IN THE SUPREME COURT OF VIRGINIA

AT RICHMOND

Governor Mark R. Warner by substitution for Governor James S. Gilmore, III, Lt. Governor and President of the Senate John H. Hager, Acting Attorney General Randolph A. Beales, Speaker of the House of Delegates S. Vance Wilkins, Jr., Senate Majority Leader Walter A. Stosch, House Majority Leader H. Morgan Griffith, Senator Kevin G. Miller, Delegate John H. Rust, Jr., Delegate S. Chris Jones, State Board of Elections Secretary Cameron P. Quinn, all in their official capacities,

Defendants and also Appellants except for Gov. Mark R. Warner, former Lt. Gov. John H. Hager, and former Acting Atty. Gen. Beales.

RECORD NO. 021003

v.

Douglas MacArthur West, Albert Simpson, Nanalou Sauder, Ruby Tucker, Shirley N. Tyler, Shanta Reid, John Mumford, Sam Werbel, Collins Howlett, Ira J. Coleman, Maryann Coleman, Carl Waterford, Regina Harris, Herman L. Carter, Jr., Grindly Johnson, Rosa Byrd, Harold A. Brooks, Elijah Sharp, III, Herbert Coulton, Delores L. McQuinn, Richard Railey, Jr., Vincent Carpenter, Leslie Byrne, L. Louise Lucas, Yvonne Miller, Henry Marsh, Henry Maxwell, Mary Margaret Whipple, Bill Barlow, Bob Brink, C. Richard Cranwell, Viola Baskerville, Flora Crittenden, Mary T. Christian, L. Karen Darner, Jay W. DeBoer, R. Creigh Deeds, Franklin P. Hall, Robert D. Hull, Thomas M. Jackson, Jr., Jerrauld C. Jones, Kenneth R. Melvin, William P. Robinson, Jr., Marian Van Landingham, Mitchell Van Yahres, Clifton A. Woodrum,

Plaintiffs/Appellees.

ON APPEAL FROM THE CIRCUIT COURT FOR THE CITY OF SALEM

BRIEF AMICUS CURIAE OF LAWYERS FOR THE REPUBLIC IN SUPPORT OF APPELLANTS

Daniel F. Rinzel, VSB 47618
Redmon, Peyton & Braswell, L.L.P.
510 King Street, Suite 301
Alexandria, Virginia 22314
(703) 684-2000
(703) 684-5109 fax

Robert N. Hunter, Jr.
Hunter, Johnston, Elam & Benjamin
822 North Elm Street
Suite 200
Greensboro, NC 27401
(336) 273-1600

Counsel for *amicus curiae*
LAWYERS FOR THE REPUBLIC

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BRIEF AMICUS CURIAE OF LAWYERS FOR THE REPUBLIC

INTEREST OF THE AMICUS

Lawyers for the Republic is a charitable Foundation engaged in fostering education regarding our basic freedoms, encouraging protection of our electoral process and education of the public regarding the Constitution. In furtherance of those goals Lawyers for the Republic has been active in attempting to promote a fair and accurate census as well as a fair and orderly reapportionment process that recognizes the rights of all voters.

ASSIGNMENTS OF ERROR

Amicus hereby adopts the Assignments of Error set forth in the Opening Brief of Appellants.

QUESTIONS PRESENTED

Amicus hereby adopts the Questions Presented set forth in the Opening Brief of Appellants.

STATEMENT OF CASE

Amicus hereby adopts the Statement of the Case set forth in the Opening Brief of Appellants.

STATEMENT OF FACTS

Amicus hereby adopts the Statement of Facts set forth in the Opening Brief of Appellants.

ARGUMENT

The circuit court in *West v. Gilmore*, CL01-84, 2002 Va. Cir. LEXIS 37 (City of Salem Mar. 10, 2002), makes three basic legal errors.

1. The court attempted to import the federal standard for racial gerrymandering into the Virginia Constitution, but then misapplied that federal standard by failing to use the threshold test for the invocation of strict scrutiny.

2. The court adopted a novel theory described as "racial packing." This theory, which has been rejected by the federal courts, will cause state law to conflict with the federal Voting Rights Act and deny the state of Virginia the ability to take advantage of the preclearance "safe harbor."

3. The circuit court ignored the Commonwealth's *Cromartie* defense.

"First compliance with the results test of §2 of the Voting Rights Act (VRA) is a compelling state interest. Second, that test can coexist in principle and in practice with *Shaw v. Reno*."[1]This statement emphasizes the tight rope that jurisdictions currently have to walk when redrawing both congressional and state legislative districts. If they fail to draw a minority district where there is a large, compact configuration, they may be found liable under §2 of the

Voting Rights Act. If they reduce the minority population in a majority-minority district below the district's current levels they will have to prove that other alternatives that did not reduce minority voting strength were unavailable. If those majority-minority districts are overly bizarrely shaped in order to achieve that majority minority status then the jurisdiction is vulnerable to a racial gerrymandering charge.

The Supreme Court, and in particular Justice O'Connor, [2] has attempted to create some legal "safe harbors" so that responsible jurisdictions can pass redistricting plans without risking an election system in legal chaos. "States and lower courts are entitled to more definite guidance as they toil with the twin demands of the Fourteenth Amendment and the VRA. . . In addition, fundamental concerns of federalism mandate that States be given some leeway so that they are not 'trapped between the competing hazards of liability."[3] "Today's decisions, in conjunction with the recognition of the compelling state interest in compliance with the reasonably perceived requirements of §2, present a workable framework for the achievement of these twin goals."[4] The circuit court decision in *West v. Gilmore* will make it impossible for jurisdictions in Virginia to take advantage of these legal "safe harbors" and will condemn the Commonwealth to endless state and federal litigation that will inevitably result in a federal court drawing most Virginia redistricting plans.

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[1] *Bush v. Vera,* 517 U.S. 952 (1996) (O'Connor, J., concurring) (citation omitted).
[2] Justice O'Connor is the only member of the Court to actually participate in constructing a redistricting plan as a legislator; she was a state senator during Arizona's reapportionment process in 1971. Arizona is a covered jurisdiction under §5 of the Voting Rights Act.
[3] 517 U.S. at 990-992, quoting *Wygrant v. Jackson Bd. of Ed*., 476 U.S. 267, 291 (1986) (O'Connor, J., concurring).
[4] *Id.* at 993.

There are different methods and burdens of proof under various claims of voting rights violations. The most difficult is under the Fourteenth Amendment; both discriminatory intent and discriminatory effects must be proven by plaintiffs at a trial.[5] Racial gerrymandering, often called a "*Shaw* action," is a type of Fourteenth Amendment claim. Under §2 of the Voting Rights Act only discriminatory effects under the totality of the circumstances test need be proven, a much easier burden of proof, but still requiring litigation.[6] Under §5 of the Voting Rights Act **the burden of proof shifts to the jurisdiction** to prove that the voting change lacked either a retrogressive purpose or discriminatory effect.[7]

THE PRECLEARANCE REQUIREMENT

Section 5 of the Voting Rights Act requires any covered jurisdiction, the Commonwealth of Virginia is covered, to seek a declaratory judgment from the District Court for the District of Columbia or obtain administrative preclearance from the Department of Justice (DOJ) before the jurisdiction can enforce any change to "any voting qualification or prerequisite to voting, or any standard, practice, or procedure."[8] The court or DOJ must declare in its judgment that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on

[5] *City of Mobile v. Bolden*, 446 U.S. 55 (1980).
[6] *Thornburg v. Gingles*, 478 U.S. 30 (1986).
[7] *Georgia v. United States*, 411 U.S. 526 (1973). *Beer v. United States*, 425 U.S. 130 (1976). See also *City of Richmond v. United States*, 422 U.S. 358 (1975).
[8] 42 U.S.C. § 1973c (2002).

account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) [language minorities]."[9] This is the "preclearance" provision.[10]

Covered jurisdictions are required to submit **ALL** redistricting and other electoral changes to either the U.S. Attorney General or the U.S. District Court for the District of Columbia for a determination that the changes do not have a retrogressive effect on the voting strength of racial or language minorities. The burden of proof before both the Attorney General and the district court is on the jurisdiction to show that the change has neither such a purpose nor such an effect. Essentially the jurisdiction must prove a negative.[11]

RETROGRESSIVE EFFECTS

[9] *Id.* While "purpose" (intent) is conjoined with "effects" by an "and," this is a declaratory judgment action where both "purpose" and "effects" are preceded by the negative term "not." Therefore, the Court reads this to mean that in the affirmative the "and" would operate as an "or" so that an indication of either retrogressive intent or effects is sufficient to deny preclearance. See *Beer v. United States*, 425 U.S. 130 (1976).

[10] Note that the section is written so that District Court of the District of Columbia is the primary enforcement mechanism of preclearance. However, to ensure efficient enforcement of this prohibition, §5 of the Voting Rights Act allows jurisdictions an alternative administrative procedure through the Department of Justice (DOJ). Covered jurisdictions may submit any changes in election laws, including redistricting plans, to the DOJ and if approved, the declaratory judgment will be unnecessary. Since submitting to DOJ does not cause a jurisdiction to lose its right to a *de novo* proceeding in the district court and because administrative preclearance is both less expensive and generally faster than judicial preclearance, most jurisdictions first submit to the DOJ.

[11] *Beer v. United States,* 425 U.S. 130, 133 (1976); *Allen v. Board of Elections,* 393 U.S. 544 (1969); *Georgia v. United States,* 411 U.S. 526 (1973).

The principal standard applied in §5 review is whether a proposed change will lead to a retrogression in the position of members of a racial or language minority group that will make them worse off than they had been before the change with respect to their opportunity to exercise the elective franchise effectively.[12] The Department of Justice, as part of the retrogression review, will determine "whether the ability of minority groups to participate in the political process and to elect their choices to office is *augmented, diminished,* or *not affected* by the change."[13]

This analysis essentially requires the court or DOJ to determine a "benchmark." 28 CFR §51.54(b)(1) states that the benchmark for retrogression shall be "the last legally enforceable practice or procedure used by the jurisdiction."[14] The Justice Department "will normally compare the submitted plan to the plan in effect at the time of the submission."[15] This benchmark is then compared to the new plan to determine whether

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[12] 28 C.F.R. §51.54 (2002).

[13] *Beer,* 425 U.S. at 141. For an example of the federal courts applying this analysis, see *Dove v. More,* 539 F.2d 1152, 1155 n.4 (8th Cir. 1976); *Panior v. Iberville Parish School Bd.,* 536 F.2d 101, 104-5 (5th Cir. 1976). The U.S. Supreme Court first applied the retrogression analysis in the redistricting context in *Beer v. United States,* 425 U.S. at 140-42 (1976), concluding that it was a question of statutory construction. After a review of the legislative history of §5, the Court compared the old and new apportionments and found that "a legislative reapportionment that enhances the position of racial minorities ...can hardly have the 'effect' of diluting or abridging the right to vote on account of race [and cannot violate §5] unless the new apportionment . . . so discriminates on the basis of race or color as to violate the onstitution." *Id*. The Court found that the plan increased the percentage of districts where members of the racial minority had a clear majority of the voters and therefore the plan could not retrogress.

[14] (Emphasis added). See also 42 U.S.C. § 1973c; *Beer v. United States*, 425 U.S. 130 (1976); *Miller v. Johnson*, 515 U.S. 900 (1995).

[15] 28 C.F.R. §51.54(2). In *Holder v. Hall*, 512 U.S. 874, 883 (1994) the Court plainly stated that "the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change." *See, also, Lockhart v. United*

the voting strength of minorities has been reduced (retrogressed) from their voting strength in the benchmark plan. If minorities are in no worse position than in the benchmark, then there are no discriminatory effects for §5 purposes. This is normally measured by the number of effective majority-minority districts in the redistricting plan. Minority percentages less than a majority (influence districts) usually are not examined unless discreet geographically compact minority communities have been divided.[16]

In *Reno v. Bossier Parish School Board*, (*Bossier II*),[17] the Supreme Court, by the exact same five to four majority as in the *Shaw* line of cases, concluded "that the 'purpose' prong of §5 covers only retrogressive dilution."[18] The Court found that this placed the purpose prong in the same relation as the effects prong was placed in *Beer*.[19] As a result, in order to violate §5, a jurisdiction must reduce minority voting strength from its **current levels**. This created a § 5 safe harbor. If a redistricting plan does not retrogress from the minority voting strength in the majority minority districts in the benchmark plan, then the Department of Justice or the District Court for the District

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States, 460 U.S. 125 (1983).

[16] *City of Richmond v. United States*, 422 U.S. 358 (1975); see also Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5413 (Jan. 18, 2001).

[17] 528 U.S. 320 (2000).

[18] *Id.* at 328.

[19] The Court distinguished two cases that indicated that the §5 purpose prong was the same as the Fourteenth Amendment- *City of Richmond v. United States*, 422 U.S. 358 (1975) and *Pleasant Grove v. United States*, 479 U.S. 462 (1987).

Columbia is required to grant preclearance.[20] Therefore, if the benchmark levels of minority voting strength are maintained or enhanced in the redistricting plan, the plan will be granted preclearance.

If a jurisdiction does not take advantage of this safe harbor the current guidance of the Department of Justice says: "if a retrogressive redistricting plan is submitted, the jurisdiction seeking preclearance of such a plan bears the burden of demonstrating that a less-retrogressive plan cannot reasonably be drawn."[21] The Department also notes: "[a] proposed redistricting plan ordinarily will occasion an objection by the Department of Justice if the plan reduces minority voting strength relative to that contained in the benchmark plan and a fairly-drawn alternative plan could ameliorate or prevent that retrogression. In considering whether less-retrogressive alternative plans are available, the Department of Justice looks to plans that were actually considered or drawn by the submitting jurisdiction as well as alternative plans presented or made known to the submitting jurisdiction by interested citizens or others."[22] Reasons which the DOJ would consider in determining whether a retrogression was unavoidable would be adherence with the principle of one person, one-vote as well as avoiding a violation of the principles enunciated by the court in *Shaw v. Reno* and related cases. Likewise, the

[20] 528 U.S. at 335. "[Preclearance] is nothing more than a determination that the voting change is no more dilutive than what it replaces, and therefore cannot be stopped in advance under the extraordinary burden-shifting procedures of § 5

[21] This guidance was written to reflect the changes in §5 preclearance procedure established in *Reno v. Bossier Parish*.

[22] Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights

Department would examine "the geographic compactness of a jurisdiction's minority population."[23] The DOJ's examination would include "a review of the submitting jurisdiction's historical redistricting practices and district configurations to determine whether the alternative plan would (a) abandon those practices and (b) require highly unusual features to link together widely separated minority concentrations."[24]

This guidance goes on to say however that "Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain of its redistricting criteria," including those that require the jurisdiction to follow "county, city, or precinct boundaries, protect incumbents, preserve partisan balance, or in some cases, require a certain level of compactness of district boundaries may need to give way to some degree to avoid retrogression."[25]

No Affirmative Finding Necessary

The Attorney General will interpose an objection to a redistricting plan if, within the review period, he is unable to determine that the plan is free of retrogressive purpose and effect.[26] This includes "situations where the evidence as to the purpose or effect of the change is conflicting and the Attorney General is unable to determine that

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Act, 66 Fed. Reg. 5413 (Jan. 18, 2001)
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] 28 C.F.R. § 51.52(c).

the change is free of discriminatory purpose and effect."[27] Thus, the Attorney General does not have to make an affirmative finding of discrimination. It is sufficient that he is "'unable to conclude that the plan does not have a discriminatory [retrogressive] racial effect on voting.'"[28] He may also merely enter an objection, unsupported by reasons and without any explicit finding of racially discriminatory effect.[29]

The Attorney General likewise does not have to make the determination in the initial sixty-day period. If the Attorney General concludes that the submitted materials provide insufficient information on which to make a decision, additional information can be requested from the submitting authority. After the receipt of the additional materials, a *new* 60 day period begins to run.[30] The DOJ can request additional information during the new 60 day period, but such a request does not initiate another 60 day period.[31] However, the Department can decide that the jurisdiction's response to the initial request for information was inadequate, which will toll the 60 day period until the deficiency is corrected to the Department's satisfaction. Moreover, saying that information is unavailable is an inadequate response to a request for additional information.[32]

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[27] *Id.*
[28] *Georgia v. United States*, 411 U.S. 526, 537 (1973).
[29] *United States v. Cohan,* 358 F.Supp. 1217 (S.D. Ga. 1973).
[30] 28 C.F.R. § 51.37 (2002). Of course, if the Attorney General does not request additional information, he must decide within 60 days of the submission.
[31] 28 C.F.R. § 51.37(c) (2002).

If the submitting jurisdiction *voluntarily* submits additional materials to supplement their original submission, the 60 day period begins to run anew.[33] Although the additional 60 day period after supplemental materials are received was not mentioned in the statute, courts have concluded that the procedure is valid, since a submission is not considered to be complete until the additional materials are received.[34] However, while the DOJ cannot continue to postpone the start of the 60 day period by multiple, serial requests for additional information, they can effectively delay the second period's start by making an initial request for additional information that is difficult to comply with and continually informing the jurisdiction that its attempts to comply were inadequate.[35]

Plan Unenforceable

Unless and until a plan has been precleared, a covered jurisdiction's redistricting plan is unenforceable.[36] An objection does not have the effect of repealing a legislative act; it simply prevents a plan from being enforced as a matter of federal law.[37] If a covered jurisdiction attempts to implement a plan that has not been precleared, a private party or the Attorney General may file suit in federal court in the covered

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[32] 28 C.F.R. § 51.37(d) (2002).
[33] 28 C.F.R. § 51.39 (2002).
[34] *Georgia v. United States,* 411 U.S. 526 (1973); *City of Rome* v. *United States,* 446 U.S. 156 (1980).
[35] *Garcia v. Uvalde County,* 455 F.Supp. 101 (W.D. Tex. 1978), *aff'd* 439 U.S. 1059 (1979).
[36] 28 C.F.R. §51.52(c).
[37] *Francis v. Cothran,* 280 S.C. 516, 313 S.E.2d 332 (S.C. Ct. App. 1984).

jurisdiction to block its implementation.[38] The statute requires the convening of a three-judge federal district court in the district where the covered jurisdiction is located or where venue is otherwise proper.[39]

A three-judge court convened within the covered jurisdiction under §5 has no authority to determine whether or not the proposed plan is likely to have a discriminatory purpose or effect or whether it should be precleared.[40] The U.S. District Court for the District of Columbia has exclusive jurisdiction over these questions.[41] The court within the covered jurisdiction can only decide: (1) whether the proposed plan is covered by §5; (2) if the plan is covered, whether the preclearance requirements were satisfied; and (3) if the requirements were not satisfied, what remedy is appropriate.[42]

Since §5 provides that a covered jurisdiction is barred from enforcing its plan if it fails to obtain one of the forms of preclearance required by the section, the Supreme Court has indicated that an injunction against the holding of an election under the plan is an appropriate remedy for a violation. In *Allen v. State Bd. of Elections,* the Supreme Court held: "[A]fter proving that the State has failed to submit the covered enactment

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[38] 42 U.S.C. 1973j(d); *Allen v. State Bd. of Elections,* 393 U.S. 544 (1969) (private right of action to enforce §5 implied).
[39] *393 U.S. at 544.* However, such an action may be heard by a single judge if the issues presented are "insubstantial" or "frivolous." *Broussard v. Perez,* 572 F.2d 1113 (5th Cir. 1978), *cert. denied,* 439 U.S. 1002 (1978).
[40] *Herron v. Koch,* 523 F.Supp. 167, 172 (E.D. N.Y.), *stay den.* 453 U.S. 946 (1981).
[41] 42 U.S.C. § 1973c (2002).
[42] *Id. See United States v. Bd. of Supervisors of Warren County, Mississippi,* 429 U.S. 642,645-

for §5 approval, the private party has standing to obtain an injunction against further enforcement, pending the State's submission of the legislation pursuant to §5."[43]

On the basis of the strong language of §5 and the language of the Supreme Court, elections have been enjoined just days before they were to take place when the plan had not been precleared. For example, on September 8, 1981, a federal court enjoined New York City's primary and general elections because the City had not obtained preclearance for its city council redistricting plan.[44] Although the primary was scheduled to be held just two days later, the court concluded -- despite the obvious costs inherent in delay -- that it is "eminently more equitable to all concerned to delay the election rather than to allow an election in direct contravention of the Voting Rights Act."[45]

Since the retrogression standard under §5 differs so dramatically from that of the Fourteenth Amendment and §2, preclearance provides no protection from subsequent vote dilution litigation based on standards other than §5.[46] Likewise the reversal of the burden of proof means that retrogression which could not be proved by a plaintiff in

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47 (1977); *Perkins v. Matthews,* 400 U.S. 379, 383-86 (1971); *Allen v. State Bd. of Elections,* 393 U.S. 544, 555 n.19, 558-59 (1969).
[43] *Supra,* 393 U.S. at 555; *Georgia v. United States,* 411 U.S. 526 (1973); *Bolt v. City of Richmond,* 406 U.S. 903 (1972).
[44] *Herron v. Koch, supra.*
[45] *Id., citing Heggins* v. *City of Dallas,* 469 F.Supp. 739, 742-43 (N.D. Tex. 1979).
[46] 42 U.S.C. §1973c (2002).

litigation under the Fourteenth Amendment or §2 might be incapable of being disproved by the jurisdiction in a §5 preclearance review.

THORNBURG v. GINGLES
DISTRICT COURT FINDINGS

The Commonwealth must also deal with the possibility of litigation that seeks to create new majority minority seats under §2 of the Voting Rights Act. The definitive judicial interpretation of §2 is still *Thornburg v. Gingles*.[47] The 1982 amendments came in the midst of the *Gingles* litigation (although before trial),[48] and the district court decision in *Gingles v. Edmisten,*[49] was the first case to apply the newly amended §2.

The court found that statistical evidence presented by expert witnesses, supplemented by anecdotal, informed lay opinion, established that within all the challenged districts racially polarized voting existed in a persistent and severe degree.[50] The evidence was intended to determine the extent to which blacks and whites vote differently from each other in relation to the race of candidates.[51] After finding for the plaintiffs, the district court subsequently approved a temporary single-member district plan passed by the legislature.[52]

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[47] 478 U.S. 30 (1986).
[48] For an extensive analysis of the background and history of the case, *see Robert N.* Hunter, Jr., *Racial Gerrymandering and the Voting Rights Act in North Carolina,* 9 CAMPBELL L. REV. 255 (1988).
[49] 90 F.Supp. 345 (E.D. N.C. 1984).
[50] 590 F.Supp. at 367.
[51] 590 F.Supp. at 367-8 n.29.
[52] 590 F.Supp. 377 *et. seq.*

SUPREME COURT'S THREE-PART ANALYSIS

On appeal, the Supreme Court affirmed, with Justice Brennan, in a plurality opinion, writing for the Court.[53] Justice Brennan noted that "[the] essence of a §2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[54] Brennan then set out the "necessary preconditions" to prove that multimember districts impair minority voters' ability to elect representatives of their choice:

- "First, the minority group must be able to demonstrate that it is *sufficiently large and geographically compact* to constitute a majority in a single-member district ….
- Second, the minority group must be able to show that it is *politically cohesive* ….
- Third, the minority must be able to demonstrate that the *white majority votes sufficiently as a bloc* to enable it --in the absence of special circumstances, such as the minority candidate running unopposed --usually to defeat the minority's preferred candidate."[55]

[53] 478 U.S. 30 (1986). Concurring with Justice Brennan in the critical portion of his opinion (§IIB) were Justices White, Marshall, Blackmun, and Stevens.
[54] 478 U.S. at 47.
[55] 478 U.S. at 50-51 (emphasis added; citations omitted).

Finally, Justice Brennan noted that "the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election."[56]

Justice O'Connor wrote an opinion, concurring in the judgment, which accepted the three part test as a threshold requirement, which would then trigger an examination of the 'totalities of the circumstances' test.[57] The application of the three part test as a threshold has been unanimously validated for multi-member and single member districts in *Growe v. Emison*,[58] and *Voinovich v. Quilter*.[59] As a result, failure to meet any of the three parts is fatal to the plaintiff's case but while O'Connor's and Brennan's tests are theoretically different, in practice no court which has found for the plaintiffs on the three part test and failed to find sufficient evidence under the 'totalities of the circumstances' test. This simply illustrates that in any district where polarized voting is pronounced the other elements of the totality of the circumstances will also likely exist.

RACIALLY POLARIZED VOTING

The linchpin of the Court's analysis was its focus on racially polarized (or bloc) voting. Justice Brennan adopted the district court's working definition of racially polarized voting:[60] Racially polarized voting exists where there is a consistent relationship between the race of the

[56] 478 U.S. at 51.
[57] *Gingles* at 83, O'Connor concurring.
[58] 507 U.S. 146 (1993).
[59] 507 U.S. 25 (1993).
[60] The second and third prongs are often combined into the shorthand of "polarized voting." 478 U.S. at 52 n. 18.

voter and the way in which the voter votes, e.g., where black voters and white voters vote differently.[61]

While the Court did not limit its analysis to racially polarized voting, most post-*Gingles* cases have emphasized this element of the analysis. Even with the use of exit polling or some similar technique,[62] it is generally impossible to determine how members of a particular race have voted in particular races without resort to various statistical methods which have gained prominence as tools to **estimate** racial voting patterns.

The district court in *Gingles* relied, in part, on testimony of lay witnesses, but relied primarily on statistical evidence based on "two complementary methods of analysis --extreme case analysis and bivariate ecological regression analysis --in order to determine whether blacks and whites in [the districts in question] differed in their voting behavior."[63]

Homogeneous precinct analysis is based on the assumption that if one wishes to know how members of a certain racial or ethnic group have voted in a particular election, one should examine the election results of a precinct made up entirely of

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[61] 106 S.Ct at 1776.
[62] *See, e.g., Romero v. City of Pomona,* 665 F.Supp. 853 (C.D. Cal. 1987); *Cf.* Wildgen, *Vote - Dilution Litigation and Cold Fusion Technology,* 22 URB. LAW. 487 (1990). Also note that states which maintain voter rolls by race may be susceptible to other more precise methods.
[63] *Gingles,* 478 U.S. at 53 (Footnote omitted).

members of that group. Since few precincts are 100 percent black, white or Hispanic, homogeneous precinct analysis generally focuses on precincts that are 90 percent or more of one race.[64] The obvious benefit of homogenous precinct analysis is that it uses unmodified actual election returns to analyze voting behavior. Such analysis can be effected by factors such as voting age population, voter registration and voter turnout.[65]

Because of these problems, homogenous precinct analysis is generally used in conjunction with bivariate or ecological regression analysis, which examines the relationship between a precinct's racial makeup and the percentage of votes cast for particular candidates in that precinct.[66] In effect, regression analysis develops **estimates** of racial voting behavior based on a hypothetical homogeneous precinct derived from statistical equations. Such analysis provides a means of analyzing voting behavior even in the absence of homogeneous precincts.[67]

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[64] See, e.g., Grofman, Migalski, and Noviello, The "Totality of Circumstances Test- in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective, 7 LAW & POLICY 199,203,208-210 (1985); Jacobs and O'Rourke, "*Racial Polarization in Vote Dilution Cases Under Section 2 of the Voting Rights Act: The Impact of Thornburg v. Gingles*", 3 J. L. & POL. 295, 321-323 (1986).

[65] Jacobs and O'Rourke, *op. cit.* at 322.

[66] For relatively nontechnical explanations of bivariate analysis, see Loewen & Grofman, *Recent Developments in Methods Used in Vote Dilution Litigation*, 21 URB. LAW. 589 (1989); Engstrom, *When Blacks Run for Judge: Racial Divisions in the Candidate Preferences of Louisiana Voters*, 73 JUDICATURE 87 (1989); Engstrom & McDonald, *Definitions, Measurements, and Statistics: Weeding Wildgren's Thicket*, 20 *Urb. Law.* 155 (1988); and Grofman, Migalski & Noviello, *op. cit.*

[67] *See* Jacobs and O'Rourke, *op. cit.* at 323-331. Courts typically examine both methods as a check on the accuracy of each.

The *Gingles* Court did not foreclose other methods of measuring polarized voting, but found that in *Gingles*, homogeneous precinct and bivariate ecological regression analysis were sufficient to prove racially polarized voting.[68] Homogeneous precinct and bivarate regression analysis are the principal methods of proof relied upon by the courts for proving polarized voting.[69]

Scylla and Charybdis

If the Voting Rights Act is the rock, then *Shaw v. Reno* is the hard place. *Shaw* spawned a line of cases which culminate in *Bush v. Vera*. Most of these cases are 5-4 decisions in which the Court is divided into at least three distinct positions, and perhaps as many as six. The deciding vote in all of these 5-4 decisions has been Justice O'Connor. She has consistently carved out a position that is distinct from either of the two main blocs and, because she is the fifth vote, her position is the opinion of the Court on virtually all Voting Rights Act cases. Whereas the rest of the court seems to view these cases strictly through ideological prisms, Justice O'Connor takes a more pragmatic approach. She is sympathetic to the recognition of minority communities and political requirements but is leery of Department of Justice interference in legislative decision

[68] Hunter, *Racial Gerrymandering and the Voting Rights Act in North Carolina,* 9 CAMPBELL L. REV. 255, 283 (1988).

[69] For a spirited exchange between opponents and proponents of bivariate analysis, *see* Wildgen, *op. cit.;* Engstrom, *Getting the Numbers Right: A Response to Wildgen,* 22 URB. LAW. 495 (1990); Loewen, *Sand in the Bearings: Mistaken Criticisms of Ecological Regression,* 22 URB. LAW 503 (1990). See also Gary King, A SOLUTION TO THE ECOLOGICAL INFERENCE PROBLEM, Princeton Univ. Press (1997) who proposes an alternative statistical method.

making. As noted at the beginning of this brief, Justice O'Connor has never believed that *Shaw* and *Gingles* are antithetical.

In *Bush v. Vera*,[70] the Democrat controlled Texas legislature drew a series of districts which resembled an onion skin in the area around Dallas - Fort Worth and drew districts centered in Houston which "interlock 'like a jigsaw puzzle… in which it might be impossible to get the pieces apart.'"[71] The district court found all three districts violated the principles of *Shaw* and its progeny.

The Supreme Court, by the same five to four margin as in the entire *Shaw* line of cases, affirmed the District Court. Justice O'Connor delivered the decision of the Court but Justice Kennedy, and Justice Thomas with Justice Scalia submitted concurring opinions differing with key points of Justice O'Connor's analysis.[72] Justice O'Connor

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[70] 517 U.S. 952 (1996).

[71] *Id* at 973.

[72] Justice Kennedy's concurrence borrowed from his opinion in *Miller* which directly attacks the idea embodied in Justice O'Connor's opinion in *Shaw I* and in *Bush* that bizarre shape is a threshold or even key element of a *Shaw* cause of action.

> Our observation in *Shaw* of the consequences of racial stereotyping was not meant to suggest that a district must be bizarre on its face before there is a constitutional violation. Nor was our conclusion in *Shaw* that in certain circumstances a district's appearance (or, to be more precise, its appearance in combination with certain demographic evidence) can give rise to an equal protection claim, [cite omitted] a holding that bizarreness was a threshold showing, as appellants believe it to be. Shape is relevant <u>not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof</u>, but because it may be persuasive circumstantial evidence that race for its own sake, and not other

took the highly unusual step of filing her own concurring opinion in the case because she believed "the States and lower courts are entitled to more definite guidance as they toil with the twin demands of the Fourteenth Amendment and the Voting Rights Act...In addition fundamental concerns of federalism mandate that states be given some leeway so that they are not 'trapped between the competing hazards of liability."[73]

> districting principles, was the legislature's dominant and controlling rationale in drawing its district lines. *Miller v. Johnson, 515 U.S. 900,* 912 (emphasis added).

Justice O'Connor's concurrence in Miller is in direct conflict with Justice Kennedy's view of the proof required to state a claim under *Shaw*:

> To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices. Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind. The standard would be no different if a legislature had drawn the boundaries to favor some other ethnic group; certainly the standard does not treat efforts to create majority-minority districts *less* favorably than similar efforts on behalf of other groups. Indeed, the driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks.
>
> Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may well have been considered in the redistricting process. [Cite omitted] But application of the Court's standard helps achieve *Shaw*'s basic objective of making extreme instances of gerrymandering subject to meaningful judicial review. *Id.* at 928(emphasis added).

The circuit court in *West* improperly substitutes the Kennedy standard for the O'Connor standard.

[73] *Id.* at 990 (O'Connor, J. concurring), quoting *Wygrant v. Jackson Bd. of Ed*., 476 U.S. 267,

JUSTICE O'CONNOR'S CONCURRANCE IN *BUSH V. VERA* IS NOW THE DEFINITIVE STANDARD FOR REVIEW OF REDISTRICTING PLANS UNDER SECTION 2 AND THE SHAW LINE OF CASES.

Over 30 years ago, the Supreme Court began the reapportionment journey in *Baker v. Carr*.[74] Like *Shaw,* the *Baker* case only established that the claim existed under the Fourteenth Amendment. The early Supreme Court cases required that deviations from population equality should be "carefully and meticulously scrutinized" and placed the burden on the states to justify those deviations.[75] The next decade of litigation in the lower courts proved that the mere acknowledgment of a cause of action and the application of the standard "strict scrutiny" analysis used in employment, contracting, admissions, accommodations, and other situations was simply insufficient to provide a workable guide for lower courts attempting to give appropriate deference to the political bodies of the states and apply the new requirements of the Supreme Court.[76]

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291 (1986).

[74] 369 U.S. 186 (1962).

[75] *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Swann v. Adams,* 385 U.S. 440 (1967); *Gray v. Sanders,* 372 U.S. 368 (1963).

[76] One of the fundamental problems that has emerged in the context of the Court's redistricting jurisprudence concerns the "political thicket" of reapportionment, first recognized in *Colgrove v. Green*, 328 U.S. 549 (1946). The political branches are intentionally designed to recognize and balance the conflicting needs and desires of a variety of "communities of interests." Many of these communities will be defined by their race and ethnicity because these characteristics will shape and determine their interactions with the rest of society. All other areas touched by the Court's reverse discrimination jurisprudence involve areas of society that are not, because of their institutional nature, obliged to recognize the interests of specific racial and ethnic communities.

During the 1970's redistricting cycle, a trilogy of cases - *Mahan v. Howell*,[77] *Gaffney v. Cummings*,[78] and *White v. Regester*[79] - provided a far more functional refinement of equal protection analysis even though it is somewhat different than the analysis generally applied outside the redistricting context. These cases created a hierarchy of shifting burdens of proof depending on the amount of deviation from the ideal that existed in any given plan. A plan with a deviation of 9.9 percent or less did not violate the Equal Protection Clause unless some invidious intent could be linked directly to the deviation.[80] From 9.9 to 16.25 percent there is a rebuttable presumption that the deviation violates the one person, one vote standard.[81] Somewhere above 16.25 percent (as yet undefined) a deviation would be a per se violation the Fourteenth Amendment's Equal Protection guarantee.[82] The inevitable result of this hierarchy is that states have sought the "safe harbor" of staying under 10 percent deviation, thereby eliminating the need to settle every reapportionment in court.

The *Shaw* line of cases have created a problem very similar to that initially created by *Baker*. *Shaw I* acknowledged the cause of action without providing much guidance as to the standards to be used by the district courts. As Judge Chapman said from the bench during the trial in *Able v. Beasley,* the case "is about as illuminating as a

[77] 410 U.S. 315 (1973).
[78] 412 U.S. 735 (1973).
[79] 422 U.S. 935 (1975).
[80] *White* at 936; see also *Gaffney v. Cummings*, 412 U.S. 735 (1973).
[81] *Mahan* at 323-330.
[82] *Id.*

candle." Not only were courts and legislatures left with little guidance regarding the application of the principles in *Shaw*, they still had to contend with the continuing validity as stated by the *Shaw* Court of §§ 2 and 5 of the Voting Rights Act and racial vote dilution under the Fourteenth Amendment. A majority of the Justices for vastly different and mutually incompatible reasons view the *Shaw* line of cases, the Voting Rights Act and racial vote dilution under the Fourteenth Amendment to be antithetical and irreconcilable.[83] Justice O'Connor, the deciding vote in all of the *Shaw* cases, has from *Shaw I* disagreed.[84] She has asserted that these are not antithetical concepts and in her opinion and concurrence in *Bush,* she has created a more workable, unifying hierarchy which she refers to as a "framework" similar to that used in the deviation cases.[85]

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[83] *Bush v. Vera*, 517 U.S. 952 (1996) Justice Kennedy concurring; Justice Thomas, joined by Justice Scalia, concurring in the judgment; Justice Stevens, joined by joined by Justices Ginsberg and Breyer, dissenting; Justice Souter, joined by Justices Ginsberg and Breyer, dissenting.

[84] "This Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances. *Shaw I* at 642. " [C]ompliance with the results test of §2 of the Voting Rights Act (VRA) is a compelling state interest. Second that test can coexist in principle and in practice with *Shaw* [cite omitted] and its progeny." 517 U.S. 990 (O'Connor, J., concurring). "Although I agree with the dissenters about § 2's role as part of our national commitment to racial equality, I differ from them in my belief that that commitment can and must be reconciled with the complementary commitment of our Fourteenth Amendment jurisprudence to eliminate the unjustified use of racial stereotypes." 517 U.S. at 993. See also 515 U.S. at 928, supra at n. 123.

[85] Justice O'Connor, describing her reasons for writing a separate concurrence after having delivered the opinion of the Court in *Bush*, explained that she believed "States and lower courts are entitled to more definite guidance as they toil with the twin demands of the Fourteenth Amendment and the VRA… . . In addition, fundamental concerns of federalism mandate that States be given some leeway so that they are not 'trapped between the competing hazards of liability.'" 517 U.S. at 990-992, quoting *Wygrant v. Jackson Bd. of Ed*., 476 U.S. 267, 291 (1986) (O'Connor , J., concurring). "Today's decisions, in conjunction with the recognition of the compelling state interest in compliance with the reasonably perceived requirements of § 2, present a workable

Justice O' Connor would allow race to be considered and majority-minority districts to be **intentionally** drawn so long as these districts did not violate the state's redistricting criteria without invoking strict scrutiny.[86] This would be the equivalent of the under 10 percent "safe harbor" of malapportionment. Violations of the state's criteria could be justified if it is shown that the state has "a strong basis in evidence" that the *Gingles* factors are present.[87] This would correspond with deviations above 9.9 percent but below the range of a per se violation. Finally, as with deviation, some minority districts would be so odd that even the presence of the *Gingles* factors could not justify them.[88]

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framework for the achievement of these twin goals." *Id.* at 993.

[86] Justice O'Connor makes this point throughout her opinion by emphasizing "[f]or strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were ' subordinated' to race." 517 U.S. at 959. She goes on to elevate the violation of the states traditional districting criteria to a threshold issue. In Part II of the decision Justice O'Connor states "the neglect of traditional districting criteria is merely necessary, not sufficient. For strict scrutiny to apply, traditional districting criteria must be *subordinated to race*. [Cite omitted] Nor, as we have emphasized, is the decision to create a majority-minority district objectionable in and of itself." *Id.* at 962. Likewise Justice O'Connor notes that states "may avoid strict scrutiny altogether by respecting **their own** traditional districting principles. . . and nothing we say today should be read as 'limiting a State's discretion to apply traditional districting principles,'[cite omitted] in majority-minority, as in other districts." *Id.* at 978 (emphasis added). She repeats this point in her concurrence when she says "States may **intentionally** create majority minority districts, and may otherwise take race into consideration, without coming under strict scrutiny. . . so long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy." *Id.* at 993 (emphasis added).

[87] *Id.* at 994. Justice O'Connor would find that a violation of §2 of the Voting Rights Act (and presumably the Fourteenth Amendment) would constitute "a compelling state interest" sufficient to meet strict scrutiny which could be remedied by a race based method if narrowly tailored. *Id.* at 990.

[88] "Finally, however, districts that are bizarrely shaped and noncompact, and that otherwise neglect traditional districting principles and deviate substantially from a hypothetical court-drawn district, for *predominately racial reasons*, are unconstitutional." *Id* at 994. "In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e]. . . voters' on the basis of race." *Shaw I* at 646-7 quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960).

Justice O'Connor's proposed "safe harbor" creates a threshold level of proof that plaintiffs must overcome. Justice O'Connor indicated that this will be difficult for a plaintiff to prove when she states "I understand the threshold standard the Court adopts -- that 'the legislature subordinated traditional race-neutral districting principles. . . to racial considerations' -- to be a demanding one."[89] This is also perfectly logical. If you had a standard that required stricter criteria for majority-minority districts than those that are applied to majority-majority districts then you would violate the *sine qua non* of equal protection - the same rules should apply to everyone. For O'Connor, at least, this is the fundamental logic behind the *Shaw* line of cases.[90]

This first level of this framework creates two obvious basic questions:

- Whose criteria are they?
- What are the criteria?

Justice O'Connor finds that these "traditional districting criteria" are the states' criteria and not federal or constitutional requirements.[91] ("The Constitution does not

[89] *Miller v. Johnson*, 515 U.S 900, 928 (1995). (Citation omitted).
[90] "[C]ertainly the standard does not treat efforts to create majority-minority districts *less* favorably than similar efforts on behalf of other groups." *Id.* at 928.
[91] 517 U.S. at 993 (O'Connor, J. concurring).

mandate the regularity of district shapes.[92] States "may avoid strict scrutiny altogether by respecting **their own** traditional districting principles.[93] (emphasis added) This finding is consistent with prior precedents since the federal courts have long considered these redistricting criteria to be created by state policy and are state, not federal, policy choices.[94] Furthermore states have been left free to adopt or change criteria when these criteria have a rational basis and are not used as a subterfuge to dilute voting strength.[95]

Clearly these criteria are not embodied in the Constitution and come from state policy. This also means that a state's redistricting criteria can be a very amorphous concept. However, examination of prior plans can provide a template which can be used to determine a state's traditional criteria. If you examine districts which are unaffected by any racial component you can discover the extent to which a jurisdiction has considered it appropriate to cross county lines, divide towns, protect communities of interest as well as the degree of compactness and contiguity maintained and then argue that this comprises the standard.

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[92] *Id.* at 962. "We emphasize that these criteria are important not because they are constitutionally required -- **they are not**." *Shaw I* at 647, citing *Gaffney* at 752 n. 18 (emphasis added).

[93] *Id.* at 978. The "Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts where presumably the States have drawn the boundaries in accordance with **their** customary districting principles." *515 U.S.* at 928 (emphasis added). See also *Bandemer v. Davis*, 478 U.S. 109 (1986).

[94] The court in *Carstens v. Lamm*, 543 F.Supp. 68 (D. Colo. 1982) noted that the federal courts have refused to establish any constitutional standards of contiguity, compactness, communities of interest, jurisdictional integrity, cores of existing districts, or incumbent protection. Therefore, the courts have looked to state policy to establish criteria. Justices White and Souter noted in their dissents in *Shaw v. Reno*, 509 U.S. 630, 674 & 687 (1993) that the Court had refused to constitutionalize any of these criteria earlier in the term in *Pope v. Blue*, 809 F.Supp. 392 (W.D.N.C. 1992), *aff'd. mem*. 506 U.S. 801, 113 S.Ct. 30 (1992). See also *Mahan v. Howell*, 410 U.S. 315 (1973) and *Gaffney v. Cummings*, 412 U.S. 735 (1973).

[95] *Mahan v. Howell*, 410 U.S. 315 (1973); and *Gaffney v. Cummings*, 412 U.S. 735 (1973).

Justice O'Connor has identified, without defining, six traditional redistricting criteria which have been used by the Court when assessing whether race was predominate: compactness, contiguity, jurisdictional lines, communities of interest, political balance and avoiding contests between incumbents.[96] The Court has emphasized that by referencing one or another criteria it has not excluded the use of others.[97] Justice O'Connor has virtually defined the *Shaw* cause of action by compactness and contiguity, thereby turning violation of the shape criteria into a threshold proof for plaintiffs in a *Shaw* case.[98] The other criteria have all, either been used as an attempt by defendants to justify a lack of compactness and contiguity or as additional evidence of the predominance of race after the district was shown to be "bizarrely shaped."[99] As a result shape is the key criteria and all other criteria should be viewed as either a lower priority or in terms of how they can explain an odd shape in terms of a non-racial criteria.

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[96] 517 U.S. at 963 - 964. Not surprisingly these are the state criteria which can be used to justify a population deviation as well.

[97] Two obvious criteria would be the equalization of voters (see *Burns v. Richardson*, 384 U.S. 73 (1966)) and its close relative, the equal political sharing of institutional and other non-voting population. See *Garza v. County of Los Angeles*, 918 F.2d 763, 778 (1990) (Kozinski, J., concurring and dissenting).

[98] 517 U.S. at 993.

[99] In *Bush*, the state attempted to use incumbency protection, jurisdictional lines, and communities of interest to explain the districts. 517 U.S. at 963-964. In *Cromartie v. Hunt*, 526 U.S. 541 (1999) the state used incumbency protection, jurisdictional lines, communities of interest, and political balance to explain the districts. In *Abrams v. Johnson,* 521 U.S. 74 (1997) the Court used county lines to support its initial finding on shape.

The second level of O'Connor's framework suggests that a state may deviate from its own criteria in order to accommodate a "strong basis in evidence" that the *Gingles* factors exist in an area.[100] O'Connor goes on to state that this record "need not take any particular form."[101] Finally, she asserts that such a district would be narrowly tailored if it "does not deviate substantially from a hypothetical court-drawn district… . . " that would have remedied the violation.[102]

A "strong basis in evidence" does not require a preponderance. Justice O'Connor states that when "the *Gingles* factors are present, it [a jurisdiction] may create a majority-minority district without awaiting judicial findings."[103] The purpose of this is to allow states to avoid being "trapped between competing hazards of liability."[104] Any evidence required should be no more than a prima facie showing of a §2 violation or the

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[100] In *Bush,* the Court stated: "having concluded that strict scrutiny applies, we must determine whether the racial classifications embodied in any of the three districts are narrowly tailored to further a compelling state interest." 517 U.S at 976. The Court clearly viewed being within the parameters of the state's own criteria as a threshold, but the criteria could be overcome by showing a reasonable belief that a §2 violation should be remedied.

[101] While not requiring "any particular form" **timing is important**. In *Bush,* the Court dismisses the dissent's factual argument that the 1992 election results indicate that political motivations were more responsible for the districts' shape than racial ones by stating that "[w]hile that may be true, the dissents reliance on the 1992 election results is misplaced. Those results were not before the legislature when it drew the district lines in 1991. . ." *Id.* at 971, footnote *. Clearly the **complete** record must be made **before** the plan is enacted.

[102] 517 U.S at 993. Why or how a "hypothetical court-drawn district" would deviate from a state's traditional redistricting criteria is not explained, but if it relates back to the test in *Gingles*, it must mean that the imposition of some traditional redistricting criteria results in a violation of §2 of the Voting Rights Act and, therefore, an exception in that criteria must be made. This actually makes the definition of compactness under §2 more amorphous since there was some thought that majority-majority single-member districts might constitute the standard of compactness for majority-minority districts under the *Gingles* test.

[103] 517 U.S. at 994.

possibility of the denial of preclearance, such that a reasonable person could find a violation.[105] Any greater requirement would involve second guessing the legislature and would eviscerate Justice O'Connor's stated purpose of allowing jurisdictions to "navigate between the Scylla of racial gerrymandering and Charybdis of minority vote dilution."[106]

Justice O'Connor further states that "narrow tailoring" is judged by comparing the district drawn to a "hypothetically court drawn district" to determine if they "substantially" deviate. Her next paragraph makes it clear that she is referring to the geographic shape of the district not the percentage of minority population contained in the district. This again is a logical formulation since the traditional criteria typically focus on the shape of a district and is correlated to the compactness prong of the *Gingles* preconditions.[107] This issue would be a fact determination based on the location and

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[104] *Id.* at 992.

[105] O'Connor's "strong basis in evidence" is probably the functional equivalent of a "substantial basis in evidence" test traditionally used by the courts when reviewing the record in an administrative appeal since the same policy consideration underlies both standards. Courts reviewing the decisions of executive branch agencies have noted that substantial evidence is "more than a scintilla but less than a preponderance… if there is enough evidence to justify the refusal to direct a verdict, if the case had been tried before a jury, then there is substantial evidence." A reviewing court is not allowed to try the issue *de novo* and "whether this court, if it had been the arbiter of the facts… might have arrived at a conclusion contrary to the one reached... is of no moment." *Kelly v. Cellebrezze*, 220 F.Supp. 611, 614 (D.C.S.C. 1963) See also *Universal Camera Corp. v. N.L.R.B*., 340 U.S. 474 (1951); *N.L.R.B. v. Lester Brothers, Inc*., 337 F2d. 706 (1964).

[106] D. Lublin & D.S. Voss, *The Partisan Impact of Voting Rights Law: A Reply to Pamela S. Karlan*, 50 Stan. L. Rev. 765, 773 (1998).

[107] Compactness under *Gingles* has been addressed in very few cases and all at the district court level. In *East Jefferson Coalition v. East Jefferson Parish*, 691 F. Supp. 991 (E.D. La. 1988) the District Court stated that a "proposed district is sufficiently compact if it retains a natural sense of

size of the territorially proximate minority populations. Drawing the districts in a fashion similar to earlier non-minority districts should be more than sufficient.

GEOGRAPHIC COMPACTNESS

While *Gingles* speaks of geographic compactness, it failed to provide any definition of the term. Likewise, the *Shaw* line of cases has been equally silent about what would be compact under the second level of O'Connor's framework, except for the "eyeball test," that can be given to the districts that have survived scrutiny under *Shaw* and those which have not.

Only in *Cromartie v. Hunt*,[108] the latest incarnation of the original *Shaw* case, and *King v. State Bd. of Elections*,[109] has any court found that the district was required by

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community." *Id.* at 1007. The court then refused to accept plaintiffs' proposed plan that did not meet the minimal requirements of reapportionment. By contrast, the court in *Dillard v. Baldwin County Bd. of Ed*., 686 F.Supp. 1459 (M.D. Ala. 1988) rejected a defense argument that a district was too" elongated" and "curvaceous." The court noted that: "By compactness [*Gingles*] does not mean that a proposed district must meet, or attempt to achieve, some aesthetic absolute, such as symmetry or attractiveness… . . It is apparent from the [*Gingles*] opinion that compactness is a relative term tied to certain practical objectives under §2; the requirement is not that a district be compact, but that it be 'sufficiently' compact under §2." No matter where this compactness debate leads, a minority district under *Gingles* could not be held to a greater standard of compactness than majority-majority districts in the jurisdiction without destroying O'Connor's tenet that the standards for minority districts should not be stricter than those for majority-majority districts as well as the entire objective of simplifying a proof of discrimination under the 1982 amendments to §2 of the Voting Rights Act. Moreover, this would ignore one of the principle purposes of §2 which is to eliminate tenuous state policies that cause voter dilution. S. Rep. No. 417, 97 Cong. 2d Sess. (1982) at 28-29 (1982) 1982 U.S. Code & Admin. News at 177.

[108] *Cromartie v. Hunt*, 133 F. Supp.2d 407, 423 (E.D.N.C. 2000). This portion of the case was not appealed.

[109] 979 F.Supp. 619 (N.D. Ill. 1997) *(King II)*. This case is a subsequent *Shaw* challenge to the original deadlock case, *Hastert v. State Bd. of Elections*, 777 F.Supp. 634 (N.D.Ill. 1991), which in 1992 found §2 violations in Cook County on behalf of Hispanics and African-Americans and

Gingles and was narrowly tailored to remedy the violation after determining that the district violated Justice O'Connor's threshold for invocation of strict scrutiny under *Shaw*.[110] The *Cromartie* court found that District 1, as opposed to its more infamous sibling District 12, was not the most compact configuration of a majority-minority district possible in that part of the state, however, it determined that the deviations from that more compact design were based on politics and not race. (The approved First Congressional District in North Carolina is included in Appendix A.)

In *King*, the court found that, while the district was irregularly shaped, it was still compact and maintained most of the other traditional redistricting criteria in Illinois. The odd shape was in fact necessitated because of the need to accommodate an existing African–American incumbent.[111] As a result the court found that the district, which has commonly been referred to as an "earmuff," met the compactness prong of *Gingles* and was therefore narrowly tailored. (The "earmuff" district is included in Appendix B.)

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ordered the plan drawn by the *Hastert* plaintiffs into effect. See also *King v. State Bd. of Elections*, 979 F.Supp. 582 (N.D. Ill. 1996) (*King I*).

[110] In his dissent, Judge Thornburg concurs with the judgment regarding the First District but asserts that the strict scrutiny analysis was unnecessary since plaintiffs had failed to prove that the First District was outside of the parameters of North Carolina's redistricting criteria. *Cromartie v. Hunt*, 133 F. Supp.2d 407, 431-33 (E.D.N.C. 2000) Thornburg, concurring in the judgment in part, and dissenting in part. Other districts have been unsuccessfully challenged under *Shaw*, but all of these districts were decided based on the threshold of violating the shape criteria.

[111] *King I* at 597. This ruling would appear to be contrary to the logic of the Supreme Court's ruling in *Bush* regarding the "interlocking" Hispanic and Black districts in Houston. ("Although the State could have drawn either a majority-African-American district or a majority-Hispanic district in Harris County without difficulty, there is no evidence that two reasonably compact majority-minority districts could have been drawn there." 517 U.S. at 998, (Kennedy concurring).) However, the configuration in *Hastert* and *King* is far less contorted than in *Bush*.

The General Assembly of Virginia took the rational and reasonable decision to seek the legal "safe harbors" that were available in the reapportionment process. In the case of Virginia this is a particularly sensible decision because of the extremely short time span which the Commonwealth has to complete the reapportionment process. The census results were not released to the state until March, 2001. The General Assembly had to construct a redistricting plan and obtain preclearance for that plan in time for the 2001 elections. If the preclearance process had not been rapid it would been impossible to conduct the elections in an orderly fashion. Therefore, it was imperative that Virginia receive preclearance within the initial sixty-day period.

From an examination of the 2001 redistricting plan, it is evident that the legislature attempted to maintain the benchmark level of voting strength in every majority-minority legislative district where this feasible. In doing so, the General Assembly relied on the compactness and contiguity constraints used by the legislature in the 1991 redistricting scheme which was upheld by this court in *Jamerson v. Womack*.[112] In those districts where the General Assembly could not maintain the benchmark, legislators attempted to stay as close to the benchmark as the compactness and contiguity constraints would allow. This placed the legislative redistricting plan in the preclearance "safe harbor," a fact verified by the rapid grant of preclearance to the 2001 redistricting plan by the Department of Justice.

The General Assembly also created a new majority-minority district, House District 49, which had been requested by the American Civil Liberties Union. This district was not a majority African-American district. While no ethnic or racial group makes up a majority of the voting strength in House District 49 it was created in order to end the fragmentation of Hispanic communities in Northern Virginia. This was the only new majority-minority district suggested to the General Assembly. This placed the 2001 redistricting plan in the §2 "safe harbor." Even the circuit court approved of this district.[113]

The General Assembly also placed itself inside of the racial gerrymandering "safe harbor" created by Justice O'Connor. No majority minority district in the 2001 redistricting plan is less compact or contiguous than the districts drawn in the 1991 redistricting scheme. In particular no district is less compact than Senate District 18, which was specifically upheld by this Court in *Jamerson*. The compactness tests used by both plaintiffs, and defendants, experts confirm this point.[114] Justice O'Connor is very clear if the district does not violate the compactness and contiguity criteria of that jurisdiction, then that district cannot constitute a racial gerrymander even if the **sole** reason for the construction of the district was racial. In Virginia this means that if a plaintiff cannot prove that a district violates the compactness and contiguity provision of Article IV, § 6 of the Virginia Constitution, then the plaintiff has failed to prove an essential element of his racial gerrymandering case and cannot prevail. Once the circuit court determined that all of the majority minority districts, except Senate District 2 and House

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[112] 244 Va. 506, 423 S.E.2d 180 (Va. 1992)
[113] *West v. Gilmore*, CL01-84, 2002 Va. Cir. LEXIS 37 (City of Salem Mar. 10, 2002).
[114] *Id.* at *12-14. This is also confirmed by the fact that plaintiffs have not brought a federal

District 74, complied with Article IV § 6 of the Virginia Constitution it was legal error to find that these districts were racially gerrymandered.

Amicus would assert that the circuit court's ruling regarding Article IV § 6 of the Virginia Constitution as regards Senate District 2 and House District 74 is in error. Senate District 2 in the 2001 redistricting plan is far more compact and contiguous than its predecessor in the 1991 redistricting scheme. It is also more compact and contiguous than several districts drawn for white incumbents in the 1991 redistricting scheme. Likewise it is more compact and contiguous than Senate District 18 was in the 1991 redistricting scheme. This district, like most of the existing majority-minority districts, required additional population in order to comply with the one-person one-vote principle. Adding population from the north or west to Senate District 2 in its configuration as it existed in the 1991 redistricting scheme would have either meant a retrogression or risking a racial gerrymander. Crossing Hampton Roads by bridge to Portsmouth allowed the General Assembly to dramatically improve the compactness and contiguity of this district over its predecessor while avoiding retrogression.

Likewise House District 74 in the 2001 redistricting plan is very similar to its predecessor in the 1991 redistricting scheme. In fact, the chief criticism which the circuit court levels at House District 74- the "arm" from Charles City County to Henrico County - is almost exactly the same as it was in the 1991 redistricting scheme. Moreover this feature is required in order to keep the current African-American incumbent's residence within the district. If his residence were removed from the district, he would have to be paired with another incumbent, which as

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racial gerrymandering cause of action.

was described above would certainly raise a § 5 preclearance issue which would remove the Commonwealth of Virginia from the preclearance "safe harbor."

However assuming for mere argument that this Court affirmed the circuit court on the Article IV § 6 issue that decision would constitute a change of the compactness and contiguity criteria which was used by the Commonwealth of Virginia in 1991 and therefore became the benchmark. Any change of this compactness and contiguity criteria by the courts of Virginia would have to be precleared.

The Supreme Court approach to court-approved changes in voting differentiates between federal courts and state courts regarding the preclearance of "changes in voting." In *Wise* v. *Lipscomb,*[115] the district court gave the City of Dallas an opportunity to enact a constitutionally acceptable city council plan after the city's at-large system was found to dilute minority access to the electoral process. The city responded by passing a plan creating single-member districts. Although the district court approved the single-member plan, the Supreme Court found it to be a legislative plan, not a judicial one, and therefore subject to §5 preclearance. This decision has been confirmed by *McDaniel v. Sanchez.*[116] The Court in *McDaniel* declared that any plan drafted and proposed by the jurisdiction to the court for its adoption as a court drawn plan must be

[115] 437 U.S. 535 (1978).
[116] 452 U.S. 130 (1981).

precleared even if the plan had never been submitted to the legislative body of the jurisdiction and had not been approved by the jurisdiction's legislative process.[117]

Generally, to the extent that they reflect the legitimate policy choices of the submitting authority, "changes in voting" are subject to preclearance even if they are ordered by a federal court.[118] A federal court-ordered change in voting that is developed by a court as a remedy and is included in its decree need not be submitted to the Attorney General for preclearance if it does not reflect state policy.[119]

This logic prevents state courts from making unprecleared "changes in voting" because state court decisions are treated as if they reflect the policy choices of the jurisdiction since the state court is part of the government of the state and its reapportionment plans are entitled to the same deference in federal court as a jurisdiction's legislative plan. Therefore, the Supreme Court has held that state court changes in voting practices are subject to preclearance.[120] State courts in covered

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[117] *See also Campos v. Baytown,* 840 F.2d 1240 (5th Cir. 1988) (plan proposed by jurisdiction in place of one which bas been invalidated by a court requires preclearance).
[118] 28 C.F.R. §51.18(a).
[119] *Sims* v. *Amos,* 365 F.Supp. 215 (M.D. Ala.), *aff'd* 415 U.S. 902 (1973); *Connor v. Johnson,* 402 U.S. 690 (1971).
[120] *Hathorn v. Lovorn*, 457 U.S. 255(1985). See also 28 C.F.R. §51.18. Prior to this decision a number of lower courts treated state court decisions the same as federal court decisions. See *Webber v. White*, 422 F.Supp. 416 (N.D. Tex. 1976); *Gangemi v. Sc1afani*, 506 F.2d 570 (2d Cir. 1974). See also *Eccles v. Gargiulo*, 497 F.Supp. 419 (E.D. N.Y. 1980); *Williams v. Sclafani*, 444 F.Supp. 895 (S.D. N.Y. 1977).

jurisdictions are now submitting state court ordered voting changes to the DOJ for preclearance.[121]

It is likely that the Department of Justice would object to a decision that changes the compactness and contiguity criteria from their prior usage because it would require a major retrogression in Senate District 2. If the district is not allowed to cross the bridge into Portsmouth, it is questionable whether the district could continue to be represented by a minority candidate. Given that there is not a more compact version of this district which would avoid the retrogression, the General Assembly clearly had a "strong basis in evidence" that would allow it to adjust the criteria under the second level of Justice O'Connor's racial gerrymandering framework.

Likewise, with respect to House District 74, the Department of Justice would likely object to the new criteria required by an affirmance of the circuit court's decision. Such an affirmance would require pairing the African-American incumbent with another incumbent in the Richmond area because of the elimination of the configuration that was used in 1991 and became part of the benchmark. Similarly the addition of the area in Hopewell is no less compact and contiguous than white areas which were attached to white districts in 1991. Again this would constitute a strong basis in evidence sufficient to support the General Assembly's decision. The circuit court erroneously requires the Commonwealth "to show that the electoral districts of the

[121] *Elliott v. Richland County*, 327 S.C. 175 (1997).

House of Delegates or Senate achieve any state interest…"[122] The standard as discussed earlier would merely were require that the General Assembly have a reasonable basis for its belief irrespective of whether the court would have made the same decision were it the initial decision maker.

By failing to follow Justice O'Connor's framework the circuit court potentially places Virginia's constitutional law at odds with federal voting rights law. The practical result is to narrow the passageway between the rock and the hard place to such an extent that it will be practically impossible for the Commonwealth of Virginia to produce a redistricting plan which would be assured of preclearance and comply with the Virginia Constitution. This is particularly true since the standards which the circuit court applies are so amorphous that the result will depend greatly on the initial trier of fact. It is relatively safe to assume that any plaintiffs will successfully forum shop so that they can locate the most favorable forum available.[123] The end result will be that the state process will consistently deadlock, due to the inability to take advantage of the preclearance "safe harbor" in the short time available to it, and the federal courts, which do not have to have their plans precleared, will draw the legislative plans without input from the Commonwealth of Virginia. The General Assembly should not be obliged to

[122] *West* at 79.

[123] An example of this is the circuit court's ruling regarding House District 49. There is no discussion of what objective points could have differentiated this district from the other districts in the 2001 plan which the circuit court found to be racial gerrymanders except for the bipartisan support for the creation of this district. This directly implies that the decision was made on a political basis and not a legal one. *West* at 59.

abandon the legal "safe harbors" provided to the state by the federal courts because a single circuit court has chosen to adopt a standard for racial gerrymandering which conflicts with the federal standard.

The circuit court also adopts an additional legal theory which has been rejected by the federal courts. The idea of a racially packed district in federal voting rights law has a very specific meaning. "Packing" has always referred to the excessive placement of minorities into a few majority minority districts when a reduction of the number of minorities in the district would not endanger the safe election of the minority candidate of choice and would allow the creation of an additional majority minority district.[124] The circuit court adopts the theory that any percentage of minority voting strength in excess of the minimum amount necessary to provide minority candidates with a "chance" or a "tossup" is sufficient to meet the concerns of the voting rights act and any additional minority population is illegal "packing."

This is an attempt by the plaintiffs to repackage a legal theory which was unanimously rejected by the United States Supreme Court in *Voinovich v. Quilter*. In *Voinovich v. Quilter,* the Court faced the same type of theory adopted by the circuit court.[125] The Democrats claimed that "the plan [drawn by Republicans] packed black voters by creating districts in which they would constitute a disproportionately large

[124] *Voinovich v. Quilter,* 507 U.S. 146, 153 (1993)
[125] 507 U.S. 146 (1993)

majority," thereby violating §2 of the Voting Rights Act. In the Democrats view, "the plan should have created a larger number of influence districts -- districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of crossover votes from white voters, elect their candidates of choice." [i.e. NHW(non-Hispanic white) Democrats][126] the District Court found for the NHW Democrat plaintiffs however the Supreme Court in a unanimous opinion reversed.

The Court refused to decide "whether influence dilution claims such as appellees' are viable under section 2."[127] The court noted that this case did not involve the usual vote dilution claims of "fragmentation of a minority group" (cracking) or that "Ohio's creation of majority black districts prevented black voters from constituting a majority in additional districts." (packing)[128] However, the Court did say that while the "first *Gingles* precondition, the requirement that the group be sufficiently large to constitute a majority in a single member district, would have to be modified," the other two preconditions would definitely apply if an influence claim were actionable.[129] The Court then noted that it was necessary for the plaintiffs' argument to assert "coalitional voting between whites and blacks" and that black interests could be adequately

[126] *Id.* at 149-150.
[127] *Id.* at 154.
[128] *Id.* at 153.
[129] *Id.* at 158.

represented from "districts with only a 35% black population."[130] The Court used this to find that plaintiffs could not prove the polarized voting requirements of the *Gingles* preconditions.[131]

The Democrats also claimed intentional discrimination against minority voters under the Fourteenth and Fifteenth Amendments. The Court found that the Republicans clearly lacked discriminatory intent since they solicited the input of minority advocacy groups and produced many of the majority minority districts, albeit in somewhat different configurations, that these groups requested. The input of the minority advocacy groups and a plan that accurately reflected minority voting strength acted as a shield to a finding of intent.[132]

As a result of *Voinovich,* the argument that the failure to maximize NHW Democrat districts violates §2 is dead since, factually, the proof of polarized voting would necessarily defeat the argument that minorities could be adequately represented at such low percentages and, conversely, the lack of polarized voting prevents the invocation of the protections of §2 of the Voting Rights Act. (Without polarized voting it is legal political gamesmanship.)

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[130] *Id.* at 151-152. The choice of 35 percent is significant because it is in the range of the quota of black vote typically needed to draw a safe white Democrat district.
[131] *Id.* at 158.
[132] See also *City of Richmond v. United States*, 422 U.S. 357 (1975).

The circuit court, in an effort to make it appear that defendant's expert Dr. Lowen defined "packing" in the same manner as the court, inserted words into Dr. Lowen's testimony. The circuit court states that "'packing' defeats chance" and that Dr. Lowen "defined packing as meaning so many minorities have been stuffed into one or more [minority] districts they used have way over done it and. . . you have wasted them; if you will. They will for sure control that district and thereby you have decreased the number of districts that blacks might have control [or influence]."[133] Dr. Lowen's definition is actually correct if you remove the insertions made by the court in particular the phrase "or influence." Dr. Lowen very specifically stated that minority control of the majority-minority district being reduced could not be endangered and that the minority must gain control of a new district by the reduction in the minority population.

The court places further words in Dr. Lowen's mouth by confusing the difference between projected vote totals, which are based on estimations of minority turnout and racial polarization in realistically contested elections, and actual election results. Actual election results in seats without realistic opponents will tend to be inflated and therefore are useless in determining what level of minority voting strength is necessary to ensure that the minority candidate of choice continues to be elected. This is particularly true in Virginia which has open primaries where all voters can vote in the primary and white crossover vote tends to be less than in the general election because

[133] *West* at 54.

fewer white Democrats vote for the minority candidate of choice in the Democratic primary.

The circuit court does not address the problem of why minority incumbents are not allowed to have "safe seats" in exactly the same manner as their white counterparts. A redistricting criterion, which would require the elimination of all existing safe majority minority districts and reduce these districts to "tossup" districts would constitute an unnecessary retrogression which in all probability will be objected to by the Department of Justice. Furthermore, all of the projections regarding the minority voting strength required in order to maintain the election of the minority candidate of choice are estimates and the General Assembly should certainly be allowed to make the safe choice of complying with the benchmark which will ensure compliance with the Voting Rights Act.

The circuit court also ignored the Commonwealth's *Cromartie* defense. On April 18, 2001, the United States Supreme Court issued its fourth ruling regarding the 12th Congressional district of North Carolina. In a 5-4 decision, the Court reversed the district court's factual finding that "race, *rather than* politics *predominantly* explains District 12's 1997 boundaries."[134] Instead, the Court held that the evidence showed that "racial identification is highly correlated with political affiliation in North Carolina" and as such, "[i]f district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to

[134] *Hunt v. Cromartie*, No. 99-1864 (U.S. Apr. 18, 2001). (Hereinafter *Cromartie II*)

justify."[135] Because race was not the predominant factor in the line drawing process (politics which correlated with race was) District 12 did not violate the Fourteenth Amendment's Equal Protection Clause.

In the first *Shaw* decision, and continually in all the other cases in the line, Justice Stevens has vehemently criticized the majority in his dissents for focusing on race as the instigator of the gerrymanders in North Carolina and elsewhere when the real culprit is political gerrymandering. The majority, however, considers political gerrymandering to be permissible[136] and after *Cromartie* political gerrymandering is a legitimate state policy that must be overcome by a plaintiff in order to prove racial gerrymandering.[137]

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[135] *Cromartie II*, No. 99-1864, slip op. at 8 (U.S. Apr. 18, 2001) quoting *Bush v. Vera*, 517 U.S. 952, 968 (1996) (O'Connor, J., principal opinion).

[136] While political gerrymandering was found to be justiciable in *Davis v. Bandemer*, 478 U.S. 109 (1986) in a 6-3 opinion, a 7-2 majority found that the facts in that case were insufficient to meet the legal standard for showing an unconstitutional effect. The legal standard was devised in such a fashion that only fringe parties are likely to be able to take advantage of the decision. It is hard to imagine a likely case where a major party could produce evidence that would meet the standard and certainly not in a standard political gerrymander. *Badham v. March Fong Eu*, 694 F.Supp.664 (Cal., 1988); Appeal Dismissed *sub nom, Badham v. Eu*, 488 U.S. 804 (1988); rehearing granted 488 U.S. 953 (1989); *affirmed* 488 U.S. 1024 (1989); *Pope v. Blue*, 506 U.S. 801; see contra *Republican Party of N.C. v. Martin*, 980 F2d 943 (4th Cir. 1992) *cert. denied sub nom Hunt v. Republican Party of N.C.* 510 U.S. 828 (1993). All of the members of the plurality opinion, those who found justiciability but reversed the district court's decision for the plaintiff's (Justice White, the author of the plurality opinion, Brennan, Marshall and Blackmun) are no longer on the court. Of the six who found justiciability only one, Justice Stevens the author of the opinion in favor of the plaintiffs, remains on the Court. Most importantly Justice O'Connor who wrote the dissent for herself, Justice Rehnquist and then Chief Justice Burger asserting that political gerrymandering was not unconstitutional, is still on the Court (as is now Chief Justice Rehnquist) and is now the deciding vote in most redistricting cases. Justice O'Connor in her opinions in the *Shaw* line of cases has repeated that political gerrymandering is a constitutional excuse for misshapen districts. (See the Opinion for the Court in *Bush v. Vera*, 517 U.S. 952, 964 (1996) where Justice O'Connor cites to her own opinion concurring in the judgment and states that "purely political gerrymandering claims are not justiciable") Justices Thomas and Breyer have echoed that in both *Cromatie* decisions. Essentially the *Shaw* cases have changed

Cromartie v. Hunt,[138] is the continuation of *Shaw I and II*. After *Shaw II,* the Legislature had to either draw a plan or let the district court draw a plan. The Legislature attempted to draw a redistricting plan which protected all of the current incumbents (including the African-Americans).[139] The 12th was a Democratic district, all of the districts surrounding the 12th were Republican. The compactness of both the First and the Twelfth Districts was substantially improved but the Twelfth in particular was still elongated.

The district court, citing *Shaw I & II,* granted plaintiffs' motion for summary judgment, concluding that "the General Assembly, in redistricting, used criteria with respect to District 12 that are facially race driven and thereby violated the Equal Protection Clause of the Fourteenth Amendment."[140] The Supreme Court reversed with all nine Justices concurring in the judgment. In an opinion for the Court by Justice

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political gerrymandering from a cause of action to a defense. If there was any room left in the coffin lid *Cromartie* has managed to add one more nail to seal the fate of political gerrymandering as a federal cause of action.

[137] 517 U.S. at 964.

[138] 34 F.Supp.2d 1029 (E.D.N.C. Apr 03, 1998), *reversed by* 526 U.S. 541 (1999) and *vacated by* 526 U.S. 1128 (1999). (Hereinafter *Cromartie I*)

[139] The Twelfth District had an African-American population of 46% and a non-Hispanic white population of 45%. If all minorities are aggregated it is a majority-minority district. However, no argument was made by the state that the minorities voted in a cohesive pattern or that the level of total minority voting strength allowed for the election of an African-American. The state instead relied totally on its political deal or "gerrymandering" defense. The plaintiffs did assert that the makeup of the district with its strong Democratic voters and the less than 50% of the population status of the non-Hispanic white vote meant that it was highly unlikely that any candidate other than an African-American could win.

[140] *Cromartie I* at 545.

Thomas, in which the *Shaw* majority joined, the Court held that a trial was necessary to determine if the State's primary motivation had been politics or race. The Court cited evidence presented by the State's expert, Dr. Peterson whose testimony to this exact same effect was ignored by the circuit court in *West*, stated that the pieces of geography selected for District 12 corresponded to the political criteria of picking the most loyal Democrat voters for that district.[141] Furthermore the Court specifically noted that "[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, **even if it so happens that the most loyal Democrats happen to be black Democrats and even if the state were CONSCIOUS OF THAT FACT.**"[142] Justice Stevens, in his opinion concurring in the judgment, chided the *Shaw* majority for its earlier decisions and noted that the "record supports the conclusion that the most loyal Democrats living near the borders of District 12 happen to be black Democrats, and I have no doubt that the legislature was conscious of that fact when it enacted this apportionment plan."[143]

The district court held a four day trial and found that District 12 still constituted a racial gerrymander. The court cited as evidentiary support the contorted shape of the district and the tendency to pick geographic units based upon their racial characteristics. The district court rejected the argument that these geographic units had been chosen based upon their voting characteristics. The State asserted that these

[141] *Id.* at 549-550.
[142] *Id.* at 551 (emphasis added).

geographic units had been selected because they were more Democrat in their voting characteristics than were the non-selected geographic units. The court noted that adjacent precincts with similar Democrat registration were not selected and that these precincts had higher non-minority population than the precincts which had been selected. The court chose to ignore the fact that the precincts with the higher minority percentages actually tended to vote for Democrat candidates at a higher rate than the non-selected precincts with similar or higher Democrat registration figures.

The State promptly requested and received a stay from the Supreme Court. In *Cromartie II*, the Court reviewed the evidence presented found that factual findings of the district court were "clearly erroneous."[144] The Court also noted that "where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance."

The Court found (as it had in 1999) that the district's shape, splitting of towns and counties, and high African-American population could not "as a matter of law"

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[143] *Id.* at 557 (Stevens, concurring in judgment).
[144] *Easly v. Cromartie, 532 U.S. 234*, 237 (2001) (*Cromartie II*) The Court indicates that cases that arise on the appellate docket of the Court, as do most redistricting cases, will receive a more intensive review of the facts than other cases.

itself support a finding that race was the predominant factor given that "racial identification is highly correlated with political affiliation in North Carolina."[145] It is undisputed that race and political affiliation are highly correlated in Virginia. Plaintiffs actually have less circumstantial evidence in this case than in North Carolina because the districts are more compact and contiguous and there is no direct evidence of intent.

The Court reviewed three evidentiary findings and held that the district court made erroneous conclusions of fact in each.

- First, the Court found that relying on voter *registration* was not as reliable as voter *behavior*, because, as expert witness, Dr. Peterson stated, "in North Carolina, party registration and party preference do not always correspond."[146]

- Second, plaintiff's expert testimony establishing, amongst other things, that this district was 63% Democrat reliable while 60% was all that was needed; that the legislature excluded white precincts; that one precinct was split; and that other plans were drawn that would have created a safe Democrat district with fewer African-American precincts was not sufficient to show that race was the predominant factor.[147]

[145] *Id.* at 243.
[146] *Id.* at 251.

- Third, the district court could not reject evidence that showed that African-American Democrats were more reliably Democrat and the district's boundaries were drawn to include reliable Democrats.[148]

If a legislature constructs a majority-minority district based on political performance rather than race, then it is engaged in "constitutional political gerrymandering."[149] Majority-minority districts, or the approximate equivalent, are allowed as long as they are based on political performance. It allows legislatures to draw lines that concentrate Democrats *even if* they are minorities, not *because* they are minorities.

The Court has placed a substantial legal burden on any plaintiff attempting to show that a legislature has used race as a "predominant factor" in line drawing. When attacking a majority-minority district "where racial identification correlates highly with political affiliation," you must be able to show that the legislature could get the same political effect with alternate means using traditional districting principles. You must also show using the alternate means "would have brought about significantly greater [racial] balance."[150]

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[147] *Id.* at 246.
[148] *Id.* at 252.
[149] *Cromartie I*, 526 U.S. at 541.
[150] *Cromartie II*, No. 99-1864, slip op. at 23 (U.S. Apr. 18, 2001).

Plaintiffs did not and cannot show that the General Assembly could have gained the same political effect through alternate means. The circuit court's constant reference to increased "influence", as opposed to the election of minority candidates, proves that plaintiffs did not produce a plan which produced a greater racial balance among the districts yet left the political results of the redistricting plan intact. Indeed, plaintiffs' influence theory relies on the correlation of politics and race. The entire purpose of the litigation was to reduce the size of the Republican majority in the General Assembly. Dr. Peterson testified, as he did in North Carolina, that race and political affiliation correlates in Virginia. This was not disputed. As in North Carolina, plaintiffs here failed to produce the evidence necessary to prove that race, and not politics, was the predominant motivation in the construction of the districts.

Finally plaintiffs have attempted to create this "whipsaw" effect between the federal and state standards by waiving their federal causes of action. Had the plaintiffs brought all of their claims in a single venue, instead of seeking a particular circuit court, many of the conflicting issues could have been resolved in a single forum.

CONCLUSION

If the circuit court is affirmed, all redistricting plans in the Commonwealth of Virginia will become engulfed in both state and federal litigation. Decisions of the state courts will be challenged in the federal courts. The jurisdictions of the State will have a

near impossible task even though they are attempting to be responsible in the construction of their redistricting maps. The federal courts have, in the last five years, attempted to eliminate some of the uncertainty in this area of the law and allow responsible jurisdictions the ability to construct redistricting plans with the reasonable certainty that the election process will not be thrown into legal chaos. This Court needs to further that process. This can only be done by conforming any racial gerrymandering cause of action under the Virginia Constitution to the standards used by the federal courts in assessing these cases. Under those standards, the decision of the circuit court must be reversed and the plaintiffs' case dismissed.

Respectfully submitted,

CERTIFICATE OF SERVICE

Pursuant to Rule 5:30(c) of the Rules of Supreme Court of Virginia, I hereby certify that Rules 5:26(d) and 5:27 have been complied with, that twenty copies of this *amicus* brief were filed by hand-delivery this ___ day of July, 2002 in the Office of the Clerk of the Supreme Court of Virginia, and that three copies of this *amicus* brief were mailed by certified first-class mail, postage prepaid, this ___ day of July, 2002, to the following counsel:

Jerry W. Kilgore, Esq.
William H. Hurd, Esq.
Francis S. Ferguson, Esq.
Judith Williams Jagdmann, Esq.
Maureen R. Matsen, Esq.
Anne Marie Cushmac, Esq.
A. Anne Berkebile, Esq.
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071 (Telephone)
(804) 371-2087 (Facsimile)

E. Duncan Getchell, Jr., Esq.
Robert L. Hodges, Esq.
Stephen A. Katsurinis, Esq.
William H. Baxter II, Esq.
McGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030
(804) 775-4319 (Telephone)
(804) 698-2061 (Facsimile)

Jeffrey K. Mitchell, Esq.
Kevin P. Oddo, Esq.
Flippin, Densmore, Morse & Jessee
1715 Platt Drive, Suite 1300
Blacksburg, Virginia 24060
(540) 961-2600 (Telephone)

(540) 961-2941(Facsimile)

Pamela S. Karlan, Esq.
Stanford Law School
559 Nathan Abbott Way
Stanford, California 94305-8610
(650) 725-4851 (Telephone)
(650) 725-0253 (Facsimile)

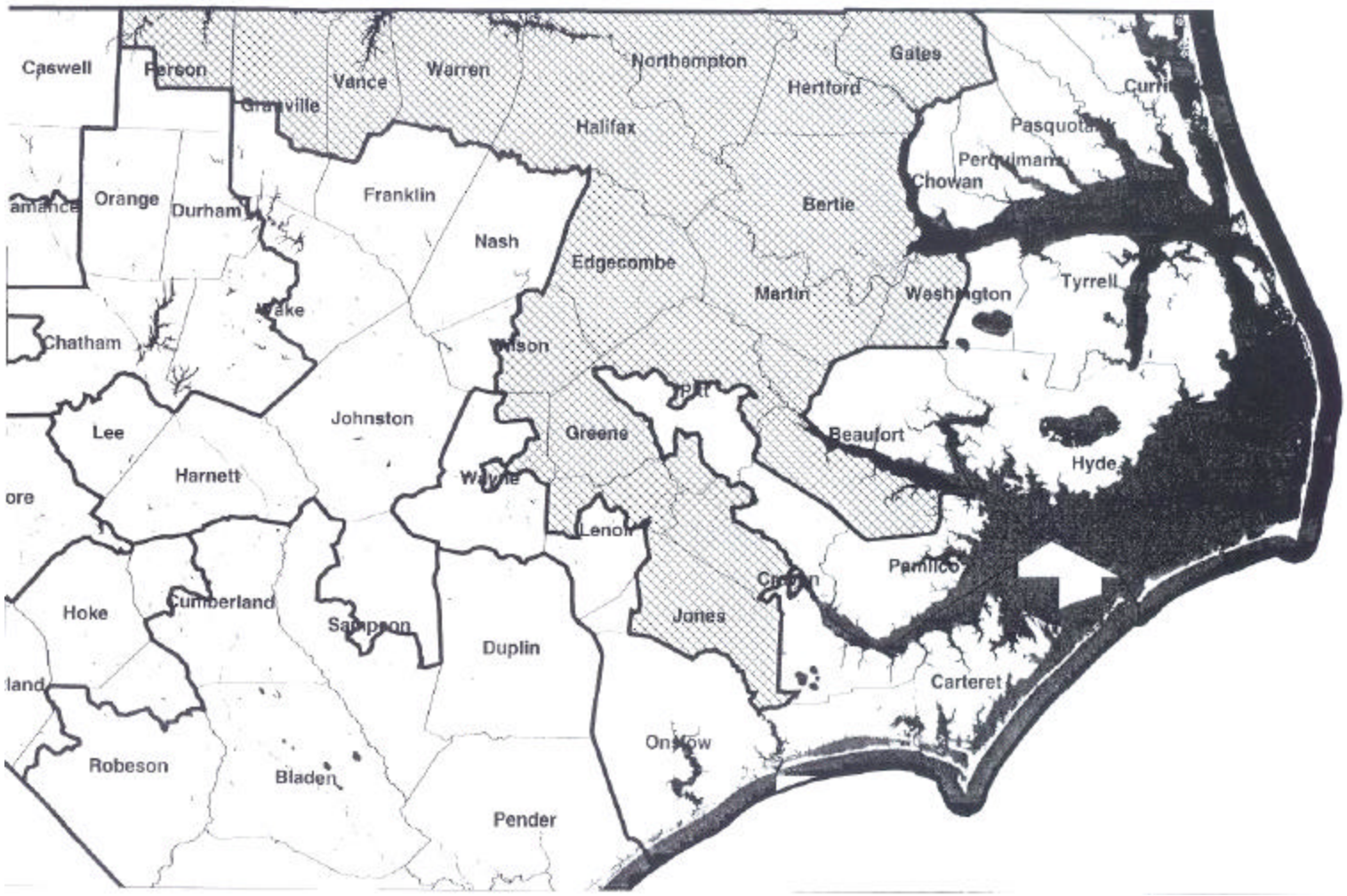
Ronald A. Klain, Esq.
Jonathan D. Hacker, Esq.
Jeremy B. Bash, Esq.
O'Melveny & Myers, LLP
555 13th Street N.W.
Washington, D.C. 20004-1109
(202) 383-5300 (Telephone)
(202) 383-5414 (Facsimile)

William B. Hopkins, Esq.
Martin Hopkins & Lemon, P.C.
P.O. Box 13366
Roanoke, Virginia 24033
(540) 982-1000 (Telephone)
(540) 982-2015 (Facsimile)

_/s/ _____

APPENDIX A

Court Approved North Carolina District 1



APPENDIX B

Court Approved Illinois District 4 "The Earmuff District"