Shaw v. Reno: A Color-Blind Court in a Race-Conscious Society

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Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.¹

In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.²

INTRODUCTION

Ever since Justice Harlan wrote his famous dissent in Plessy v. Ferguson,³ the United States Supreme Court has had to face the problem of how to reconcile the ideal of a “color-blind” Constitution with the reality that race has historically played a major role in the political and social affairs of this country.⁴ Race also plays a significant role in the legal affairs of this country, as demonstrated by the Court’s affirmative action,⁵ jury selection,⁶ and, in particular, its voting rights cases.⁷ The Supreme Court has never interpreted color-blindness to mean that all race-based classifications or preferences are per se invalid.⁸ In fact, the Court has “recognized that in order to remedy the effects of prior discrimination, it may be necessary to

¹ Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), overruled by Brown v. Board of Educ. of Topeka (Brown 1), 347 U.S. 483 (1954). In Plessy, the Court held that “separate but equal” railroad accommodations for African-American railroad passengers did not violate the Fourteenth Amendment. Id. at 547-52. According to the Court, “social prejudices [could not be] overcome by legislation,” and “social equality” was not a goal of the Equal Protection Clause. Id. at 551-52. In 1954, the Brown Court rejected the “separate but equal” doctrine and held that segregation of public school students based on race created “inherently unequal” facilities. 347 U.S. at 495.
² Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part & dissenting in part) (holding that a medical school could take race into account as part of the admissions process).
³ 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).
⁵ See infra notes 192-209 and accompanying text (discussing the Court’s affirmative action jurisprudence).
⁶ See infra notes 210-43 and accompanying text (discussing the Court’s jury selection jurisprudence).
⁷ See infra notes 112-91 and accompanying text (discussing some of the Court’s decisions in voting rights cases).
⁸ See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 314 (1986) (Stevens, J., dissenting) (stating that in today’s society, race is sometimes relevant to governmental decisionmaking); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (holding that under certain circumstances, race-based classifications are valid in order to achieve diversity in medical school).
take race into account." The Supreme Court’s cases indicate that the primary difficulty is defining how far policy makers can go when making race-based distinctions, and the contexts in which racial classifications are permissible. Shaw v. Reno is among the latest in a long line of Supreme Court cases which illustrate this struggle.

In Shaw, the Court was faced with a race-based classification involving congressional redistricting by the North Carolina state legislature. Shortly after the 1990 Census, the state legislature created an unusually shaped congressional district to provide effective representation for the state’s roughly twenty percent African-American population. In a five-four decision, the Supreme Court stated that the redistricting scheme was so irrational on its face that it could only be understood as an effort to segregate voters by race. Thus, the Court held that the Appellants stated a claim under the Equal Protection Clause of the Fourteenth Amendment. Justice O'Connor, writing for the majority, stated that districts which are unexplainable on grounds other than race are harmful because they “threaten to carry us further from the goal of a political system in which race no longer matters,” and “may balkanize us into competing racial factions.” She added that all racial classifications are potentially harmful because “they reinforce the belief . . . that individuals should be judged by the color of their skin.”

The Shaw case threatens to undermine many of the Court’s voting rights cases, including the landmark decision in Thornburg v. Gingles. Shaw may also significantly affect the Court’s jurisprudence in other areas of the law which involve racial classifications, particularly the Court’s affirmative action jurisprudence. The decision is particularly troubling because race-con-
sciousness is arguably more appropriate in voting rights than in other contexts.\textsuperscript{21} For the first time, the Supreme Court in \textit{Shaw} held that a congressional district that simply appears "bizarre" is automatically subject to strict scrutiny review.\textsuperscript{22} This is true even if the district was admittedly created to benefit a minority group and to comply with the 1965 Voting Rights Act.\textsuperscript{23}

Before 1992, several states with substantial African-American populations, including North Carolina, had failed to send an African-American to Congress since Reconstruction.\textsuperscript{24} Many states with substantial African-American populations have had to create unusually-shaped districts to comply with the Voting Rights Act to provide for effective representation of their African-American populations.\textsuperscript{25} After \textit{Shaw}, many of these districts are now vulnerable to legal challenge.\textsuperscript{26}

Section I discusses the historical background of African-American voting rights in this country, with particular emphasis on North Carolina.\textsuperscript{27} Next, Section I presents an examination of the 1965 Voting Rights Act, along with a summary of the Court's major voting rights, affirmative action, and jury selection cases.\textsuperscript{28} Section II summarizes the facts and issues presented in the \textit{Shaw} case and examines the majority and dissenting opinions.\textsuperscript{29} Section III analyzes the Court's holding and argues that the case is inconsistent with precedent, ignores the purposes behind the Voting Rights Act,
and represents bad policy. Finally, Section IV discusses the probable impact of the case on other congressional districts around the country and on subsequent Supreme Court cases.

I. BACKGROUND

A. African-American Voting Rights in North Carolina

Before the Civil War, very few African-Americans enjoyed the right to vote. African-Americans were not permitted to vote at all in southern states, and fewer than ten percent of adult African-American males were allowed to vote in the rest of the country. This situation changed with the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments (the Civil War Amendments) between 1865 and 1870. Soon after these Amendments were passed, significant numbers of African-Americans were elected to Congress. Before 1877, two southern African-Americans were elected to the Senate and fourteen to the House of Representatives. Unfortunately for African-Americans, their enjoyment of the right to vote would soon come to a dramatic end. Despite the fact that the Civil War Amendments were primarily passed in order to protect the rights of recently freed slaves, state legislatures continued to curtail African-American voting rights for the next cen-

30. See infra notes 349-607 and accompanying text.
31. See infra notes 608-41 and accompanying text.
32. Brainerd Dyer, One Hundred Years of Negro Suffrage, 37 PAC. HIST. REV. 1, 1 (1968), reprinted in 6 RACE, LAW, AND AMERICAN HISTORY 1700-1990, supra note 4, at 123, 123.
33. Id.
34. The Thirteenth Amendment abolished slavery and involuntary servitude. U.S. CONST. amend. XIII, § 1.
35. The Fourteenth Amendment prohibits states from denying any citizen the equal protection of law. Id. amend. XIV, § 2. Although the Fourteenth Amendment’s provision securing citizens equal protection of the laws provided African-Americans with a means to secure political equality, this provision was not extensively used by the courts for this purpose until well into the Twentieth Century. Chandler Davidson, The Voting Rights Act: A Brief History, in CONTROVERSIES IN MINORITY VOTING II (Bernard Grofman & Chandler Davidson eds., 1992).
36. The Fifteenth Amendment guarantees the right to vote. U.S. CONST. amend. XV, § 1.
37. SUSAN WELCH ET AL., AMERICAN GOVERNMENT 184 (2d ed. 1988).
38. Id.
39. Id. In 1872, 324 African-Americans were elected to southern state legislatures and Congress. By 1900, this number had diminished to five. J. Morgan Kousser, The Voting Rights Act and the Two Reconstructions, in CONTROVERSIES IN MINORITY VOTING, supra note 35, at 135, 140.
Devices such as literacy tests, grandfather clauses, poll taxes, and white primaries were widely used in southern states to suppress African-American voting rights.

North Carolina's response to the Civil War Amendments was typical of most southern states. For the most part, the state complied with voting rights laws until the late nineteenth century when federal troops withdrew from the South, and the infamous Plessy v. Ferguson case was decided. In 1900, North Carolina amended its Constitution to include provisions allowing literacy tests, grandfather clauses, poll taxes, and white primaries to suppress African-American voting rights.

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A grandfather clause in the North Carolina Constitution exempted anyone whose lineal ancestor had the right to vote before 1867 (before African-Americans had the right to vote) from taking a literacy test. John V. Orth, North Carolina Constitutional History, 70 N.C. L. Rev. 1759, 1786 (1992). The Supreme Court held that the use of a grandfather clause violated the Fifteenth Amendment in Guinn v. United States, 238 U.S. 347 (1915).

The Supreme Court held that use of a poll tax violates the Fourteenth Amendment in Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666 (1966). A poll tax is "a tax of a specific sum levied upon each person within the jurisdiction of the taxing power and within a certain class (as, all males of a certain age, etc.) without reference to his property or lack of it." Black's Law Dictionary 1159 (6th ed. 1990).

African-Americans were barred from voting in primary elections where only white candidates were selected. In Nixon v. Herndon, 273 U.S. 536 (1927), the Supreme Court held that this practice violated the Fourteenth Amendment.

See generally Dyer, supra note 32, at 130-42 (discussing the various uses of discriminatory devices by the states). The effect of these devices was staggering. Illustrative is Louisiana where by 1900, the number of registered African-American voters dropped from 130,000 to 5,000. Armand Derfner, Racial Discrimination and the Right to Vote, 26 Vand. L. Rev. 523, 542 (1973), reprinted in 6 Race, Law, and American History 1700-1990, supra note 4, at 43, 62.


See Hunter, supra note 47, at 257-60 (describing how African-Americans in North Carolina played a significant role in state politics until the late 19th century when a series of initiatives were implemented which were designed to curtail African-American voting rights).
father clauses, and poll taxes. Throughout the first half of the twentieth century, vigilante groups such as the Ku Klux Klan beat, lynched, and burned the houses of African-American voters. State-sponsored voting discrimination continued until well into the late 1970’s. An African-American did not serve in North Carolina’s General Assembly again until 1970. Although the state’s African-American population is roughly twenty-two percent, before 1984 less than five percent of the General Assembly consisted of African-Americans. The Voting Rights Act of 1965 was enacted in response to the inequities these figures represent.

B. The Voting Rights Act of 1965 and Amendments

1. The Voting Rights Act of 1965 (the Act)

In 1965, President Lyndon Johnson asked Congress to pass a tough, comprehensive voting law after concluding that case-by-case litigation and the voting provisions of the Civil Rights Acts of 1957, 1960, and 1964 were not adequate to combat pervasive voting rights discrimination in this country. Representative Emanuel Celler, the floor manager of the bill, argued that the bill would prevent white racists from using “legal dodges and subterfuges” to undermine the intent of the Fifteenth Amendment. Before the Voting Rights Act of 1965 was passed, a house report indicated that a tougher voting rights law was needed because of “the variety of means used to bar Negro voting and the durability of such discriminatory policies.”

50. N.C. Const. of 1900, art. VI, § 4.
52. See Hunter, supra note 47, at 260.
53. Id. at 261.
54. Id.
57. Davidson, supra note 56, at 18. Several southern Senators were in strong opposition to the bill. Senator Herman E. Talmadge of Georgia said the bill was “grossly unjust and vindictive,” and Senator Strom Thurmond of South Carolina feared that if the bill was passed, “we [would] have a totalitarian state in which there will be despotism and tyranny.” Id.
58. 2 Statutory History of the United States: Civil Rights 1486 (Bernard Schwartz
and, "the systematic exclusion of Negroes from the polls that characterizes certain regions of this nation." 69

Sections 4 through 8 constitute the main provisions of the Voting Rights Act. Section 4 abolishes literacy tests in all states and their subdivisions which had a voter turnout rate of less than fifty percent in the last presidential election and used a literacy test at the time. 60 Section 5 has become the Voting Rights Act's most important provision 61 and was at the heart of the controversy in Shaw. 62 This section requires states which fall under section 4 to submit to the Attorney General or the District Court for the District of Columbia any changes in "voting qualifications or prerequisite to voting, or standard, practice or procedure with respect to voting" that was not in effect during the last Presidential election. 63 This preclearance requirement gives the Attorney General great power in insuring local voting rights laws are in compliance with section 2's general mandate that the practices do not "deny or abridge the right to vote on account of race or color." 64 Sections 6 through 8 give the Attorney General power to send federal voting examiners to make sure qualified citizens are allowed to register, and that the voting process is administered in a manner consistent with the Voting Rights Act. 65

59. 2 id. Additionally, the report indicated that many cases, such as United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963) (finding invalid a state constitutional requirement that applicants for voting registration be able to understand and give a reasonable interpretation of any provision of the state or federal constitution), aff'd, Louisiana v. United States, 380 U.S. 145 (1965), demonstrate that literacy tests and other devices were systematically and consciously used to deprive African-Americans of the right to vote. 2 id., at 1488-89. In many places, the tests were never applied to whites and the language of some of the tests allowed their administration to be performed in such an arbitrary and vague manner that their "only real function [is] to foster racial discrimination." 2 id. at 1489.


61. See generally Davidson, supra note 56, at 27-30 (describing the effectiveness of section 5 challenges, especially as a weapon against minority vote dilution).

62. See infra notes 246-348 and accompanying text (discussing Shaw v. Reno).


65. Voting Rights Act of 1965, Pub. L. No. 89-110, § 6-8, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973d-f (1988)). Officials are required to provide illiterate voters with as much "reasonable assistance" as necessary so the voter can cast his ballot in accordance with his decision. See Hamer v. Ely, 410 F.2d 152, 155-57 (5th Cir. 1969) (holding that a refusal to appoint
The Court upheld the Constitutionality of the Voting Rights Act in *South Carolina v. Katzenbach,* as a permissible exercise of Congress' power under Section 2 of the Fifteenth Amendment "to enforce . . . by appropriate legislation" the right guaranteed by Section 1 of that Amendment. In *Katzenbach,* the Court stated that "in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."2

2. Amendments to the Voting Rights Act

The Act's temporary provisions were due to expire five years after the Act was passed. Despite vocal opposition by many southern officials, Congress extended the Act's temporary provisions for five more years in a 1970 Amendment. The Amendment covered additional states, and abolished literacy tests nationally. In 1975, the Commission on Civil Rights reported that the Act was successful in increasing the number of African-Americans who registered and voted.

Unfortunately, African-Americans continued to be grossly underrepresented, both nationally and at the state level. When the Commission reported its findings, there was only one African-American congressman, and no African-American held a high state office in the South. Because of these circumstances, Congress extended the


66. 383 U.S. 301 (1966). The Court rejected the state's contention that, "Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts." *Id.* at 326; see also *Allen v. State Bd. of Elections,* 393 U.S. 544, 570-71 (1969) (stating that courts should construe section 5 broadly, and apply it to any practice than could "undermine the effectiveness of voters").

68. *Id.* at 326.
70. Governor Lester G. Maddox of Georgia, who prevented African-Americans from entering his restaurant by threatening them with a pickaxe handle, called the Act "ungodly" and "unpatriotic." *Id.* at 29. After making the speech containing these references to the Senate Judiciary Committee, he immediately went to the House restaurant to autograph souvenir pickaxe handles. *Id.*
71. *Id.*
72. *Id.* at 29-30.
73. *Id.* at 34.
74. *Id.*
75. *Id.* These states were not covered before because they did not have a voter turnout rate of
Act's temporary provisions for another seven years. More importantly, states with substantial African-American and other minority group populations, such as Texas, that were previously not covered by the Act were brought under its provisions.

3. The Requisite Standard for Cases Under the Voting Rights Act

In 1980, the Supreme Court decided the controversial case of *Mobile v. Bolden*. For the first time, the Court held that minority plaintiffs making a claim under the Constitution or the Voting Rights Act had to prove that the legislative body enacted or retained a voting scheme with the intent of discriminating against a racial group. This proved disastrous for minority groups, since this burden of proof was extremely difficult to meet.

Fortunately for minority groups, Congress was sympathetic to their need to secure favorable voting rights legislation and in 1982, when the temporary provisions of the Voting Right Act were due to expire, Congress extended them for another twenty-five years. Additionally, Congress expressed its disagreement with the intent test established in *Mobile* because it made a minority plaintiff's burden of proof "inordinately difficult." Thus, Congress amended section 2 of the Act to explicitly prohibit any voting practice which *results* in racial discrimination.

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76. Davidson, supra note 56, at 35.
77. Id. at 35-36. Additionally, the Amendment required covered states with Asian-American, American-Indian, Native Alaskan and Latino populations of more than five percent to provide election materials in these languages. Id.
78. 446 U.S. 55 (1980). *Mobile* involved an at-large voting scheme in Alabama which had been in effect since 1911. Id. at 58. African-Americans claimed the scheme diluted their sizeable voting strength because they were unable to elect African-American candidates. Id. at 71-73. The Supreme Court refused to invalidate the scheme. Id. at 80.
79. Id. at 66-67.
81. Davidson, supra note 56, at 40.
82. McDonald, supra note 80, at 68.
83. Id. at 67; see also Voting Rights Act of 1965, Pub. L. No. 89-110, §2, 79 Stat. 437 (codified as amended at 42 U.S.C. §1973(a) (1988)) ("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 abridgement of the right of any citizen of the United
the Amendment indicate that courts should look to a number of objective factors, such as historical racial discrimination in the area, racially polarized voting, and any lack of elected minority office holders, to determine whether a practice has resulted in racial discrimination.84

The Voting Rights Act has had a profound impact on securing the right to vote for African-Americans. In the eleven southern states covered under the Act, the percentage of African-Americans over age eighteen registered to vote increased from 43.3% in 1964 to 63.7% in 1988.85 Seven states, including North Carolina, were originally targeted by the Act.86 In 1965, less than 100 African-American officials were elected from these states.87 By 1989, this number had increased to 3,265.88 After the 1990 Census, race-conscious redistricting doubled the number of majority-minority districts from twenty-six to fifty-two.89 In 1990, thirty-nine of the 535 United States congressmen were African-American or Latino, and in 1992 the number increased to fifty-nine.90

C. Equal Protection Analysis in Race-Based Classifications

Plessy v. Ferguson91 was the first case in which a Supreme Court

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84. McDonald, supra note 80, at 68. Most of the factors Congress listed were taken from the Court's decision in White v. Regester, 412 U.S. 755, 765-70. (1973) and the United States Court of Appeals for the Fifth Circuit decision in Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973). Two days after the Amendment became law, the Supreme Court in Rogers v. Lodge, 458 U.S. 613 (1982), held that a racially discriminatory purpose can be inferred from a voting scheme’s effect of diluting a minority group’s voting strength, combined with other circumstantial evidence. Id. at 622-28. Rogers involved an at-large voting system in a substantially African-American county where no African-American had ever been elected to the county’s governing Board of Commissioners. Id. at 614-15. The Court deferred to the district court’s findings that the community had experienced a long history of voting rights discrimination, and local elected officials were unresponsive to the needs of the African-American population. Id. at 622-26. In Chisom v. Roemer, 501 U.S. 380 (1991), the Court held that the Act is applicable to state judicial elections. Id. at 384.

85. Davidson, supra note 56, at 43. During the same period, the number of African Americans over age 18 registered to vote in the five Deep South states increased from 22.5% to 65.2%. Id. 86. Id.

87. Id.

88. Id. For 1965, there are no comparable figures available regarding Latino elected officials. However, in Arizona, California, Florida, New Mexico, New York and Texas, 1,280 Latino officials were elected in 1973, and 3,592 were elected in 1990. Id.


90. Dennis Rivera, Democracy and Diversity, NEWSDAY, July 30, 1993, at 56.

91. 163 U.S. 537 (1896), overruled by Brown v. Board of Educ. of Topeka (Brown I), 347 U.S.
Justice articulated the notion of a color-blind Constitution.\textsuperscript{92} Although the majority upheld separate-but-equal accommodations for African-American and white railroad passengers,\textsuperscript{93} Justice Harlan's dissent became the implicit basis for later cases. Such cases include the Court striking down a city ordinance requiring separate city blocks for African-Americans and whites,\textsuperscript{94} a state law which forced African-Americans who sought a legal education to attend school outside of the state,\textsuperscript{95} a law which forbade African-Americans from attending the same law school as whites,\textsuperscript{96} and the state laws which mandated segregated public schools.\textsuperscript{97}

These early cases illustrated blatant attempts by legislators to discriminate against African-Americans. Most of the recent cases involving race-based classifications involve more subtle forms of racial discrimination, or in some cases, "benign" discrimination — which many argue is not discrimination at all, but rather a means of remediating prior racial discrimination.\textsuperscript{98} In order to fully understand how the courts analyze voting rights cases, it is necessary to first understand how they analyze race-based classifications generally. A race-based classification is normally subject to strict scrutiny review.\textsuperscript{99}

Prior to \textit{City of Richmond v. J.A. Croson Co.},\textsuperscript{100} strict scrutiny analysis was usually reserved for groups that have historically been the victims of discrimination.\textsuperscript{101} Strict scrutiny will only be applied

\begin{footnotes}
\footnote{483 (1954).}
\footnote{92. \textit{Id.} at 559 (Harlan, J. dissenting).}
\footnote{93. \textit{Id.} at 548.}
\footnote{94. Buchanan v. Warley, 245 U.S. 60, 82 (1917).}
\footnote{95. Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 352 (1938).}
\footnote{96. Sweatt v. Painter, 339 U.S. 629, 642 (1950).}
\footnote{97. Brown v. Board of Educ. of Topeka (Brown I), 347 U.S. 483, 495 (1954).}
\footnote{98. See, e.g., Laurence H. Tribe. \textit{American Constitutional Law} § 16-22, at 1521 (2d ed. 1988) (stating that affirmative action or benign discrimination programs are sometimes used to eliminate the effects of past discrimination).}
\footnote{99. Under strict scrutiny review, the burden of proof shifts to the government to show that it has a compelling government interest in making a racial classification. \textit{Black's Law Dictionary}, supra note 44, at 1422. The only time the Court upheld explicit racial discrimination under strict scrutiny was in \textit{Korematsu v. United States}, 323 U.S. 214 (1944) (upholding a law which excluded persons of Japanese origin from certain West Coast areas); Tribe, supra note 98, § 16-6, at 1451-52. Strict scrutiny is contrasted with the rational basis test, an extremely deferential standard which holds that a racial classification is valid if it is, "reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." \textit{Black's Law Dictionary}, supra note 44, at 1262.}
\footnote{100. 488 U.S. 469 (1989) (plurality opinion).}
\footnote{101. See, e.g., Hunter v. Erickson, 393 U.S. 385 (1969) (invalidating a municipal ordinance that stated a city council could not take measures to eliminate racial discrimination in housing
if there is proof of purposeful (or intentional) discrimination. This usually refers to invidious discrimination which is sometimes described as discrimination on account of an immutable characteristic such as race or sex. In *Strauder v. West Virginia*, the Court struck down a statute which allowed only whites to serve on juries because the statute discriminated on its face, and intentional discrimination could thus be presumed. In contrast, *Washington v. Davis* held that proof of a discriminatory impact alone is normally not enough to constitute an equal protection violation. However, a discriminatory impact alone is enough to constitute an Equal Protection violation when a differential in effect is so great that it must reflect a discriminatory purpose.

The Court recently held that the rule applies even if the classification was designed to benefit a minority group. For example, in *Croson*, the Court applied strict scrutiny to invalidate a race-conscious affirmative action program designed to aid minority construc-

without majority approval by the city's voters); *Hernandez v. Texas*, 347 U.S. 475 (1954) (holding that the systematic exclusion of Latinos from juries is invalid); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that systematic discrimination against Asian laundry operators violated the Equal Protection Clause). Modern use of strict scrutiny in racial classifications is traceable to *U.S. v. Carolene Prod. Co.*, 304 U.S. 144 (1938). In that case, Justice Stone wrote, "[p]rejudice against discrete and insular minorities may be a special condition, ... which may call for a correspondingly more searching judicial inquiry." *Id.* at 152-53 n.4. Professor Laurence Tribe argues that, "the device of strict scrutiny is most powerfully employed for the examination of political outcomes challenged as injurious to those groups in society which have occupied, as a consequence of widespread, insistent prejudice against them, the position of perennial losers in the political struggle." *Tribe, supra* note 98, at 1453-54.

102. See, e.g., *Washington v. Davis*, 426 U.S. 229, 238-46 (1976) (explaining that proof of purposeful discrimination is a necessary predicate of a successful Equal Protection claim, but that a discriminatory purpose can sometimes be inferred from the effects).


104. 100 U.S. 303 (1880).

105. *Id.* Similarly, in *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1976), the Court stated that an adverse effect can reflect invidious gender-based discrimination. *Id.* at 274.


107. *Id.* at 246. The fact that African-Americans failed police examinations four times more frequently than whites was not enough to infer that the test was created or administered to discriminate against African-Americans. *Id.; see also Feeney*, 442 U.S. at 274-76 (holding that to show discriminatory intent, a plaintiff must prove that legislation was consciously enacted because of its discriminatory impact, and not merely with a passive awareness of such an impact).

tion contractors.\(^{109}\) Unlike Congress, which has a specific constitutional mandate to remedy societal discrimination through Section 5 of the Fourteenth Amendment, a municipality is generally not allowed to take steps to remedy societal discrimination.\(^{110}\) Therefore, the majority concluded that awarding public contracting opportunities to persons based on their race was not a compelling government interest.\(^{111}\) Croson dramatically illustrates how the Court has become willing to apply strict scrutiny analysis to cases in which whites are disadvantaged.

\section*{D. Equal Protection in Minority Voting Rights Cases}

\subsection*{1. Early Cases}

In the 1966 case of \textit{Harper v. Virginia State Board of Elections},\(^{112}\) the Supreme Court for the first time held that the right to vote is fundamental.\(^{113}\) The Court found that even minor inequities in the way voting rights are administered are subject to strict scrutiny review.\(^{114}\) Thus, one must examine voting rights cases in light of voting's major importance to the American democratic system, particularly in the context of federal elections.\(^{115}\)

In the 1960 case of \textit{Gomillion v. Lightfoot},\(^{116}\) the Alabama legis-

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\item[110.] Id. at 487-93. This was particularly true in this case since minorities comprised over 50\% of the city's population, and there was no evidence of past discrimination against minority contractors initiated by the city or other contractors. Id. at 501.
\item[111.] Id. at 505. The dissent argued that since the city found a "'strong,' 'firm,' and 'unquestionably legitimate' basis" upon which to conclude that the effect of past discrimination warranted remedial measures, the legislation should be sustained. Id. at 541 (Marshall, J., dissenting).
\item[112.] 383 U.S. 663 (1966).
\item[113.] Id. at 670.
\item[114.] Id. In \textit{Harper}, the Court struck down the imposition of an annual poll tax of $1.50. Id. at 665. The Court was concerned that the tax would keep the impoverished away from the polls, thus infringing on their right to participate in the electoral process. Id. at 668.
\item[115.] See Gaffney v. Cummings, 412 U.S. 735, 741-44 (1973) (standing for the proposition that state districting schemes are subject to lower standards than those applied to congressional districting plans). Voting districts are required to have the same number of people in each district so that the votes of people in some districts are not "worth more" than the votes in other districts. Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (establishing the one-man, one-vote requirement); see also infra notes 116-20 and accompanying text (discussing Gomillion). This one-man, one-vote principle is of particular importance in federal elections. For example, in Karcher v. Daggett, 462 U.S. 725 (1983), a congressional redistricting scheme which had a maximum percentage deviation of only point seven percent between the value of votes in two districts was held invalid. Id. at 727, 732. In contrast, in Mahan v. Howell, 410 U.S. 315 (1973), a state redistricting plan which had a maximum percentage deviation of over 16\%, was constitutionally permissible. Id. at 328-29.
\item[116.] 364 U.S. 339 (1960).
\end{enumerate}
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lature changed the boundaries of the city of Tuskegee from a square to an "irregular twenty-eight sided figure." 117 All but a handful of the city's African-American voters were effectively fenced out of the city's boundaries, while none of the white voters were. 118 In finding a clear Fifteenth Amendment violation, Justice Frankfurter stated, "the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." 119 He also stated that a statute with this "inevitable effect" and no countervailing municipal function is clearly invalid. 120

Shortly after Gomillion, the Court decided Baker v. Carr, 121 the case which "launched the modern era of voting rights jurisprudence." 122 In Baker, the Court held for the first time that a state legislature's apportionment of voters was a justiciable issue. 128 The case inspired a series of voting rights cases, not all of which resulted in Court decisions as favorable to minority interests as Gomillion. For example, in Wright v. Rockefeller, 124 minority voters in New York claimed that congressional districts located in their county were gerrymandered in order to confine a disproportionate number of the county's African-American and Latino population into one district. 128 The inevitable effect of the plan was that only one of the four district representatives would be from a minority group. 126 Although the Court acknowledged that there was a strong inference

117. Id. at 339-41.
118. Id. at 341.
119. Id.
120. Id. The decision is similar to Yick Wo v. Hopkins, 118 U.S. 356 (1886), in the sense that where a discriminatory effect is so extreme that it can only be explained as purposeful discrimination, a violation has been shown. See also Palmer v. Thompson, 403 U.S. 217, 225 (1971) (interpreting Gomillion as turning on the unconstitutional effect of the legislation).
121. 369 U.S. 186 (1962).
122. Alexander Athan Yanos, Note, Reconciling the Right to Vote with the Voting Rights Act, 92 COLUM. L. REV. 1810, 1815 (1992). Although it was not clear at the time, the case had tremendous significance in the area of racial vote dilution. Davidson, supra note 56, at 31; see Gray v. Sanders, 372 U.S. 368, 379 (1963) (stating that a state could not dilute votes on the basis of race under the Fifteenth and Nineteenth Amendments); see also Reynolds v. Sims, 377 U.S. 533, 545, 568 (1964) (holding that a legislative districting scheme in which some districts contained more than 40 times the number of voters as other residents, thereby diluting their voting strength, violated the Fourteenth Amendment).
123. Baker, 369 U.S. at 237. In Baker, the state legislature had failed to reapportion itself for 60 years. Id. at 191. Due to population growth and redistribution during this time, the plaintiffs' votes became diluted in relation to voters in other counties. Id. at 193-94.
125. Id. at 53.
126. Id.
that the districts were created with this unlawful purpose in mind, it held that the plaintiffs failed to present specific evidence that the state legislature in fact drew the districts along racial lines.\footnote{127 \textit{Id.} at 55-58.} Similarly, in \textit{Whitcomb v. Chavis},\footnote{128 Id. at 163.} the Court refused to invalidate a multi-member voting district which operated to minimize the voting strength of African-American voters.\footnote{129 \textit{Id.} at 149-55.} In this case, the Court held that the plaintiffs failed to meet their burden of proving how the use of multi-member districts minimized African-American voting strength or that the legislature intended to discriminate against African-Americans.\footnote{130 Id. at 766.}

2. \textit{The Court Becomes More Sympathetic to Minority Voters}

The Court finally struck down a multi-member voting district scheme in \textit{White v. Regester}.\footnote{131 403 U.S. 124 (1971).} Although the Court did not find that the scheme was facially invalid,\footnote{132 Id. at 766.} the minority plaintiffs did meet the burden of proving their “members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice.”\footnote{133 Id.} The Court cited a number of factors that led it to believe minorities were unfairly excluded from the political process in Texas. Among the factors were: (1) Texas historically participated in official racial discrimination;\footnote{134 Id.} (2) only two African-Americans from the Dallas County delegation had been elected to the Texas House of Representatives since Reconstruction;\footnote{135 Id.} and (3) the local candidate slating body used “racial campaign tactics in white precincts to defeat candidates who had...
the overwhelming support of the black community."138 Similar findings were made with regard to the Latino population.137 These objective factors were later used as illustrations in House and Senate reports accompanying the Amendments to the Voting Rights Act so that courts would know what to look for under the "results test."138

A case which elaborated on enforcement of section 5 of the Voting Rights Act was Beer v. United States.139 After the 1970 Census, New Orleans enacted a redistricting plan to apportion seats for the city council.140 The Attorney General refused to give the plan preclearance, and the city brought a declaratory judgment action.141 In invalidating the plan, the district court held that the scheme was inconsistent with the Voting Rights Act, because it didn't allow African-Americans to elect representatives in proportion to their population.142 The Supreme Court vacated the district court's judgment, and stated, "a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the effect of diluting or abridging the right to vote on account of race within the meaning of Section 5."143 One commentator argues that the following principles came out of Beer:

Section 5 precludes changes that have a retrogressive effect on the preexisting voting rights of minorities, and ameliorative changes, even if they fall short of what might be accomplished in terms of increasing minority representation, cannot be found to violate section 5 unless they so discriminate on the basis of race or color as to violate the Constitution. The New Orleans plan was ameliorative, not retrogressive.144

136. Id. at 767.
137. Id. The Court noted that Latinos in the area suffered from invidious discrimination in many different fields. Id. According to the Court, the Latino voter, "suffers a cultural and language barrier that makes his participation in community processes extremely difficult." Id.
140. Id.
141. Id. at 137.
142. Id.
143. Id. at 141. Moreover, the Court stated that, "there is every reason to predict, upon the District Court's hypothesis of bloc voting, that at least one and perhaps two Negroes may well be elected to the council under [the present plan]." Id. at 142.
144. Drew S. Days III, Section 5 and the Justice Department, in Controversies in Minority Voting. supra note 35, at 52, 56; see also Lockhart v. United States, 460 U.S. 125, 136 (1983) (applying principles established in Beer in finding that the introduction of staggered terms would not have a "retrogressive effect on minority voting strength").
In *United Jewish Organizations, Inc. v. Carey*, white Hasidic Jews claimed that a state's splitting up of their district in order to create two majority African-American districts was unconstitutional. It was undisputed that the redistricting was an intentional attempt to guarantee the voting strength of African-American voters by creating "substantial nonwhite majorities in [two] districts." The redistricting scheme was created to comply with the Voting Rights Act and received preclearance from the Attorney General.

In upholding the plan, Justice White, speaking for a plurality, first observed that the Act was, "'designed by Congress to banish the blight of racial discrimination in voting.'" The Court held that "neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in redistricting." According to the Court, it is proper for the state to take steps to make sure there is a fair opportunity for the African-American population to elect an African-American representative. Further, the Court stated that even if the plan was not mandated by the Voting Rights Act, it "represented no racial slur or stigma with respect to whites or any other race" and did not violate the Fourteenth or Fifteenth Amendments. As long as white voters as a group were fairly represented, individual white voters could not claim a Constitutional violation.

The Court acknowledged that although voting based on a candidate's race is an unfortunate reality, this did not mean the state was powerless to minimize the consequences of racially discriminatory voting by maintaining the voting strengths of certain groups. Justice Brennan, in his concurrence, argued that a state's remedial use of race was not always forbidden. In a separate concurrence, Justice Stewart argued that the plaintiffs failed to show the scheme had the purpose or the effect of discriminating against them on the basis

145. 430 U.S. 144 (1977) (plurality opinion).
146. *Id.*
147. *Id.* at 153.
148. *Id.* at 157.
149. *Id.* (quoting South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).
150. *Id.* at 160.
151. *Id.* (citing City of Richmond v. United States, 422 U.S. 358, 370-71 (1975)).
152. *Id.* at 165.
153. *Id.* at 166-68.
154. *Id.* at 165-69.
155. *Id.* at 173 (Brennan, J., concurring).
of their race.\textsuperscript{156}

3. A Drastic Change By the Court and An Equally Drastic Congressional Response

As discussed above, the \textit{Mobile}\textsuperscript{157} case was a setback for African-American voting rights.\textsuperscript{158} The city of Mobile used an at-large multi-member voting district scheme to elect its city commissioners.\textsuperscript{159} Although the city had an African-American population of thirty-three percent, no African-American had been elected to the commission in seventy years.\textsuperscript{160} A Supreme Court plurality held that in order for the African-American plaintiffs to prevail, they would have to show more than a lack of proportional representation of their population.\textsuperscript{161} The plurality held that the plaintiff had to show that the purpose (or intent) of the legislative scheme was to "invidiously . . . minimize or cancel out the voting potential of racial or ethnic minorities."\textsuperscript{162} In an apparent retreat from the \textit{White} case, the Court held that evidence of the discriminatory effect of this plan fell far short of what was needed to show the scheme was enacted or retained to promote racial discrimination.\textsuperscript{163}

In response to harsh criticism of the \textit{Mobile} decision, Congress amended the Voting Rights Act to establish that a discriminatory purpose was not an essential element of a voting rights claim.\textsuperscript{164} This Amendment and the corresponding \textit{Rogers v. Lodge} decision seemed to make clear that an intent to discriminate did not have to be specifically proven in a voting rights case but could be inferred

\begin{itemize}
  \item \textsuperscript{156} Id. at 181 (Stewart, J., concurring).
  \item \textsuperscript{157} Mobile v. Bolden, 446 U.S. 55 (1980).
  \item \textsuperscript{158} See supra notes 78-80 and accompanying text (discussing the \textit{Mobile} case).
  \item \textsuperscript{159} Mobile, 446 U.S. at 56-60.
  \item \textsuperscript{160} Timothy G. O'Rourke, \textit{The Voting Rights Paradox}, in CONTROVERSIES IN MINORITY VOTING. supra note 35, at 85, 95 n.28.
  \item \textsuperscript{161} Mobile, 446 U.S. at 67.
  \item \textsuperscript{162} Id.
  \item \textsuperscript{163} Id. at 71. The \textit{Mobile} case received much criticism from commentators. See, e.g., Frank R. Parker, \textit{The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard}, 69 VA. L. REV. 715, 737-46 (1983) (arguing that since the right to vote is so fundamental to our democratic system, minority citizens' access to the political process should not depend upon their ability to prove discriminatory intent underlying questionable election schemes). In a case decided on the same day as \textit{Mobile}, the Court held that a municipality could not be precleared by the Attorney General under the Voting Rights Act unless both discriminatory purpose and effect were absent. City of Rome v. United States, 446 U.S. 156, 172 (1980).
\end{itemize}
from the scheme's effect and other circumstantial evidence. 165

The most significant voting rights case of the past decade was the 1986 case of Thornburg v. Gingles. 166 In that case, the Court for the first time attempted to define a standard for proving dilution of a minority group's voting rights. 167 In Thornburg, African-American voters challenged North Carolina's state legislative redistricting scheme by alleging that the plan impaired their ability to elect representatives of their choice. 168 The Court began its analysis by examining the extensive racial discrimination suffered by African-Americans in North Carolina, both generally and in the context of voting rights. 169 It also accepted the lower court's finding that white candidates had encouraged voting along racial lines, and that very few African-Americans had been elected to office in North Carolina. 170 Next, the Court held that Congress explicitly rejected the Mobile plurality's "intent test" by enacting the 1982 Voting Rights Act Amendments. 171 Most importantly, the Court held that vote dilution "was to be measured by the actual electoral practices of the day, and the polarized voting inquiry was to be its evidentiary centerpiece." 172

The Court stated that in order to prove racially polarized voting, "a bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group." 173 The Court held that the degree of racial bloc voting necessary to prove a claim under section 2 will vary according to various factual circumstances. 174 Nevertheless, the Court stated that as a general principle, racial bloc voting occurs when substantial numbers of the same minority group vote for the same candidate, the white bloc vote is large enough to normally defeat the minority group's candidates (even when white "crossover" votes are included), and this process occurs over a lengthy period of time. 175

165. 458 U.S. 613 (1982); see supra note 84 (discussing the facts and holding of Rogers).
166. 478 U.S. 30 (1986).
167. Id. at 31, 55-58.
168. Id. at 35.
169. Id. at 38-39.
170. Id. at 40-41.
171. Id. at 43-44.
173. Thornburg, 478 U.S. at 49.
174. Id. at 58-59.
175. Id. at 56-58.
finding for the plaintiffs, the Court held that the district court’s approach, “which tested data derived from three election years in each district, and which revealed that blacks strongly supported black candidates, while, to the black candidates’ usual detriment, whites rarely did, satisfactorily addresses each facet of the proper legal standard.”

In the 1993 term, the Supreme Court decided two major cases under the Thornburg test. The first, Growe v. Emison, involved a single member legislative district vote dilution claim brought by minority plaintiffs in Minneapolis. A unanimous Court held that the plaintiffs had failed to prove they were geographically compact and failed to provide statistical or anecdotal evidence of majority bloc voting or political cohesion. Thus, the plaintiffs did not meet the requirements of Thornburg and could not prevail.

In the second case, Voinovich v. Quilter, a unanimous Court once again held that the creation of single-member minority-majority voting districts does not violate the Voting Rights Act because it does not “invariably minimize or maximize minority voting strength” (either effect was possible). The Court noted that section 2 of the Act placed the burden of showing a state practice has the effect of diminishing or abridging the voting strength of the protected class on the party making a vote dilution claim. Further, the Court stated that the plaintiffs did not meet the part of the Thornburg test that requires the minority plaintiffs to show that the white majority engages in bloc voting, and thus led to the inability of minority voters to elect their chosen representatives. Additionally, there was no showing of a legislative intent to dilute African-
American voting power.184

In sum, cases such as *Gomillion, Wright, Whitcomb*, and *Mobile* illustrate that, as in most situations involving classifications based on race, the plaintiff has the burden of proving both a discriminatory intent and effect. In *Beer*, the plaintiffs failed to show a discriminatory effect,185 while the white plaintiffs in *UJO*, and the African-American plaintiffs in *Mobile*, failed to show a discriminatory intent.186 In response to the extreme burden on plaintiffs to show a discriminatory legislative intent, Congress enacted the Voting Rights Act Amendments of 1982 to provide that a Voting Rights Act violation could be established by proof of discriminatory results alone.187 Congress listed several factors, many of which were taken from the *White* case, that the courts may consider when deciding whether a plaintiff has proven the requisite discriminatory effects.188 The Court used an effects test to invalidate an at-large voting district scheme in *Rogers*.189 In *Thornburg*, the Court ruled that racial polarization was an essential element of a successful showing of discriminatory effects, and held that racial polarization existed in that case.190 The *Growe* and *Voinovich* cases are recent applications of this rule.

Voting rights cases often incorporate principles developed in affirmative action and jury selection cases, because all three types of cases involve classifications based on race and racial "stereotypes."191 Accordingly, the major cases in these areas will be dis-

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184. *Id.* at 1159.
186. *Mobile v. Bolden*, 446 U.S. 55, 74 (1980); *United Jewish Orgs. v. Carey*, 430 U.S. 144, 167 (1977) (plurality opinion); see *supra* notes 78-80, 157-63 and accompanying text (discussing the *Mobile* decision); see also *supra* notes 145-56 and accompanying text (discussing the *UJO* decision).
187. See *supra* notes 81-84 and accompanying text (discussing the 1982 amendments and their purposes).
188. See *supra* note 84 and accompanying text (listing the factors).
189. See *supra* note 84 (discussing Rodgers v. Lodge, 458 U.S. 613 (1982)).
190. See *supra* notes 166-76 and accompanying text (discussing Thornburg v. Gingles, 478 U.S. 30 (1986)).
191. For example, one of the reasons the *Shaw* Court held the way it did is because "racial classifications of any sort pose the risk of lasting harm to our society. [Racial gerrymanders] reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw v. Reno*, 113 S. Ct. 2816, 2832 (1993). These statements not only seem inconsistent with prior voting rights cases, but also represent a departure from several decades of affirmative action and jury selection cases which explicitly held that racial classifications are necessary in certain social contexts. See *infra* notes 192-245 and accompanying text (discussing many of these cases).
cussed in the next section.

E. Affirmative Action Cases

The first time the Court addressed the affirmative action issue was in the 1978 case of Regents of the University of California v. Bakke. In this case, a plurality invalidated a minority set-aside program for medical students at the University of California-Davis under intermediate scrutiny, but held that a person's race or ethnicity could be considered a "plus" in the admissions process. Apparently, similar to the Croson case, the plurality believed that the Board of Regents of the University was not an appropriate body to remedy societal discrimination.

Three years later, in Fullilove v. Klutznick, the Court held that Congress could remedy prior discrimination in public building procurement programs by mandating that ten percent of the federal funds granted for such programs go to minority business enterprises. The Court used language which resembled the intermediate scrutiny test used in Bakke. The Court believed that by enacting this measure, Congress was not invidiously discriminating against whites but instead, had "recognized a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity."

192. 438 U.S. 265 (1978) (plurality opinion). In DeFunis v. Odegaard, 416 U.S. 312 (1974), the Court avoided adjudicating an affirmative action issue by holding that the case was moot. Id. at 318-20.

193. Bakke, 438 U.S. at 319-20. Justices Blackmun, Brennan, Marshall and White favored using intermediate scrutiny for cases involving what they considered to be remedial or benign discrimination. Id. at 359 (concurring in part & dissenting in part). Under this level of scrutiny, the racial classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." Id.

194. Id. at 320 (opinion of Powell, J., joined by White, Brennan, Marshall and Blackmun, JJ.).

195. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (plurality opinion). In Croson, the Court stated that even though "Congress may identify and redress the effects of society-wide discrimination [this] does not mean that, a fortiori, the States and their political subdivisions are free to decide that such remedies are appropriate." Id. at 490; see supra notes 109-11 and accompanying text (discussing the Croson case).

196. 448 U.S. 448 (1980).

197. Id. at 472-73, 483-85. In 1976, less than one percent of all federal procurement in public works went to minority business enterprises. Id. at 459.

198. Id. at 480 ("We recognize the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal."). For the language used in Bakke, see supra note 193.

199. Fullilove, 448 U.S. at 486.

200. Id. at 490. The dissent cited the Plessy dissent and argued for a purely "color-blind"
In *Wygant v. Jackson Board of Education*, the Court invalidated a public school board's teacher lay-off scheme which provided greater protection for African-American teachers than for white teachers. The plurality applied strict scrutiny and found that correcting for general societal discrimination and supplying role models for African-American students were not sufficiently compelling government interests. The plurality noted that sometimes, innocent parties must bear the burden of the remedy for curing racial discrimination. However, the Court stated that unlike other cases, where the burden innocent individuals must suffer is diffused among society at large, plans like the one at issue impose a more serious injury on individuals.

The most recent affirmative action case decided by the Court was *Metro Broadcasting, Inc. v. FCC*, where the Court upheld the Federal Communication Commission's policy of considering minority ownership among other factors when awarding radio licenses. The Court held that enhancing broadcast diversity was an important enough Congressional goal to pass intermediate scrutiny. Using language similar to that in *Fullilove*, the Court emphasized that a "congressionally mandated, benign race-conscious program that is substantially related to the achievement of an important governmental interest is consistent with equal protection principles so long as it does not impose undue burdens on nonminorities."

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Constitution. *Id.* at 522-23 (Stewart, J., dissenting).


202. *Id.* at 270-73.

203. *Id.* at 274-76.

204. *Id.* at 280-81.

205. *Id.* at 282-83 ("Denial of a future employment opportunity is not as intrusive as loss of an existing job."); see *Steelworkers v. Weber*, 443 U.S. 193, 209 (1979) (upholding a hiring program designed to benefit minority workers).


207. *Id.* at 563-66.

208. *Id.* at 584. Specifically, the Court held that "the minority ownership policies are in other relevant respects substantially related to the goal of enhancing broadcast diversity." *Id.*

209. *Id.* at 596-97. The Court emphasized that the burden on nonminorities in this context was slight. *Id.* at 597. The Court reaffirmed the proposition in *UJO*, that "a State subject to § 5 of the Voting Rights Act of 1965 . . . may 'deliberately creat[e] or preserv[e] black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5.'" *Id.* at 584 (quoting United Jewish Orgs., Inc. v. Carey, 430 U.S. 144, 159 (1977) (plurality opinion)).
F. Jury Selection Cases

The 1880 case of Strauder v. West Virginia,210 was the first time the Court had to face the disturbing problem of racial discrimination in jury selection. In Strauder, the conviction of an African-American by an all-white jury was invalidated partly because the defendant did not receive a fair trial by a jury of his peers.211 After Strauder, the Court did not address the problem of racial discrimination in jury selection until the 1965 case of Swain v. Alabama.212

There, although twenty-six percent of the people eligible to sit on grand and petit juries were African-American, since 1953 only ten to fifteen percent of the people actually selected to serve had been African-American.213 Further, although an average of six to seven African-Americans were selected to sit on jury venires, no African-American had served on a petit jury during the previous thirteen years.214

In this particular case, the defendant claimed that the prosecutor's use of preemptory challenges to exclude all eight African-Americans who made it to the petit panel violated his Equal Protection rights.215 In rejecting this argument, the Court emphasized the historic and practical importance of the peremptory challenge.216 Moreover, the Court established an extremely difficult burden of proof for defendants to meet in order to show a Constitutional violation of a prosecutor's use of the peremptory challenge — the defendant had to show that a particular prosecutor repeatedly excluded African-American jurors in various kinds of cases in order to prevail in an Equal Protection claim.217

210. 100 U.S. 303 (1880).
211. Id. at 308. The West Virginia statute struck down by the Court read: "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors . . . ." Id. at 304; see also Taylor v. Louisiana, 419 U.S. 522, 534-36 (1975) (holding invalid a state statute which allowed women to serve on juries only if they volunteered).
213. Id. at 205.
214. Id.
215. Id.
216. Id. at 212-13.
217. Id. at 223-24 ("[W]hen the prosecutor . . . in case after case . . . whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors . . . it would appear that the purposes of the peremptory challenge are being perverted."). In Commonwealth v. Soares, 387 N.E.2d 499, 516-18 (Mass.), cert. denied, 444 U.S. 881 (1979), and People v. Wheeler, 583 P.2d 748, 761-62 (Cal. 1978), state courts used state constitutions to hold that defendants need only
Fortunately for minority criminal defendants, the Court lowered the burden of proof years later in *Batson v. Kentucky*. There, the prosecutor used his peremptory challenges to strike all four African-Americans from the petit jury, and the defendant was subsequently convicted. The Court began its analysis by noting the difficulty minority defendants were having in proving an Equal Protection violation under the *Swain* standard. In order to alleviate this difficulty, the Court articulated a new standard whereby a defendant only had to show racial discrimination in the use of peremptory challenges by the prosecutor *in the defendant's particular case:* first, the defendant must show that he is a member of a cognizable racial group; second, the defendant can presume that peremptory challenges are devices by which a prosecutor can engage in racial discrimination; and third, the defendant can show by relevant facts and circumstances in his case that the prosecutor discriminated against jurors on account of their race. Once the defendant makes this prima facie showing, the burden of proof shifts to the prosecution to provide a racially neutral explanation for the exclusion. In dissent, Justice Burger, joined by Justice Rehnquist, stated that a peremptory challenge based on race is permissible because it "allows the covert expression of what we dare not say but know is true more often than not."
In the same year as *Batson*, the Court decided two other major cases dealing with racial classifications in jury selection. The first was *Vasquez v. Hillery*. In this case, the Court held that the systematic exclusion of grand jurors of a defendant's race was grounds for reversible error when the defendant was ultimately convicted. The second case was *Turner v. Murray*, where an African-American was convicted of killing a white jewelry store owner and sentenced to death. The trial court in *Turner* refused the defendant's request that he be allowed to question the prospective jurors about their possible racial prejudice. The Court held that because the jury is vested with so much discretion in the sentencing phase of a capital trial (jurors must weigh mitigating and aggravating factors), there was, "a unique opportunity for racial prejudice to operate but remain undetected." This opportunity, along with the inherent finality of the death sentence, convinced the Court that, "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias."

Two recent jury selection cases involved white defendants. In
Powers v. Ohio,232 a white defendant objected to the prosecution’s use of peremptory challenges to exclude seven African-American venire-persons.233 In overturning the defendant’s subsequent conviction, the Court modified Batson by holding that the defendant no longer had to prove that he was a member of a cognizable racial group, and that the prosecution used peremptory challenges to exclude members of the same group.234 According to the Court, the defendant simply had to show that the prosecutor excluded jurors based on race.235 One of the reasons the Court held that the defendant had standing to sue on behalf of the excluded jurors was because he was denied his right “to be tried by a jury free from ethnic, racial or political prejudice.”236 The Court also stated that the decision was necessary to foster a public perception of fairness and impartiality in the justice system.237

In Georgia v. McCollum,238 three white criminal defendants accused of committing aggravated assault and battery against an African-American couple intended to use their peremptory challenges to exclude African-Americans from the jury.239 The prosecution sought an order providing that if it could make out a prima facie case of racial discrimination by the defense, under Batson, the defense would then have to put forth a race-neutral explanation for the exclusion.240 The Court agreed with the prosecution.241 Similar to its decision in Powers, the Court emphasized the need for public confidence in the criminal justice system,242 and that a criminal defendant’s use of peremptory challenges in this context constitutes “state action” which violates Equal Protection.243

233. Id. at 403.
234. Id. at 407-09.
235. Id.
236. Id. at 410-12. In Holland v. Illinois, 493 U.S. 474 (1990), the Court held that although a white defendant had standing to object to the prosecutor’s use of peremptory challenges to exclude African-Americans from the jury, he was not entitled to relief since the suit was brought under the Sixth Amendment, rather than on Equal Protection grounds. Id. at 487 & n.3. According to the Court, the Sixth Amendment demands an impartial jury, but not necessarily a representative one. Id. at 480-81.
239. Id. at 2351.
240. Id. at 2351-52.
241. Id. at 2359.
242. Id. at 2354.
243. Id. at 2354-57. Justice O’Connor, author of the Shaw opinion, seemed to acknowledge the reality of certain racial “stereotypes” in her dissent: “It is by now clear that conscious and unco-
To summarize, although members of the Court often assert that the Constitution is color-blind, many cases, such as the voting rights, affirmative action, and jury selection cases discussed above demonstrate that the Constitution often tolerates, and in some cases even mandates, race-consciousness. This is particularly true when Congress enacts legislation as a remedial measure, or when discrimination affects a fundamental right such as voting or the right to a fair trial. Often, a racially discriminatory purpose is inferred solely from discriminatory effects.

II. SUBJECT OPINION: SHAW V. RENO

A. Facts and Procedure

After the 1990 Census, North Carolina became entitled to a twelfth federal congressional district. Pursuant to the 1965 Voting Rights Act, the state legislature submitted its new redistricting plan to the Attorney General, who formally objected to it. The plan contained only one African-American majority district, and since the voting age population of the state is approximately twenty percent African-American, the Attorney General believed a second district should be created in order to give effective representation to the minority population. In response to the Attorney General's objection, North Carolina created a 160-mile long district which in some areas was no wider than Highway I-85.

Soon after the state legislature enacted the plan, several white
North Carolina residents challenged it under the Equal Protection Clause, alleging that the plan constituted an unconstitutional political gerrymander. Relying on *Davis v. Bandemer*, the district court ruled that although the plaintiffs may have made a sufficient showing of an intent to discriminate against an identifiable political group, they had not proven a discriminatory effect. Thus, the court found that the plan did not “shut [plaintiffs] out of the political process,” and granted the defendant’s motion to dismiss. Subsequently, the plaintiffs brought a new challenge against then Attorney General, William Barr, under the Equal Protection Clause.

According to the district court, the plaintiffs’ basic premise for their argument was that “any state legislative redistricting driven by considerations of race — whatever the race, whatever the specific purpose, whatever the specific effect — is unconstitutional.” The court took judicial notice of the fact that the plaintiffs were white. In dismissing the plaintiffs’ claim, the court relied primarily on the following language in *United Jewish Organizations, Inc. v. Carey (UJO)*: “‘compliance with the [Voting Rights] Act in reapportionment cases [will] often necessitate the use of racial considerations in drawing district lines.’” As in *UJO*, the court in *Shaw*


251. 478 U.S. 109 (1986). The *Bandemer* Court ruled that as in racial gerrymandering cases, a plaintiff alleging an unconstitutional political gerrymander must “prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.” *Id.* at 127.

252. *Pope*, 809 F. Supp. at 396. As the court pointed out, it is difficult to comprehend how the plaintiffs could claim there was discrimination against an identifiable political group when the plaintiffs themselves belonged to different political groups. *Id.* at 396 n.3. For purposes of the case, the court proceeded on the assumption that the alleged discrimination was against the Republican Party. *Id.*

253. *Id.* at 397.

254. *Id.* at 399. In dismissing the complaint, the majority seemed to anticipate and perhaps even desire future proceedings: “Until we hear otherwise from a higher authority, we ... dismiss the plaintiffs’ complaint ... with prejudice.” *Id.*


256. *Id.* at 467-68.

257. *Id.* at 470. Prior to this, the plaintiffs only identified themselves as individuals acting on behalf of themselves and “all other citizens and registered voters of North Carolina — whether black, white, Native American, or others.” *Id.* (citing Compl. ¶ 29, at 12).

258. 430 U.S. 144 (1977) (plurality opinion).

259. 808 F. Supp. at 470-71 (alteration in original) (quoting *UJO*, 430 U.S. at 159).
believed the plaintiffs failed to prove a discriminatory intent or effect.\textsuperscript{260} The court rejected the plaintiffs' contention that an intent to favor African-Americans automatically constitutes an intent to invidiously discriminate against whites.\textsuperscript{261} Further, the court stated that the plaintiffs failed to show how the plan had the effect of fencing the white population out of the political process, thereby minimizing or canceling out their voting strength.\textsuperscript{262} Thus, the court concluded, the plaintiffs suffered no cognizable harm and failed to state a claim under the Equal Protection Clause.\textsuperscript{263}

The Supreme Court granted certiorari to the plaintiffs' direct appeal.\textsuperscript{264} The Court limited the appeal to the question of "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."\textsuperscript{265} The Court's response to this question represents a major step in voting rights jurisprudence.

\section*{B. The Supreme Court's Opinion}

\subsection*{1. Historical Racial Discrimination in Voting Rights}

A five member Supreme Court majority, speaking through Justice Sandra Day O'Connor, began its analysis by examining this country's history of racial discrimination in voting rights, and the major cases adjudicated by the Court involving voting rights claims.\textsuperscript{266} The opinion emphasized how the racial gerrymander was one "of the weapons in the States' arsenal" designed to exclude African-Americans from the voting process.\textsuperscript{267} Further, the Court noted the progress made in the area of minority voting rights after the passage of

\begin{itemize}
  \item \textsuperscript{260} Id. at 472.
  \item \textsuperscript{261} Id. at 473.
  \item \textsuperscript{262} Id. The court noted that the plan, "will not lead to proportional underrepresentation of white voters on a statewide basis." \textit{Id.}
  \item \textsuperscript{263} Id. One judge agreed that race-conscious redistricting is not always unconstitutional, but dissented from the court's holding. \textit{Id.} at 475-77 (Voorhees, C.J., concurring in part & dissenting in part).
  \item \textsuperscript{265} Shaw, 113 S. Ct. at 653-54.
  \item \textsuperscript{266} Shaw v. Reno, 113 S. Ct. 2816, 2822-23 (1993).
  \item \textsuperscript{267} Id. at 2823. O'Connor cited the district at issue in Gomillion v. Lightfoot, 364 U.S. 339 (1960), as one example. \textit{Id.}
\end{itemize}
the Voting Rights Act of 1965, particularly the 1982 Amendments. Nevertheless, the Court stated that “[i]t is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past.” Although the Court acknowledged that race-conscious decision-making is not per se impermissible, they concluded that the plaintiffs in this case could seek relief under the Equal Protection Clause.

2. Race-Conscious Classifications and Voting

Justice O’Connor next summarized race-based classifications in Equal Protection analysis generally, and concluded that legislation containing a race-based classification must be “narrowly tailored to further a compelling governmental interest.” Moreover, the Court agreed with Appellants’ contention that “redistricting legislation that is so bizarre on its face that it is ‘unexplainable on grounds other than race,’ ” demands strict scrutiny review. According to the Court, *Gomillion v. Lightfoot* stands for the proposition that “district lines obviously drawn for the purpose of separating voters by race require careful scrutiny . . . regardless of the motivations underlying their adoption.” Further, the Court stated that cases such as *Wright v. Rockefeller* illustrate the difficulty of proving a racial gerrymander. The Court explained that one way a state can rebut the claim that it created a voting district exclusively on

268. Id.
269. Id. at 2824.
270. Id. The plaintiffs conceded that a color-blind Constitution was an ideal, and that the Court has never interpreted it as a literal principle of American law. See id. (stating that “despite their invocation of the ideal of a ‘color-blind’ Constitution . . . appellants appear to concede that race-conscious redistricting is not always unconstitutional”) (citing Tr. of Oral Arg. 16-19).
271. Id. at 2825 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277-78 (1986) (plurality opinion)). According to the Court, classifications based on race are to be avoided even if they are remedial in nature, because they stigmatize individuals and promote racial hostility. Id. at 2824-25.
274. Shaw, 113 S. Ct. at 2826.
275. 376 U.S. 52 (1964); see supra notes 124-27 and accompanying text (discussing the facts and holding of Wright).
276. Shaw, 113 S. Ct. at 2826. According to the Court, this is especially true since a reapportionment statute doesn’t classify persons, it classifies tracts of land. Id. It pointed out that although legislators may be aware of race when drawing district lines just as they are aware of other demographic factors, this does not necessarily constitute unconstitutional racial gerrymandering. Id.
racial grounds is by demonstrating it adhered to "traditional districting principles such as compactness, contiguity, and respect for political subdivisions." In contrast, the Court stated that a district that includes people "who are widely separated by geographical and political boundaries" and who have little in common except their race "bears an uncomfortable resemblance to political apartheid." Justice O'Connor emphasized that this kind of district fosters the stereotype that "members of the same racial group — regardless of [other demographic factors] . . . think alike, share the same political interests, and will prefer the same candidates at the polls." According to the Court, this kind of district may also present the danger that the district's elected representatives may see their function as representing only their racial group's interests instead of the interests of the entire community. Thus, the Court held that the plaintiffs stated a claim sufficient to survive a motion to dismiss.

3. Rebutting the Dissenters

The Court then attacked the positions of the various dissenters. Justice O'Connor acknowledged that the dissenters correctly pointed out that in other districting schemes, such as at-large and multi-member plans, the Court has required the plaintiff to prove discriminatory intent and effect. However, she stated that these schemes are different than the one at issue because they do not classify voters on the basis of race. The majority also responded to Justice Stevens' argument in his dissent that there is no constitutional violation when district lines favor the minority. The Court rebutted Justice Stevens' argument by stating that "equal protection analysis is not dependent on the race of those burdened or benefitted by a..."
particular classification.'" The Court distinguished the *UJO* case by stating that the plaintiffs in that case did not and could not al-
lege that the district was so bizarre on its face that it could only be explained as an attempt to classify voters based on race. The dis-
trict in *Shaw*, according to the majority, "immediately offends prin-
ciples of racial equality" and is thus subject to a different analysis.

Justice Souter, in dissent, asserted that since redistricting always requires legitimate considerations of race, racial gerrymanders should be subject to a relaxed form of judicial review as long as racial bloc voting takes place. The Court rejected this argument by stating that racial bloc voting "specifically must be proved in each case." Justice O'Connor perceived Justice Souter's state-
ments as classifying the redistricting scheme at issue as a benign form of discrimination, but conceded that it should be subject to strict scrutiny anyway because "a court cannot determine whether or not the discrimination truly is 'benign.'"

The state asserted that it created the district because it had a compelling interest in complying with the Voting Rights Act. In rejecting this contention, the Court stated that, "courts must bear in mind the difference between what the law permits, and what it re-
quires." For instance, in *UJO*, the plaintiffs failed to show that the state went beyond what was necessary to avoid retrogression as...
required by *Beer v. United States*. Therefore, if a state did go beyond what was reasonably necessary, its plan “would not be narrowly tailored to the goal of avoiding retrogression.”

4. **Rejection of the State’s “Compelling Interests”**

Rather than asserting that the revised districting plan was necessary to prevent retrogression, the state Appellees contended that the North Carolina legislature created the district to avoid section 2's prohibition against dilution of African-American voting strength under the principles announced in *Thornburg v. Gingles*. The Appellants responded by stating that since the African-American population is so widely dispersed throughout the state, it is not geographically compact enough to pass muster under the *Thornburg* test. Further, they argued that there was no evidence of African-American political cohesion in North Carolina, and demonstrated that whites were willing to vote for African-Americans. The Court held that these issues “need not be decided in this stage of the litigation” and remained open for consideration on remand.

In conclusion, the Court emphasized the evils of racial classifications generally. Justice O’Connor was especially critical of racial gerrymanders because they “may balkanize us into competing racial factions” and threaten “to carry us further from the goal of a political system in which race no longer matters.” Finally, the Court expressed no view on whether the Appellants could have successfully

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294. *Id.* (citing United Jewish Orgs. v. Carey, 430 U.S. 144, 162-63 (1977)).

295. *Id.*

296. *Id.* Additionally, the state argued that North Carolina had a compelling interest in eradicating the effects of past racial discrimination entirely independent from any obligations under the Voting Rights Act. *Id.* The state brought forth evidence of pervasive state-sponsored racial discrimination in North Carolina, as well as studies showing racial bloc voting. *Id.* at 2831-32; see also supra notes 166-76 and accompanying text (discussing *Thornburg v. Gingles*, 478 U.S. 30 (1986)).


298. *Id.* The Appellants pointed out that the Speaker of the North Carolina House of Representatives, state Auditor, and chair of the North Carolina State Board of Elections were African-American. *Id.*

299. *Id.* at 2832. The Court did point out that in *UJO*, “only three Justices . . . were prepared to say that States have a significant interest in minimizing the consequences of racial bloc voting apart from the requirements of the Voting Rights Act.” *Id.* (citing United Jewish Orgs. v. Carey, 430 U.S. 144, 167-68 (1977)).

300. *Id.* (“They reinforce the belief held by too many for too much of our history, that individuals should be judged by the color of their skin.”).

301. *Id.*
challenged a district created in another part of the state. 302

C. Justice White's Dissent

1. Use of the Traditional Intent and Effects Test

Justice White, who wrote the plurality opinion in UJO, relied primarily on that case to write a stern dissent. Justice White believed there was no basis for the Appellants' claim because they had not alleged a cognizable injury. 303 He analogized this case to UJO, where five Justices held that the plaintiffs in that case likewise had not alleged a cognizable injury because they could not show that the legislation was intended, or had the effect of, minimizing their group's voting strength. 304 According to Justice White, it is not remarkable to observe that legislators routinely consider race when making redistricting decisions. 305 Since legislators typically consider race, the Court's decisions have required an identifiable group to show more than "mere lack of success at the polls," 306 but rather that "the political processes . . . were not equally open to participation by the group in question." 307 Justice White further stated that, "it is not mere suffering at the polls but discrimination in the polity with which the Constitution is concerned." 308

2. The Court's Misreading of Precedent

According to Justice White, since the plaintiffs in UJO could not show how the white vote was unfairly minimized, they did not have a valid Fourteenth Amendment claim. 309 Like New York (the state Appellee in UJO), the Voting Rights Act covers several of North
Carolina's political subdivisions because North Carolina has a history of racial discrimination in voting. In both cases, the Attorney General objected to the states' original plans and ordered them to create new ones. With these facts in mind, Justice White asserted that it "strain[ed] credulity" to believe the North Carolina legislature intended to discriminate against members of the majority group. Justice White added that even if the Appellants could somehow show a discriminatory intent, the redistricting plan certainly did not produce any discriminatory effects given that even under the rejected plan, the seventy-eight percent white population would have held eighty-three percent of the congressional districts.

3. The Majority's Approach "Makes No Sense"

Justice White further argued that the majority had no foundation for distinguishing UJO and stated that "race-conscious redistricting that 'segregates' by drawing odd-shaped lines is qualitatively different from race-conscious districting that affects groups in some other way." Justice White also admonished that the Court mischaracterized Gomillion v. Lightfoot, as a segregation case. In reality, Justice White made clear, Gomillion focused on the unconstitutional effect of the legislation which was "to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee." The majority's invocation of Wright v. Rockefeller was also puzzling to Justice White. He stated, "I fail to see how a

310. Id.
311. Id. at 2837-38.
312. Id. at 2838. Justice White also noted that "[t]he State has made no mystery of its intent, which was to respond to the Attorney General's objections . . . by improving the minority group's prospects of electing a candidate of its choice." Id.
313. Id. Under the new plan, whites would have held 10 (83%) of the state's 12 congressional districts. Id.
314. Id. White stated that the plaintiffs in this case, as did the plaintiffs in UJO, brought forth a claim that the state intentionally created a district along racial lines. Id. at 2838-39. He asserted that this argument was rejected in UJO. Id. at 2839.
317. Id. at 2839 (quoting Gomillion, 364 U.S. at 341). "In Gomillion, in short, the group that formed the majority at the state level purportedly set out to manipulate city boundaries in order to remove members of the minority, thereby denying them valuable municipal services." Id. Justice White also cited Palmer v. Thompson, 403 U.S. 217, 225 (1971), and United States v. O'Brien, 391 U.S. 367, 385 (1968), as interpreting Gomillion as turning on the unconstitutional effect of the legislation. Id.
decision based on a failure to establish discriminatory intent can support the inference that it is unnecessary to prove discriminatory effect.\textsuperscript{319}

In Justice White's words, the majority's approach to this case "makes no sense."\textsuperscript{320} Justice White believed it was illogical to suggest that an unusually-shaped gerrymander is somehow more harmful than a different kind of racial gerrymander, and thus subject to a higher level of review.\textsuperscript{321} According to Justice White, although "district irregularities may provide strong indicia of a potential gerrymander, they do no more than that."\textsuperscript{322} Justice White believed it was a mistake to focus on the district's appearance rather than its effect,\textsuperscript{323} and was troubled that the decision "will unnecessarily hinder to some extent a State's voluntary effort to ensure a modicum of minority representation."\textsuperscript{324}

4. Compelling Interests

Justice White went on to say that even if this plan was subject to strict scrutiny review, a state's compliance with the Voting Rights Act is certainly a compelling interest.\textsuperscript{326} Although the Court acknowledged that the state is permitted to create a second majority-minority district to give effective representation to its African-American population, it held that the current plan is not narrowly tailored to further the state's interest in complying with the law.\textsuperscript{327} Justice White believed the current plan was narrowly tailored, and was uncertain how the Court would manage this standard in the future.\textsuperscript{328} In conclusion, Justice White noted that efforts to remedy

\textsuperscript{319}. Shaw, 113 S. Ct. at 2839. White believed that Wright was only relevant to show that under certain circumstances, a complaint alleging that a race-based districting scheme is grounds for relief under the Fourteenth Amendment. Id. at 2839-40.
\textsuperscript{320}. Id. at 2840.
\textsuperscript{321}. Id. White was also troubled by the majority's use of the term "segregation" to describe the district at issue since 54.7% of the district is African-American, and no racial group can be said to have been "set-apart" or "isolated." Id. at 2840 n.7 (citations omitted).
\textsuperscript{322}. Id. at 2841. Justice White was perplexed by the majority's concession that "'compactness . . . has never been held to constitute an independent federal constitutional requirement for state legislative districts.'" Id. (quoting Gaffney v. Comings, 412 U.S. 735, 752 n.18 (1973)). He believed the shape of a district in and of itself had no bearing on whether it violated the Constitution. Id. (footnote omitted).
\textsuperscript{323}. Id.
\textsuperscript{324}. Id.
\textsuperscript{325}. Id. at 2842.
\textsuperscript{326}. Id.
\textsuperscript{327}. Id. As an illustration of the difficulty in managing this standard, White offered the
minority vote dilution differ from affirmative action programs in that they are not preferential treatment, but rather an attempt to equalize treatment. 328

D. Justice Blackmun's Dissent

Justice Blackmun wrote a short dissent in which he agreed with Justice White's view that the Appellants failed to prove a discriminatory intent or effect, and stressed the irony that the Court had struck down a redistricting plan under which North Carolina sent African-Americans to Congress for the first time since Reconstruction. 329

E. Justice Stevens' Dissent

Justice Stevens agreed with Justice White's dissent but wrote separately to point out that the majority wasted their time trying to prove two undisputed facts: first, that the North Carolina legislature obviously created the district to favor or disfavor an identifiable group of voters, and, second, that they created it so that African-American voters would have an opportunity to elect an African-American representative. 330 According to Justice Stevens, the only real issue in the case was whether the Constitution imposes a requirement on the states to create only contiguous and compact districts, or prevents them from creating such a district in order to facilitate the election of a member of an identifiable racial group. 331 He pointed out that the majority conceded that the Constitution does not itself require compactness in creating districts. 332 Justice following:

Is it more "narrowly tailored" to create an irregular majority-minority district as opposed to one that is compact but harms other state interests such as incumbency protection or the representation of rural interests? Of the following two options -- creation of two minority influence districts or of a single majority-minority district -- is one "narrowly tailored" and the other not? Once the Attorney General has found that a proposed redistricting change violates § 5's nonretrogression principle in that it will abridge a racial minority's right to vote, does "narrow tailoring" mean that the most the state can do is preserve the status quo? Or can it maintain that change, while attempting to enhance minority voting power in some other manner?

Id. 328. Id. at 2843.
329. Id. (Blackmun, J., dissenting).
330. Id. (Stevens, J., dissenting).
331. Id.
332. Id. The Court stated: "We emphasize that [traditional districting principles such as such as compactness and contiguity] . . . are important not because they are constitutionally required
Stevens believed, therefore, that when a majority group creates unusually-shaped districts to aid a minority group, the majority does not violate the Constitution. Since politicians frequently make assumptions as to how particular groups will vote, "when an assumption that people in [a] particular a [sic] minority group . . . will vote in a particular way is used to benefit that group, no constitutional violation occurs." In conclusion, Justice Stevens argued that since it is permissible for legislators to draw boundary lines to favor groups such as political parties, union members and other ethnic groups, "it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history in the United States gave birth to the Equal Protection Clause."

F. Justice Souter's Dissent

1. Race-Consciousness in Districting is Different

According to Justice Souter, unlike other contexts in which the Court has analyzed race-conscious decision making, decisions concerning electoral districting almost always require the legitimate consideration of race. For Justice Souter, as long as the Court can discuss concepts such as "minority voting strength" and "dilution of minority votes," and racial bloc voting takes place, legislators will be compelled to take race into account in these situations.
Souter stated that another reason why race-conscious redistricting is different from other contexts, such as affirmative action, is because in the latter context, a benefit to a member of one race is at the obvious expense of a member of another.\footnote{339} In redistricting, Justice Souter believed, "the mere placement of an individual in one district instead of another denies no one a right or benefit provided to others.\footnote{340} He also emphasized that "dilution" refers to the effects on a group's voting power, not an individual's.\footnote{341} In Justice Souter's view, the Court has analyzed race-conscious redistricting cases differently from other cases involving a state's use of race in making decisions.\footnote{342} He pointed out that in the race-based redistricting context, prior cases indicate that instead of using a traditional Fourteenth Amendment analysis, it is more appropriate to examine the effects of the redistricting legislation.\footnote{343} Thus, according to Justice Souter, once the Court identifies an impermissible result like vote dilution, the redistricting plan is automatically violative of the Fourteenth Amendment and requires no further scrutiny.\footnote{344} Justice Souter did not see an inconsistency in having a separate test for racial redistricting, nor did he consider the test a form of "benign" discrimination.\footnote{345}

\footnote{339} Id. at 2846.
\footnote{340} Id. (footnote omitted). To support this statement, Justice Souter stated that: "All citizens may register, vote, and be represented. In whatever district, the individual voter has a right to vote in each election, and the election will result in the voter's representation." Id. Further, Justice Souter asserted that the majority's use of the word "segregation" was inappropriate in this context since the word is normally used to describe school segregation and other similar contexts where inequality of facilities and/or opportunities is the typical result. Id. at 2846 n.4 (citations omitted).
\footnote{341} Id. (citations omitted).
\footnote{342} Id. at 2846-47. Justice Souter stated that in non-redistricting cases, every member of the Court has agreed that, at a minimum, heightened scrutiny is the proper level of review. Id.
\footnote{343} Id. "[T]he purpose and effect of the districting must be to devalue the effectiveness of a voter compared to what, as a group member, he would otherwise be able to enjoy." Id. (citing United Jewish Orgs., Inc. v. Carey, 430 U.S. 144, 165-66 (1977) (plurality opinion)). Justice Souter thus agreed with Justice White that it would be difficult for the white plaintiffs to show that their, "opportunity to participate equally in the North Carolina's electoral process has been unconstitutionally diminished." Id. at 2847 n.6.
\footnote{344} Id. at 2847.
\footnote{345} Id. at 2848. In response to the majority's suggestion that he believed the use of race in redistricting was a "benign" form of discrimination, Justice Souter stated that, in electoral districting there frequently are permissible uses of race, such as its use to comply with the Voting Rights Act, as well as impermissible ones. In determining whether a use of race is permissible in cases in which there is a bizarrely-shaped district, we can readily look to its effects, just as we would in evaluating any other electoral districting scheme.
Id. at 2848 n.7.
2. Nothing Inherently Wrong With "Bizarre" Districts

In Justice Souter's opinion, there is no reason to treat unusually-shaped districts differently from other districts.\(^{346}\) He repeated the majority's and Justice White's observation that the Constitution does not require "'sound districting principles.'"\(^{347}\) In summary, Justice Souter "would not respond to the seeming egregiousness of the redistricting now before us by untethering the concept of racial gerrymander in such a case from the concept of harm exemplified by dilution."\(^{348}\)

III. Analysis

The Voting Rights Act of 1965 was passed thirty years ago, and although many forms of private racial discrimination began to be eliminated around that time,\(^{349}\) racial discrimination continues to play a significant role in contemporary American society.\(^{350}\) When analyzing any Supreme Court opinion involving race, especially when it concerns something as fundamental to our democratic system as voting rights,\(^{351}\) one must make every effort to separate the ideal from the reality. The Supreme Court cannot continue to acknowledge the fact that our Constitution and society are not color-blind,\(^{352}\) while reaching conclusions in cases like Shaw which strongly imply that they are. Ignoring racial divisions in our society will not make them go away. At some point, the Court must discon-

346. Id.
347. Id. at 2848-49 (quoting UJO, 430 U.S. at 168). Further, Justice Souter was not persuaded by the majority's view that the district would cause stigmatic harm and went against the American system of democracy. Id. at 2848 n.9. He stated it was implausible that the district gave the plaintiffs a sense of inferiority, and believed that representational democracy was actually enhanced. Id.
348. Id. at 2849.
349. See Howard J. Anderson & Michael D. Levin-Epstein, Primer of Equal Employment Opportunity 3-9 (2d ed. 1982) (discussing various acts, statutes, regulations, and executive orders initiated during the 1960's that were designed to eliminate racial discrimination in employment); Lucius J. Barker & Twiley W. Barker, Jr., Civil Liberties and the Constitution 387-94 (6th ed. 1990) (discussing the impact of Title VII of the 1964 Civil Rights Act on racial discrimination in employment); Paul Birstein, Discrimination, Jobs & Politics 69-96 (1985) (discussing the Civil Rights movement which sought to bring an end to discrimination in education, employment, housing, and public accommodation).
352. Shaw, 113 S. Ct. at 2824.
tinue the practice of examining racial issues in a vacuum and, as it
did in Brown v. Board of Education, play a more active role in
dealing with the reality that "we are far from a color-blind society."  

A. The Court's Opinion is Inconsistent With Precedent

1. What If the District Was Never Created At All?

Racial gerrymandering is unquestionably an uncertain and contro-
versial area of the law. Over the years, the Court's opinions have
sometimes reached different conclusions in virtually identical factual
situations. The Shaw opinion is unusual because, given that the
plaintiffs could not possibly argue that their voting strength was di-
luted, and this was the only way they could have prevailed under
Thornburg v. Gingles, the Court chose to apply a strict scrutiny
analysis after concluding the district was "unexplainable on grounds
other than race." This prompted at least one scholar to assert that
the Court in effect made it easier for whites to receive a remedy
under the Voting Rights Act than for African-Americans.  

However, in fairness, the Court's opinion should not be inter-
preted this way since one must assume that if an unusually-shaped
district was created to aid white voters, the same analysis would
apply. Nevertheless, the Court explicitly chose not to analyze the

353. 347 U.S. 483 (1954). It is doubtful that anyone would seriously argue that overt racial
discrimination today is as serious a problem as it was when Brown was decided. Nevertheless, this
author believes that one of the reasons our society has made progress in the area is because of the
Court's willingness in cases like Brown to take meaningful steps to eliminate racism.

354. Aleinikoff, supra note 350, at 330. "The belief that Americans are approaching a color
and creed-blind society is easily disabused by the ethnic image data collected [in an extensive
1990 survey]." Id. at n.16 (quoting Tom W. Smith, National Opinion Research Center, Uni-
versity of Chicago, Ethnic Images, GSS Topical Report No. 19 at 4 (1990)).

355. For example, the Court in Mobile v. Bolden, 446 U.S. 55 (1980), used a discriminatory
intent test to uphold an at-large voting scheme which had the effect of severely curtailing African-
American voting strength. Id. at 65-74. Two years later, the Court struck down a similar scheme


357. See supra notes 166-76 and accompanying text (discussing the facts and holding of
Thornburg).

358. Shaw, 113 S. Ct. at 2825; see supra notes 91-111 and accompanying text (describing the
Court's analysis for race-based classifications under the Fourteenth Amendment generally).

359. "The Supreme Court discovered an entirely new constitutional right for white voters,
entirely new... Unlike black voters, all these white voters had to show was that the district had
an odd and irregular shape." Thomas B. Edsall, Guinier Raps Ruling On Remap: Justices Said
to Create New Right for Whites, WASH. POST. July 14, 1993, at A3. (Quoting Lani Guinier, a law
professor at the University of Pennsylvania, during a speech at the NAACP annual convention).
case under the principles announced in *Thornburg* because the issue of vote dilution was not developed by the lower court. The problem is that if the plaintiffs did attempt to argue a vote dilution claim under *Thornburg*, they almost certainly would not have survived a motion to dismiss since their voting strength was not diluted by the plan. Further, if the unusually-shaped district was not created at all and African-American plaintiffs brought suit, under *Thornburg* the Court would be compelled to order the creation of a majority-minority district. Thus, the *Shaw* case stands for the strange proposition that African-American voters are better off if the state does nothing, rather than if the state takes affirmative, albeit drastic steps, to eliminate dilution of minority voting power.

Many commentators believed that the major racial gerrymandering issues were settled in the Court’s 1986 *Thornburg v. Gingles* case. In that case, the Court emphasized that under section 2 of the 1965 Voting Rights Act, minority plaintiffs were not required to show discriminatory intent, but could sustain a claim by simply proving that their group suffers from vote dilution. Under *Thornburg*, the plaintiffs must show three main conditions: first, that the minority group “is sufficiently large and geographically compact to constitute a majority in a single-member district”; second, that the group is “politically cohesive”; and third, that “the white majority votes sufficiently as a bloc to usually to defeat the

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362. In a recent case, the Court emphasized that “the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law.” *Voinovich v. Quilter*, 113 S. Ct. 1149, 1156 (1993). In the *Shaw* case, the Court implied that, while North Carolina’s creation of an unusually-shaped district is a violation of federal law, the absence of a majority-minority district in the state may not have been. *Shaw*, 113 S. Ct. at 2830 (stating that “in the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits, and what it requires”).
364. See, e.g., Bernard Grofman et al., *Minority Representation and the Quest for Voting Equality* 47 (1992) (discussing how the *Thornburg* case “shed light on all the major issues, including the role of racial bloc voting in a vote dilution suit”); Issacharoff, *supra* note 172, at 1850-53 (discussing how the *Thornburg* case made polarized voting the critical element of a minority plaintiff’s vote dilution claim).
365. *Thornburg*, 478 U.S. at 43-51. Of course, according to the 1982 Amendments to Act, evidence of racially polarized voting was only one (although probably the most significant) way of proving racial discrimination in voting. See *supra* note 84 and accompanying text (listing some of the factors a court can analyze in determining whether a violation of the Act has taken place). One of the factors is the extent of historical racial discrimination in the geographic area. *Thornburg*, 478 U.S. at 39. For a historical background of African-American voting rights in North Carolina, see *supra* notes 32-55 and accompanying text.
minority's preferred candidate." The amount of racial bloc voting necessary to sustain a claim will vary from district to district based on a number of factors, and this phenomenon is easier to prove if it occurs over a period of time. In Shaw, the state Appellees' cited Thornburg for the argument that the state explicitly took race into account in order to foster an equal opportunity for African-American and white voters to elect candidates of their choice.

Assuming the district was never created at all, African-American voters in North Carolina would have easily met the second and third conditions. The Shaw majority proclaimed that these issues, "need not be decided in this stage of the litigation." In fact, it would have been repetitive to decide these issues at this time since in Thornburg, a case which also came out of North Carolina, the Court explicitly held that African-Americans in North Carolina were politically cohesive and noted that, "a substantial majority of white voters would rarely, if ever, vote for a black candidate." African-American voters in North Carolina overwhelmingly supported African-American candidates, while whites usually disfavored them. The Court accepted the district court's findings that white voting practices would usually result in the defeat of African-American candidates based on two main facts. First, African-

366. Thornburg, 478 U.S. at 50-51.
367. Id. at 56-57. The factors include:
the nature of the allegedly dilutive electoral mechanism; the presence or absence of other potentially dilutive electoral devices, such as majority vote requirements, . . .
the percentage of registered voters in the district who are members of the minority group; the size of the district; and, in multi-member districts, the number of seats open and the number of candidates in the field.
368. Id. at 56.
371. Thornburg, 478 U.S. at 58-59. The Court's statements were based on the findings of the district court in the context of discussing the several multi-member state legislative voting districts at issue in that case. Based on the court's extensive discussion of North Carolina's history of blatant state-sponsored racial discrimination against African-American voters and the fact that, "within all the . . . districts racially polarized voting exists in a persistent and severe degree", one must assume that racial polarization is not a phenomenon unique to these particular districts.
372. Thornburg, 478 U.S. at 60. Specifically, in 11 of the 16 elections studied, between 71% to 92% of African-American voters voted for African-American candidates. Id. at 59. In all of the primaries studied, only 8% to 50% of white voters voted for African-Americans. Id. Nearly 82% of the whites never voted for any African-American during these elections. Id.
373. Id.
Americans in North Carolina have had extremely limited success in electing candidates of their choice.\textsuperscript{374} Second, when African-Americans did win elections, the victories were attributed to other factors besides the absence of polarized voting.\textsuperscript{375}

Other evidence shows that African-Americans are politically cohesive in North Carolina, and the voting strength of whites usually operates to defeat the minority-supported candidates. Although the state is roughly twenty-two percent African-American, before 1990 no African-American from North Carolina had served in Congress since Reconstruction.\textsuperscript{376} When two majority-African-American districts were created for the 1990 congressional elections, each district elected an African-American representative.\textsuperscript{377} This is consistent with the historical voting practices of North Carolina. Out of 120 members of the North Carolina House of Representatives, only two to four African-Americans served between the years 1971 and 1982.\textsuperscript{378} The state Senate, which consists of fifty members, had only one or two African-American members at any one time between the years 1975 and 1983.\textsuperscript{379} During House Judiciary subcommittee hearings, Kenneth Spaulding, an African-American who ran for Congressional office in 1984, gave testimony concerning, “his failed attempt to run a ‘color blind’ campaign and ‘garner white votes as well as black votes’ in a district that was sixty-five percent white and thirty-five percent black.”\textsuperscript{380} He went on to state, “‘As I campaigned across the district, it became clearer and clearer that no one person could eradicate the ‘race consciousness’ that existed in the very fabric of people’s daily lives.’”\textsuperscript{381} As recently as 1990, a white

\textsuperscript{374} Id.
\textsuperscript{375} Id. In some cases the African-American candidate for all practical purposes ran unopposed, and in others two white candidates ran for three seats. Id. at 60 n.29.
\textsuperscript{376} Glasser, supra note 24.
\textsuperscript{377} Id.
\textsuperscript{379} Id. Additionally, in 1984 African-Americans held 9\% of the larger city council seats, 7.3\% of county commission seats, and 4\% of the sheriff’s offices. Id.
\textsuperscript{381} Id. Spaulding lost the election with 48\% of the vote. Melvin Watt, the current representative from the disputed district said at the hearings that he was certain many African-Americans would have “‘ably served in Congress but for the fact that their skins happened to be black.’” Id. Watt added, “‘I don’t believe I could have won in [a district that was 23\% African-American]. I certainly hope [such as thing could happen] sometime during the life of my children.” Tim Curran, Chair of Civil Rights Panel Attacks Court’s Shaw Decision on Race-Based Redistricting,
candidate defeated an African-American in an election for a United States Senate seat. Thus, African-Americans would have had little difficulty in meeting prongs two and three of the Thornburg test.

If the district was never created at all, and African-Americans brought suit, the only real issue would have been whether the African-American voters could have shown they were "sufficiently large and geographically compact to constitute a majority in a single-member district." In Thornburg, the Court did not expressly define what this condition meant. However, several lower court decisions have shed light on the issue. Most courts agree that a group must first show that its voting age population is sufficiently large to constitute a majority in a district. Since the African-American voting population in the disputed Twelfth District is 53.34%, this first requirement would have easily been met. For obvious reasons, showing the African-American population is geographically compact would present a greater challenge. The Appellants in Shaw...
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contended that the bizarre shape of the Twelfth District is evidence that the African-American population in North Carolina is too widely dispersed to support a geographically compact district. Nevertheless, according to at least one expert, before Shaw, the courts generally held that, "if the plaintiffs are able to draw a (contiguous) plan in which they comprise a majority in at least one district, then they have met the first prong [of the Thornburg test], regardless of the shape of the district." Most discussions of compactness are found in district court opinions, and before Shaw, a common theme in most of them was that the shape of the district was not significant as long as the district, "maintains a natural sense of community." Despite its odd shape, North Carolina's twelfth district was fully contiguous, and there was no indication that the majority of its constituents did not consider themselves part of the same community. Further, as two dissenters in Shaw pointed out and the majority conceded, "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts." Therefore, although the Shaw majority devotes much of its argument to a discussion of the "bizarre" shape of the district, this fact alone is of no constitutional significance.

Considering the above facts, it is quite possible that if the state legislature had never created a second minority-majority district, under Thornburg, the Court would have reached the conclusion that racial polarization exists in North Carolina. Further, the Court may have held that the creation of an unusually-shaped district was necessary to remedy this problem. Of course, it is even more possible that the Court would have simply ordered the creation of a second district somewhere in the state, without specifying a particular

389. Grofman, supra note 364, at 64.
390. Id. at 64-65 (citing East Jefferson Coalition for Leadership and Dev. v. Parish of Jefferson, 691 F. Supp. 991, 1007 (E.D. La. 1988), aff'd, 926 F.2d 487 (5th Cir. 1991)); see also Dillard v. Baldwin County Bd. of Educ., 686 F. Supp. 1459, 1465 (N.D. Ala. 1988) (stating that "by compactness, Thornburg does not mean that a proposed district must meet, or attempt to achieve, some aesthetic absolute, such as symmetry or attractiveness"); Neal v. Coleburn, 689 F. Supp. 1426, 1437 (E.D. Va. 1988) (holding the majority-minority districts at issue were, "not unreasonably irregular in shape, given the population dispersal within the County and the need to create majority black districts").
391. Shaw, 113 S. Ct. at 2833 app.
392. Id. at 2841 (White, J., dissenting) (citing Gaffney v. Cummings, 412 U.S. 735, 752 n.18 (1973)); accord id. at 2843 (Stevens, J., dissenting).
393. Id. at 2825, 2831.
shape or location. On remand, the district court had the option of deciding this way. It is clear that a geographically compact district could be created in the south-central to southeastern part of the state. Since there was a good chance the state legislature would have had to draw a second majority-African-American district even if the current one was never created, one must wonder why the location or appearance of the district makes so much difference. It is too easy to say there is something inherently improper with a district that appears "bizarre." Similar to the way most congressional districts throughout the country are currently, and have historically been drawn, none of the congressional districts in North Carolina are even close to perfect squares. Undoubtedly, political reasons account for the shape of many of these districts, and it is illogical to hold that a different standard should apply to these districts than to race-based ones.

394. The Attorney General does not have the statutory authority to mandate a particular redistricting plan, and it is also unlikely that the Court would order the enactment of a specific plan. Brief for the state Appellees at 9 n.9, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357). In Voinovich, the Court stated:

federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. But that does not mean that the State's powers are similarly limited. Quite the opposite is true: federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place.


395. Instead, on remand the district court simply held that although the district is considered a racial gerrymander under Shaw, the redistricting plan is not unconstitutional, "because it is narrowly tailored to further the state's compelling interest in complying with the Voting Rights Act." Shaw v. Hunt, 861 F. Supp. 408, 417 (E.D.N.C. 1994).

396. In fact, when the original state redistricting plan was rejected by the Attorney General, it was suggested that a second African-American majority district could have been created in the south-central to southeastern part of the state, instead of in the north-central region where the unusually-shaped district was actually drawn. Letter from John R. Dunne, Assistant Attorney General of the United States to Tiare B. Smiley, Esq., Special Deputy Attorney General of North Carolina, in Brief for the State Appellees at 16a, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357). The Attorney General believed that the state legislature could have created a district in this area that would have appeared no more unusual than other districts in the plan. Id. Further, several groups including the National Association for the Advancement of Colored People (NAACP) and American Civil Liberties Union (ACLU), submitted feasible plans for the creation of a second district in this area. Id. at 17a.

397. See Shaw, 113 S. Ct. at 2848 (Souter, J., dissenting) ("The Court offers no adequate justification for treating the narrow category of bizarrely shaped district claims differently from other districting claims.").

398. See id. at 2833 app. (displaying a map of the 1991 North Carolina congressional district plan).

399. As phrased by Justice Stevens, "[i]f it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish-Americans,
2. The Court’s Failure to Insist on a Discriminatory Intent and Effect

When analyzing any case involving voting rights, one must examine the legislative intent of Congress in passing the Voting Rights Act, and in particular, the 1982 Amendments. The Voting Rights Act was clearly designed to combat pervasive voting rights discrimination against African-Americans in this country.\footnote{364 U.S. 339, 340 (1960).} The “uncouth twenty-eight-sided” gerrymander at issue in Gomillion v. Lightfoot,\footnote{See supra text accompanying notes 56-77 (discussing the Voting Rights Act and Amendments); see also South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (stating that the Act was designed to eliminate discrimination against minority voters).} is only one example of the blatant attempts made by white controlled legislatures to fence African-Americans out of the voting process.\footnote{See supra notes 124-30 and accompanying text (describing other cases in which white-controlled legislatures have attempted to fence out African-American voters).} Thus, the majority’s statement in Shaw that, “[i]t is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past,”\footnote{Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993).} is misleading and irrelevant. In Gomillion, the Court did not state that the shape of the gerrymander was of particular significance.\footnote{In fact, until Shaw, the Court has never held that voting districts must look a certain way. Gaffney v. Cummings, 412 U.S. 735, 752 n.18 (1973) (citing White v. Weiser, 412 U.S. 783 (1973); Wright v. Rockefeller, 376 U.S. 52, 54 (1964)). There are many valid reasons for why districts may appear unusual. For example, it is often necessary to avoid drawing boundaries lines in the middle of natural geographic obstacles such as lakes, rivers and mountains, or to draw them around large tracts of land where no one resides such as cemeteries and shopping malls. At best, strangely shaped districts are only, “a signal that something may be amiss.” Karcher v. Daggett, 462 U.S. 725, 758 (1983); see Grofman, Lombardi, supra note 399, at 1258 n.83 (discussing why “ill-compactness” in voting districts is not per se undesirable).} What made the gerrymander egregious was that it, “fenc[ed] Negro citizens out of...
town so as to deprive them of their pre-existing municipal vote.”

In *Shaw*, the white voters were certainly not “fenced out,” and a discriminatory intent does not exist where, as here, the majority clearly acts to benefit the minority.

According to *United Jewish Organizations, Inc. v. Carey*, a state such as North Carolina, which is subject to the Voting Rights Act, is not prevented from “deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with Section 5.” In a later opinion where she discussed the *UJO* case, Justice O'Connor, the author of the *Shaw* opinion, stated that states have a “constitutional duty to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination.” The fact pattern in *UJO* was remarkably similar to the situation in *Shaw*. In *UJO*, the Attorney General believed New York's original redistricting plan did not pass muster under the Act. In response, the state legislature created several majority-minority districts with higher percentages of non-white majorities than under the original plan. This action split a group of white voters between two districts, thereby diluting their voting strength. In ruling against the white voters, the Court stated that even in the absence of its authority under the Voting Rights Act, the state was free to make any redistricting changes that did not violate the Constitution. The Court held that the plaintiffs could not prove a violation of the Fourteenth Amendment because they

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406. Discrimination is defined as, “[u]nfair treatment or denial of normal privileges because of [a group's] race, age, sex, nationality or religion.” *Black's Law Dictionary*, supra note 44, at 467. This definition is consistent with how the Court has interpreted the term. See *Rogers v. Lodge*, 458 U.S. 613, 616-17 (1982) (discussing how certain voting schemes have the effect of discriminating against minorities by diluting their voting strength); *White v. Regester*, 412 U.S. 755 (1973) (holding that a redistricting plan was being used by the majority to invidiously discriminate against minority racial groups); see also *Shaw*, 113 S. Ct. at 2844 (Stevens, J., dissenting) (“The difference between constitutional and unconstitutional gerrymanders . . . [is] whether their purpose is to enhance the power of the group in control of the districting process at the expense of any minority group.”).

407. 430 U.S. 144 (1977) (plurality opinion).

408. *Id.* at 161.

409. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring) (emphasis in original). O'Connor also noted that prior Court rulings recognized the states' authority to voluntarily take race-conscious initiatives to comply with the law even if a specific finding of past discrimination is never made. *Id.*

410. *UJO*, 430 U.S. at 150.

411. *Id.* at 151-52.

412. *Id.* at 152.

413. *Id.* at 165.
could not show that the scheme was enacted with the intent, or had the effect of, discriminating against white voters. 414

The majority in Shaw conceded that race-conscious redistricting is not always unconstitutional. 415 They never purported to overrule UJO, or implied that its reasoning was invalid in any way. 416 Thus, the only possible way the white plaintiffs in the Shaw case should have been able to successfully challenge the redistricting scheme is if they could specifically prove both a discriminatory intent and effect under the traditional Fourteenth Amendment analysis. Instead of requiring such a showing, however, the Shaw majority chose to remove this burden from the plaintiffs by creating an entirely new cause of action where plaintiffs can win an Equal Protection suit by merely showing the plan “rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race.” 417

The Court’s holding is troubling for a number of reasons. The majority’s failure to insist on a showing of discriminatory intent and effect undermines one of the purposes for having this kind of Fourteenth Amendment analysis in the first place, i.e., that the plaintiff suffered some kind of cognizable harm 418 because he was subjected to intentional differential treatment, 419 which resulted in discriminatory effects. 420 In Shaw, the state explicitly stated that it used race in a purposeful manner, but its intent was simply to comply with the mandate of the Attorney General and the Act. 421 The Court did not

414. Id. at 165-66. The Court accepted the lower court’s finding that the new plan gave whites 70% of the state assembly and state senate districts even though they only constituted 65% of the population. Id. at 166.
415. Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993). They also agreed with the dissenters that redistricting is inherently different from other kinds of race-conscious state decision-making because legislators are always aware of race when creating districts, just as they are aware of many other demographic factors. Id. at 2826.
416. See id. at 2834 (White, J., dissenting) (“The Court today chooses not to overrule, but rather to sidestep, UJO.”). In fact, the Court cited UJO for the proposition that a state can create majority-minority districts to provide fair representation for minority groups, and to prevent the majority from repeatedly outvoting them. Id. at 2829.
417. Id. at 2830.
418. Id. at 2834 (White, J., dissenting) (stating that the plaintiffs should not prevail because they have not stated a cognizable injury).
419. See, e.g., Washington v. Davis, 426 U.S. 229, 246 (1976) (stating that even though African-Americans failed police examinations four times as frequently as whites, this was not enough to hold that they suffered from intentional discrimination).
420. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (holding that although a statute was neutral on its face, it was applied in a racially discriminatory way).
find this to be a constitutionally invidious intent in *UJO*,\(^{422}\) nor does it logically constitute such an intent.\(^{423}\) "[A]wareness that a decision will have a specific impact on a protected class . . . does not by itself constitute the invidious intent necessary to make out an equal protection claim."\(^{424}\) This is not a case such as *Strauder v. West Virginia* where the Court struck down a law enacted by the white legislature which harmed all African-Americans by preventing them from serving on juries.\(^{425}\) Here, common sense dictates that the white-majority North Carolina legislature did not act with "hatred of or condescension toward"\(^{426}\) white voters.\(^{427}\)

In *Beer v. United States*,\(^{428}\) the Court held that before a redistricting plan can obtain preclearance from the Attorney General, the state must demonstrate that the plan will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."\(^{429}\) As long as minority representation is not reduced under the new plan there is no violation of the Act.\(^{430}\) Thus, the Act requires state legislatures to consider race when creating voting districts, because if they fail to, they may create districts which dilute minority voting power — a result prohibited by *Thornburg*.\(^{431}\)

Even if the plaintiffs could have succeeded in arguing that the legislature's race conscious intent constitutes invidious intent,\(^{432}\) they would have faced an almost impossible challenge in proving a discriminatory effect.\(^{433}\) In *UJO*, the petitioners did not object to the

\(^{422}\) United Jewish Orgs., Inc. v. Carey, 430 U.S. 144, 165 (1977) (plurality opinion).

\(^{423}\) See supra notes 102-05 and accompanying text (discussing invidious intent generally).


\(^{425}\) 100 U.S. 303 (1880).


\(^{428}\) 425 U.S. 130 (1976).

\(^{429}\) Id. at 141.

\(^{430}\) O'Rourke, supra note 160, at 93.


\(^{432}\) Apparently, the Appellants in *Shaw* argued for a reinterpretation of invidious intent. Brief for the state Appellees at 27, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357).

\(^{433}\) Shaw v. Reno, 113 S. Ct. 2816, 2838 (1993) (arguing that the appellants have not alleged
effect of the revised plan on white voters. In fact, they could not have argued that they suffered from discriminatory effects, since even under the revised plan, the sixty-five percent white population would have representatives in seventy percent of the districts at issue. The Court concluded that "whites would not be under-represented relative to their share of the population." Similarly, in Shaw, under the rejected plan, the seventy-six percent white population would have had a majority in eighty-three percent of the congressional districts. Thus, the only possible discriminatory effect that Appellants could have suffered is that they were denied the "privilege" of having a better than fifty percent chance that their representative would be white. The Appellants apparently did not allege such a claim since they asserted that they had a "constitutional right to participate in a 'color-blind' electoral process." Such an allegation would have been unwise anyway, since the Court has never held that citizens have the right to vote for a "winning candidate." This is not to suggest that the Act gave minority groups a right to proportional representation. However, when a

the requisite discriminatory effects).

434. United Jewish Orgs., Inc. v. Carey, 430 U.S. 144, 166 (1977) (plurality opinion). In UJO, the petitioners argued that as members of the Hasidic Jewish population, their group voting power was diluted. Id. at 152-53. They alleged that the revised plan "would dilute the value of each plaintiff's franchise by halving its effectiveness." Id. at 152 (quoting Petitioner's Brief in United Jewish Org. v. Wilson, 377 F. Supp. 1164, 1165-66 (E.D.N.Y. 1974), aff'd 510 F.2d 512 (2d. Cir. 1975)).

435. Id. at 166.

436. Id.

437. Shaw, 113 S. Ct. at 2838 (White, J., dissenting).

438. In UJO, all seven of the districts at issue under the revised plan contained African-American populations ranging from 65-90%. UJO, 430 U.S. at 151-52. In Shaw, the district at issue was only 53.34% African-American, and thus gave white voters a much greater chance to elect a white representative than the districts approved of in UJO. Brief for the state Appellees at 24a, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357).

439. Shaw, 113 S. Ct. at 2824. It is difficult to understand the motivation in bringing the suit in the first place since the Appellant, Ruth Shaw, told reporters she voted for Melvin Watt, an African-American, in the last congressional election. Jim Morrill, 2 N.C. Citizens' Names at Center of Voting Rights Debate, CHARLOTTE OBSERVER, July 7, 1993, at A1. Of course, Shaw's ability to vote for Watt, or anyone else for that matter, was not impaired by the creation of an unusually-shaped district.

440. See Shaw, 113 S. Ct. at 2838 (White, J., dissenting) (arguing that the fact that one must sometimes face the prospect of voting for a losing candidate does not constitute discriminatory treatment); see also Brief for the state Appellees' at 36-37, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357) (citing cases which support the proposition).

441. In fact, in Thornburg v. Gingles, 478 U.S. 30 (1986), the Court stated that the Act is not violated solely because the group lacks proportional representation. Id. at 46; see Bruce E. Cain, Voting Rights and Democratic Theory: Toward a Color-Blind Society, in CONTROVERSIES IN MINORITY VOTING, supra note 35, at 261, 262-66 (discussing the arguments for and against pro-
group has had disproportionate representation in their favor for decades and would continue to under a new plan, the Court should at the very least presume that "this segment of the population is [not] being denied access to the political system."\footnote{442}

Another reason why the Court's automatic presumption of an invidious intent based on the shape of the district is troublesome is because the Court has only rarely presumed a discriminatory intent based solely on discriminatory effects.\footnote{443} For example, in \textit{Wright v. Rockefeller},\footnote{444} the Court held that a district drawn with "zigzag, tortuous lines"\footnote{445} was not sufficient evidence to infer a legislative intent to discriminate based on race.\footnote{446} The Court uses the same analysis in other contexts. In \textit{Washington v. Davis},\footnote{447} it was arguable that the fact that African-Americans failed police examinations four times more frequently than whites was a result "unexplainable on grounds other than race," and thus would not require a specific showing of discriminatory intent.\footnote{448} Nevertheless, the Court held that the disproportionate impact in that case was not enough to warrant a finding that it reflected a discriminatory purpose.\footnote{449} One of the reasons the Court did not believe a discriminatory intent existed in the \textit{Washington} case was because of the affirmative attempts made by the police department to recruit African-Americans.\footnote{450} This is analogous to \textit{Shaw}, where the state legislature, acting pursuant to the Attorney General's order, took an affirmative step to aid African-American voters by creating majority-minority districts.\footnote{451}

443. \textit{Shaw}, 113 S. Ct. at 2825. Strict scrutiny applies to those "rare statutes that, although race-neutral, are, on their face, unexplainable on grounds other than race." \textit{Id.} (quoting \textit{Arlington Heights v. Metropolitan Hous. Dev. Corp.}, 429 U.S. 252, 266 (1977)).
444. 376 U.S. 52 (1964).
445. \textit{Id.} at 59 (Douglas, J., & Goldberg, J., dissenting).
446. \textit{Id.} at 58. If the Act was never enacted, the \textit{Wright} case may have given the states wide latitude in drawing gerrymanders with the intent to ensure minorities were disproportionately underrepresented. Robert C. Smith, \textit{Liberal Jurisprudence and the Quest for Racial Representation}, 15 S.U. L. Rev. 1, 7 & n.16 (1988) (citing \textit{Wright v. Rockefeller} and \textit{Legislative Gerrymanders: The Desegregation Decisions Plus a Problem of Proof}, 72 Yale L.J. 1061 (1963)).
448. \textit{Id.} at 237 ("This disproportionate impact, standing alone and without regard to whether it indicated a discriminatory purpose, was held sufficient to establish a constitutional violation [by the appellate court].").
449. \textit{Id.} at 246.
450. \textit{Id.}
3. The Court’s New “Bizarre Shape” Standard is Unworkable and Illogical

In Shaw, the Court established a new rule whereby it can make a presumption of invidious intent based solely on the “bizarre” shape of a legislative district.452 Perhaps the new standard would have made more sense if the Court provided some objective guidelines for legislators to follow when creating districts, instead of exclusively relying on an extremely vague term like “bizarre.”453 For example, the Court could have struck down the district because it was, in the words of one commentator, “non-cognizable.”454 According to this concept, a district is non-cognizable if ordinary citizens of the district cannot easily explain where the boundaries of their district are located.455 At least this kind of standard would give legislators and the lower courts something from which to work. After Shaw, officials will undoubtedly have a very difficult time determining when a particular district is unconstitutionally “bizarre.”456 No one would seriously argue that the Shaw Court decreed that all districts must resemble squares; yet, one must wonder how non-cubical a district must appear before it is labeled “bizarre.” The North Carolina congressional districts illustrate the difficulty in making this determination.457 Although none of the other districts are as “snake-like” as

452. Id. at 2824-25.
453. According to the Court, when deciding if an unconstitutional racial gerrymander exists, appearances make all the difference. Id. at 2827. The Court stated that an unconstitutional gerrymander is one that is “dramatically irregular” and contains people “who may have little in common with one another but the color of their skin.” Id.
454. See Grofman, Lombardi, supra note 399, at 1261. This same commentator filed an affidavit in Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992) where he offered the “non-cognizability” of the North Carolina district as a rationale for invalidating it. Id.
455. Id. at 1262. For example, if citizens of a district could not easily describe where their district’s boundaries are because the lines do not follow logical patterns along major geographical or political referents, the district could be characterized as “non-cognizable.” Id. at 1261-62.
456. Even the majority opinion acknowledges this fact. Shaw, 113 S. Ct. at 2826. Although the dissenters in Wright v. Rockefeller, 376 U.S. 52, 59 (1964), described the district in that case as having “zigzag, tortuous lines,” the majority in Shaw stated that the boundaries in that case, “were not so bizarre as to permit of no other conclusion [than that they were drawn exclusively along racial lines].” Id. According to the Court, “Wright illustrates the difficulty of determining from the face [of a districting plan] that it purposefully distinguishes between voters on the basis of race.” Id. Further, the Court stated that the petitioners in UJO could not have argued that the district in that case was unconstitutionally “irregular.” Id. at 2829.
the one at issue in *Shaw*, some are arguably just as unusual.\(^4^{458}\) One expert believes that the only way to reconcile the *Shaw* decision with Court precedents is by interpreting the case as creating a very narrow rule where only the most unusual districts are subject to constitutional attack.\(^4^{459}\)

Another problem with the Court's new test is its use of the words "segregation"\(^4^{460}\) and "political apartheid"\(^4^{461}\) to describe the district in *Shaw*. These terms were obviously used more for their emotional value, rather than for any guidance they might provide in analyzing other gerrymanders.\(^4^{462}\) Nevertheless, "segregation" has a specific legal meaning,\(^4^{463}\) and the Court should avoid using it in such a sloppy and inaccurate way. The majority cited *Gomillion v. Lightfoot*,\(^4^{464}\) and stated that the gerrymander in that case effectively "segregated" all of the African-American voters by excluding them from the city limits.\(^4^{465}\) The Court implies that the same thing took place in *Shaw*, except this time it was the white voters who were segregated out of an exclusively African-American district.\(^4^{466}\) Nothing was further from the truth. The district was 45.21% white\(^4^{467}\) and

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\(^4^{458}\) *Shaw*, 113 S. Ct. at 2833 app. For example, by examining a map of North Carolina's congressional districts, one notices that its Second District is almost as long as the "snake-like" 12th District at issue in *Shaw*, only "fatter," the Seventh District would actually resemble a longer snake than the 12th if stretched out, the Third District resembles a weird five-appendage beast, and the 11th District has a gaping hole in the Eastern half of it which divides five counties. "[C]ontorted districts are the rule, not the exception, in North Carolina's congressional redistricting plan." *Brief Amicus Curiae of the Republican National Committee, in Support of Appellants* at 13, *Shaw v. Reno*, 113 S. Ct. 2816 (1993). It is likely that North Carolina gerrymandered the state's congressional districts to protect the incumbents. In 1992, all the white-majority districts in North Carolina did, in fact, reelect incumbents. *Shaw*, 113 S. Ct. at 2833 n.10 (citing CAPITOL DIRECTORY. Donnald K. Anderson, Clerk of the House of Representatives (Jan. 3, 1993)); see Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry Into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652, 653 & n.10 (1993) (stating that the "ugly" Seventh and Fifth Districts were designed to ensure reelection of incumbents).

\(^4^{459}\) Grofman, *High Court Ruling*, supra note 382, at 19. Grofman stated: "I expect few (if any) challenges to minority districts under the "'so bizarre'" test. *Id.*

\(^4^{460}\) *Shaw*, 113 S. Ct. at 2830.

\(^4^{461}\) *Id.* at 2827.

\(^4^{462}\) *Id.* at 2840 (White, J., dissenting). According to White, "[p]art of the explanation for the majority's approach has to do, perhaps, with the emotions stirred by words such as "'segregation'" and "'political apartheid.'" *Id.*

\(^4^{463}\) Segregation is defined as a "practice of separating people on the basis of color . . . ." *BLACK'S LAW DICTIONARY*. * supra* note 44, at 1358.


\(^4^{465}\) *Shaw*, 113 S. Ct. at 2825.

\(^4^{466}\) *Id.*

was described as one of the most integrated in North Carolina.\textsuperscript{468} This is in no way analogous to the kind of segregation the Court proscribed in cases such as \textit{Brown v. Board of Education}.\textsuperscript{469} In \textit{Brown}, the Court held that racial segregation in public schools was inherently unequal, because it "generates a feeling of inferiority as to [African-American students'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone."\textsuperscript{470} Furthermore, the law at issue in that case created a complete separation of white and African-American students.\textsuperscript{471} In stark contrast, it is almost laughable to suggest that the white plaintiffs in \textit{Shaw}, or anyone else in the state, felt "inferior" after the creation of the district.\textsuperscript{472} A better argument is that before the district was created, African-Americans may have felt a sense of inferiority since they suffered from years of state-sponsored racial discrimination,\textsuperscript{473} and were not represented in Congress by an African-American for nearly 100 years.\textsuperscript{474}

The Court believes that unusually-shaped districts are destructive, because instead of bringing communities together, such districts pull them apart.\textsuperscript{475} Ironically, just the opposite is true with regard to the district in \textit{Shaw}. The Court has held that federal courts should refrain from making attempts to cure de facto segregation.\textsuperscript{476} However, there is no reason state legislators should not consider creative
ways of eliminating de facto segregation. In Shaw, North Carolina arguably did just that when it took racially divided communities and brought them together in one congressional district. Individuals who previously may have had nothing in common were given a reason to get to know each other, cooperate, and work together to achieve common goals.\(^{477}\) The Shaw Court effectively destroyed this unique opportunity because it considers the district a threat to "our system of representative democracy."\(^{478}\)

**B. "Color-Blindness" is a Social and Legal Fiction**

If the Court had made its "bizarre-shape" test applicable to politically-based, ethnicity-based, union-member based, and other kinds of gerrymanders in addition to race-based ones, the Court's opinion may not seem so unsound.\(^{479}\) However, the Court created this test exclusively for racial-gerrymanders.\(^{480}\) The majority's rationale is that unusually-shaped racial gerrymanders reinforce stereotypes,\(^{481}\) threaten to "balkanize us into competing racial factions,"\(^{482}\) and carry us further away from the ideal of a color-blind society.\(^{483}\) Of course, it is true that in a perfect world where one's skin color truly does not matter, there would be no reason to create voting districts based on race.\(^{484}\) Unfortunately, clear racial divisions have existed

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\(^{477}\) In fact, residents of the Twelfth District already had much in common. For example, the district had the state's highest percentage of single-mother households, the highest rate of public transportation use, and the highest rate of AIDS cases. Ripley Eagles Rand, Note, *The Fancied Line: Shaw v. Reno and the Chimerical Racial Gerrymander*, 72 N.C. L. Rev. 725, 756 n.263 (1994).

\(^{478}\) *Shaw*, 113 S. Ct. at 2828.

\(^{479}\) As put by Justice Stevens in dissent, "[i]f 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 [African-Americans]." *Id.* at 2844-45 (Stevens, J., dissenting).

\(^{480}\) *Id.* ("[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny."). In the next sentence, the Court stated that a higher level of scrutiny should apply to race-based gerrymanders because of this country's history of racial discrimination in voting. *Id.*

\(^{481}\) *Id.*

\(^{482}\) *Id.* at 2832.

\(^{483}\) *Id.* According to the Court, they are also harmful because they encourage representatives to only work for the interests of their racial group, and not for their entire constituency. *Id.* at 2828. Apparently, the Appellant, Ruth Shaw, did not believe this was the case since she voted for Mel Watt, an African-American, during the last congressional election. Morrill, *supra* note 439, at A1.

\(^{484}\) If racial factors in voting truly do not matter, one must wonder why the Voting Rights Act was ever enacted, or why the Court formulated the *Thornburg* test, which requires legislators to consider race when devising redistricting plans. *See supra* text accompanying notes 138-47
in this country for centuries and continue to live on today.\textsuperscript{485} Although few would deny that we have made real advancements in the area of race-relations,\textsuperscript{486} race continues to play a major role in the political and social affairs of this country.\textsuperscript{487}

1. Stereotypes and Realities in Voting

In Shaw, the Court stated that an unusually-shaped racial gerrymander, "reinforces the perception that members of the same racial group — regardless of their age, education, economic status, or the community in which the [sic] live — think alike, share the same political interests, and will prefer the same candidates at the polls."\textsuperscript{488} In the next sentence, the Court calls this perception an "impermissible racial stereotype."\textsuperscript{489} While it is of course a stereotype that members of the same racial group think alike, this is not the issue at hand. What the Court fails to acknowledge, and what has been proven through empirical studies, is that individuals tend to vote for people from their racial group\textsuperscript{490} because they under-

(discussing the Thornburg test).

\textsuperscript{485} See Aleinikoff, supra note 350 (discussing the continuing impact of racial discrimination in various American contexts including employment, housing, and higher education).


\textsuperscript{487} Bernard Grofman & Chandler Davidson, Postscript: What is the Best Route to a Color-Blind Society?, in Controversies in Minority Voting, supra note 35, at 300, 300. ("[I]n our view . . . ours is a race-conscious world in which there remains a need for race-conscious remedies . . . ."); Aleinikoff, supra note 350, at 325, 330 (claiming that racism "remains a social disease, one that - far from being cured - has barely been controlled"); see Nancy J. King, Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions, 92 Mich. L. Rev. 63, 67-105 (1993) (arguing that racial discrimination can have a real and measurable affect on juror decisions); Simpson, supra note 382, at 397 (arguing that the use of the primary runoff can be used to effectively restrain African-American political influence).


\textsuperscript{489} Id. The Court goes on to state that "a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract." Id. In reality, majority-minority districts are seemingly created because they acknowledge, rather than necessarily alleviate, the unfortunate phenomenon of racial bloc voting.

\textsuperscript{490} Aleinikoff, supra note 350, at 348. According to a recent survey, one out of every seven whites openly stated that they would not vote for an African-American. Id. (citing Tom W. Smith, National Opinion Research Center, University of Chicago, Ethnic Images, GSS Topical Report No 19 at 4 (1990)). According to another recent study, "[the] evidence points to the pervasive impact on race in American politics." Jack Citrin et al., White Reactions to Black Candidates: When Does Race Matter? 54 Pub. Op. Q. 74, 91 (1990). Extreme cases of racially polarized voting have been recorded throughout the United States. See McDonald, supra note 80, at 75-76. It is possible that racial polarization is even more severe than the studies indicate because voters are possibly reluctant to reveal their racist voting patterns to survey takers. See Charles A. Bullock, III & Michael A. Maggipinto, Survey Research and Racially Polarized Voting, 33 Jurimetrics 133, 137 (1992); Steven A. Finkel et al, Race of Interviewer Effects in a
standably believe that these candidates, once elected, will better understand and strive to achieve their group's interests. Few minority voters would dispute this, although at least one commentator has argued that African-American representatives may not be as responsive to their group's interests as is commonly believed. Obviously, this is not to say that an African-American would never vote for a white, or that a white would never vote for an African-American. Furthermore, one cannot assume that just because an African-American community elected an African-American official, he is automatically "representative" of that community. These are simply generalities based on current political realities that we must acknowledge in order to make intelligent decisions concerning voting rights.

The Court is understandably troubled by the sad reality of ra-

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492. Guinier, supra note 490, at 1128-34.

493. THERNSTROM, supra note 486, at 210 (reporting rare occasions where African-American voters have supported white candidates over African-American ones); Carol M. Swain, Some Consequences of the Voting Rights Act, in CONTROVERSIES IN MINORITY VOTING, supra note 35, at 292, 293 n.20 (citing elections where African-American candidates have won with substantial white support, and where African-American voters have supported white candidates); see also supra note 298 and accompanying text (showing some white support for a few African-American officials in North Carolina).

494. Guinier, supra note 490, at 1103 n.115 ("Authentic representatives need not be black as long as the source of their authority, legitimacy, and power base is in the black community.").

495. "No matter how much we may try to hide it, race has been a significant, often crucial factor in elections throughout American history, even when opponents were of the same race, and we're not rid of it yet. Instead, we should deal with it — realistically." Clarence Page, Color is Fading in Mayoral Races, CHI. TRIB., Nov. 7, 1993, § 4, at 3.
cially polarized voting in this country, but this is no excuse for disregarding polarization as a mere "stereotype." \(^\text{496}\) After all, few would seriously dispute that other political realities in the United States are not stereotypes. For example, people who belong to a certain political party tend to vote for members of the same political party, \(^\text{497}\) individuals who live in rural communities tend to vote for candidates who live in rural communities, \(^\text{498}\) and members of ethnic groups tend to vote for representatives with whom they share the same ethnic background. \(^\text{499}\) After Shaw, these groups can continue to draw unusually-shaped gerrymanders that are even more odd-looking than the one at issue in that case, without any fear of constitutional challenge. \(^\text{500}\) The Court fails to explain why racially-based gerrymanders pose a greater threat to "balkanization" \(^\text{501}\) of our society than ethnicity-based or politically-based gerrymandering schemes.

Obviously, the most persuasive evidence that we are not dealing with stereotypes is the fact that out of the twenty-six new majority-minority congressional districts created after the 1990 Census, \(^\text{502}\) twenty-five districts elected African-American representatives. \(^\text{503}\) Both majority-minority districts in North Carolina elected African-American congressmen. \(^\text{504}\) Regardless of how one feels about de facto segregation, the reason majority-minority districts are usually


\(^{498}\) Richard Morrill, A Geographer’s Perspective, in Political Gerrymandering and the Courts supra note 497, at 212, 216 ("At the broadest scale there is a strong historic divergence of identity between an urban core (central city), suburbs, and rural small town areas, because they are usually different jurisdictions, because they have different needs and problems, and because they attract people with different values and preferences.").

\(^{499}\) See, e.g., United Jewish Orgs., Inc. v. Carey, 430 U.S. 144, 152 (1977) (plurality opinion) (involving Hasidic Jewish community members bringing suit after their district was split in half by a redistricting plan).

\(^{500}\) See Shaw, 113 S. Ct. at 2828 (stating that racial and political gerrymanders are subject to different constitutional scrutiny).

\(^{501}\) Id. at 2832.

\(^{502}\) Biskupic, supra note 89, at A4.


\(^{504}\) Frank McCoy, Racial Politics and the High Court, Black Enter., Nov. 1993, at 25.
easy to create is because ethnic and racial groups tend to congregate in the same areas.\textsuperscript{605} This is particularly true in urban settings like Chicago.\textsuperscript{606} Some experts believe districts, like Illinois' Fourth Congressional District in Chicago, which are located entirely within urban areas, could successfully defend a constitutional challenge.\textsuperscript{607} The experts note that although these districts may, in the words of the Court, "contain people who belong to the same race," the people are usually not "widely separated by geographic and political boundaries."\textsuperscript{608} If a lower court rules that Shaw does not apply to unusually-shaped districts in urban areas, and the Court grants certiorari, the members of such districts can only hope the Justices acknowledge de facto racial segregation in major cities instead of cavalierly calling this phenomenon just another "stereotype."

If polarized voting is indeed merely a "stereotype," the Court must explain how a plaintiff is now supposed to prove polarized voting under the Thornburg test.\textsuperscript{609} The only possible way to reconcile Shaw with Thornburg is to interpret the former as stating that evidence of polarized voting is an impermissible stereotype if the case involves an unusually-shaped gerrymander, but is a vital necessity if a minority group seeks to prove a districting plan dilutes its voting.

\textsuperscript{505} Joe T. Darden, Accessibility to Housing: Differential Residential Segregation for Blacks, Hispanics, American Indians, and Asians, in RACE, ETHNICITY, \\& MINORITY HOUSING IN THE UNITED STATES 107, 124 (Jamshid A. Momeni ed., 1986); see Angela D. Chatman, Author Says City Remains Divided, THE CLEVELAND PLAIN DEALER, Sept. 28, 1993, at 6F (finding that African-Americans are more segregated than Latinos, Asians, or Native-Americans). After extensively researching 38 major U.S. cities, Nancy A. Denton concluded that "'[b]lacks are segregated twice as much as Hispanics.'" Id. (quoting Nancy A. Denton in a presentation given to Countrywide Financial Institutions Advisory Committee). Demographic researchers have found that "'[t]here was little, if any, reduction in residential segregation of blacks during the 1980s.'" Bob Dart, Study Foresees Dollar Dividing Blacks, THE ATLANTA J. \\& CONST., Aug. 9, 1991, at A2 (quoting Kelvin Pollard, author of the report: African-Americans in the 1990s, prepared by POPULATION REFERENCE BUREAU, INC.).

\textsuperscript{506} See Mark W. Zimmerman, Note, Opening the Door to Race-Based Real Estate Marketing: South-Suburban Housing Center v. Greater South Suburban Board of Realtors, 41 DePaul L. Rev. 1271, 1271 n.2 (1992) (citing John E. Farley, Segregation in 1980: How Segregated Are America's Metropolitan Areas?, in DIVIDED NEIGHBORHOODS, CHANGING PATTERNS OF RACIAL SEGREGATION 100 (Gary A. Tobin ed., 1987) for the proposition that segregation levels in Chicago remained constant between the years 1970-1980). The president of a fair-housing agency recently stated that "Chicago is still one of the most segregated cities in the country." Elizabeth Birge, More Attention to Segregation Urged, CHI. TRIB., May 14, 1993, at 3.

\textsuperscript{507} Glasser, supra note 24.

\textsuperscript{508} Id. Representative Luiz Gutierrez of the 4th District said "'[m]y district doesn't run 160 miles. It takes 60 minutes to go to any part and that is in the worst of Chicago traffic.'" Id. (quoting Representative Gutierrez).

\textsuperscript{509} See supra notes 171-76 and accompanying text (discussing the Thornburg test and its requirement that minority plaintiffs provide evidence of racially polarized voting).
strength.\textsuperscript{510} It is improbable that the Shaw majority is proclaiming that they will never recognize the existence of racially polarized voting, as they never questioned the validity of the Thornburg Court's acknowledgement of this social phenomenon.\textsuperscript{511} Nevertheless, the Court conceivably will now require minority plaintiffs to overcome the presumption that racially polarized voting is a stereotype in order to prevail under the Thornburg test, thereby increasing the standard of proof. Some scholars criticized the Thornburg test precisely because the standard of proving minority vote dilution was potentially too easy to meet.\textsuperscript{512}


The Shaw majority asserted in dictum that, "racial classifications of any sort pose the risk of lasting harm to our society."\textsuperscript{513} Apparently, this risk was not present in the dozens of prior cases where the Court approved of racial classifications, particularly in the affirmative action and jury selection areas.\textsuperscript{514} For example, in the most recent affirmative action case, Metro Broadcasting, Inc. v. FCC,\textsuperscript{515} the Court allowed the Federal Communications Commission (FCC) to consider minority ownership as one of several factors when the FCC awards radio licenses.\textsuperscript{516} The Court did not believe that the FCC's policy of encouraging diversity fostered an imper-

\textsuperscript{510} As phrased by Justice Stevens in dissent, "citizens and legislators . . . will no doubt be confused by the Court's requirement of evidence in one type of case that the Constitution now prevents reliance on in another." Shaw v. Reno, 113 S. Ct. 2816, 2844 n.3. (1993) (Stevens, J., dissenting). An interesting dilemma will occur if a minority group seeks to prove an oddly-shaped white-majority district dilutes the minority group's voting strength. Should the group bring forth evidence of racial polarization in the hope of meeting the Thornburg test, or should it argue that the district is "bizarrely-shaped" enough to warrant a finding that it fosters impermissible racial stereotypes? It would probably have to do both due to the difficulty in determining in advance whether a district is unconstitutionally unusually-shaped. See supra notes 452-59 and accompanying text (discussing the difficulty in determining what constitutes a "bizarrely-shaped" district).

\textsuperscript{511} Thornburg v. Gingles, 478 U.S. 30, 52 (1986).

\textsuperscript{512} See THERNSTROM, supra note 486, at 222-23. According to Thernstrom, it is "possible to condemn a particular method of election even though it has permitted considerable electoral success for minority candidates. . . . A multimember district in which the majority of whites voted differently from the majority of blacks is . . . suspect even if blacks are winning in proportion to their numbers." Id.


\textsuperscript{514} See supra notes 192-243 and accompanying text (discussing racial classifications in some of the Court's affirmative action and jury selection cases).

\textsuperscript{515} 110 S. Ct. 2997 (1990); see supra notes 206-09 and accompanying text (discussing the facts and holding of Metro Broadcasting).

\textsuperscript{516} Metro Broadcasting, 110 S. Ct. at 3004-09.
missible stereotype. On the contrary, the Court reasonably believed that minority-owned radio stations would tend to produce programs that generally appeal to minority audiences, and represent their point of view. The Court held that the FCC's policies served to achieve the important governmental goal of increasing broadcast diversity. Perhaps the Shaw Court believes the goal of increasing broadcast diversity is more important than achieving diversity in Congressional legislators.

In a previous affirmative action case, Fullilove v. Klutznick, the Court held that Congress could mandate that ten percent of the federal funds granted for local public works projects had to be allocated to minority business enterprises (MBE's). Both the Metro Broadcasting and Fullilove cases are significant to Shaw, because they demonstrate that the Court deals with race-conscious remedial measures instituted by Congress in a very deferential manner. This is in sharp contrast to cases such as City of Richmond v. J.A. Croson Co., and Wygant v. Jackson Board of Education, where the Court invalidated affirmative action programs instituted by local authorities. One reason a higher level of deference is

517. The Court stated that, "[t]he judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping." Id. at 3016.
518. See id. at 3003 ("Acute underrepresentation of minorities among the owners of broadcast properties is troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his or her audience." (quoting FCC MINORITY OWNERSHIP TASK FORCE, REPORT ON MINORITY OWNERSHIP IN BROADCASTING 1 (1978)).
519. See id. at 3004 ("[W]e are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public." (quoting Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 980-81 (1978)).
520. Id. at 3028.
521. 448 U.S. 448 (1980); see supra notes 196-200 and accompanying text (discussing the facts and holding of Fullilove).
522. Fullilove, 448 U.S. at 453-54, 492.
523. Metro Broadcasting, 110 S. Ct. at 3008 ("We hold that benign race-conscious measures mandated by Congress — even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination — are constitutionally permissible to the extent that they serve important governmental objectives . . . ."); Fullilove, 448 U.S. at 472 ("[W]e are bound to approach our task with appropriate deference to the Congress, a coequal branch . . . .").
524. 488 U.S. 469 (1989) (plurality opinion); see supra notes 109-11 and accompanying text (discussing the facts and holding of Croson).
525. 476 U.S. 267 (1986) (plurality opinion); see supra notes 201-05 and accompanying text (discussing the facts and holding of Wygant).
526. Croson, 488 U.S. at 477, 511 (striking down a city ordinance which required prime contractors that received municipal contracts to subcontract at least 30% of the business to MBEs); Wygant, 476 U.S. at 269-71, 273 (striking down the policy of a public school board of providing
given to Congress is because of its constitutional power to "provide for the . . . general Welfare of the United States," and "to enforce, by appropriate legislation," the equal protection guarantee of the Fourteenth Amendment. A related, and perhaps more practical reason, is that Congress is in a better position than local authorities to determine whether and when legislation is needed to correct situations which threaten basic principles of equality. "Congress as a national legislature . . . stands above factional politics," and presents less danger of oppression from political factions than smaller political units. Thus, Congress can remedy societal discrimination even when they have not made specific findings of discrimination.

One could easily argue that by enacting the Voting Rights Act, Congress was attempting to remedy societal discrimination in voting rights, and that North Carolina and the Attorney General were simply acting pursuant to this authority. Similar to the Congressional findings of prior discrimination in Metro Broadcasting and Fullilove before enacting the Voting Rights Act, Congress found a long and pervasive history of voting rights discrimination in the United States. The fact that extensive racially polarized voting exists in North Carolina is strong evidence that remedial measures

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528. Id. amend XIV, & 5.
530. See Croson, 488 U.S. at 490-91 (discussing when Congress may exercise its power under the Fourteenth Amendment); see also William P. Langdale, III, Metro Broadcasting, Inc. v. FCC: The Constitutionality of the FCC's Use of Racial Classifications, 25 GA. L. REV. 535, 554-65 (1991) (discussing that the Court gives greater deference to Congress in enacting race-based measures, as opposed to state and local political units).
531. Metro Broadcasting, 110 S. Ct. at 3009.
532. Id.
533. Id.
534. Id. at 3009-10. Congress found that racial and ethnic discrimination in mass media contributed to severe underrepresentation of minorities in this field. Id.
535. Fullilove v. Klutznick, 448 U.S. 448, 475-76 (1980). Congress found that MBEs were given disproportionately less public contracting opportunities due to racial and ethnic discrimination. Id.
536. See supra notes 56-59 and accompanying text (discussing the findings of racial discrimination in voting rights which led to the passage of the Voting Rights Act).
are still necessary to rectify the effects of this discrimination. By giving the Attorney General the authority to reject redistricting plans which may “deny or abridge the right to vote on account of race or color” under section 5 of the Act, one could argue that Congress effectively mandated that states which were covered under, but not in compliance with the Act, had to implement a race-conscious remedial measure to remedy the situation. This remedy is the creation of majority-minority districts. Unlike the situation in Croson where the city acted unilaterally, the state legislature in Shaw acted in direct response to Congress's mandate through the Attorney General. By carrying this reasoning one step further, a state which is not covered by the Act, but created a majority-minority district as a race-conscious remedial measure would indeed violate the Fourteenth Amendment.

In Shaw, the Court ruled that all racial classifications demand strict scrutiny review even if they are arguably benign, supposedly because courts are incapable of determining whether a particular classification is in fact benign. The Court in Metro Broadcasting, however, seemed to establish a workable standard for making this determination. According to the Metro Broadcasting case, a judge can separate benign racial classifications from other kinds of racial classifications by carefully examining the legislative history to determine the purposes behind the measure.

Perhaps it is true that in some cases, courts will not be able to

537. See supra notes 371-83 and accompanying text (discussing evidence of racial polarization in North Carolina).
538. See supra notes 61-64 and accompanying text (discussing this provision of the Voting Rights Act).
539. “Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives.” Fullilove, 448 U.S. at 490.
540. City of Richmond v. J.A. Croson Co., 448 U.S. 469, 505 (1989) (holding in part that states and their subdivisions must specifically identify existing discrimination, which has been exacerbated by the state's own spending, in order to effectuate constitutionally valid remedial measures).
542. Id. at 2830. But see Tribe, supra note 98, at 525 (arguing that a racial classification is suspect, and thus subject to strict scrutiny, only when the classification, “denigrat[e] someone’s equal worth on racial grounds — as by reinforcing the legacy of slavery”).
determine whether a classification is actually benign due to problems such as inconsistent statements made by legislators while debating the legislation.\textsuperscript{546} Nevertheless, if North Carolina's redistricting plan does not constitute a benign form of discrimination, then there is no such thing as benign discrimination.\textsuperscript{546} The Court would have to disregard more than a decade of precedent holding that Congress, universities,\textsuperscript{547} and even private parties\textsuperscript{548} can take reasonable steps to remedy the effects of past discrimination.\textsuperscript{549}

3. \textit{Minority Voting Rights and Jury Selection: Another Analogy}

Minority voting rights cases are also comparable to jury selection cases because both involve racial classifications and "stereotypes." Ever since the case of \textit{Strauder v. West Virginia},\textsuperscript{650} the Court has taken steps to ensure that lawyers do not use peremptory challenges to dismiss jurors on the grounds of race.\textsuperscript{651} In \textit{Strauder}, the Court concluded that a statute which prohibited all African-Americans from serving on juries violated the equal protection rights of an African-American defendant\textsuperscript{652} because of the "prejudices [that] often exist against particular classes in the community, which sway the judgment of jurors."\textsuperscript{653} The potential for racial prejudice against the defendant was also the main concern in cases such as \textit{Swain v. Alabama},\textsuperscript{654} \textit{Batson v. Kentucky},\textsuperscript{655} and \textit{Vasquez v. Hillery}.\textsuperscript{656} In \textit{Vasquez v. Hillery}, the Court recognized the problematic nature of peremptory challenges and held that they must be used with caution to avoid racial bias.

\textsuperscript{545} Another reason it is often problematic to examine legislative history is because it is easily skewed with Congressmen making remarks to an empty chamber.

\textsuperscript{546} \textit{See supra} notes 418-42 and accompanying text (arguing that there was no discriminatory intent or effect in \textit{Shaw}). Justice Souter, in dissent, argued that race-conscious redistricting was not a form of discrimination at all, but rather, was one of the few areas in which the use of race in governmental decisionmaking is permissible. Shaw v. Reno, 113 S. Ct. 2816, 2848 (1993) (Souter, J., dissenting).

\textsuperscript{547} Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (opinion of Powell, J., joined by White, Brennen, Marshall and Blackmun, JJ.) (holding that race can be considered as a factor in a university admissions program).

\textsuperscript{548} United Steel Workers v. Weber, 443 U.S. 193, 209 (1979) (holding that an affirmative action plan instituted by a private employer did not violate Title VII of the 1964 Civil Rights Act).

\textsuperscript{549} The Court's first affirmative action case was Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (plurality opinion).

\textsuperscript{550} 100 U.S. 303 (1880); \textit{see supra} notes 210-11 and accompanying text (discussing the facts and holding of \textit{Strauder}).

\textsuperscript{551} \textit{See supra} notes 212-43 and accompanying text (discussing Supreme Court cases involving the use of race in peremptory challenges).

\textsuperscript{552} \textit{Strauder}, 100 U.S. at 310.

\textsuperscript{553} \textit{Id.} at 309.

quez, even though the defendant was ultimately convicted by an impartial jury, the existence of racial discrimination at the grand jury phase constituted such great potential for prejudice that the defendant's conviction had to be reversed. In *Turner v. Murray,* the Court held that because of the "unique opportunity for racial prejudice to operate but remain undetected" in capital sentencing hearings where the defendant was convicted of an interracial crime, the defendant must have an opportunity to question prospective jurors on racial prejudice.

The Court's jury selection cases clearly illustrate that it has accepted the reality that, "conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials." Until recently, the Court was not concerned that any of its decisions in the jury selection area might foster stereotypes about how jurors of one race perceive defendants of a different race. On the contrary, the cases clearly indicated that the Court was willing to acknowledge that racial prejudice by jurors can compromise the fairness of a trial. If the potential for juror bias is only a stereotype, then there was no reason for the Court to rule the way it did in *Batson.*

Further, no reason would exist for prosecutors to use their peremptory challenges to exclude all prospective jurors who are of the same race as the defendant. Nevertheless, according to Chief Justice Burger, unexplained peremptory challenges are appropriate precisely because they allow lawyers to covertly rely on stereotypical assumptions about how prospective juri-
rors will decide a case. Thus, although the Shaw majority is opposed to relying on stereotypes in minority voting cases, similar stereotypes play a major role in the Court’s jury selection jurisprudence.

In recent jury selection cases such as Powers v. Ohio, the Court seems to place a great deal of emphasis on the “stigma or dishonor” attached to excluded jurors. In Georgia v. McCollum, the Court went so far as to say that “[r]egardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same — in all cases, the juror is subjected to open and public racial discrimination.” What the Court has failed to emphasize in these recent cases is that the greatest danger in excluding members of certain racial groups from a jury is that it may subject the defendant to a trial by a biased jury. Few would deny that the excluded juror may suffer stigmatic and emotional harm, but the main concern is the rights of the defendant. After all, it is the defendant who could face penalties involving fines, imprisonment, and possibly even death. It is illogical to conclude, as the Court did in Powers, that a defendant will challenge a race-based exclusion of a juror because of a burning desire to maintain “the integrity of the judicial process.”

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565. Id. at 121 (Burger, C.J., dissenting) (citing Barbara A. Babcock, Voir Dire: Preserving “Its Wonderful Power,” 27 STAN. L. REV. 545 (1975)).
567. 499 U.S. 400 (1991); see supra notes 232-37 and accompanying text (discussing the facts and holding Powers).
568. “[T]he assumption that no stigma or dishonor attaches to the excluded juror] contravenes accepted equal protection principles.” Powers, 499 U.S. at 410; see also Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2082 (1991) (“[D]iscrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial.”).
569. 112 S. Ct. 2348 (1992); see supra notes 238-43 and accompanying text (discussing the facts and holding of McCollum).
570. McCollum, 112 S. Ct. at 2353.
571. See, e.g., Batson v. Kentucky, 476 U.S. 79, 86 (1986) (stating that discrimination of jurors based on race violates the defendant’s equal protection rights). Similarly in Taylor v. Louisiana, 419 U.S. 522 (1975), the Court held that a statute which allowed women to serve as jurors only if they volunteered violated a defendant’s right to “a jury drawn from a fair cross section of the community.” Id. at 530.
573. Powers, 499 U.S. at 414 (citing Rose v. Mitchell, 443 U.S. 545, 556 (1979)).
an action is the belief that a jury which consisted of the excluded jurors would have treated the defendant more fairly than the jury that ultimately convicted him.574

Until 1991, the Court accepted this belief as a reality.575 That jurors would decide a case unfairly because of a defendant's race is disturbing to consider,576 but recent events illustrate that this belief is not unsound. For example, many commentators believed race played a major role in the two Rodney King trials,577 as well as in the trial of Detroit police officers who were convicted of the second-degree murder of an African-American,578 and in the infamous O.J. Simpson case.579

Again, one can make an analogy between jury selection and voting rights. In the same way that criminal defendants believe that jurors of their own racial group will better understand their experiences and possibly exercise more empathy toward them in the guilt and or sentencing phases of their trial,580 voters also believe that the representatives they vote for will better understand and strive to achieve their interests if they are members of the same racial group.581 Their belief is not a stereotype, but rather an acknowledgement of reality. Although the Shaw Court believes "the auto-

574. See, e.g., Susan N. Herman, Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury, 67 TUL. L. REV. 1807, 1809 (1993) (arguing that conscious and unconscious racism exists in the jury decisionmaking process); Sheri Lynn Johnson, Black Innocence and the White Jury, 83 MICH. L. REV. 1611 (1985) (arguing that there is a tendency among white juries to convict African-American defendants in situations where whites would have been acquitted); Race and the Criminal Process, 101 HARV. L. REV. 1472, 1559-60 (1988) (arguing that racially underrepresented juries pose greater risks of unfair verdicts to minority defendants).

575. Before 1991, the Court accepted the fact that by changing the racial composition of a jury, a prosecutor could change the outcome of a trial. King, supra note 487, at 67.


579. See, e.g., Douglas L. Colbert, For Simpson, a Multiracial Jury Insures Justice, N.Y. TIMES. Sept. 16, 1994, at A30 (arguing that a jury's racial makeup has historically, and continues to be of critical importance in determining whether an African-American will be found guilty).

580. See supra notes 561-66 and accompanying text (discussing evidence that jurors of a different racial group than the defendant are more likely to give the defendant an unfair trial).

581. See supra notes 490-91 and accompanying text (discussing the tendency for members of the same race group to vote for candidates who are members of the same group). When a litigant uses a peremptory challenge to exclude a juror, he is in a sense "voting" against that juror. Likewise, he is "voting" for the jurors he does not exclude.
matic invocation of race stereotypes retards [societal] progress and causes continued hurt and injury," the majority unwittingly engages in their own racial stereotyping when they state that, "racial gerrymandering . . . may balkanize us into competing racial factions." By making this statement, the Court actually recognizes the "stereotype" that African-Americans will typically vote for African-Americans and whites will typically vote for whites. If color-blindness was indeed a reality at the polls, then the particular shape of a district would be of absolutely no consequence. By the same token, if color-blindness was a reality in the courtroom, then the issue of the particular racial composition of a jury would also be moot.

4. Even if Race-Consciousness is Unwise in Other Contexts, Voting Rights Are Different

Even if one does not condone affirmative action, or holds the belief that lawyers should have the right to use peremptory challenges to exclude jurors for any reason including race, there are sound reasons for allowing legislators to consider race when creating voting districts. According to the Court, voting is a fundamental right. Affirmative action cases usually involve receiving preferential employment or educational opportunities which the Court generally does not consider fundamental rights. In affirmative action situations, a non-minority who deserves an opportunity to receive higher education or employment as much as a minority may not get the opportunity he deserves, simply because of the color of his skin. Thus, innocent parties can suffer a distinct, immediate, and material harm from affirmative action programs. If a non-minority is de-
nied an opportunity he has earned, he has arguably been denied a right. In voting rights situations, few could argue that non-minorites have earned a right to elect certain officials, or that candidates have earned a right to win an election. Assuming a redistricting plan results in roughly proportional racial representation, the only individuals who can possibly suffer harm are incumbents who may find themselves in a district where their racial group does not form the majority.

Beneficiaries of affirmative action programs often suffer harm as well since people may perceive them as needing preferential treatment because they are less intelligent, less sophisticated or not as responsible as members of other groups. No comparable stigma could attach to voters in an majority-minority district even if the district “is so bizarre on its face that it is ‘unexplainable on grounds other than race.’” It is difficult to believe that constituents in racial gerrymanders are stigmatized any more than constituents in non-racial gerrymanders. Furthermore, the creation of majority-minority districts may actually reduce the amount of stigmatic injury currently experienced by minorities, because the representatives elected by those districts would serve as role models, not only to minorities, but to non-minorities as well. Non-minorities would begin to view minority representatives as strong leaders who can responsibly serve their community’s interests.

Affirmative action programs often foster resentment among non-

589. Id. Unlike the situation with educational or employment opportunities, “there are no ‘objective’ criteria for elected office.” Id.
590. See, e.g., Grofman, Lombardi, supra note 399, at 1246 (arguing that white incumbents can’t claim a “right” to keep their offices after their district is reconfigured).
592. Thernstrom, supra note 486, at 242.
594. See supra notes 497-99 and accompanying text (discussing the existence of non-racial gerrymanders).
595. See Guinier, supra note 490, at 1102-06 (stating that African-American elected officials provide both psychological and actual benefits to their constituents).
minorities and give people of all ethnic and racial backgrounds an excuse to dislike one another.\textsuperscript{596} Again, this is untrue in the voting rights context.\textsuperscript{597} When roughly proportional racial representation exists and all groups are fairly represented,\textsuperscript{598} democracy works at its best and is consistent with James Madison's vision.\textsuperscript{599} Diverse representation fosters a spirit of cooperation and allows people with different views to work together to solve problems. If it is important to have diversity and a "robust exchange of ideas" in higher education institutions,\textsuperscript{600} it is vitally important to have such an exchange in Congress.\textsuperscript{601} Under such conditions, representatives can confidently pass legislation secure in the knowledge that all group interests and points of view have been debated and considered. This should increase the likelihood of the passage of more virtuous legislation that is fair and acceptable to everyone. For example if the Senate did not have at least one African-American member, it probably would have had little insight into the resentment African-Americans feel toward the Confederate flag.\textsuperscript{602} The Senate was about to approve the use of this flag again, as it has for many years

\textsuperscript{596} "[O]ther [governmental] decisions using racial criteria characteristically occur in circumstances in which the use of race to the advantage of one person is necessarily at the obvious expense of a member of a different race." Shaw, 113 S. Ct. at 2846 (Souter, J., dissenting).

\textsuperscript{597} "To the extent that no other racial group is injured, remedying a Voting Rights Act violation does not involve preferential treatment. It involves, instead, an attempt to equalize treatment, and to provide minority voters with an effective voice in the political process." Id. at 2842-43 (White, J., dissenting) (comparing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 295 (1986) (plurality opinion)). Because the creation of majority-minority districts is much less threatening to non-minorities than affirmative action, "Congress and the federal courts have generally been more sympathetic to voting rights claims than to other types of equal protection." Grofman, Lombardi, supra note 399, at 1247.

\textsuperscript{598} In 1990, although African-Americans constituted 11.2% of the U.S. population, they held no seats in the U.S. Senate, only 5.5% of the seats in the House of Representatives, and 5.9% of the state legislative seats. Hugh Davis Graham, Voting Rights and the American Regulatory State, in Controversies in Minority Voting. supra note 35, at 177, 189. Latinos, who constitute 8% of the population, held only 2% of the U.S. Congressional seats and 1.5% of the state legislative seats. Id. In 1986, out of all the elected offices in the U.S., African-Americans held 1.3% of them. Robert C. Smith, Liberal Jurisprudence and the Quest for Racial Representation, 15 S.U. L. REV. 1, 1 (1988).

\textsuperscript{599} Guinier, supra note 490, at 1105 (citing The Federalist No. 39 (James Madison) (rejecting elitist plutocracy)). According to John Adams, legislatures should be "an exact portrait, in miniature, of the people at large." Polsby & Popper, supra note 458, at 666 (citing Letter from John Adams to John Penn (Jan. 1776), in IV Works of John Adams 203, 205 (Boston, Charles C. Little & James Brown 1851)).

\textsuperscript{600} Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312-13 (1978) (plurality opinion).

\textsuperscript{601} "[A]llowing for elected representation under racially polarized voting conditions may well facilitate the breaking down of some racial and ethnic barriers." Issacharoff, supra note 172, at 1880.

in the past, as part of an emblem of an organization called the Daughters of the Confederacy.\textsuperscript{603} However, after a speech made by the Senate's only African-American member, Carol Moseley-Braun, the Senate voted to reject it.\textsuperscript{604}

It is arguable that the absence of African-American jurors at the trial of an African-American does not necessarily mean the jurors were biased, or their verdict was unjust.\textsuperscript{606} The fact that studies have indicated that in some cases African-American jurors can be more severe on African-American defendants, adds credence to this argument.\textsuperscript{606} However, no published studies indicate that minority representatives represent their minority group's interests less effectively than non-minorities. One explanation for why African-American jurors may be more severe on African-American defendants is because victims of crime are usually of the same race as the perpetrator.\textsuperscript{607} One would have extreme difficulty arguing that an African-American elected representative shows a similar in-group bias toward his constituency.

IV. IMPACT

The heads of the Congressional Black and Hispanic Caucuses are, "seek[ing] legislation to lessen the practical harm of the decision . . . [by] drawing on the advice of legal scholars and other interested parties."\textsuperscript{608} Many believe that after the Shaw decision, several unusually-shaped congressional districts around the country are vulnerable to legal challenges.\textsuperscript{609} The Black Caucus stated, "The

\textsuperscript{603} Id.

\textsuperscript{604} Id.

\textsuperscript{605} Underwood, supra note 572, at 730.

\textsuperscript{606} See King, supra note 487, at 97 n.129 (citing studies).

\textsuperscript{607} See Irene Sege, Race, Violence Make Complex Picture, BOSTON GLOBE, Jan. 31, 1990, at 1 (stating that most victims of violent crime are attacked by someone of their own race); Calvin W. Rolark, A National Crisis, THE ETHNIC NEWSWATCH, Aug. 12, 1992, at 12 (citing NAACP report which stated that 94% of the African-Americans murdered in the U.S. were killed by African-Americans).

\textsuperscript{608} Susan B. Glasser, Court Scraps South Carolina Map, ROLL CALL, July 15, 1993, available in LEXIS, News Library, Rollcall File. This article also discusses how a federal court ordered the South Carolina legislature to eliminate its current redistricting plan and create a new one by April 1, 1994. One of the judges noted that, "the 6th district might have a problem facing scrutiny under Shaw." Id. The Sixth District was an oddly-shaped majority-minority district which elected an African-American from South Carolina to Congress for the first time in nearly a century. Id. Representative James Clyburn, who was elected by the Sixth District, has not responded as of the date of this publication to the author's request for comments on the situation in South Carolina.

\textsuperscript{609} See infra notes 613, 619 (citing examples of post-Shaw cases).
highest Court in the land has plunged into disarray the standing precedent and legal criteria used in determining the efficacy of existing district configurations."

Louisiana’s Fourth District, currently held by Cleo Fields, was challenged prior to the ruling in Shaw, and a decision was postponed pending resolution of the Shaw case. A U.S. district court subsequently struck down the district as an unconstitutional racial gerrymander, and held that the state redistricting plan did not further any compelling governmental interest. The African-American majority district was previously described as, “an ungainly looking Z” and “a stepped-on spider, roaming all over the map.” In relying primarily on Shaw, the district court found the plan was clearly the product of racial gerrymandering and rejected the state’s argument that conformity with the Voting Rights Act, proportional representation of African-Americans in Louisiana, or remedying the effects of past racial discrimination were compelling governmental interests in this case.

Similarly, Texas’s Eighteenth District formerly held by Representative Craig Washington and Twenty-Ninth currently held by Representative Gene Green (who is white), were said to “twist about wildly to cram [in] as many blacks or Hispanics as possible.” These districts, along with the Thirtieth, were also recently declared unconstitutional. As in the Louisiana case, the court determined

610. Glasser, supra note 24. But see Grofman, High Court Ruling, supra note 382, at 19 (arguing that the Shaw case probably will not result in a major attack on the Voting Rights Act).
611. As of the date of this publication, Representative Fields has not responded to the author’s request for comments on the situation in Louisiana.
617. Id. at 1205. As in Shaw, the Hays court referred to what was taking place in the district as “segregation” even though only 63% of district four’s population was African-American. Id. at 1206-07.
618. Redistricting: A State By State Look, supra note 503.
that the districts lacked conformity to traditional neutral districting criteria, and were designed primarily as majority-minority districts.620 Further, the court held that the districts were not narrowly tailored to satisfy the state's interest in avoiding Voting Rights Act liability.621

Other majority-minority districts that could be declared unconstitutional after the Shaw case include the following.622 Illinois's Fourth District currently held by Representative Luis Gutierrez is described as an "earmuff,"623 and withstood a challenge in 1991;624 Mississippi's Second District currently held by Representative Bennie Thompson is even longer than North Carolina's district and "runs snake-like along the Mississippi River, ½ the length of the State;"625 New York's Twelfth District, which is currently held by Representative Nydia Velasquez, and winds snake-like through three New York City boroughs, is believed by local experts to be immune from challenge because of the city's history of discrimination, racial bloc voting, and the fact that the Latino residents of the district are not as "widely separated" as the residents in the Shaw district;626 Florida's Third District held by Representative Corrine Brown also resembles a long snake,627 and the twenty-third held by Representative Alcee L. Hastings, resembles "a lumpy line that spans Dade, Broward and Palm Beach and branches off into an area that includes Lake Okeechobee."628 Due to the inherent difficulty

620. Id.

621. Id.

622. As of the date of this publication, none of the representatives mentioned have responded to the author's requests for comments on the situation in their respective states. Representative Kweisi Mfume, head of the Black Congressional Caucus, and Representative Jose Serrano, head of the Hispanic Congressional Caucus, also have not responded to the author's request for their comments on the Shaw case.


624. Redistricting: A State By State Look, supra note 503.

625. Redistricting: This Could Get Ugly, supra note 615. The Attorney General had approved the district before the Shaw case. Id.

626. Todd S. Purdum, New Ruling Could Affect New York Redistricting, N.Y. TIMES. June 29, 1992, at B4. Local authorities believe the Shaw case may impede the creation of a third Latino district in New York, which is what the Puerto Rican Legal Defense and Educational Fund is currently asking a federal district court judge to order. Id. The lawyer defending New York's current plan stated: "They'll have a heck of a time trying to draw a third district that doesn't look very odd." Id.


628. Erick Johnson, Supreme Court's Ruling on District Boundaries Seen as a Setback for Blacks, MIAMI TIMES. July 1, 1993, at a1. These are the first two African-Americans from Florida to serve in Congress since Reconstruction. Glasser, supra note 24.
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under Shaw in determining whether a gerrymander is unconstitutionally bizarre, it is almost impossible to make specific predictions regarding these districts. Nevertheless, whatever happens to the districts, the Shaw decision will almost certainly result in the number of minority representatives in Congress declining substantially.

The Supreme Court recently decided two voting rights cases, both brought under section 2 of the Voting Rights Act. In the first, Johnson v. De Grandy, African-Americans and Latinos claimed that the Florida legislature violated the Voting Rights Act by disproportionately representing their voting strengths in Florida’s state legislative districting plan. Predictably, the Court ruled against the minority plaintiffs. Ironically, however, the Court stated that the reason there was no violation was because “minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters’ respective shares in the voting-age population.” This reasoning seems inconsistent with the Shaw case because to give the minority groups proportional representation, the state would have to create (or at least maintain) districts based exclusively and obviously on race — an action condemned by the Shaw majority. The Shaw case is not cited in the Court’s opinion, and it is difficult to understand why “roughly proportional representation” is acceptable in this case but not in Shaw. Perhaps it is because the De Grandy districts are not quite as “bizarre” looking as the district in Shaw.

The second case is Holder v. Hall, where African-American voters in Georgia brought suit alleging that the local single-county commissioner system prevents African-Americans from holding the

629. See supra notes 452-59 and accompanying text (discussing why Shaw’s “bizarre” shape test is unworkable).

630. Two districts interpreting Shaw in almost identical factual situations reached diametrically opposite conclusions. Shaw v. Hunt, 861 F. Supp. 408, 417 (E.D.N.C. 1994) (holding a bizarrely-shaped district constitutional); Vera v. Richards, 861 F. Supp. 1304, 1345 (S.D. Tex. 1994) (holding a bizarrely-shaped district unconstitutional). These two decisions illustrate that Shaw has already resulted in a great deal of confusion, uncertainty, and inconsistency in this area of the law. See supra note 394 (discussing Hunt); see also supra notes 617-20 (discussing Vera).


632. Id. at 2651-52.

633. Id. at 2651.

634. Id. (emphasis added).


position. The county is only nineteen percent African-American, and the position has been held by whites since the office was created in 1912. Since setting up a multi-member board where minority groups would have a chance at proportional representation may "stigmatize" the groups or further "balkanize" our society, one would probably not expect the Court to order the state legislature to change the system.

The Court did in fact refuse to issue such an order, albeit on different grounds. It held that the plaintiffs could not maintain a section 2 vote dilution suit because they could not present "a reasonable alternative practice as a benchmark against which to measure the existing voting practice." The Court stated that the plaintiffs failed to show what constitutes a reasonable size for this kind of governing body, or the principles a court should use when making such a determination.

One must wonder how far the Court will extend the Shaw analysis, and what effect the case will have on the intentional consideration of political affiliation when creating congressional districts. If it is a stereotype that members of certain racial groups typically vote for representatives from that same group, is it also a stereotype that members of the same political group predictably vote for representatives from that group? If the latter is indeed a mere stereotype, one must wonder why legislatures work so hard to create districts that will represent all interests. A local example is the "carving up" of the Cook County Board of Illinois into seventeen single-member districts. The plan includes several unusually-shaped racial and political gerrymanders. If racial gerrymanders are subject to legal challenges because they reinforce stereotypes, then a similar argument could be made concerning political gerrymanders.

CONCLUSION

It is imperative that we continue to strive to end racial polarization in this country and achieve the ideal of our nation's motto: E.

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637. Id. at 2584-85.
638. Id. at 2584.
639. Id. at 2585.
640. Id. at 2586-88.
641. For a discussion of controversies surrounding the map and the interests of various groups, see Andrew Fegelman, County Board Approves Map of Voting Districts, CHI. TRIB., Sept. 22, 1993, § 1, at 6; Bonnie Miller Rubin, Cook County Board District Map is Cutting the Wrong Way, CHI. TRIB., Sept. 23, 1993, at 2.
Pluribus Unum (One out of many). We can learn from the hard lessons of others that the creation of societal divisions based on immutable characteristics can only lead to disaster, as exemplified by the extreme ethnic and religious polarization that has led to bloody civil war and even genocide in Bosnia and Rwanda. Likewise, we cannot let the ideal of color-blindness blind us from reality. Racial divisions have existed in this country for hundreds of years and continue to exist today. The fact that organizations such as the Black and Hispanic Congressional Caucuses exist is clear evidence of this fact. Although race-relations have improved, we are still in a stage of transition between the destructive race-consciousness of our past, and the color-blindness of our ideal future. When significant numbers of whites are consistently elected from African-American majority districts, and significant numbers of African-Americans are consistently elected from white-majority districts, we can finally put an end to race-conscious gerrymandering. Until that day arrives, however, fair representation through racial gerrymandering is needed during this critical time in our nation's slow but steady development. By overlooking these realities, the Supreme Court in the Shaw case inadvertently places more obstacles on the road to true color-blindness.

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642. See Roger Cohen, Cross v. Crescent; The Battle Lines Are Being Drawn In Bosnia Along Old Religious Scars, N.Y. TIMES, Sept. 17, 1992, at A14 (describing the historical religious differences which has led to the fighting in Bosnia); see also Janusz Bugajski, Dispel Balkan Myths, Demand Minority Rights, CHRISTIAN SCI. MONITOR, Apr. 27, 1993 (discussing how religious and ethnic stereotypes may have created and perpetuated Bosnian conflict).


644. Dayna Cunningham, a voting rights litigator with the NAACP Legal Defense and Educational Fund, who submitted an amicus brief in the Shaw case stated: "This notion of color-blindness is pure fiction... It doesn't exist. And what it says is we're going to ignore racism and racial prejudice. We're going to ignore the discriminatory impact of various so-called neutral practices. See no evil. And who gets hurt by that?" Lynne Duke, Advocates Say Justices Muddy Voting Rights; Decision in North Carolina Congressional Redistricting Case Criticized as "Utopianism," WASH. POST, June 30, 1993, at A8 (quoting Dayna Cunningham).