites can easily elect their first choice, but blacks and browns cannot unless they happen to be arranged in geographic patterns that seem attractive to judges. This utterly vague "standard" of "aesthetic correctness,"[325] nowhere mentioned in, or fairly derived from specific phrases in the Constitution, and clearly contradicting seemingly settled federal law and precedent, is separate and unequal, both in the present and in contrast to the past. If implemented as in *Vera* v. *Richards*,[326] it would allow widespread geographic manipulation of majority-white districts, while condemning minority opportunity districts that are as or more compact by some numerical measure,[327] and, as Section III above shows, such a standard has never previously been followed in North Carolina.[328] Moreover, in contrast to the requirements in minority vote dilution cases, whites in cases that follow *Shaw* are exempt from proving discriminatory effects. Thus *Shaw* marks a return to separate but unequal in another sense. And if recently elected black and Latino members of Congress are deleted from Congress, already 87% white, as a result of *Shaw*, Congress and public life in general will become more segregated. This is exactly the shibboleth with which Justice O'Connor assaulted the "segregated" (57% black) districts in North Carolina.

The irony of using weapons forged in the First Reconstruction to crush the Second adds stigmatic insult to concrete injury. The Reconstruction Amendments were primarily intended to protect former slaves, free persons of color, and their descendants from discrimination *against* them.[329] Their framers, veterans of an extended and often

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324. QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (Chandler Davidson & Bernard Grofman, eds., 1994).

325. The phrase is due to Lani Guinier, *Analysis: Lessons of 'History,'* VOTING RTS. REV., Fall 1993, at 3.

326. 861 F. Supp. 1304 (S.D. Tex. 1994).

327. *See* Pildes & Niemi, *supra* note 85, at 565, tbl. 3 (comparing perimeter compactness scores with racial majority populations for various districts).

328. The longer version of this paper, available from the author, demonstrates that it has never been followed in Texas, either.

329. It is instructive to note, for instance, that the index to the 1866 hearings on the Freedman's Bureau Bill conducted by the Joint Committee on Reconstruction (the

desperate campaign against racial slavery and for civil rights, knew that racial discrimination was not easily erased.[330] Slavery had existed for 250 years in North America. Freedom, so far, has lasted about half that long. The Amendments could not have been meant to facilitate—not just allow, as in *Plessy* v. *Ferguson*, but reestablish—a separate but unequal standard, but that is the precise effect of *Shaw*. For courts to institutionalize unequal justice in the guise of "color blindness" not only perverts the intentions of the framers, it turns them upside down. Some commentators and judges purport to be color blind when, in fact, all they can see is white.[331]

Fortunately, the Supreme Court can still avoid such a broadside attack on the political rights of minority voters. *Shaw*'s many ambiguities and its preliminary nature allow five ways out that do not require an embarrassing scuttling of the opinion.

First, the Court could rule that Anglos must bear the same burden of proof of a discriminatory effect as minorities bear in vote dilution or redistricting cases. In the leading federal case on anti-minority redistricting, *Garza* v. *Los Angeles County Board of Supervisors*,[332] which the Supreme Court declined to review, both district and circuit courts ruled that even when plaintiffs proved that a line had been drawn partly because of a racially discriminatory intent, minorities still had to make some showing of a racially discriminatory effect. Since no Latino had been elected to the five-member Board since 1874, despite the fact that the population of Los Angeles county in 1990 was 37% Latino, it was not difficult to demonstrate such an effect.[333] For the Supreme

Committee that framed the Fourteenth Amendment in the same year), contains two pages of entries under the heading "Freedmen, evidence of general hostility and occasional cruelty towards." JACOBUS TENBROEK, EQUAL UNDER LAW 203 (1965).

330. See the speech of Thaddeus Stevens, just prior to passage of the Fourteenth Amendment by the House of Representatives, *quoted in* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 254-55 (1988).

331. Abigail Thernstrom, *Redistricting, in Black and White*, N.Y. TIMES, Dec. 7, 1994, at A19. In contrast to Dr. Thernstrom's rosy picture of race relations, the facts show that only two African-Americans have ever been elected to Congress from the ex-Confederate South from majority-Anglo districts, southern Republicans in Congress vote almost unanimously against the views of any black constituents who may be wasted in their districts, and white Democratic members of Congress seldom closely reflect the preferences of their black constituents. *See supra* part III.A.1.

332. 756 F. Supp. 1298 (C.D. Cal.), *aff'd in part, vacated and remanded in part*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

333. *See* Johnson v. De Grandy, ___ U.S. ___, 114 S. Ct. 2647 (1994); Holder v. Hall, 114 S. Ct. 2582 (1994) (pointing to jurisdiction-wide proportionality as a natural

Court to fail to apply a similar standard in *Shaw*-type cases would be patently unequal.[334]

Second, the Court could determine that the alleged consequences of "racial gerrymandering"—incorrectly treating minority voters as if they shared interests, increasing racial bloc voting, and electing unusually parochial representatives—turn out in fact not to follow from race-conscious redistricting.[335] Alternatively, the Court might remand the cases, or some of them, back to the lower courts for more evidence on this matter.

Third, the Court could rule that it meant what O'Connor said when she repeated again and again that race had to be the *sole* reason for the shape of the districts, and that evidence presented to the lower courts convincingly refuted that contention. Specifically, it could affirm that it was not the decisions to take race into account or to draw minority opportunity districts *per se* that potentially infringed the Constitution, but the decision to draw the lines in a particular fashion.[336] It could then turn to a question that O'Connor did not squarely address in *Shaw*—whether a redistricting plan amounted to a "racial classification" if partisan politics or other motives, such as preserving communities of interest, played an important role in shaping the lines in the minority opportunity districts, as they clearly did in North Carolina. Nothing in the *Shaw* majority opinion prevents the Court from ruling that a set of districts whose lines are the product of very mixed motives can be constitutional, and much in the opinion seems to require it.[337]

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baseline). In none of the southern states are Anglos currently represented in Congress in less than their proportion in the population.

334. In *Garza*, 918 F.2d at 763, the district and circuit courts did not merely rely on a comparison of district lines with ethnic maps. Rather, it supplemented the comparison with a very extensive review of other direct and circumstantial evidence of the intent of the redistricters. This evidence is presented in full in Kousser, *supra* note 178, at 593-684.

335. *See supra* part II.3. It is possible that some Justices, perhaps a majority, regard these as *a priori* truths, not subject to verification or falsification. If the justices may simply assume any fact that justifies a policy, then a court may become a superlegislature guided only by political whim, and not even subject to factual demonstration.

336. *See supra* part II.2; United States v. Hays, 862 F. Supp. 119 (W.D. La. 1993), *prob. juris. noted*, 115 S. Ct. 687 (1994) (Nos. 94-558 and 94-627), in which the State redrew a second black-majority district to have much more compact lines, offers an especially good opportunity for the Court to affirm this distinction.

337. District lines that purposefully dilute the overall voting strength of minorities should be held unconstitutional regardless of whether there were additional

Fourth, even if it were to apply strict scrutiny, the Court could rule that rectifying specific instances of past anti-minority racial gerrymandering or avoiding legal liability under Sections 2 and 5 of the Voting Rights Act constituted sufficiently compelling state interests to justify the actions taken. Section III of this paper demonstrates at the very least that reasonable people could have believed such rectification necessary or such suits likely to succeed. Thus, they need not have been motivated by any racial purpose whatsoever in drawing the districts at issue, but only by the serious non-racial interests of remedying past injustice and avoiding costly litigation. The Court would then have to clarify what "narrow tailoring" means in a redistricting context. If "narrow tailoring" means that a redistricting plan providing for a number of minority opportunity districts that is less than or equal to the proportion of minorities in the population was legally unobjectionable, and that drawing districts containing a fairly high proportion of one minority group was necessary, because of continued racial bloc voting by whites, then all of the new southern districts would be constitutional.

Fifth, the Court could endorse specific compactness and segregation standards. It could give its constitutional blessing to one or a group of mathematical compactness indices and to a specific level of minority percentage in a district's population that triggered constitutional doubt. Then, depending on the levels chosen, some districts would pass muster and others would not. On the other hand, the difficulty of reading specific threshold numbers into the Constitution might convince the Court to abandon *Shaw* as unmanageable or at least constitutionally unjustifiable.[338] In practice, *Shaw* imposes a difficult dilemma: If it does not require specific numerical standards, it invariably leads to subjective and unequal decisions on what is legal. If it does require, for instance, a "perimeter compactness score" of 0.10 and an African-American or Latino percentage of 55%, then where in the Constitution could such numbers be drawn from? In either case, *Shaw* is inevitably arbitrary and should be reconsidered on this ground alone.

All five paths away from *Shaw* require abandoning the ivory tower world of legalistic abstractions. With the retirement of Justice Byron

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motives for drawing the lines because they represent a discrimination ***against*** a relatively powerless group. *See Garza*, 918 F.2d at 769-70.

338. *Cf.* Justice O'Connor's denunciation of the "nebulous standard" adopted by the Court in Davis v. Bandemer, 478 U.S. 109, 144-45 (1986) (O'Connor J., concurring).

White, the author of so many of the Court's voting rights opinions,[339] a person of often "conservative" principle, but a Justice of relentless common sense on the topic of voting rights, the ideal person on the Court to execute this realignment of legal theorizing with real world experience is the only Justice with redistricting experience, the senior "moderate" Justice, Sandra Day O'Connor.

339. White was the author of the Court's opinions in seven major voting rights cases. This was more than any of his colleagues during his three decades on the Supreme Court. Swann v. Adams, 385 U.S. 440 (1967); Whitcomb v. Chavis, 403 U.S. 124 (1971); White v. Regester, 412 U.S. 755 (1973); Gaffney v. Cummings, 412 U.S. 735 (1973); White v. Weiser, 412 U.S. 783 (1973); United Jewish Orgs. v. Carey, 430 U.S. 144 (1977); Rogers v. Lodge, 458 U.S. 613 (1982). In addition, he issued notable dissents against mechanical and inflexible applications of absolute population equality in Wells v. Rockefeller, 394 U.S. 542 (1969), and Karcher v. Daggett, 462 U.S. 725 (1983); against a clumsy and unwarranted application of intent requirements (requirements that White had introduced in Washington v. Davis, 426 U.S. 229 (1976)), in City of Mobile v. Bolden, 446 U.S. 55 (1980), as well as in Shaw v. Reno, ___ U.S. ___, 113 S. Ct 2840 (1993).