The Remedial Use of Race-Based Redistricting After *Shaw v. Reno*

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> Some commentators have suggested that the Court's role in protecting minorities should consist only in removing barriers to their participation in the political process. We have seen, however—and the realization is one that threads our constitutional document—that the duty of representation that lies at the core of our system requires more than a voice and a vote. No matter how open the process, those with most of the votes are in a position to vote themselves advantages at the expense of the others, or otherwise to refuse to take their interests into account.[1]

INTRODUCTION

At first glance, the section of Interstate 85 in North Carolina which runs from Charlotte to Durham looks no different than any other roadway passing through the South's tobacco country. In 1991, however, the North Carolina General Assembly transformed this stretch of highway into a political battleground by redrawing its state legislative map.[2] In an effort to comply with § 5 of the Voting Rights Act of 1965 and increase minority representation in state politics, the North Carolina General Assembly submitted a redistricting proposal to the U.S. Attorney General for approval.[3] The plan created one majority-black district centered in the northeast portion of the state.[4] The U.S. Attorney General rejected the proposal, however, because it failed to create a second majority-black district in an area of high minority concentration.[5] In response to the Attorney General's request for the creation

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1. JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135 (1980).

2. The state redistricting plan was based on 1990 Census information which entitled North Carolina to a twelfth seat in the U.S. House of Representatives. Shaw v. Reno, 113 S. Ct. 2816, 2819 (1993); *see also* 1990 BUREAU OF THE CENSUS, POPULATION & HOUSING CHARACTERISTICS FOR CONG. DISTRICTS OF THE 103RD CONGRESS, NORTH CAROLINA CPH-4-35 at 3-12.

3. *Shaw*, 113 S. Ct. at 2820. Section 5 of the Voting Rights Act prohibits a covered jurisdiction from implementing changes in a "standard, practice, or procedure with respect to voting" without approval from either the Attorney General or the U.S. District Court for the District of Columbia. Voting Rights Act of 1965, 42 U.S.C. § 1973(c) (1988); *see also* note 82 and accompanying text.

4. *Shaw*, 113 S. Ct. at 2820. District 1 has been described as looking like a "Rorschach ink-blot test," Shaw v. Barr, 808 F. Supp. 461, 476 (E.D.N.C. 1992) (Voorhees, C.J., concurring in part and dissenting in part), *rev'd sub nom.*, Shaw v. Reno, 113 S. Ct. 2816 (1993), and a "bug splattered on a windshield," *Political Pornography-II*, WALL ST. J., Feb. 4, 1992, at A14.

5. According to the Attorney General, the North Carolina General Assembly, for "'pretextual reasons,'" failed to create a second majority-minority district in the southeastern portion of the state. *Shaw*, 113 S. Ct. at 2820 (quoting Appendix to Brief for Federal Appellees at 10a-11a, *Shaw* (No. 92-357)).

of a second "majority-minority" district in North Carolina,[6] and in an effort to protect several incumbent legislators,[7] the General Assembly turned a substantial section of I-85 into one of the most uniquely shaped and controversial political districts in the country.[8]

North Carolina's newly created Congressional District 12, also known as the "I-85 district,"[9] is approximately 160 miles long and not much wider than the highway itself for most of its length.[10] In describing the peculiar shape of the district,[11] the U.S. Supreme Court noted that "[i]t winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighborhoods.'"[12] The North Carolina General Assembly created the I-85 district in the hope of enfranchising a large number of black voters who had traditionally been fenced out of the political process in North Carolina.[13] By stretching the boundaries of "creative cartography,"[14] the legislature rekindled an old political debate over the issue of how far a state may go in redrawing its political map.

Most racial gerrymandering cases involve the creation of districts intended to dilute the voting strength of racial minorities.[15] The North Carolina General Assembly, however, purposefully created the I-85 district to enhance the position of black voters in North Carolina and to ensure them effective

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6. A "majority-minority" district is a political unit in a given geographical area where a racial or ethnic minority group constitutes a majority of the voting age population. This seemingly contradictory term is often used to describe political districts from which it is assumed that a minority candidate will win an election over a non-minority candidate. Since this Note deals specifically with a "majority-black" district, the terms will be used interehangeably. For a discussion of "majority-minority" districts in electoral politics, see generally ANDREW HACKER, CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION (rev. ed., Greenwood Press 1964) (1963).

7. The two legislators up for reelection were Representative Charles Rose (D) and Representative W.G. (Bill) Hefner (D). Richard E. Cohen, *Voting Rights Act Could Harm Democrats*, NAT'L J., Jan. 4, 1992, at 36.

8. In describing the unique nature of the "I-85 district," one North Carolina state legislator noted, "'if you drove down the interstate with both car doors open, you'd kill most of the people in the district.'" Jeffrey Rosen, *Gerrymandered: How Justice O'Connor Imperiled Voting Rights*, L.A. DAILY J., Oct. 26, 1993, at 6 (quoting Justice O'Connor quoting an unnamed North Carolina legislator).

9. *See id.* (describing the "I-85 district"). Appendix A contains a map of the North Carolina congressional districts, including the "I-85" district, prior to the Supreme Court's decision.

10. Shaw v. Reno, 113 S. Ct. 2816, 2820-21 (1993).

11. When a state legislature redraws its political map to favor minority groups, the terms "racial gerrymandering" and "race-based redistricting" are often implicated and are essentially synonymous. In this Note, the former will be used to refer to instances where the districting scheme is intended to discriminate or "fence out" the minority group and the latter will be used to describe remedial redistricting measures. Racial gerrymandering is generally used as a pejorative based on its historical derivation and meaning. *See also infra* note 36 and accompanying text.

12. *Shaw*, 113 S. Ct. at 2821 (quoting Shaw v. Barr, 808 F. Supp. 461, 476-77 (E.D.N.C. 1992) (Voorhees, C.J., concurring in part and dissenting in part), *rev'd sub nom.*, Shaw v. Reno, 113 S. Ct. 2816 (1993)).

13. For a general discussion of racial gerrymandering and voting rights litigation dealing with race-based districts, see Bernard Grofman & Lisa Handley, *Identifying and Remedying Racial Gerrymandering*, 8 J.L. & POL. 345 (1992).

14. *See The Final Days of Creative Cartography*, L.A. DAILY J., May 30, 1990, at 6.

15. *See* ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 63-78 (1987).

representation in Congress.[16] As a result of North Carolina's redistricting plan, a group of white voters brought suit against the North Carolina General Assembly and the U.S. Attorney General in *Shaw v. Reno*.[17] In *Shaw*, the plaintiffs claimed that the two majority-black districts were created solely for the purpose of "assur[ing] the election of two black representatives to Congress"[18] in violation of the Fifteenth Amendment[19] and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. In an interesting case of alleged reverse discrimination, the white voters claimed that *they* were being denied an equal voice in the political process by the intentional creation of the two majority-black districts.[20]

In a 5-4 decision, Justice O'Connor, writing for the majority, held that "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification," states a claim upon which equal protection relief may be granted.[21] Although the Court never reached the ultimate issue in *Shaw*—the constitutional validity of the North Carolina plan[22]—its recognition of a new cause of action represents a conspicuous and troubling departure from its previous position regarding the remedial use of

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16. *Shaw*, 113 S. Ct. at 2843 (White, J., dissenting) ("[The state effort] involves . . . an attempt to *equalize* treatment, and to provide minority voters with an effective voice in the political process.") (emphasis in original).

17. 113 S. Ct. 2816.

18. *Id.* at 2821. The plaintiffs also claimed that the Voting Rights Act of 1965 had either been misconstrued by the North Carolina General Assembly, or alternatively, that the Act itself was unconstitutional. *Id.*; *see also infra* notes 121-22 and accompanying text.

19. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

20. Article I, § 2, cl. 3 of the U.S. Constitution provides for the apportionment of representatives among the states. It reads, in pertinent part: "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers. . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as [Congress] shall by Law direct."

Additionally, each state Constitution contains a provision which sets forth guidelines by which the state's legislature may reapportion electoral districts based on Census data: ALA. CONST. art. 9, §§ 197-201; ALASKA CONST. art. VI, §§ 1-11; ARIZ. CONST. art. 4, pt. 2, § 1; ARK. CONST. Amend. No. 45; CAL. CONST. art. 4, § 6; COLO. CONST. art. V, §§ 46-48; CONN. CONST. art. 3, §§ 3-6; DEL. CODE tit. 29, pt. II; FLA. CONST. art. III, § 16; GA. CONST. art. 3, §§ 2-3; HAW. CONST. art. III, §§ 1-4; IDAHO CONST. art. 3, §§ 4-5; ILL. CONST. art. 4, § 3; IND. CONST. art. 4, § 5; IOWA CONST. art. 3, §§ 34-39; KAN. CONST. art. 10; KY. CONST. § 33; LA. CONST. art. III, § 6; ME. CONST. art. IV; MD. CONST. art. III, §§ 2-5; MASS. CONST. art. CI, §§ 1-3; MICH. CONST. art. IV, §§ 2-6; MINN. CONST. art. 4, §§ 2-3; MISS. CONST. art. 13, § 254; MO. CONST. art. III, §§ 2, 7, 10, 45; MONT. CONST. art. V, § 14; NEB. CONST. art. III, § 5; NEV. CONST. art. 4, § 5; N.H. CONST. pt. 2, arts. 9, 9a, 26; N.J. CONST. art. 4, §§ 2-3; N.M. CONST. art. IV, § 3; N.Y. CONST. art. 3, §§ 4-5; N.C. CONST. art. II, §§ 3, 5; N.D. CONST. art. IV, §§ 1-2, OHIO CONST. art. XI; OKLA. CONST. art. 5, §§ 9A, 10A, 11A-E; OR. CONST. art. IV, § 6; PA. CONST. art. 2, §§ 16-17; R.I. CONST. art. 7, § 1; art. 8, § 1; S.C. CONST. art. 3, §§ 3-6; S.D. CONST. art. III, § 5; TENN. CONST. art. II, §§ 4-6; TEX. CONST. art. 3, §§ 25-28; UTAH CONST. art. IX, §§ 1-2; VT. CONST. ch. II, §§ 13, 18, 74; VA. CONST. art. II, § 6; WASH. CONST. art. 2, § 43; W. VA. CONST. art. VI; WIS. CONST. art. IV, §§ 3-5; WYO. CONST. art. 3, § 3.

21. *Shaw*, 113 S. Ct. at 2824. The Court reversed the judgment of the District Court in favor of the defendants and remanded the case for a determination of the constitutionality of the district. *Id.* at 2832.

22. *Id.* at 2828.

race-based redistricting and the need to provide a remedy for past racial discrimination against minority groups in the electoral process.[23]

In 1965, Congress provided a legislative remedy for voting discrimination by enacting the historic Voting Rights Act.[24] Congress intended the Act to restore fairness in the political process and to ensure effective representation for minority interests in government.[25] By amending the Act in 1970,[26] 1975,[27] and most recently in 1982,[28] Congress reaffirmed its commitment to protecting minority voting rights. Since its inception, the Court has given the Act's remedial provisions a broad interpretation in order to effectuate the intention of Congress to protect minority groups from a wide variety of dilution schemes,[29] and most notably, the practice of invidious racial gerrymandering.[30] The Court's decision in *Shaw*, however, ignores the congressional intent behind the Voting Rights Act—to promote the enfranchisement of minorities in the political process. If the *Shaw* decision is an adequate indicator of the Court's current attitude toward voting rights jurisprudence, it represents an erosion of well-established legal doctrine promoting the inclusion of minorities in the political process.

The Court's previous position regarding the use of race-based redistricting permitted state legislatures to create majority-minority districts in order to comply with the remedial purposes of the Voting Rights Act and to prevent the dilution of minority voting strength in a given jurisdiction.[31] In the past, in order to challenge the constitutionality of a redistricting plan, the Court required proof of discriminatory purpose and effect—proof that the plan "was meant to, and did in fact, exclude an identifiable racial group from

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23. *Cf.* Stuart Taylor, Jr., *A Rorschach Test for Racial Gerrymanders*, LEGAL TIMES, July 5, 1993, at 25 ("[The Court's opinion] vindicates the vital constitutional principle that racial classifications are strong and socially divisive medicine, which should be prescribed only for important reasons and in careful doses.").

24. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973 (1988)). The commitment of Congress to providing an effective legislative remedy for past voting discrimination through the Voting Rights Act of 1965 was emphasized in the report of the Senate Judiciary Committee during consideration of the 1982 amendments to the Act.

> The Voting Rights Act has proven the most successful civil rights statute in the history of the Nation because it has reflected the overwhelming consensus in this Nation that the most fundamental civil right of all citizens—the right to vote—must be preserved at whatever cost and through whatever commitment required of the Federal government.

S. REP. NO. 417, 97th Cong., 2d Sess. 111 (1982).

25. "[Racial gerrymandering has] caused the political process to degenerate into an uncompetitive, insiders' game that is incompatible with representative government." John A. Slezak, *How Democrats Nabbed the Ballot Box*, L.A. DAILY J., May 30, 1990, at 6.

26. Pub. L. No. 91-285, 84 Stat. 314 (1970).

27. Pub. L. No. 94-73, 89 Stat. 402 (1975).

28. Pub. L. No. 97-205, 96 Stat. 134 (1982). This Note will focus primarily on the 1982 amendments because of their relation to cases involving racial gerrymandering.

29. *Congressional Anti-Gerrymandering Act of 1979: Hearings on S. 596 Before the Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 104-05 (1979) [hereinafter *Hearings*].

30. S. REP. NO. 417, *supra* note 24; *see also* H.R. REP. NO. 227, 97th Cong., 2d Sess. 3 (1982) ("The Act provides evidence of this Nation's commitment to assure that none of its citizens are deprived of this most basic right guaranteed by the fourteenth and fifteenth amendments.").

31. *See* United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 160 (1977).

participation in the political process."[32] In *Shaw*, the Court departed from these established principles, making it significantly more difficult for states to voluntarily use race-based redistricting as a means to remedy past discrimination and comply with the remedial provisions of the Voting Rights Act.[33] The Court's decision represents a step backward in voting rights jurisprudence by frustrating the intent of Congress to open up the political process and provide "fair and effective representation for all citizens."[34]

The American political system has undergone a major transformation from the days of the "black codes," "grandfather clauses," and literacy tests which once kept minorities from fully exercising their right to vote.[35] It is apparent, however, that the right to vote does not always guarantee meaningful access to the political process. This Note will argue that the Supreme Court, in *Shaw v. Reno*, failed to follow its own case law precedent in the area of race-based redistricting and disregarded the intentions of Congress as set forth in the 1965 Voting Rights Act regarding permissible remedial measures designed to enfranchise minority voters. It will also argue that the *Shaw* decision represents unwarranted judicial activism in the absence of any congressional action regarding the use of race-based redistricting as a remedy for past racial discrimination. Similar treatment of selected state redistricting plans will only inhibit certain States' efforts to promote minority representation in the political process and will defeat the remedial purposes of the Voting Rights Act of 1965.

Part I of this Note will present an overview of the Court's response to racial gerrymandering as a means to deny minority groups an opportunity to effectively influence the political process. It will also discuss the Court's treatment of race-based redistricting as a remedial measure used to counteract various forms of voting discrimination. Part II will examine the Voting Rights Act of 1965 and its effectiveness as a remedy for past racial discrimination in voting. Part III will discuss the Court's decision in *Shaw v. Reno* and the negative impact it will have on the remedial use of race-based redistricting and the promotion of minority voting rights. Finally, Part IV will suggest that the Court adopt a position consistent with its previous race-based redistricting decisions and the congressional intent behind the Voting Rights Act of 1965. It will argue that the Court should adopt a meaningful standard of review that takes into account the permissible uses of race in certain jurisdictions which have a prior history of racial discrimination in voting.

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32. *Shaw*, 113 S. Ct. at 2840 (White, J., dissenting) (citing Voinovich v. Quilter, 113 S. Ct. 1149, 1155 (1993); Thornburg v. Gingles, 478 U.S. 30, 46 n.11 (1986); Connor v. Finch, 431 U.S. 407, 422 (1977); and White v. Regester, 412 U.S. 755 (1973)).

33. *Id.* at 2843-44 (Stevens, J., dissenting).

34. Reynolds v. Sims, 377 U.S. 533, 565-66 (1964).

35. *Shaw*, 113 S. Ct. at 2823; *see also* THEODORE B. WILSON, THE BLACK CODES OF THE SOUTH (1965).

I. RACIAL GERRYMANDERING AND THE POLITICS OF EXCLUSION

The art of gerrymandering—redrawing district lines in order to gain an electoral advantage—is almost as old as the American political system itself.[36] Gerrymandering has been described as "[t]he jewel in the incumbents' crown" because of its potential capability to shield long-term politicians from successful electoral challenge.[37] In addition to its partisan use,[38] however, gerrymandering has also been strategically used to dilute the voting strength of minorities—especially blacks—and to prevent them from attaining an equal role in the American political process.[39] As Senator John F. Kennedy noted in 1958, "'[T]he apportionment of representation in our Legislatures and (to a lesser extent) in Congress has been either deliberately rigged or shamefully ignored so as to deny the cities and the voters that full and proportionate voice in government to which they are entitled.'"[40]

As minority groups gained a larger voice in the electoral process over the years, their gains at the ballot box were often nullified by the implementation of "a broad array of dilution schemes," most notably, the use of invidious racial gerrymandering.[41] Although minority groups struggled for years to obtain the right to vote,[42] that right lost much of its meaning in light of redistricting proposals which were designed to dilute minority voting strength.[43] In dealing with the issue of racial gerrymandering, the Supreme Court has found itself acting in a dual role by both addressing the position of

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36. The word "gerrymander" is defined as a verb, meaning "to divide (a territorial unit) into election districts in an unnatural and unfair way with the purpose of giving one political party an electoral majority in a large number of districts while concentrating the voting strength of the opposition in as few districts as possible." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 952 (1981). Although this definition commonly refers to political gerrymandering, the same definition applies to a division of electoral districts based on race. The word "gerrymander" was coined in Massachusetts in 1812 and was named after that state's governor, Elbridge Gerry. For a historical discussion of gerrymandering and its comparison to the "rotten boroughs" of England, see ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 23-124 (1907).

37. *The 98.4% House*, L.A. DAILY J., Aug. 4, 1987, at 4 (describing gerrymandering as a "profoundly antidemocratic device" used by state legislatures).

38. For a discussion of partisan gerrymandering, see DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 1-42 (Bruce Nichols ed., 1992). Leading partisan gerrymandering cases include: Davis v. Bandemer, 478 U.S. 109 (1986); Karcher v. Daggett, 462 U.S. 725 (1983); Gaffney v. Cummings, 412 U.S. 735 (1973); Reynolds v. Sims, 377 U.S. 533 (1964); and Badham v. Eu, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989).

39. *See supra* note 15 and accompanying text.

40. ROBERT B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 35 (1965) (quoting John F. Kennedy, *The Shame of the States*, N.Y. TIMES MAG., May 18, 1958, at 12); *see also* Slezak, *supra* note 25, at 6 ("Ideally, reapportionment should craft competitive districts with a representative cross-section of political, social and interest groups.").

41. S. REP. NO. 417, *supra* note 24, at 6.

42. *See* WILSON, *supra* note 35.

43. For a discussion of various responses to vote dilution schemes used to inhibit minority participation in the political process, see Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991).

minority groups in the electoral process and evaluating the Court's own role in promoting electoral opportunity in the American political system.[44]

A. The Invidious Use of Racial Gerrymandering

The Supreme Court first addressed the issue of racial gerrymandering in 1960 in the celebrated case of *Gomillion v. Lightfoot*.[45] In *Gomillion*, the Alabama Legislature passed a bill which changed the city's boundary lines in order to exclude virtually all of the black residents of the city of Tuskegee from voting in local elections.[46] The black citizens of Tuskegee challenged the creation of the new boundaries[47] by claiming that the boundaries were purposefully created to exclude blacks from the political process and therefore constituted a violation of their rights under the Equal Protection Clause.[48] In a unanimous decision, the Supreme Court held that the black residents of Tuskegee, by being fenced out of local politics, were effectively denied their right to vote in local elections.[49]

Four years after the Court decided *Gomillion*, it addressed the validity of another redistricting scheme, this time in New York City. In *Wright v. Rockefeller*,[50] the Court rejected the claim of several black and Puerto Rican plaintiffs asserting that congressional district lines had been drawn on a discriminatory basis.[51] The Court held that the plaintiffs had failed to prove that the New York Legislature had acted with a discriminatory purpose.[52] In *Wright*, the Court's requirement of proof of discriminatory purpose erected a high standard which would later prove difficult for minority groups to meet when challenging the constitutionality of redistricting schemes.[53]

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44. *See* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2123 (1990) ("[C]onstitutional law is no longer understood as the judicial policing of well-defined spheres of powers and immunities, but as a means of facilitating democratic participation and decision-making.").

45. 364 U.S. 339 (1960).

46. *Id.* at 340.

47. Writing for the majority in *Gomillion*, Justice Frankfurter stated that the new boundaries changed the shape of the city of Tuskegee from a square to "an uncouth twenty-eight-sided figure." *Id.*

48. *Id.*

49. *Id.* at 341. In holding that the act passed by the Alabama Legislature was unconstitutional, the Court stated: "When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment." *Id.* at 346.

50. 376 U.S. 52 (1964).

51. *Id.* at 58.

52. *Id.* In an oft-quoted impassioned dissent, Justice Douglas argued that state legislatures should never be allowed to draw district lines on the basis of race.

> Racial electoral registers, like religious ones, have no place in a society that honors the Lincoln tradition—"of the people, by the people, for the people." Here, the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. . . . Of course, race, like religion, plays an important role in the choices which voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines.

Id. at 66 (Douglas, J., dissenting) (citation omitted) (footnote omitted).

53. *See id.* at 69 (Goldberg, J., dissenting).

The difficulty of proving discriminatory intent became evident in *Whitcomb v. Chavis*.[54] In *Whitcomb*, several black residents of Indianapolis claimed that their voting strength had been diluted unfairly as a result of a redistricting plan which put them in an unusually large majority-controlled district.[55] The high burden of proving discriminatory intent proved fatal to the plaintiffs' case. The Supreme Court ultimately reversed the lower court finding—that the black voters of Indianapolis had been victims of discrimination—because the plaintiffs failed to prove discriminatory intent.[56]

Before the passage of the 1982 amendments to the Voting Rights Act, the Court's standard of review in cases involving invidious racial gerrymandering made it extremely difficult for minority groups to challenge effectively legislative redistricting plans.[57] Redistricting arrangements could be found unconstitutional "only if they were *intentionally* drawn to dilute the votes of disadvantaged minorities."[58] This difficulty in proving discriminatory intent eventually led Congress to readdress the standard of review for redistricting cases in the 1982 amendments to the Voting Rights Act.[59]

B. Race-Based Redistricting as a Remedial Measure

Although race-based redistricting schemes generally have been used to exclude minority groups from effective participation in the political process, in many instances, race-based plans are used to facilitate the enfranchisement of minority voters.[60] In the cases preceding *Shaw* where the use of race as a redistricting factor served as a remedy for past discrimination, the Court generally upheld redistricting plans which did not dilute the voting strength of white voters.[61] The leading pre-*Shaw* case, *United Jewish Organizations of Williamsburgh, Inc. v. Carey*,[62] upheld the right of state legislatures to use race-based redistricting in a remedial manner in those jurisdictions with a past history of racial discrimination in voting.[63]

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54. 403 U.S. 124 (1971).

55. *Id.* at 129 (Black voters "'have almost no political force or control over legislators because the effect of their vote is cancelled out by other contrary interest groups'") (citation omitted).

56. *Id.* at 162-63. In his dissenting opinion, Justice Douglas noted the special considerations of black voters in redistricting cases:

> It is said that if we prevent racial gerrymandering today, we must prevent gerrymandering of any special interest group tomorrow, whether it be social, economic, or ideological. I do not agree. Our Constitution has a special thrust when it comes to voting; the Fifteenth Amendment says the right of citizens to vote shall not be "abridged" on account of "race, color, or previous condition of servitude."

Id. at 180 (Douglas, J., dissenting).

57. *See* BUTLER & CAIN, *supra* note 38, at 114-15.

58. *Id.* at 35-36 (emphasis added) (citation omitted).

59. *Id.* For a discussion of the 1982 amendments, see *infra* part III.A-B and accompanying text.

60. *See* Shaw v. Reno, 113 S. Ct. 2816, 2843-44 (1993) (Stevens, J., dissenting).

61. *Id.*; *see also* United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

62. 430 U.S. 144.

63. *Id.* at 159-60.

The Court in *Carey* upheld a New York redistricting plan designed to create black majorities in two electoral districts.[64] The plan divided the Williamsburgh city district into several separate districts. In doing so, it divided a community of Hasidic Jews.[65] The Hasidim challenged the plan by claiming that it "'would dilute the value of each plaintiff's franchise by halving its effectiveness.'"[66]

The Court nevertheless upheld the redistricting plan in order to "achieve a fair allocation of political power between white and non-white voters."[67] In emphasizing the remedial purpose of the Voting Rights Act, the Court stated:

> It is true that New York deliberately increased the nonwhite majorities in certain districts in order to enhance the opportunity for election of nonwhite representatives from those districts. Nevertheless, there was no fencing out the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength.[68]

The Court ultimately held that the New York redistricting plan did not violate either the Fourteenth or Fifteenth Amendments in light of its remedial purpose.[69] In so holding, the Court created a precedent favoring race-based redistricting in cases where the strength of minority groups is enhanced while majority voting strength is not simultaneously diluted or diminished.[70]

II. THE VOTING RIGHTS ACT OF 1965: REMEDYING PAST DISCRIMINATION

Congress enacted the Voting Rights Act of 1965[71] to protect minority voting rights and to promote the enfranchisement of minorities in the American political process.[72] Additionally, Congress intended the Act to serve as an effective remedy for past racial discrimination in electoral

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64. *Id.* at 150-52.

65. *Id.* at 144. The Hasidic population in the Williamsburgh district was approximately 30,000 at the time the redistricting plan was enacted. *Id.* at 152.

66. *Id.* at 152 (citation omitted).

67. James C. Francis IV, Note, United Jewish Organizations v. Carey *and the Need to Recognize Aggregate Voting Rights*, 87 YALE L.J. 571, 577 (1978) (citing *Carey*, 430 U.S. at 167).

68. *Carey*, 430 U.S. at 165.

69. In recognizing the permissible use of racial considerations in drawing district lines, the Court quoted from a previous case:

> "[C]ourts have [no] constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State."

Id. at 168 (quoting Gaffney v. Cummings, 412 U.S. 735, 754 (1973)).

70. *Id.*

71. Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. § 1973).

72. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) ("The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting . . . .").

politics.[73] Several of the Act's provisions were amended in 1970,[74] 1975,[75] and 1982[76] in order to strengthen its protection of minority voting rights and as a means for Congress to reaffirm its commitment to electoral equality.[77]

A. The Act's Remedial Provisions

The remedial provisions of the Voting Rights Act—specifically § 5 and § 2—provide minority groups with effective weapons to prevent the dilution of their voting strength and protect their right to meaningful political participation.[78] The Court's broad interpretation of these provisions has allowed minority groups to combat the use of invidious racial gerrymandering and defend claims opposing the creation of remedial districts.[79]

1. Section 5: The "Non-retrogression" Principle

Under § 5 of the Voting Rights Act, states with a history of voting rights discrimination are required to obtain "preclearance" from either the U.S. Attorney General or the U.S. District Court for the District of Columbia in order to implement any changes "with respect to voting" in state elections.[80] In *Allen v. State Board of Elections*,[81] the Court held that § 5 applies to both "tests or devices" that infringe on minority voting rights and also to "electoral

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73. The majority in *Shaw* noted that:

> Congress enacted the Voting Rights Act of 1965 as a dramatic and severe response to [discrimination]. The Act proved immediately successful in ensuring racial minorities access to the voting booth; by the early 1970's, the spread between black and white registration in several of the targeted Southern States had fallen to well below 10%.

Shaw v. Reno, 113 S. Ct. 2816, 2823 (1993) (citing THERNSTROM, *supra* note 15, at 44).

74. Pub. L. No. 91-285, 84 Stat. 314 (1970).

75. Pub. L. No. 94-73, 89 Stat. 402 (1975).

76. Pub. L. No. 97-205, 96 Stat. 134 (1982).

77. The Report of the Senate Judiciary Committee stated:

> The forthcoming debate in the United States Senate on the Voting Rights Act will focus upon one of the most important public policy issues ever to be considered by this body. It is an issue with both profound constitutional implications and profound practical consequences. In summary, the issue is how this nation will define 'civil rights' and 'discrimination.'

S. REP. NO. 417, *supra* note 24, at 108.

This Note will primarily discuss the 1982 amendments to the Voting Rights Act because of their relevance to racial gerrymandering. The 1970 amendments extended the preclearance period for covered jurisdictions for five years. Additionally, the 1975 amendments broadened the definition of "test or device" under § 2 of the Act. For a detailed discussion of these amendments, see *id.* at 116-18.

78. *See* Guinier, *supra* note 43, at 1092.

79. *See generally* Grofman & Handley, *supra* note 13.

80. 42 U.S.C. § 1973(c). Section 5 reads, in pertinent part:

> [No] voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect [at the time the proceeding was commenced . . . shall be enforced] unless and until the court [finds] that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the [voting] guarantees set forth [herein].

Id.

81. 393 U.S. 544 (1969).

structures" that have the effect of diluting minority voting strength.[82] Commentators have praised § 5 for its effectiveness in preventing the erosion of minority participation in the political process.[83]

In order to implement changes in state redistricting plans, a state legislature drafting committee must prove that the changes "[do] not have the purpose and will not have the effect of denying or abridging the right to vote on the account of race or color."[84] In *Beer v. United States*,[85] the Court held that a New Orleans redistricting plan did not violate § 5 of the Voting Rights Act because its enhancement of the position of racial minorities did not dilute the majority's right to vote based on race.[86] The Court emphasized that Congress intended § 5 to prevent a "retrogression" in the position of minority groups with respect to their ability to participate in the electoral process.[87]

The remedial use of race-based redistricting is consistent with the non-retrogression standard of § 5, as set forth in *Beer*, and its requirement of proof of discriminatory purpose and effect. The Court previously had upheld the use of race-based redistricting as a means of complying with § 5 in *Carey* stating that "neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment."[88] Because Congress created § 5 as a safeguard against minority vote

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82. Mark E. Haddad, Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 YALE L.J. 139 (1984) (quoting Allen v. State Bd. of Elections, 393 U.S. 544 (1969)). Racial gerrymandering is considered an "electoral structure" under § 5 of the Voting Rights Act because of its potential to dilute the voting strength of various minority groups. *Id.* at 140-44.

83. The § 5 preclearance provision has been described as "the most effective and efficient mechanism for preventing voting rights violations." BARBARA Y. PHILLIPS, HOW TO USE SECTION 5 OF THE VOTING RIGHTS ACT ix (3d ed. 1983).

84. 42 U.S.C. § 1973(c).

85. 425 U.S. 130 (1976).

86. *Id.* at 141. In interpreting the remedial provisions of § 5 of the Voting Rights Act, the Court coneluded that:

> It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respcct to their effective exercise of the electoral franchise can hardly have the "effect" of diluting or abridging the right to vote on account of raee within the meaning of § 5. We conclude, therefore, that such an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.

Id.

87. *Id.* In discussing the legislative history of the Voting Rights Act and the non-retrogression principle of § 5, the Court noted that:

> "Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible beeause each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory. . . . Congress therefore decided, as the Supreme Court held it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be non-discriminatory.'"

Id. at 140 (footnote omitted in original) (quoting HOUSE COMM. ON THE JUDICIARY, VOTING RIGHTS ACT EXTENSION, H.R. REP. NO. 196, 94th Cong., 1st Sess., 57-58 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774).

88. United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 160 (1977). The Court added: "Implicit in *Beer* . . . is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5." *Id.* at 161.

dilution, race-based redistricting is an appropriate method of complying with the Act in jurisdictions with a history of racial discrimination unless specific proof exists that the redistricting plan was intended to and has the effect of discriminating against another identifiable racial group.[89]

2. Section 2: Looking for Discriminatory Results

Section 2 of the Voting Rights Act, as amended in 1982, forbids voting practices which result in any identifiable group having "less opportunity than other members of the electorate to participate in the political process."[90] The 1982 amendment to § 2 constituted Congress' response to the Court's 1980 decision in *City of Mobile v. Bolden*,[91] which required specific proof of discriminatory *intent* to establish a Voting Rights Act violation.[92] The amended § 2 abandoned the "intent test" of *City of Mobile* and established a "results test" which requires proof of the discriminatory *effect* of a voting procedure in order to find a violation of the section.[93] Section 2, as amended, makes it easier for minority groups to bring claims of vote dilution based on the broad language of the provision and its focus on discriminatory effect rather than intent.[94]

The *City of Mobile* decision specifically rejected the holding of *Zimmer v. McKeithen*[95] where proof of discriminatory intent was not required if an aggregate of specified factors demonstrated a history of discrimination.[96] In considering the standard of review for vote dilution cases, the Court in *Zimmer* held that "access to the political process . . . [is] the barometer of

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89. For a discussion of the failure of race-based redistricting to serve its stated purpose, see Haddad, *supra* note 82, at 139 ("[S]ection 5 has . . . failed to achieve its potential in eliminating racial vote dilution.").

90. 42 U.S.C. § 1973. Section 2, as amended, reads:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees [of this Act].
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id.

91. 446 U.S. 55 (1980).

92. *Id.* "After *City of Mobile*, the civil rights community centered its efforts on amending the Voting Rights Act to make the test for racial vote dilution a results test, not an intent test." Haddad, *supra* note 84 at 139.

93. 42 U.S.C. § 1973.

94. One of the main differences between § 5 and § 2 is the latter's breadth of coverage. While § 5 only applies to "covered jurisdictions," § 2 prohibits discrimination throughout the United States. *See* PHILLIPS, *supra* note 83, at 14.

95. 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam).

96. *City of Mobile*, 446 U.S. at 72-73; *see also* Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 97 (1985).

dilution of minority voting strength."[97] The Court eventually returned to this position in 1982 in *Rogers v. Lodge*,[98] when it held that evidence of past discrimination and effective vote dilution would suffice to prove discriminatory intent.[99]

The 1986 case of *Thornburg v. Gingles*,[100] however, continues to define how the courts are to interpret the language of the 1982 amendment to § 2.[101] *Thornburg* established a definitive three-part test which created a standard by which § 2 actions are to be adjudicated.[102] In order to prove a claim of minority vote dilution under § 2, the *Thornburg* test requires: (1) that a single-member district remedy is feasible, (2) that the minority community is politically cohesive, and (3) that minority candidates can be expected to lose as a result of their submergence in a racially polarized electorate.[103]

The Court's creation of the *Thornburg* standard, along with Congress' rejection of the Court's holding in *City of Mobile*, represented a significant milestone in the history of voting rights.[104] The amended § 2 provided the Court with evidence of Congress' intention to ensure that the ultimate issue decided under the Voting Rights Act would be "whether the political processes are equally open to minority voters."[105]

B. Establishing a Standard of Review for Race-Based Redistricting

The 1982 amendments to § 2 and § 5 of the Voting Rights Act provided the Court with an effective standard of review to use in race-based redistricting cases.[106] The codification of the results test in § 2, coupled with the non-retrogression standard in § 5, represent a clear standard by which courts can examine individual cases of race-based redistricting.[107] In its explicit rejection of the Court's holding in *City of Mobile*, Congress specifically

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97. *Zimmer*, 485 F.2d at 1303.

98. 458 U.S. 613 (1982).

99. Grofman, *supra* note 96, at 97-98.

100. 478 U.S. 30 (1986).

101. *See* Grofman & Handley, *supra* note 13, at 347.

102. *See generally id.* The first part of the *Thornburg* test refers specifically to at-large voting districts as opposed to single-member districts. For a discussion of these types of voting districts and their characteristics, see generally GRAHAM GUDGIN & PETER J. TAYLOR, SEATS, VOTES, AND THE SPATIAL ORGANIZATION OF ELECTIONS (1979).

103. Grofman & Handley, *supra* note 13, at 347 n.7 (citing *Thornburg*, 478 U.S. 30).

104. The decision to amend the Voting Rights Act in 1982 has been called "one of the most significant issues to come before . . . Congress." S. REP. NO. 417, *supra* note 24, at 1.

105. *Id.* at 2.

106. In considering the amendments to the Voting Rights Act, Senator Paul Laxalt stated:

> In sum, I believe this "objective design" standard is the only theory I have seen which coherently binds the apparently inconsistent threads of this new section 2 language. It accomplishes what the drafters of this language say they want to accomplish, and prevents consequences they say they wish to avoid. It is analogous to classic forms of legal analysis in our jurisprudence. Finally, it is a logical general formulation of the precedents in the voting rights area.

Id. at 192.

107. For further discussion of the 1982 amendments, see *supra* part III.A-B.

intended for the Court to focus on the effect of the redistricting plan on minorities rather than the intent of the legislators in creating it.[108] The 1982 amendments to the Voting Rights Act established a workable standard of review for remedial race-based redistricting cases. The standard serves as a means for minority groups to prove that a redistricting plan has the effect of diluting their voting power and reducing their opportunity to achieve an equal voice in the political process.[109]

III. SHAW V. RENO: THE DEBATE OVER REPRESENTATIVE DEMOCRACY

North Carolina has historically been the focal point of many voting rights battles.[110] In *Shaw v. Reno*,[111] the Court addressed the issue of how far the North Carolina General Assembly could go to remedy its history of racially discriminatory voting practices.[112] The Court's holding, although it did not directly address the constitutionality of the North Carolina redistricting plan, represents a retreat from its previously held expansive view of the Voting Rights Act. This presents significant problems for states working to remedy past voting discrimination and provide an equal opportunity for minority groups to participate in the political process.[113]

A. The Case of Shaw v. Reno

As a result of the 1990 U.S. Census, North Carolina was entitled to a twelfth seat in the U.S. House of Representatives.[114] Currently, forty of North Carolina's one hundred counties are "covered jurisdictions" under § 5 of the Voting Rights Act.[115] In 1990, the North Carolina General Assembly was required to submit any proposed electoral changes to either the U.S. Attorney General or the U.S. District Court for the District of Columbia for

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108. The Senate Judiciary Committee noted that

> *White* and the decisions following it, made no finding and required no proof as to the motivation or purpose behind the practice or structure in question. Regardless of differing interpretations of *White* and *Whitcomb*, however, and despite the plurality opinion in *Mobile* that the *White* [sic] involves an 'ultimate' requirement of proving discriminatory purpose, *the specific intent of this amendment is that the plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose.*

S. REP. NO. 417, *supra* note 24, at 205-06 (emphasis added).

109. *See id.*

110. For a discussion of the history of voting rights in North Carolina, see Robert N. Hunter, Jr., *Racial Gerrymandering and the Voting Rights Act in North Carolina*, 9 CAMPBELL L. REV. 255, 256-61 (1987); *see also* Thornburg v. Gingles, 478 U.S. 30 (1986).

111. 113 S. Ct. 2816 (1993).

112. *See id.* at 2836 (White, J., dissenting).

113. *See* Richard C. Reuben, *Voting Rights in Court: Challenges to Race-Based Districts Could Shatter Minority Electoral Gains*, CAL. LAW., Nov. 1993, at 39, 40 ("'[The *Shaw* opinion] is essentially a political document in which the Court gives credenee to attacks by traditional foes of civil rights, who have been antagonistic to some of the remedial efforts under the Voting Rights Act.'" (quoting Lani Guinier)).

114. *See* 1990 U.S. CENSUS REPORT, *supra* note 2.

115. *See id.*

approval.[116] The legislature's initial redistricting plan included one majority-black district in the northeast portion of the state; however, the Attorney General objected to the proposal because it failed to create a second majority-minority district in an area of heavy minority concentration in the southeastern part of the state.[117] After receiving the Attorney General's objection, the legislature chose not to appeal the decision, and instead, created a revised plan which included the now-famous "1-85 district."[118]

Five white North Carolina voters brought suit against the North Carolina General Assembly and the U.S. Attorney General, claiming that the newly created district violated their rights under the Equal Protection Clause of the Fourteenth Amendment.[119] Although the district court initially dismissed their complaint,[120] the Supreme Court presumably accepted the case for review because of its relevance to prior racial gerrymandering cases and its potential for clarifying the Court's current interpretation of the Voting Rights Act of 1965.

B. The Court's Analysis in Shaw

Although the Court never reached the issue regarding the constitutionality of the North Carolina redistricting plan, it held that the appellants stated a cause of action upon which equal protection relief may be granted based on the unusual shape of the district.[121] This holding represented a dramatic departure from the Court's previous position which permitted race to be considered as a factor in certain redistricting decisions.[122] The Court began its analysis by examining the history of racial discrimination in the South.[123] In comparing the "I-85 district" to reapportionment schemes the Court had previously considered, Justice O'Connor stated, "It is unsettling how closely

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116. 42 U.S.C. § 1973(c); *Shaw*, 113 S. Ct. at 2820. Most state legislatures opt to submit their proposals to the U.S. Attorney General for "administrative preclearance," as did the North Carolina General Assembly, because it is more expedient and less expensive than filing a proposal with the D.C. Circuit Court ("judicial preclearance"). PHILLIPS, *supra* note 83, at 6-13.

117. *Shaw*, 113 S. Ct. at 2820. According to the Attorney General, the North Carolina General Assembly's proposal failed to "'give effect to black and Native American voting strength in this area' . . . for 'pretextual reasons.'" *Id.* (quoting Appendix to Brief for Federal Appellees at 10a-11a, *Shaw* (No. 92-357)).

118. *Id.*

119. *Id.* at 2821. The North Carolina voters' equal protection claim stated: "'[The legislature] create[d] two Congressional Districts in which a majority of black voters was concentrated arbitrarily—without regard to any other considerations, such as compactness, contiguousness, geographical boundaries, or political subdivisions.'" *Id.* (citation omitted). The voters also claimed that the districts were created along racial lines solely to "assure the election of two black representatives to Congress." *Id.*

120. Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. 1992), *rev'd sub nom.* Shaw v. Reno, 113 S. Ct. 2816 (1993).

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

122. *See* United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 160 (1977).

123. *See Shaw*, 113 S. Ct. at 2822-23.

the North Carolina plan resembles the most egregious racial gerrymanders of the past."[124]

In addressing the North Carolina plan, the Court applied strict scrutiny review due to the legislature's use of race as a factor in its redistricting decision.[125] By doing so, the Court paid particular attention to the physical appearance of the district and the legislature's disregard of "traditional districting principles."[126] Much of the Court's decision in *Shaw* hinges upon the highly irregular physical appearance of Congressional District 12 instead of the reasoning behind the legislature's decision to draw such unusual district lines, namely improving the political position of a large number of minority voters in North Carolina who had traditionally been fenced out of that state's political process.[127] Focusing on the physical appearance of the district, the Court stated:

> [W]e believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.[128]

In addition to the Court's objection to the physical appearance of the district, Justice O'Connor noted that racial gerrymandering may actually promote the very racial stereotyping that "majority-minority districting is sometimes said to counteract."[129] In noting that the plaintiffs had stated a

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124. *Id.* at 2824. The Court also noted its longstanding disfavor of the use of race-based classifications: "Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Id.* (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

125. *Id.* at 2825 (stating that race-based redistricting legislation "demands the same close scrutiny [given] to other state laws that classify citizens by race").

With regard to the burden of proof in racial gerrymandering cases, the Court noted that "[t]he difficulty of proof, of course, does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race." *Id.* at 2826.

126. *Id.* at 2826. The Court stated that "traditional districting principles such as compactness, contiguity, and respect for political subdivisions [are] important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Id.* at 2827 (interual citation omitted).

127. *Id.* at 2825-27.

128. *Id.* at 2827 (citations omitted).

129. *Id.* Justice O'Connor noted that racial gerrymandering threatens representative democracy by promoting group interests above all else. She stated:

> The message that such districting sends to elected representatives is . . . pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials 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. This is altogether antithetieal to our system of representative democracy.

Id.

sufficient claim for relief, the Court limited its holding to the facts of the case and expressed no view as to whether "the intentional creation of majority-minority districts, without more" is always sufficient to state an equal protection claim.[130]

In its analysis of the North Carolina redistricting plan, the Court stated that "the very reason . . . the Equal Protection Clause demands strict scrutiny of all racial classifications is because, without it, a court cannot determine whether or not the discrimination truly is benign."[131] Consequently, the Court announced that state legislatures would not be given *carte blanche* to engage in race-based redistricting even in the name of compliance with the Voting Rights Act.[132] The majority opinion concluded that, on remand, the plaintiffs will sufficiently state a cause of action on which equal protection relief may be granted if the legislature fails to prove a compelling state interest for the redistricting plan.

C. A Vigorous Dissent

Four Justices dissented from the majority opinion in *Shaw*.[133] Justice White, noting the similarities between *Shaw* and *Carey*, stated that no cognizable claim exists in a racial gerrymandering case where the plaintiffs "have not alleged a cognizable injury."[134] Additionally, Justice White noted that "there must be an allegation of discriminatory purpose and effect, for the constitutionality of a race-conscious redistricting plan depends on these *twin elements*."[135] Justice White criticized the majority for overlooking the requirement that there be proof that the North Carolina plan had the effect of excluding the white voters from participation in the political process.[136] He stated that the majority's reliance on the district's "irregularities" was an illogical basis for its decision in light of the fact that "a regularly shaped district can just as effectively effectuate racially discriminatory gerrymandering as an odd-shaped one."[137]

Justice Stevens' dissent also focused on the majority's concerns with the shape of the district.[138] Noting both the traditional purpose of the Equal

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130. *Id.*

131. *Id.* at 2829 (citation omitted).

132. *Id.* at 2830; *cf.* United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

133. Justices White, Blackmun, Stevens, and Souter all wrote separate dissenting opinions. *See Shaw*, 113 S. Ct. at 2834-49.

134. *Id.* at 2832 (White, J., dissenting). Comparing *Shaw* to *Carey*, Justice White noted that "members of the white majority [cannot] plausibly argue that their influence over the political process had been unfairly cancelled." *Id.*; *see also* Garza v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990) ("Although the showing of injury in cases involving discriminatory intent need not be as rigorous as in effects cases, some showing of injury must be made to assure that the district court can impose a meaningful remedy."), *cert. denied*, 498 U.S. 1028 (1991).

135. *Shaw*, 113 S. Ct. at 2839 (White, J., dissenting) (emphasis added).

136. *Id.*

137. *Id.* at 2840. (The North Carolina plan was merely "an attempt to equalize treatment, and to provide minority voters with an effective voice in the political process.") *Id.*

138. *Id.* at 2842-44 (Stevens, J., dissenting).

Protection Clause in protecting minority rights and case precedent regarding the role of race in remedying past discrimination, Justice Stevens stated:

> Finally, we must ask whether otherwise permissible redistricting to benefit an underrepresented minority group becomes impermissible when the minority group is defined by its race. The Court today answers this question in the affirmative, and its answer is wrong. If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the minority group whose history in the United States gave birth to the Equal Protection Clause.[139]

In light of the remedial purpose of the North Carolina redistricting plan, Justice Stevens implied that the Court should have applied only heightened scrutiny as a standard of review.[140] Similarly, Justice White's dissent added that the remedial purpose of the newly-created district constituted a compelling state interest in order to satisfy the higher standard of strict scrutiny review.[141]

However, Justice Souter, in his dissenting opinion, noted the importance of establishing an intermediate standard of review for all future race-based redistricting cases. Justice Souter stated:

> Presumably because the legitimate consideration of race in a districting decision is usually inevitable under the Voting Rights Act when communities are racially mixed, however, and because, without more, it does not result in diminished political effectiveness for anyone, we have not taken the approach of applying the usual standard of such heightened "scrutiny" to race-based districting decisions.[142]

IV. THE FUTURE OF RACE-BASED REDISTRICTING AS A REMEDIAL MEASURE

Although the holding in *Shaw* appears to be limited to the facts of the case, the Court's decision represents a dramatic departure from its previous acceptance of race-based redistricting as a means of remedying racial discrimination in the electoral process.[143] One author has suggested that the holding in *Shaw* is that "[t]he remedial use of race can be a factor in redistricting decisions, but not the only or the overriding factor."[144] That rule is not set forth clearly by the majority's opinion, however. Consequently, it is likely to "create confusion and invite circumvention" in light of the Court's previous race-based redistricting decisions.[145] The confusion over

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139. *Id.* at 2844 (citation omitted).
140. *See id.* at 2843-45.
141. *Id.* at 2842 (White, J., dissenting).
142. *Id.* at 2847 (Souter, J., dissenting).
143. *See supra* part I.B.
144. Taylor, *supra* note 23, at 25.
145. *Id.*

Shaw is also likely to create a situation where "virtually every minority district in the country is now vulnerable to a constitutional challenge."[146]

In light of the growing number of redistricting cases litigated each year, the Court must establish a meaningful standard of review with regard to the remedial use of race-based redistricting. The Court should draw on its previous holding in *Carey* and utilize the standards it had previously set forth when deciding future redistricting cases. Additionally, the Court should give greater deference to the intention of Congress to provide state remedies for past voting discrimination. Finally, the Court must reaffirm its commitment to the permissible uses of race in certain jurisdictions when states attempt to comply with the remedial provisions of the Voting Rights Act.

A. Requiring Proof of Discriminatory Effect

The requirement of proof of discriminatory effect is a common thread which runs throughout the Court's decisions dealing with issues of race-based redistricting.[147] As Justice White noted in his dissent, "there must be an allegation of discriminatory purpose and effect, for the constitutionality of a race-conscious districting plan depends on these twin elements."[148] A requirement of proof of discriminatory effect is consistent with the remedial provisions of the Voting Rights Act and permits race-based redistricting to be used in a manner which enhances minority strength in the electoral process in states where past voting discrimination has hampered the ability of minority groups to achieve an equal political status with other voter groups.[149] The majority in *Shaw* failed to address the issue of whether the North Carolina redistricting plan, in its effort to enhance the political position of minority voters, actually had the effect of disenfranchising other white voters. The Court has previously stated the principle that "mere lack of success at the polls [fails] to make out a successful gerrymandering claim."[150] Consequently, a requirement of discriminatory effect will permit the remedial use of race-based redistricting in instances where other voters are not excluded from the political process and will allow the Court to fulfill the intention of Congress when it provided minority groups with the means to protect their franchise by amending the Voting Rights Act.[151] In light of the remedial nature of race-based redistricting decisions, the issue for the Court should be "whether the

146. Rosen, *supra* note 8; *see also* Dave Kaplan, *Constitutional Doubt is Thrown on Bizarre-Shaped Districts*, CONG. Q., July 3, 1993, 1761, 1762 ("'[I]t opens up every district to judicial attack and review based on the [district's] lines.'" (quoting North Carolina Attorney General Michael F. Easley)).

147. *See* THERNSTROM, *supra* note 15 and accompanying text.

148. Shaw v. Reno, 113 S. Ct. 2816, 2839 (1993) (White, J., dissenting).

149. *See id.* at 2844-45 (Stevens, J., dissenting); *see also id.* at 2848 (Souter, J., dissenting).

150. *Id.* at 2835 (White, J., dissenting) (citing White v. Regester, 412 U.S. 755 (1973); and Whiteomb v. Chavis, 403 U.S. 124 (1971)). *But cf.* Linda Greenhouse, *Justices Delve Anew Into Race and Voting Rights*, CHI. DAILY L. BULL., July 12, 1993, at 1, 20 ("The notion that the failure of a small minority group to achieve sucecss at the polls cannot indicate a Voting Rights Act violation is at odds with the theory of the Voting Rights Act.").

151. *See* 42 U.S.C. § 1973.

classification based on race discriminates against anyone by denying equal access to the political process," and not simply whether race was used as a factor in the redistricting decision.[152] By limiting the permissible consideration of racial factors in redistricting proposals to instances where a state is attempting to remedy past discrimination, the remedial use of race-based redistricting can properly be limited to situations where the remedial provisions of the Voting Rights Act would apply. In *Shaw*, however, the Court failed to focus on the effect of the redistricting plan on the white voters of North Carolina and, in the process, abandoned a well-established standard in voting rights jurisprudence.

B. The Permissible Uses of Race

The application of strict scrutiny review in *Shaw* prevented the Court from considering the permissible uses of race in electoral redistricting. As Justice White noted in his dissenting opinion, race may be used as a factor in drawing district lines so that a state may comply with the remedial provisions of the Voting Rights Act.[153] The Court's use of strict scrutiny, while appropriate in cases of invidious discrimination, was misapplied in *Shaw* in light of the remedial purpose of the redistricting plan. Justice White also argued that race-based redistricting constitutes a compelling state interest when used as a remedy for past discrimination.[154] The Court's failure to recognize the permissible use of race in certain redistricting decisions is inconsistent with its previous position as seen in *Carey* and does not comport with the intention of Congress as envisioned through the 1982 amendments to the Voting Rights Act.[155] Even under a strict scrutiny analysis, a redistricting plan intended to remedy past discrimination constitutes a compelling state interest in light of the intent of the Voting Rights Act and its goal of including minorities in the political process. Thus, such a plan should pass strict scrutiny analysis.

The *Shaw* Court takes exception with the "highly irregular" North Carolina district because of its "disregard[] for traditional districting principles."[156] Although, as the Court points out in *Shaw*, the principles of compactness, contiguity, and respect for political subdivisions are not constitutionally required,[157] the Court's criticism of the physical appearance of the district and the Justices' failure to acknowledge the district's remedial purpose is at

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152. *Shaw*, 113 S. Ct. at 2836 (White, J., dissenting).

153. *Id.* at 2845 (White, J., dissenting). Justice White noted that race-based redistricting is an acceptable remedy when used to prevent racial vote dilution:

> [L]egislators will have to take race into account in order to avoid dilution of minority voting strength in the districting plans they adopt. One need look no further than the Voting Rights Act to understand that this may be required, and we have held that race may constitutionally be taken into account in order to comply with that Act.

Id. (footnote omitted) (citing United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 161-62 (1977)).

154. *Id.* at 2842 (White, J., dissenting).

155. *See* Grofman & Handley, *supra* note 13; *see also* text accompanying notes 62-79.

156. *Shaw*, 113 S. Ct. at 2826.

157. *Id.*

odds with the Court's previous acceptance of the use of remedial race-based redistricting. The creation of Congressional District 12 was, in addition to serving as a means of increasing minority political strength, an attempt by the North Carolina General Assembly to protect the seats of several incumbent legislators.[158] The Court's attention to the shape of the district, however, overlooked the benign use of race and the remedial intention of the North Carolina General Assembly in its effort to comply with the Voting Rights Act.[159]

In his dissenting opinion, Justice White stated that the shape of the district has little or no bearing on the constitutionality of its creation. He wrote: "[W]hile district irregularities may provide strong indicia of a potential gerrymander, they do no more than that. . . . [A] regularly shaped district can just as effectively effectuate racially discriminatory gerrymandering as an odd-shaped one."[160] Consequently, by focusing on the shape of the district, the Court failed to consider whether it had the effect of excluding an identifiable group—here, the white North Carolina plaintiffs—from the political process.[161] Although the North Carolina district may in fact be unconstitutional under equal protection analysis, the Court's failure to apply its previously accepted purpose and effect test is troubling in light of the legislative purpose behind the Voting Rights Act.

C. The Court's Re-evaluation of Representative Democracy

In many ways, the *Shaw* decision represents a "new cause of action"[162] which leaves majority-minority districts subject to attack without consideration as to whether an identifiable group has been unfairly excluded from political participation.[163] By ensuring equal access to the political process, the remedial use of race-based redistricting enhances our system of representative democracy by enfranchising those voters who have been traditionally "fenced out" of political society.[164] It has been said that

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158. It has been said that "[a]ll power corrupts, but the prospect of being out of power corrupts absolutely." (a variation on Lord Acton's well-known maxim). *Hearings*, *supra* note 29, at 211.

159. Although Congressional District 12 is a clear example of "creative cartography," state legislatures often encounter problems when redrawing district lines:

> Drawing district lines is not like picking the best-qualified candidate for the job. Communities of interest cannot be identified with anything like precision; neighborhoods and political subdivisions are not always compact; districts with vastly different dimensions are required by the one-person one-vote rule; lakes and rivers get in the way. The inherent messiness of the line-drawing process ensures that voting districts will always have irregular shapes.

Taylor, *supra* note 23, at 25; *see also* Reuben, *supra* note 113, at 40 ("'The Court spent much of its capital thundering against the shape of the voting district and none of its ink describing the need to remedy a century of exclusion. The Court was simply unconcerned with remedying the racial exclusion of blacks in North Carolina.'" (quoting Lani Guinier, professor, University of Pennsylvania Law School)).

160. *Shaw*, 113 S. Ct. at 2840 (White, J., dissenting).

161. *Id.* at 2839.

162. *Id.* at 2844 (Souter, J., dissenting).

163. *See id.* at 2840 (White, J., dissenting).

164. *See, e.g.*, Taylor, *supra* note 23, at 25.

> "[r]acially based districting may segregate voters, but it does so to integrate legislatures. It responds to the unpleasant reality that there is racial polarization among both whites and blacks. The best way to read the majority opinion [in *Shaw*] is that it saw these tensions and therefore wanted to put some limit on racial districting without abolishing it."[165]

The Court had several opportunities at the end of its 1993-94 term to address the issue encountered in *Shaw*.[166] In the cases of *Holder v. Hall*[167] and *Johnson v. DeGrandy*,[168] the Court continued its erosion of minority voting rights enhancement in a manner similar to that which occurred in *Shaw*. In a 5-4 decision, the Court in *Holder* rejected the claim brought by black voters in Georgia that a single-commissioner form of county government diluted their voting power under § 2 of the Voting Rights Act.[169] Although the case differs factually from *Shaw*, the decision illustrates the Court's narrowing attitude toward the scope of the Voting Rights Act after *Shaw*.[170] In *Johnson*, the Court ruled 7-2 that Florida minority voters are not entitled to the largest possible number of minority-majority districts.[171] Although the decision specifically dealt with the issue of *maximization* of representation and not the *creation* of majority-minority districts as in *Shaw*, the Court indicated that "there is good reason for state and federal officials with responsibilities related to redistricting, as well as reviewing courts, to recognize that explicit race-based redistricting embarks us on a most dangerous course."[172]

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165. *Id.* (quoting Paul Gewirtz, professor, Yale Law School).

166. *See generally* Greenhouse, *supra* note 150, at 1.

167. 114 S. Ct. 2581 (1994) (involving a minority vote dilution claim from Bleckley County, Georgia, where no black candidate has ever been elected to a county position).

168. 114 S. Ct. 2647 (1994) (involving a case that arose in Dade County, Florida, in which the District Court refused to change a districting plan because it could not decide between the claims of black and Puerto Rican plaintiffs).

169. *Holder*, 114 S. Ct. at 2586-88.

170. Justice Thomas, joined by Justice Scalia in a concurring opinion, described the Court's prior interpretation of the Voting Rights Act as a "disastrous misadventure in judicial policymaking." *Id.* at 2592. However, in a separate opinion, Justice Stevens, joined by Justices Blackmun, Souter, and Ginsburg, criticized Justice Thomas for his lack of attention to both the intention of Congress and stare decisis:

> Throughout his opinion, Justice Thomas argues that this case is an exception to stare decisis . . . . There is no question that the Voting Rights Act has required the courts to resolve difficult questions, but that is no reason to deviate from an interpretation that Congress has thrice approved. Statutes require courts to make policy judgments. . . . Our work would certainly be much easier if every case could be resolved by consulting a dictionary, but when Congress has legislated in general terms, judges may not invoke judicial modesty to avoid difficult questions. . . . *When a statute has been authoritatively, repeatedly, and consistently construed for more than a quarter of a century, and when Congress has reenacted and extended the statute several times with full awareness of that construction, judges have an especially clear obligation to obey settled law.*

Id. at 2629 (Stevens, J., dissenting) (emphasis added).

171. *Johnson*, 114 S. Ct. at 2662-63.

172. *Id.* at 2666.

CONCLUSION

Race-based redistricting may be used in two ways. It may serve as a means of invidiously discriminating against minority groups in an effort to deny them equal access to the political process. On the other hand, it may also be used to remedy past racial discrimination in voting and serve as a method of assuring minority representation in government. State legislatures should be permitted to use race-based redistricting in those jurisdictions where minorities have traditionally been the victims of voting discrimination in order to remedy past discrimination in state elections and to comply with the Voting Rights Act of 1965. The Court's holding in *Shaw* represents a significant and troubling departure from the its previous position regarding the remedial use of race-based redistricting and its interpretation of the Voting Rights Act. Consequently, *Shaw* is likely to prevent minorities in certain states and districts from fully assuming their place in the electoral process due to its negative impact on the remediation of past discrimination in particular locations such as North Carolina. Because the *Shaw* opinion will inhibit the voluntary efforts of states to ensure minority representation in Congress, the Court should return to its previous acceptance of the remedial use of race-based redistricting in jurisdictions where remedial action is warranted.

The "I-85 district" in North Carolina may not survive judicial scrutiny under previously accepted standards established by the Court. In light of the purpose of the Voting Rights Act, however, it merits the review it did not receive in *Shaw*. Any change in the Act or its purpose must come from Congress, and in the absence of such change, the Court should not abandon its longstanding position regarding the inclusion of minorities in the political process and the use of remedial race-based redistricting where it is necessary to create fairness and equality in voting.

In order to open up the political process and ensure "fair and effective representation" for all citizens,[173] the Court must recognize and reaffirm the permissible uses of race so that states can voluntarily comply with the spirit of the Voting Rights Act and promote minority representation if they so choose. In his dissenting opinion in *Shaw*, Justice Stevens noted that "[p]oliticians have always relied on assumptions that people in particular groups are likely to vote in a particular way when they draw new district lines, and I cannot believe that anything in today's opinion will stop them from doing so in the future."[174]

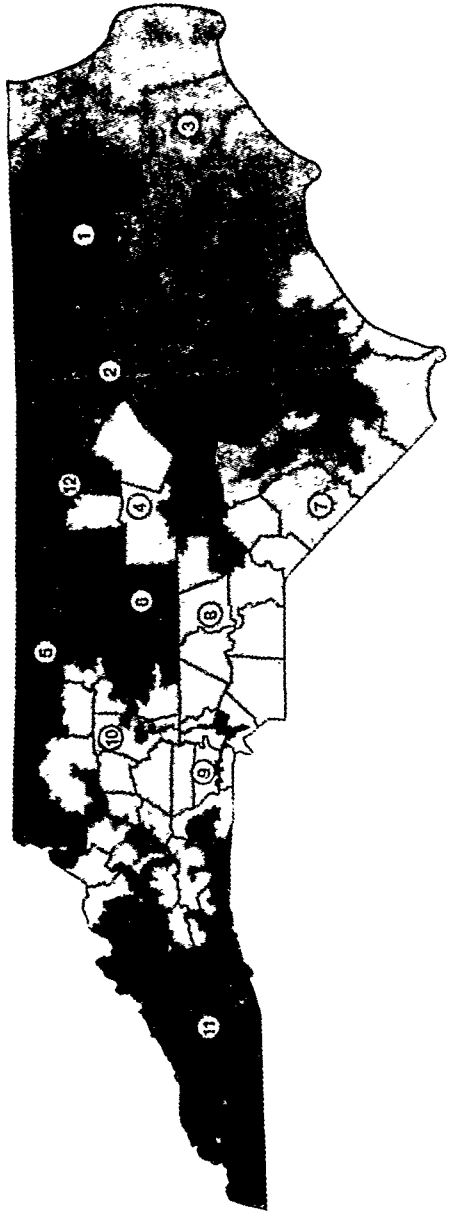
In order to effectuate fully the legislative purpose of the Voting Rights Act, the Court should return to its previous doctrinal analysis of race-based redistricting decisions by focusing on whether a newly-created district has the purpose and effect of reducing a group's access to the political process. If the question of whether the political process remains equally open to members of all racial groups can be answered in the affirmative, the use of race as a

173. Reynolds v. Sims, 377 U.S. 533, 565-66 (1964).
174. *Shaw*, 113 S. Ct. at 2843 (Stevens, J., dissenting).

redistricting criterion should be upheld in districts where past racial discrimination has diluted the voting strength of a particular minority group. Although the electoral district in *Shaw*, and other districts intended to enhance minority voting strength, may not always pass constitutional muster, it is essential that they receive proper constitutional review under the well-established standards enunciated by the Court prior to *Shaw*.

The Voting Rights Act was created to further the goal of equality in the political process. Congress has long accepted the remedial use of race-based redistricting as a means of furthering this goal and satisfying the remedial purpose of the Act. Just as political parties have historically gerrymandered legislative lines to place the opposing party at an electoral disadvantage, so too have certain states placed minority voters at a disadvantage. The remedial use of race-based redistricting recognizes this political inequality, and in certain appropriate instances where a state voluntarily wishes to remedy past voting discrimination, its use should be permitted as a stabilizing and equalizing factor in the political process as long as access to the electoral system is left equally open to all voters.

APPENDIX A
1991 NORTH CAROLINA CONGRESSIONAL PLAN



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