Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences

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Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences

Cover Page Footnote
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This article is available in Fordham Law Review: https://ir.lawnet.fordham.edu/flr/vol62/iss6/2
In this Article the authors critically examine the Supreme Court's recent decision in Shaw v. Reno, which held that a North Carolina minority-majority voting district of "dramatically irregular" shape is subject to strict scrutiny, absent sufficient race-neutral explanations for its boundaries. While the authors assert that such race-conscious redistricting will meet the burdens of strict scrutiny, given the peculiar history of the southern states, they here argue that Shaw is fundamentally flawed. They examine the history of political racism in North Carolina leading up to the 1991 redistricting plan. They then examine the Court's misguided presumptions that race-conscious districting plans are akin to political apartheid and segregation, reinforce racial stereotypes, and damage our system of democracy. The authors argue that minority-majority congressional districts—unlike apartheid and segregation—are intended to include racial minorities in the politics from which they were for so long locked out, thereby furthering pluralism in Congress. The authors therefore call on the Court to modify Shaw before its misguided reliance on shape and appearance over intent and history results in a rollback of recent political gains by African-Americans, gains which have brought America a step closer to the ideal of a truly representative democracy.
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BACKGROUND: STATEMENTS OF NORTH CAROLINA PUBLIC OFFICIALS

CONGRESSMAN George White of North Carolina, African-American, farewell speech to the United States Congress, January 29, 1901:

I want to enter a plea for the colored man, the colored woman, the colored boy, and the colored girl of this country.

... This, Mr. Chairman, is perhaps the negroes' temporary farewell to the American Congress; but let me say, Phoenix-like he will rise up some day and come again. These parting words are in behalf of an outraged, heart-broken, bruised, and bleeding, but God-fearing people, faithful, industrious, loyal people—rising people, full of potential force.

... The only apology that I have to make for the earnestness with which I have spoken is that I am pleading for the life, the liberty, the future happiness, and manhood suffrage for one-eighth of the entire population of the United States.¹

North Carolina Governor Charles Brantley Aycock, December 1903:

I am proud of my State, moreover, because there we have solved the negro problem. ... We have taken him out of politics and have thereby secured good government under any party and laid foundations for the future development of both races. We have secured peace, and rendered prosperity a certainty.²

North Carolina Governor Thomas Walter Bickett, August 23, 1920:

In North Carolina we have definitely decided that the happiness of both races requires that white government shall be supreme and unchallenged in our borders. Power is inseparably linked with responsibility; and when we deny to the negro any participation in the making of laws, we saddle upon ourselves a peculiar obligation to protect the negro in his life and property, and to help and encourage him in the pursuit of happiness.³

John Parker, upon accepting the 1920 Republican Party nomination for governor of North Carolina:

I have attended every state convention since 1908 and I have never seen a Negro delegate in any convention that I attended. The Negro as a class does not desire to enter politics. The Republican party of North Carolina does not desire him to do so. We recognize the fact that he has not yet reached the stage in his development when he can

share the burdens and responsibilities of government. This being true, and every intelligent man in North Carolina knows that it is true, the attempt of certain petty Democratic politicians to inject the race issue into every campaign is most reprehensible. I say it deliberately, there is no more dangerous or contemptible enemy of the state than the man who for personal or political advantage will attempt to kindle the flame of racial prejudice or hatred.\textsuperscript{4}

Campaign literature of Willis Smith,\textsuperscript{5} successful North Carolina candi-


Parker, appointed to the U.S. Court of Appeals for the Fourth Circuit in 1925, was nominated by President Hoover on March 21, 1930, for appointment as an associate justice of the United States Supreme Court.

Walter White, executive secretary of the NAACP, telegraphed Judge Parker on March 26, 1930, inquiring if he had actually made the [above] statement, and if so whether he still held the same views. . . . [H]e apparently did not answer the telegram, and thus the NAACP launched a vigorous campaign against Parker's confirmation. The NAACP was aided by some two hundred Negro newspapers and the National Association of Colored Women. The official protest was filed with the Senate Judiciary Committee, and the senators were bombarded with telephone calls, telegrams, letters, petitions, and visits . . . .

. . . . Walter White argued that no one who favored keeping the Negro out of politics, as Parker seemed to have done in 1920, could approach Fourteenth Amendment questions with that 'dispassionate, unprejudiced, and judicial frame of mind which would enable him to render a decision according to the Constitution.'

\textit{Id.} at 218-19. Parker's nomination was defeated on May 7, 1930 by two votes. \textit{See id.} at 230.

Some years later, as a court of appeals judge in Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. 1951), Judge Parker voted to deny the integration of South Carolina schools, reasoning that South Carolina could lawfully offer "separate but equal" schools for that state's white and black schoolchildren. \textit{Id.} at 533-37. He denied plaintiff's assertion that "separate but equal" violated the equal protection guarantee, holding that

\[\text{[t]he federal courts would be going far outside their constitutional function were they to attempt to prescribe educational policies for the states in such matters . . . . For the federal courts to do so would result, not only in interference with local affairs by an agency of the federal government, but also in the substitution of the judicial for the legislative process in what is essentially a legislative matter.}\]

\textit{Id.} at 536. Judge Waring filed a vigorous dissent to Parker's position, writing:

From [the] testimony, it was clearly apparent, as it should be to any thoughtful person . . . that segregation in education can never produce equality and that it is an evil that must be eradicated. . . . [A]ll of the legal guideposts, expert testimony, common sense and reason point unerringly to the conclusion that the system of segregation in education . . . must go and must go now.

\textit{Segregation is per se inequality.}


\textsuperscript{5} Willis Smith ran against and defeated Dr. Frank Graham, a distinguished educator and former president of the University of North Carolina. \textit{See} Julian M. Pleasants & Augustus M. Burns III, Frank Porter Graham and the 1950 Senate Race in North Caro-
date for United States Senate, 1950:

**WHITE PEOPLE WAKE UP**

**BEFORE IT'S TOO LATE**

YOU MAY NOT HAVE ANOTHER CHANCE

**DO YOU WANT?**

- Negroes working beside you and your wife and daughters in your mills and factories?
- Negroes eating beside you in public eating places?
- Negroes riding beside you and your wives in buses, cabs and trains?
- Negroes sleeping in the same hotels and rooming houses?
- Negroes teaching and disciplining your children in schools?
- Negroes sitting with you and your family at all public meetings?
- Negroes going to white schools and white children going to Negro schools?
- Negroes to occupy the same hospital rooms with you and your wife and daughters?
- Negroes as your foremen and overseers in the mills?
- Negroes using your toilet facilities?

Northern political labor leaders have recently ordered that all doors be opened to Negroes on union property. This will lead to whites and Negroes working and living together in the South as they do in the North. Do you want that?

FRANK GRAHAM FAVORS MINGLING OF THE RACES

HE ADMITS THAT HE FAVORS MIXING NEGROES AND WHITES—HE SAYS SO IN THE REPORT HE SIGNED. (For Proof of This, Read Page 167, Civil Rights Report)

DO YOU FAVOR THIS—WANT SOME MORE OF IT?

IF YOU DO, VOTE FOR FRANK GRAHAM

BUT IF YOU DON'T VOTE FOR AND HELP ELECT

**WILLIS SMITH for SENATOR**

HE WILL UPHOLD THE TRADITIONS OF THE SOUTH

KNOW THE TRUTH COMMITTEE

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lina (1990); see also Samuel Lubell, The Future of American Politics 106-17 (3d ed. 1965). Jesse Helms, who was a campaign worker for Smith, was later elected to the United States Senate, using racist, though more subtle, campaign literature. See Kathleen H. Jamieson, Dirty Politics 80 (1992).

The final oppositional campaign ad of North Carolina Senator Jesse Helms, 1990:

The . . . ad . . . showed the plaid-shirted arms and white hands of a male, a simple gold wedding ring on the third finger of his left hand, opening, presumably reading and then crumpling a rejection letter as the announcer says, 'You needed that job, and you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair? Harvey Gantt says it is. Gantt supports Ted Kennedy's racial quota law that makes the color of your skin more important than your qualifications. You'll vote on this issue next Tuesday. For racial quotas: Harvey Gantt. Against racial quotas: Jesse Helms.\(^7\)

Excerpts from the United States Supreme Court majority opinion in Shaw v. Reno,\(^8\) written by Justice Sandra Day O'Connor, 1993:

Put differently, we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. . . .\(^9\)

. . . [A]ppellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification. . . . Accordingly, we reverse the judgment of the District Court and remand the case for further proceedings consistent with this opinion.\(^10\)

I. FROM DARKNESS TO A NEW DAWN?

From 1901 to 1992, the one constant in North Carolina congressional politics was the triumph of white supremacy. For that state's African-Americans, these were nine decades of exclusion (or absence) from the United States Congress.\(^11\) Similarly, for all of these years, African-Americans were absent from the congressional delegations of Alabama, Florida, South Carolina, and Virginia.\(^12\)

When in 1992, North Carolinians elected Eva Clayton and Mel Watt, two African-Americans, to the House of Representatives of the United

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7. Jamieson, supra note 5, at 97 (quoting campaign advertisement of Jesse Helms).
9. Id. at 2827 (emphasis added).
10. Id. at 2832 (emphasis added).
12. See id. African-Americans were absent from the congressional delegations of Louisiana until 1991, of Mississippi until 1987, of Tennessee until 1975, and of Georgia and Texas until 1973. See id.
States Congress, many Americans—black and white—were ecstatic, believing they were experiencing a new dawn in American congressional racial politics. Not since 1901 had an African-American represented North Carolina in Congress, despite the candidacy of numerous, qualified black individuals and the fact that more than 20% of North Carolinians are and were African-American. Absent representation, throughout this period, the rights of North Carolina's African-Americans were stripped and their interests ignored; for decades, North Carolina politics were marred by the forcible exclusion of African-Americans from the political process, by race-baiting and by extreme racial polarization at the polls, in short, by the marginalization of the political power and interests of African-Americans.

The 1991 North Carolina congressional redistricting was a significant step toward correcting these past injustices. Pursuant to that enactment, in two of North Carolina's twelve congressional districts, African-Americans comprise a slight majority—approximately 53%—of eligible voters. In the 1992 congressional election, voters in those two districts chose African-American representatives, Eva Clayton and Mel Watt, two veterans of North Carolina politics, highly regarded by their constituents and congressional peers.

Notwithstanding these representatives' service, a suit, Shaw v. Barr, was brought by two white Duke University law professors and local voters, challenging the pluralism occurring in North Carolina's congressional delegation. These plaintiffs have sought to invalidate the 1991 redistricting which enabled Representatives Clayton and Watt to take office, claiming that the redistricting violates the Equal Protection.


15. See infra notes 64-96 and accompanying text.


17. See infra notes 110-26 and accompanying text.


19. See Southern U.S. Congressional Districts by Party and Black Vote, 103rd Congress, First Session, infra app. B. The First and Twelfth Districts (like other similar districts) are commonly referred to as "minority-majority districts" because, in these, minorities comprise the majority of voters.


21. Professors Robinson O. Everett (lead counsel) and Melvin G. Shimm (plaintiff) teach at Duke University School of Law, where this year there is only one African-American on the school's full-time faculty. Their colleague, Professor Jerome McCristal Culp, Jr., has written often about his lonely experience at that school. See, e.g., Jerome M. Culp, Jr., Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy, 77 Va. L. Rev. 539 (1991).
Clause. Plaintiffs have focused their attack on the Twelfth District’s shape, contending that its untraditional configuration renders it constitutionally infirm.

Initially, a three-judge district court panel dismissed the case. The district court majority held that plaintiffs failed to state a claim as they failed to allege (and could not prove) discriminatory intent, a prerequisite to an equal protection claim:

Simply put, . . . the plaintiffs here have not alleged—nor could they prove under the circumstances properly before us on this record—an essential element of their equal protection (and parallel Fifteenth Amendment) claim: that the redistricting plan was adopted with the purpose and effect of discriminating against white voters such as plaintiffs on account of their race. The requisite intent, for equal protection and Fifteenth Amendment purposes, is a legislative intent to deprive white voters, including plaintiffs, of an equal opportunity with all other racial groups of voters—on a statewide basis—to participate in the political process and to elect candidates of their choice.

The three-judge panel further held that plaintiffs could not prove constitutional injury:

The plan demonstrably will not lead to proportional underrepresentation of white voters on a statewide basis. Within the specifically challenged districts . . . the mere fact that white voters (assuming the sad continuation for yet another season of racial bloc voting) will elect fewer candidates of their choice than if they were in white-majority districts is not a cognizable constitutional abridgement of their right to vote, and the two plaintiffs who alone are registered to vote in one of the challenged districts, the Twelfth, will suffer no cognizable constitutional injury if her or his particular candidate should lose by virtue of the district’s racial composition.

The court concluded by recognizing that “questions about the political and social wisdom of the North Carolina congressional redistricting plan’s creation of two tortuously configured black-majority districts . . . are in the end political ones.”

 Plaintiffs’ assault on racial pluralism, however, was resuscitated on appeal. The Supreme Court reversed the district panel, stating that “ap-

22. See Barr, 808 F. Supp. at 467-68.
23. See id. A prior challenge brought by the Republican Party of North Carolina, objecting to the district as a political gerrymander, was dismissed. See Pope v. Blue, 809 F. Supp. 392, 395 (W.D.N.C.), aff’d, 113 S. Ct. 30 (1992). The Barr court described District Twelve as “a thin band, sometimes no wider than Interstate Highway 85, some 160 miles long, snaking diagonally across piedmont North Carolina . . . .” Barr, 808 F. Supp. at 464. The plan divides precincts, counties, and towns. See id. A map of the Twelfth District is appended to the Supreme Court majority opinion. See Shaw, 113 S. Ct. at 2833.
24. Barr, 808 F. Supp. at 472 (citations omitted).
25. Id. at 473 (citation omitted).
26. Id.
pearances do matter," and questioning race-conscious districting that results in bizarre districts such as North Carolina's Twelfth District. The Court held that such "dramatically irregular" districts are subject to strict scrutiny, absent sufficient race-neutral explanations for their boundaries. Under strict scrutiny, such districts would be upheld only where they are narrowly tailored to serve a compelling state interest.

To support its conclusion, the Court identified three potential "harms" that might result from "dramatically irregular" districting plans: the "uncomfortable resemblance to political apartheid," the reinforcement of racial stereotypes, and possible damage to "our representational democracy" that might result from politicians' assuming that they represent the interests of only one race.

Implicitly equating racial classification with racial discrimination, the Court's "harm" analysis abandoned settled principles of equal protection law. Yet the distinction between classification and discrimination underlies all cases considered by the Court since its decision in Regents of the University of California v. Bakke addressing state attempts to remedy past racial discrimination. Indeed, the Shaw Court tacitly acknowledged the significance of the distinction by stressing that "[t]his court never has held that race-conscious state decisionmaking is impermissible in all circumstances." The internal tension between the Court's "harm" analysis and its recognition that race-conscious remedial legislation can be justified and legal was left unresolved.

This tension was created because the Court abandoned the requirement of proving direct constitutional injury—here voter dilution. The concept of voter dilution is well established:

28. See id. at 2832.
29. Id. at 2820.
30. See id. at 2832.
31. See id.
32. See id. at 2827. Proceeding in the context of an appeal from the grant of 12(b)(6) dismissal, the Court did not find such harms, but rather posited their potential existence.
33. See The Supreme Court, 1992 Term—Leading Cases, 107 Harv. L. Rev. 144, 199-204 (1993) ("[T]hese ... analytical moves enabled the Court to substitute an ideal of color-blindness for the anti-discrimination principle at the core of the Equal Protection Clause.") (citations omitted).
34. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (race-conscious admissions not based on set racial quotas are constitutionally permissible).
35. Shaw, 113 S. Ct. at 2824. The classification/discrimination distinction had been maintained in a variety of circumstances. For example, in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 566 (1990), the Court found permissible racial classifications intended to promote diversity and remedy past discriminatory practices. See also Laurence H. Tribe, American Constitutional Law 1577-85 (2d ed. 1988) (discussing circumstances in which the Supreme Court has appropriately upheld gender distinctions).
36. Revealingly, the Court describes the notion of a "color-blind" constitution as an "ideal." Shaw, 113 S. Ct. at 2824. In trying to accomplish that ideal, the Court had previously sanctioned race-conscious remedies. See Bakke, 438 U.S. at 320.
37. See Shaw, 113 S. Ct. at 2824. The plaintiffs' failure to allege dilution was key to the district court panel's dismissal of the action. See Shaw v. Barr, 808 F. Supp. 461, 473
The essence of racial vote dilution . . . is this: that primarily because of the interaction of . . . racial polarization . . . with a challenged electoral mechanism, a racial minority with distinctive group interests . . . is effectively denied the political power to further those interests that numbers alone would presumptively give it in a voting constituency not racially polarized.\(^{38}\)

Yet the Court here specifically noted that the plaintiffs failed even to allege voter dilution:

\[\text{[A]}\text{ppellants did not claim that the General Assembly's reapportionment plan unconstitutionally 'diluted' white voting strength. Rather, appellants' complaint alleged that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a 'color-blind' electoral process.}\(^{39}\)\]

The theoretical right to "participate in a 'color-blind' electoral process," never before recognized by the Court, was accepted as a substitute for the direct injury of voter dilution.\(^{40}\) But what sets lawful classifications apart from outright discrimination is the fact that discrimination injures those adversely classified.\(^{41}\)

Absent injury—and the Supreme Court accepts there was no voter dilution here—the classification should be lawful. The Shaw Court's abandonment of the touchstones of discriminatory harm and purpose in


\(^{39}\) Shaw, 113 S. Ct. at 2824.

\(^{40}\) Id. The majority states that racial classifications "'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" Id. (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)). However, the very cases relied upon by the majority in support of permitting a claim to proceed \(\text{without}\) allegations of direct harm were cases in which \(\text{extreme}\) harm was alleged by plaintiffs. See, e.g., Hirabayashi, 320 U.S. at 86-88 (loss of liberty and property through wartime internment of Japanese American citizens); Loving v. Virginia, 388 U.S. 1 (1967) (denial of right to marry across racial lines).

\(^{41}\) For example, it was the allegations of direct constitutional injury which gave white plaintiffs standing to raise "reverse" discrimination claims in Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (white teachers laid off before black teachers with less seniority raised valid equal protection claim); \text{see also Shaw, 113 S. Ct. at 2845-49 (Souter, J., dissenting)} (criticizing majority's abandonment of traditional injury requirement and discussing cases).

In addition, under the Court's analysis, plaintiffs need not show discriminatory purpose. Since deciding Washington v. Davis, 426 U.S. 229 (1976), however, the Court has required plaintiffs alleging indirect harms—there, adverse impact—to allege discriminatory purpose. See, e.g., Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 270 n.21 (1977) (challenge to village rezoning plan adversely impacting black residents required proof of discriminatory intent); Hunter v. Underwood, 471 U.S. 222, 227-28 (1985) (challenge to criminal provision which resulted in disproportionate numbers of black convictions required proof that statute was enacted with that purpose); McClesky v. Kemp, 481 U.S. 279, 298 (1987) (challenge to death penalty statute's disproportionate impact on black defendants required proof that statute was enacted "\because of\ an anticipated racially discriminatory effect").
voting rights cases where a congressional district's shape does not comport with some obscure notion of regularity lacks any principled basis under its equal protection precedent.\textsuperscript{42}

With plaintiffs' urging, the Court has created law that could make \textit{Shaw v. Reno} equivalent for the civil rights jurisprudence of our generation to what \textit{Plessy v. Ferguson}\textsuperscript{43} and \textit{Dred Scott v. Sandford}\textsuperscript{44} were for prior generations. In the specific context of voting-rights jurisprudence, the Court has made it possible that North Carolina's (and other states' as well) congressional representation might once again become lily white by providing the basis for invalidating all minority-majority districts.\textsuperscript{45} Many districts will fail through the difficulty of applying strict scrutiny. For example, one court's application of the narrowly tailored standard to minority-majority districting has proved fatal to a districting plan. \textit{Hayes v. Louisiana},\textsuperscript{46} the first case to apply strict scrutiny to minority-majority districts, held that a black voting population of 63\% was in excess of that "adequate to ensure that blacks could elect a candidate of their choice."\textsuperscript{47} The guidance provided by that court was that a percentage of "55\%—and probably less" would be adequate.\textsuperscript{48} We fear that the Supreme Court, faced with the unworkable application of an inappropriate standard, will next move to invalidate all minority-majority

\textsuperscript{42} Moreover, the Court recognized that traditional principles of compactness and contiguity in congressional districting are not constitutionally required. See \textit{Shaw}, 113 S. Ct. at 2827. Justice Souter aptly pointed out that, because these are not constitutionally required, "their absence cannot justify the distinct constitutional regime put in place by the Court today." \textit{Id.} at 2849 (Souter, J., dissenting). Indeed, Congress itself has considered and rejected compactness requirements several times since 1929, when the last apportionment statute requiring compactness, the 1911 Apportionment Act, expired. See \textit{Wood v. Broom}, 287 U.S. 1, 6-8 (1932) (citing congressional debate concerning compactness requirement); see also H.R. 970, 89th Cong., 1st Sess. (1965); H.R. 2349, 97th Cong., 1st Sess. (1981). Congress has consistently determined that effective representation of a district is not dependent upon the shape of the district.

There is no reasoned basis for concluding that politically similar but geographically diverse voters cannot be adequately represented in Congress by the same representative. Indeed, our national government is based on the opposite assumption. National legislators typically campaign on issues transcending local political boundaries. For example, Congressman Watt's campaign was pro-labor and pro-urban development. Presidential and senatorial candidates are elected by widely dispersed coalitions responding to common issues and concerns such as health care and fiscal responsibility.\textsuperscript{43}

\textit{163 U.S. 537} (1896) (determining that "separate but equal" treatment of African-Americans is lawful).

\textsuperscript{44} 60 U.S. (19 How.) 393, 404-05, 407 (1856) (determining that blacks, as "a subordinate and inferior class" of beings, had no rights of citizenship and noting that "at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted . . . . [blacks] had no rights which the white man was bound to respect. . . .")

\textsuperscript{45} Again, the term "minority-majority" refers to districts—like North Carolina's First and Twelfth Districts—where racial minorities comprise the majority of voters.

\textsuperscript{46} 839 F. Supp. 1188 (W.D. La. 1993).

\textsuperscript{47} \textit{Id.} at 1206-08.

Accordingly, we believe that Shaw is one of the most important civil rights cases decided by the United States Supreme Court since Brown v. Board of Education and Baker v. Carr. While the majority opinion undoubtedly was written with good intentions, unwittingly it has created the potential for devastating racial consequences.

In this Article, we analyze Shaw v. Reno to determine whether it was "wrongly decided." We evaluate the potential adverse political consequences of Shaw and whether it could lead to the significant diminution throughout the South of recent gains by African-Americans in Congress. In our analysis, we focus on the Shaw case itself and on North Carolina's history of political oppression of African-American citizens, both because Shaw arose in North Carolina and because that state is a fair proxy (and even a beneficent one) for the histories of other southern states. In light of that history and for the good of the American democratic ideal, the standards set by this "wrongly-decided" decision must be modified and its application in North Carolina and other states must be strictly limited.

History illuminates the flaws of the Supreme Court's decision, in particular the Court's purported reliance on doctrines of oppression. In Shaw, the Supreme Court for the first time used the term "political

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49. As Professors Aleinikoff and Issacharoff note:
   So we are left with an unsatisfactory theory that yields an unsatisfactory standard for its implementation. Shaw does not adequately instruct lower courts as to how they should review subsequent claims, it does not resolve the ongoing claims of the filler people, and it does not answer the more troubling questions that lie close to the heart of any system of districting.


51. 369 U.S. 186 (1962) (stating that representatives must be fairly apportioned across the population).

52. Shaw has created a cottage industry for its critics. See, e.g., Richard H. Pildes & Richard G. Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno, 92 Mich. L. Rev. 483, 485 (1993) ("Shaw will not only constrain the districting process constitutionally but, through its radiating effects on statutory interpretation, may reshape the districting process at its core."); Aleinikoff & Issacharoff, supra note 49, at 650 ("At the end of the day, Shaw remains an enigmatic decision . . . .").

53. In Fullilove v. Klutznick, 448 U.S. 448, 522 (1980), Justice Rehnquist joined Justice Stewart's view that "Plessy v. Ferguson was wrong" when decided. This view has been endorsed by two members of the Shaw majority. See Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2813 (1992) ("[W]e think Plessy was wrong the day it was decided."). We submit that Shaw was similarly wrong when decided, and must be promptly modified.

54. Notably, elections in the past few years have nearly doubled the number of African-American members of Congress. See African-Americans in the U.S. Congress, 1870-1993, infra app. A; Congressional Representation (House and Senate), 1871-1993, infra app. C.
RACIAL REDISTRICTING

apartheid." Yet the Court's comparison of North Carolina's voting districts to political apartheid is based on a profound misperception of apartheid and of those districts. The Shaw majority's concern that minority-majority districts will polarize the nation and work to the detriment of African-Americans is unfounded. In congressional districts throughout America, white congressmen represent the majority of African-Americans without unduly polarizing the nation. Enabling African-American congressmen to represent some African-Americans—as well as whites in their districts—does not raise concerns different from those raised by white congressmen representing blacks and is not, as the Supreme Court hints, political apartheid.

Nor does minority-majority districting perpetuate stereotyping, or foster segregation. Rather, it is a modest policy of inclusion appropriately considered by the North Carolina legislature.

Designed so that North Carolina Governor Aycock's promise to take the Negro 'out of politics' and North Carolina Governor Bickett's plan that 'white government shall be supreme and unchallenged' would not return, there is compelling justification for the creation of North Carolina's challenged districts. Under any scrutiny, the flaws in Shaw limit its value, yet, even under the strict scrutiny that Shaw appears to require, North Carolina's 1991 redistricting, which serves to remedy the ills of lingering historic discrimination, is constitutionally sound.

II. "A PAGE OF HISTORY"—1896-1945

In Shaw v. Reno, the Supreme Court held that race-conscious redistricting is lawful if 'narrowly tailored to further a compelling govern-

55. Shaw, 113 S. Ct. at 2827.
56. As did the dissenters, we submit that "it strains credulity to suggest that North Carolina's purpose in creating a second majority-minority district was to discriminate against members of the majority group by 'impair[ing] or burden[ing] their' opportunity . . . to participate in the political process.'" Id. at 2838 (White, J., dissenting and quoting the majority) (alteration in original).
57. Approximately 8.66 million, or 42.5%, of the country's 20.38 million voting age blacks are represented by African-American congresspersons. See David A. Bositis, Joint Center for Pol. & Econ. Stud., The Congressional Black Caucus in the 103rd Congress, tbl. 16 (1993) (for number of black voters) (copy on file with the Fordham Law Review); U.S. Dep't of Commerce, 1990 Census Population and Housing Profile: Congressional Districts of the 103rd Congress (Census Doc. No. 1990 CPH-L-117), tbl. 2 (for number of black voters in minority-majority districts) (copy on file with the Fordham Law Review).
58. We agree with Justice Blackmun:

It is particularly ironic that the case in which today's majority chooses to abandon settled law and to recognize for the first time this 'analytically-distinct' constitutional claim, . . . is a challenge by white voters to the plan under which North Carolina has sent black representatives to Congress for the first time since Reconstruction.

Shaw, 113 S. Ct. 2843 (Blackmun, J., dissenting).
59. Supra note 2 and accompanying text.
60. Supra note 3 and accompanying text.
The phrases "race conscious," "narrowly tailored," and "compelling governmental interest" do not have the specificity of scientific description. The only way to wisely evaluate minority-majority districting plans in light of these specific terms is to view them in proper historical perspective, applying the maxim of Justice Oliver Wendell Holmes: "a page of history is worth a volume of logic." The redistricting plan at issue in Shaw v. Reno, for example, is permissible in view of the historic circumstances of North Carolina's extensive legitimization of racism in every sphere of public and private life during the post-Reconstruction era. The North Carolina plan is justified by the State-imposed racism—imbedded in the laws of North Carolina regulating housing, marriage, employment, public conduct and indeed every facet of life—that was reinforced and exacerbated by the private and public use of fraud and violence to deter African-Americans in North Carolina from voting.

In fact, the very housing patterns that define the shape of the challenged districts emerged as a product of North Carolina's history. To avoid white disapprobation and violence even when not state imposed, African-Americans in North Carolina conducted their lives and settled in communities where it was thought they would minimize physical hostility by whites and maximize the few economic options permitted by racially discriminatory hiring practices. Accordingly, the dispersal of blacks throughout North Carolina demands a district shape different from that which would protect the interests of white voters. Otherwise, black voters will once again be penalized by North Carolina law and culture, which forced them to live in distinct communities where most black North Carolinians continue to reside. In short, North Carolina and white North Carolinians caused the "circumstances" that now make constitutionally permissible the relatively modest race consciousness of the 1991 redistricting legislation.

The post-Reconstruction era of racial suppression in North Carolina began with the "White Supremacy Campaign" of 1898. Professor

62. Id. at 2824, 2832.
64. A list of North Carolina's numerous, patently racist statutes is on file with the Fordham Law Review.
65. In Louisiana, a snake-like district that follows the riverbeds was recently invalidated. See Hays v. Louisiana, 839 F. Supp. 1188, 1199-1200 (W.D. La. 1993). Amazingly, the court ignored the historical significance of the district's economic base: "[c]otton and soybean plantations, centers of petrochemical production, urban manufacturing complexes, timberlands, saw mills and paper mills, river barge depots and rice and sugar cane fields." Id. These "segments" of the state economy, viewed by the Hays court as diverse, have the acknowledged commonality of disadvantage. Id. at 1203 n.48 ("At this moment in history black people in the South (and generally in America) are—on average—poorer and less well-educated than their white counterparts. Moreover, blacks in largely segregated communities are probably poorer—on the average—than blacks in more integrated communities.").
Prather’s description of the violence and intimidation of the 1898 election, at the hands of racist “Red-Shirts,” is instructive:

[C]rowds of Red-Shirts were waiting for Governor Russell at Laurinburg on his return from voting in Wilmington. Anticipating that some violence would be inflicted upon him, the train conductor suggested that he ride in the baggage car to avoid personal injury, and the Governor obligingly took a prepared seat among the baggage. When the train stopped at Laurinburg, it was surrounded and boarded by Red-Shirts, shouting: ‘Where is Russell?’ ‘Where is the Governor?’ ‘Bring him out!’ Those outbursts were accompanied by all sorts of vulgar language. There were rumors of threats to assassinate Governor Russell, and a race riot in the state appeared imminent. It was pathetic, indeed, to see a chief executive of a state subjected to such crass humiliation. This incident not only made a mockery out of the two-party tradition, but the democratic process as well.66

That the Republican governor was so intimidated by race-mongers that he hid in a baggage car so that his fellow white citizens would not assassinate him serves only to underscore the legitimacy of the fear felt by African-Americans were they, against the wishes of the white community, either to exercise their franchise rights or to move into white residential areas.

The Red-Shirts’ tactics of violence and intimidation dominated the election of 1898, when “armed with Winchester rifles and shotguns.... [t]hey stalked about, frightening Republicans, Fusionists, and blacks away from the polls.”67 Two years later, volatile elections again rocked North Carolina and resulted in passage of legislation disenfranchising African-Americans with the use of literacy tests and poll taxes:

As in 1898, Red-Shirts with all types of guns could be seen throughout the Black Belt loitering around the polls in riotous manner. To avoid violence, blacks as a body just did not vote. The elections were most gratifying to the Democrats. Aycock won the governorship against his Republican rival, Adams, by a decisive vote of 186,650 to 126,296, the largest majority ever given a gubernatorial candidate. Likewise, the [disenfranchisement] amendment was carried. To win the election, intimidation, physical terror, ‘fraud and rascality have reigned supreme,’ complained Senator Butler.68

After Governor Aycock was inaugurated, he made clear that the state’s primary governmental obligation was to disenfranchise the Negro to assure white supremacy. The implementation of the Aycock disenfranchisement scheme in 1900 incorporated all means possible to defeat George White, the last African-American from North Carolina to serve

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67. Id.
68. Id. at 182.
in the United States Congress until Eva Clayton and Mel Watt were elected in November 1992.

Congressman White's defeat was part of a pervasive conspiracy throughout the southern United States to keep the colored man "in his place" and to destroy his "manhood-suffrage." \(^{69}\) White's defeat symbolized the use of governmental, vigilante and other forces that denied the African-American what he had pleaded for: "the same chance for existence." \(^{70}\)

Governor Aycock of North Carolina was determined, at all costs, to deny blacks first class citizenship and to preclude them from the right to participate in the governmental process. In December 1903, Aycock spoke before the North Carolina Society of Baltimore and proclaimed:

> I am inclined to give to you our solution of this problem. It is, first, as far as possible under the Fifteenth Amendment *to disfranchise him*; after that let him alone, quit writing about him; quit talking about him, . . . Let the negro learn once for all that there is unending separation of the races . . . that they cannot intermingle; let the white man determine that no man shall by act or thought or speech cross this line, and the race problem will be at an end. \(^{71}\)

Governor Aycock set the tone for his successors. Several years later, Governor Locke Craig described and supported a proposed amendment to the North Carolina Constitution under which "the white men of North Carolina shall make and administer *all* the laws." \(^{72}\) And, in his presentation to the all white legislature of 1920, Governor Thomas W. Bickett said:

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\(^{69}\) 34 Cong. Rec. 1635-38 (1901).

\(^{70}\) *Id.* at 1638.

\(^{71}\) Aycock, *supra* note 2, at 415 (emphasis added). Governor Aycock stressed his supposed "regard" for African-Americans:

> These things are not said in enmity to the negro but in regard for him. He constitutes one third of the population of my State: he has always been my personal friend; as a lawyer I have often defended him, and as Governor I have frequently protected him. But there flows in my veins the blood of the dominant race; that race that has conquered the earth and seeks out the mysteries of the heights and depths. If manifest destiny leads to the seizure of Panama, it is certain that it likewise leads to the dominance of the Caucasian. When the negro recognizes this fact we shall have peace and good will between the races.

*Id.*

\(^{72}\) Locke Craig, Campaign Speech on the Suffrage Amendment, *in* Memoirs and Speeches of Locke Craig: Governor of North Carolina, 1913-1917, at 34 (May F. Jones ed., 1923) (emphasis added). He further explained:

> This one section will wipe out the negro vote in North Carolina. Of the 120,000 negro voters it will disfranchise 110,000 of them, practically all of them. It will be good-bye to all negro office holders, and all those who base their hope of office on the negro vote. . . . There is only one kind of a white man in North Carolina that will be disfranchised, and that is the white man who . . . denies his race and his color . . . and swears that he is a negro or the son of a negro, or the grandson of a negro, and that white man will be disfranchised.

*Id.* at 36-38.
Candor and my deep friendship for and my abiding interest in the permanent happiness of the negro race compel me to add that it is the settled conviction of the best people in all political parties in the South that it is necessary for the protection, the progress and the happiness of both races for the government to be run by white people, and it is the unalterable determination of the whites to keep in their own hands the reins of government.\textsuperscript{73}

Some public officials in other states were even less subtle than North Carolina governors in declaring their hatred of the colored man, willfully manipulating the political process to exclude blacks from voting. Judge Chrisman of Lincoln County, Mississippi, for example, described his state’s experience to its constitutional convention in 1890:

Sir, it is no secret that there has not been a full vote and a fair count in Mississippi since 1875—that we have been preserving the ascendancy of the white people by revolutionary methods. In plain words, we have been stuffing ballot boxes, permitting perjury and here and there in the State carrying the elections by fraud and violence until the whole machinery for elections was about to rot down.\textsuperscript{74}

The explicit racism in government spanned from almost every southern state public official to, at times, the White House. As an example, in 1896 President Grover Cleveland, distraught about a false rumor that a black had been present at an official White House function, made a frenzied denial: “It so happens that I have never, in my official... position, either when sleeping or waking, alive or dead, on my head or on my heels, dined, lunched, or supped, or invited to a wedding reception any colored man, woman, or child.”\textsuperscript{75}

Seven years after the Supreme Court decided \textit{Plessy v. Ferguson}, incorporating segregation into our Constitution, President Theodore Roosevelt, who was less hostile on the race issue, invited the moderate Booker T. Washington for an informal lunch at the White House.\textsuperscript{76} In response, the \textit{Memphis Scimitar} wrote: “The most damnable outrage which has ever been perpetrated by any citizen of the United States was committed yesterday by the President, when he invited a nigger to dine with him at the White House.”\textsuperscript{77} Senator Benjamin Tillman of South Carolina said: “Now that Roosevelt has eaten with that nigger Washington, we shall have to kill a thousand niggers to get them back to their places.”\textsuperscript{78} Georgia’s governor was sure that “no Southerner can respect

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\textsuperscript{73} Bickett, supra note 3, at 292 (emphasis added).
\textsuperscript{74} Burke Marshall, Federalism and Civil Rights 13-14 (1964) (quoting remarks of Judge Chrisman).
\textsuperscript{76} See William A. Sinclair, The Aftermath of Slavery 187-96 (2d ed. 1905).
\textsuperscript{77} Id. at 187.
\textsuperscript{78} Id.\end{center}
any white man who would eat with a negro."  

Senator James K. Varderman of Mississippi, who often used Booker T. Washington as a foil for his racist rhetoric, once commented:  

I am just as much opposed to Booker Washington as a voter, with all his Anglo-Saxon reinforcements, . . . as I am to the coconut-headed, chocolate-covered, typical little coon, Andy Dotson, who blacks my shoes every morning. Neither is fit to perform the supreme function of citizenship.

Contempt for African-American suffrage was well pronounced in the political arena.

The courts were often as insensitive as the state governments on the issue of assuring equal justice for African-Americans. In many cases, appellate courts upheld convictions despite prosecutors' references to black defendants and witnesses in such racist terms as "black rascal," "burr-headed nigger," "mean negro," "big nigger," "pickaninny," 

79. Id. at 188. Not to be outdone by others in racist rhetoric, James K. Varderman, then governor of Mississippi, wrote in his newspaper:

It is said that men follow the bent of their geniuses, and that prenatal influences are often potent in shaping thoughts and ideas in after life. Probably old lady Roosevelt, during the period of gestation, was frightened by a dog, and the fact may account for the qualities of the male pup that are so prominent in Teddy. I would not do either an injustice, but am disposed to apologize to the dog for mentioning it.

Id. at 196.


81. African-Americans had few allies. Even the women's suffrage movement placed great reliance on the argument that the votes of white women would serve to dilute the "adverse" impact of black male suffrage mandated by the Fifteenth Amendment. Suffragettes Elizabeth Cady Stanton and Susan B. Anthony "opened the way to . . . bigotry" in their influential National Suffrage Association. Eleanor Flexner, Century of Struggle: The Woman's Rights Movement in the United States 316 (rev. ed. 1975). Indeed, the National Board of that organization issued a statement noting that "granting suffrage to women who can read and write and pay taxes would insure white supremacy without resorting to any methods of doubtful constitutionality." Id. at 317 (citation omitted); see also William H. Chafe, The American Woman 15 (1972). The Equal Suffrage League of Raleigh, North Carolina—a chapter of the National American Woman's Suffrage Association—was particularly strident in its calls for women's suffrage, limited through the application of literacy tests to white women, to ensure white domination. See Glenda E. Gilmore, Gender and Jim Crow: Women and the Politics of White Supremacy in North Carolina, 1896-1920, at 439-47 (1993) (Ph.D. dissertation, University of North Carolina, Chapel Hill) (forthcoming UNC Press, 1995).


83. State v. Miles, 98 S.W. 25, 31 (Mo. 1906).
"mean nigger,"88 "three nigger men,"89 "niggers,"90 and "nothing but just a common Negro, [a] black whore."91

Moreover, even the institution of the Supreme Court was not immune from racist influence:

Mr. Hoover nominated as Justice of the United States Supreme Court John J. Parker of North Carolina, in spite of the fact that Parker had opposed the right of Negroes to vote. We have been told that Parker was willing to repudiate this stand but that the White House refused to let him; at any rate, while Mr. Hoover hastened to explain Parker's labor decisions, he treated his anti-Negro attitude with disdainful silence and despite advice and pleading, insisted upon sending this nomination to the Senate. It was finally defeated by a narrow margin by the influence of the Negro and labor vote and despite every effort of the administration to force it through.92

From birth to death, even in defense of the country, innumerable aspects of legitimized racism affected the lives of most African-Americans every day. In World War I, African-American soldiers fought abroad and lost their lives for what President Woodrow Wilson proclaimed was the war to make the world "safe for democracy." Yet, at home there was segregation, not democracy. During World War II, thousands of African-American soldiers lost their lives for what President Roosevelt said was the fight for the Four Freedoms. But at home, many African-Americans were denied the Four Freedoms, including the right to vote.

Nearly every achievement was gained only through struggle. For example, consider the experiences of John Hope Franklin, now the James B. Duke Professor Emeritus at Duke University, and a former colleague of the plaintiffs in Shaw v. Reno:

[John Hope Franklin] has achieved all of [these academic honors] despite having had to cope with the outrageous indignities that can be visited on a black person in our society. When his father, who was an attorney in Indian Territory before it became Oklahoma, moved to Tulsa, the building in which he had acquired a law office was burned down by a white mob, and for months his father had to work out of a tent. As a boy riding on a Jim Crow train in Oklahoma, John Hope and his mother were put off the coach by a white conductor and left stranded in the dust.

When as a graduate student he sought to pursue historical research at the archives in Raleigh, he was not permitted to sit with white researchers but was shunted off to an isolated chamber. The Library of Congress was still worse . . . [he] could not eat with . . . colleagues at

88. Quarles v. Commonwealth, 245 S.W.2d 947, 949 (Ky. 1951).
any downtown restaurant, not even at the greasiest People's Drug Store counter. Nor, after having fought a victorious war against fascism, was there a downtown movie a black person could go to, or a downtown hotel at which, in the nation's capital, a black person could stay. That was John Hope's experience as a young scholar.

During this same period, on a train journey in North Carolina from Greensboro to Durham, he was compelled to stand even though there were ample seats in an adjacent coach—for those coach seats were reserved for whites, who sat there grinning at his discomfort. They were Nazi prisoners of war.\textsuperscript{93}

III. THE PERSISTENCE OF SIGNIFICANT POLITICAL RACISM IN NORTH CAROLINA IN THE LAST FOUR DECADES

Through the mid-20th century, voting by black North Carolinians was nearly non-existent, as literacy tests prohibited blacks from exercising their political rights.\textsuperscript{94} Although voting slowly increased through the course of the century, by 1948 still only 15% of North Carolina's blacks were registered to vote.\textsuperscript{95} Even as courts began to take action against \textit{de jure} segregation, the displacement of African-Americans from America's and North Carolina's political life continued. After the North Carolina literacy requirement was eliminated in 1961, North Carolina continued to require voting registrants "of uncertain ability" to read and copy the North Carolina Constitution, a practice that continued for another decade, disproportionately disenfranchising black citizens.\textsuperscript{96}

Even after the demise of Jim Crow \textit{de jure} segregation, racial discrimination against blacks continued. Beyond the realm of political empowerment, discrimination governed all facets of life including neighborhood development, business development, employment patterns, schooling, and criminal justice. There can be little doubt that such discrimination was able to occur because African-Americans were excluded from civic life. Through the 1960s, every significant decision-making agency in the state—public and private—was completely dominated by whites even though their policy decisions had full effect in black communities.\textsuperscript{97} In


\textsuperscript{95} See J. Morgan Kousser, After 120 Years: Redistricting in North Carolina 30-31 (Mar. 22, 1994) (submitted as sworn testimony in Shaw v. Hunt, No. 92-202-CIV-5-BR (E.D.N.C.)).

\textsuperscript{96} \textit{Gingles}, 590 F. Supp. at 359 (quoting Bazemore v. Bertie County Bd. of Elections, 119 S.E. 2d 637 (N.C. 1961)).

RACIAL REDISTRICTING

A. The Return of Race-Baiting Campaigns

After the Jim Crow Era closed, the exclusion of blacks from the political process took different forms; in particular, racial rhetoric once again inflamed North Carolina politics to divide voters along racial lines. In a 1950 Democratic Party senate primary, Willis Smith took on incumbent Frank Graham, appealing to white voters' racism. Smith supporters distributed leaflets warning: "WHITE PEOPLE WAKE UP!... FRANK GRAHAM FAVORS MINGLING OF THE RACES." From that point forward, although direct barriers to voting fell, white North Carolinians increasingly appealed to white prejudice and fear to polarize the electorate and marginalize African-Americans and candidates who might protect their interests.

In 1954, supporters of Alton Lennon distributed a false endorsement of rival Ken Scott by a black political leader, in order to discredit him. Scott responded with an adamant endorsement of segregated schools. In 1956, two of three North Carolina representatives who refused to endorse the "Southern Manifesto," which vowed to resist the desegregation order of Brown v. Board of Education, were defeated at the hands of segregationist groups.

In 1960, I. Beverly Lake ran for North Carolina governor on a segregationist platform, while his opponent, Terry Sanford, was accused of being "soft" on the race issue. In the 1964 gubernatorial election, Lake again defended segregation, prompting primary rivals to oppose the pending federal civil rights acts. Concurrently, presidential candidate Barry Goldwater, pressing for the support of North Carolina voters, asserted his opposition to civil rights legislation as well.

B. The Aftermath of the Civil Rights Act

The passage of the Civil Rights Act in 1965 did little to quell racial appeals in North Carolina politics. Although the Act has encouraged black voter registration, which between 1960 and 1982 rose in North

98. See Kousser, supra note 95, at 21-22.
99. Supra note 5 and accompanying reproduction.
101. See Watson, supra note 100, at 13.
102. See id. at 14.
103. See id. at 14-15.
Carolina from 39.1% to 50.9% of the black voting-age population, not until the challenged redistricting has the Act enabled African-Americans in North Carolina to choose representatives who would protect their interests.

After passage of the Voting Rights Act, subtle (and not so subtle) appeals to white racism in elections persisted in North Carolina elections, intimidating African-American voters, punishing candidates for protecting "black" interests or for being African-American, and dividing voters along racial lines.

In 1966, two Democratic congressmen drew fire and were defeated for acceding to federal pressures for desegregation in an election marred by "violent intimidation against black families who proposed to register their children in formerly all-white schools." George Wallace's 1968 presidential campaign appealed to voters' fears of court-ordered busing. And, Jesse Helms, in his bid for Senate in 1972, signalled his racial animus with slogans like "He's one of us."

In the 1960s, if not beyond, the North Carolina legislature continued to dilute African-American political rights with the redistricting process. Time and again the legislature approved gerrymanders to dilute the vote of African-Americans living in the well-organized, black community of Durham County. In 1965, for example, a proposal to create a "Research Triangle District" of Durham, Wake, and Orange Counties was rejected in favor of a gerrymander placing Durham with conservative Forsyth County. This "solution" led to the 16-year-term of L.H. Fountain—a conservative who opposed the civil rights movement, ignoring the interests of Durham County's substantial African-American population.

This district finally was broken up in 1982, after a protracted fight marred by neutral sounding, race-based appeals. But even in Durham County's new district, African-Americans fared no better. Although black voters represented 40% of this district's Democratic Party electorate, due to the extreme racial polarization of North Carolina politics,

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104. See id. at 15.
105. Id. at 16.
106. In an ad placed in The Charlotte News by the Wallace Campaign, a school bus was pictured with the text:
   If you're wondering why more and more millions of your fellow Americans are
   turning to Governor Wallace: Follow, as your children are bused. All across
   town. Governor Wallace as President will let you and your local schools decide
   what is best for your children.
Charlotte News, Oct. 29, 1968, at 5C.
107. See Watson, supra note 100, at 17.
108. See id. at 23-24.
109. See id.
111. See O'Reilly, supra note 110, at 5-6.
the African-American community was still unable to elect a representa-
tive who would support its interests.

In the Democratic primary for that seat, black candidate H.M. "Mickey" Michaux—a United States Attorney appointed by President Jimmy Carter—opposed Tim Valentine—a white Democrat, who did not hesitate to appeal to white voters' racist instincts. In an initial primary, Michaux finished first among three candidates, with 44.1% of the racially polarized vote, receiving 88.6% of the black vote but only 13.9% of the white vote. In a runoff between Michaux and Valentine, Valentine emphasized racial themes, warning against "the well organized bloc vote" and predicting that Michaux "will again be busing his supporters to the polling places in record numbers." In a vote straight along racial lines, Valentine defeated Michaux by a spread of 6% and went on to win the general election. Notably, Michaux received 91.5% of the black vote but only 13.1% of the white vote. Two years later, in a vote similarly split along racial lines, black candidate Kenneth Spaulding also lost the district's primary election to Valentine.

As the Michaux race demonstrates, candidates representing African-American interests and black candidates face an immense barrier in garnering white votes in North Carolina. Due to racial polarization alone, the prospect of winning 30-40% of the white vote for such candidates is remote if not inconceivable. Where Michaux had the support of the district's 40% black voters, he still failed to garner sufficient white votes to win.

In the 1980s and 1990s, race-baiting campaigns, marginalizing black voters, have been commonplace. In 1983, advertising supporting Jesse Helms' bid for governor against Jim Hunt showed Hunt beside Jesse Jackson. As one journalist described, "the primary motive is simply to make the association between Hunt and blacks and to raise fears among whites that Hunt is a captive of black voters." Helms also used a multitude of racially oriented signals in his 1990 bid for reelection to the Senate against an African-American candidate, Harvey Gantt. Gantt

112. See Kousser, supra note 95, at 48.
113. See id. at 49.
114. Watson, supra note 100, at 25-26; see also Kousser, supra note 95, at 50.
115. See Watson, supra note 100, at 26.
116. See Kousser, supra note 95, at 50.
117. See id. at 53-54.
118. See O'Reilly, supra note 110, at 2.
119. Moreover, as J. Morgan Kousser demonstrates, the ability to elect a black repre-
sentative is not merely symbolic. See Kousser, supra note 95, at 20. Black representa-
tives more effectively and consistently present and protect the chosen interests of their black constituency. See id. at 20-23. This is neither surprising nor disturbing. Due to their unique history and state-enforced inequality in America, blacks tend to hold atti-
dudes divergent from those of whites on the issues of most import to them, including race relations, remedies for discrimination, and other areas of civil rights policy. See id. at 24-
27.
120. Watson, supra note 100, at 18.
had been leading in the polls until the final week of the race when the Helms campaign ran an advertisement showing a white man's hand crumpling a job rejection notice, with a voice-over explaining:

You needed that job, and you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair? Harvey Gantt says it is. Gantt supports Ted Kennedy's racial quota law that makes the color of your skin more important than your qualifications.¹²¹

This advertisement galvanized white support for Helms, bringing him victory.¹²²

More directly, an anonymous leaflet appeared in rural Columbus County in 1990, warning voters of “the Negro Vote” and that “more Negroes will vote in this election than ever before.”¹²³ Representative J. Alex McMillan of the 9th District fanned racial fears with a 1990 fundraising letter that warned of “the potential danger of a sophisticated get-out-the-vote effort among the core Gantt constituency—a constituency that particularly exists in substantial numbers in the most populous part of my district, Mecklenburg County.”¹²⁴

In the 1992 Presidential campaign, local Republican Party advertisements warned that “[i]f Bill Clinton is elected President, Jesse Jackson will be a U.S. Senator.”¹²⁵ And, the Republican Party also engaged in a massive “postcard campaign,” mailing postcards to black voters to discourage them from voting by threatening prosecution against voters who no longer lived at addresses registered with the Board of Elections.¹²⁶

C. North Carolina’s Racial Politics Disproportionately Harm African-Americans

There can be no dispute that race consciousness has been—and continues to be—central to North Carolina’s politics. Racial appeals in campaigns are serious strategic tactics, designed to bring victory, that minimize the effectiveness of African-American participation in the electoral process. Race consciousness and racial polarization have regularly marginalized African-American voters—intimidating African-Americans from voting; fomenting fear among white voters of candidates who may forward interests of black citizens; suggesting that black candidates

¹²¹ Jamieson, supra note 5, at 97.
¹²² See id. at 99-100. The “white hands” commercial was not an isolated incident of the Helms campaign playing to racial fears and animus. The Helms campaign featured numerous advertisements highlighting Democratic Party Chairman Ron Brown, an African-American, as well as advertisements featuring Gantt’s black campaign manager. See Watson, supra note 100, at 20.
¹²³ Watson, supra note 100, at 21.
¹²⁴ Id. at 26.
¹²⁵ Id. at 21.
¹²⁶ See Watt, supra note 13, ¶ 8; Affidavit of Charles E. Johnson, ¶¶ 8-13 (sworn to Mar. 18, 1994) (submitted as evidence in Shaw v. Hunt, No. 92-202-CIV-5-BR (E.D.N.C.)).
are unable to protect the interests of all constituents; and perpetuating animosity and political divisions along racial lines.

Moreover, a mere decade ago the federal courts found that North Carolina's *de jure* exclusion of African-Americans from the voting process—with, among other means, a poll tax, a literacy test, and a prohibition against bullet voting—had contributed to the continued suppression of African-American participation in North Carolina's political process. In 1982, there was approximately a 14% disparity between voter registration of white and black age-qualified citizens—66.7% of whites were registered as compared with 52.7% of blacks. Although the Court expressed a hope that continued registration efforts would overcome the chilling effect of historic discrimination, such efforts have not yet succeeded. The lingering effects of historic discrimination in voting (as well as in myriad other facets of civic life) continue to dilute the political power of African-Americans in North Carolina. In fact, a significant disparity in voter registration alone—approximately 6.8%—between whites and blacks still persists, limiting the ability of African-Americans in North Carolina to assert their political interests.

The exclusion from North Carolina politics that African-Americans have suffered has served only to reinforce the legacy of racial segregation in which many black North Carolinians have lived. For example, black North Carolinians suffer the harms of poverty, inadequate education and medical care, infant mortality, unemployment, and violent crime more acutely than their white counterparts. The North Carolina legislature's 1991 redistricting is not only the first step toward recognizing that African-Americans disproportionately suffer these ills, but also the first step toward remedying them.

127. Bullet voting is a practice designed to maximize a group's voting strength in at-large voting schemes. In at-large districts—where multiple seats are filled in a single election—voters may cast one vote for as many candidates as there are seats available. Thus if there are five seats available each voter may cast a vote for any five candidates running. With bullet voting, voters decline to cast all of their votes—choosing instead to vote only for their "target" candidate—thereby avoiding the dilution of their vote that would accompany voting for a full slate. When done in concert, and particularly where racial bloc voting occurs, bullet voting provides gains to the "target" candidate relative to other candidates, and therefore increases the likelihood of minority representation.


129. See Gingles, 590 F. Supp. at 360. In North Carolina, 70.8% of voting-age whites are registered, while only 64% of voting age blacks are registered. See Jerry T. Jennings, U.S. Dept' of Commerce, Voting and Registration in the Election of November 1992, at 27 (on file with the *Fordham Law Review*).

130. See Gingles, 590 F. Supp. at 361.


132. See Jennings, *supra* note 129, at 27.

IV. THE 1991 REDISTRICTING PLAN—A STEP TOWARDS PLURALISM

In 1991, the North Carolina state legislature formulated the current redistricting plan. Armed with 1990 census data, the state redistricting committee implemented the guidelines set forth in the 1982 amendments to the Voting Rights Act that prohibit the dilution of minority voting power, both in intent and effect. In addition, population shifts that allocated North Carolina an additional representative also altered the concentration of voters on the county level. Accordingly, the legislature redrew the entire face of North Carolina's congressional districts.

In its initial formulation, the redistricting plan included one district of twelve as a minority-majority district. That district, the First Congressional District, is located in eastern North Carolina, and is largely rural in character. The other eleven districts, all drawn to account for, among other factors, the race and political concerns and party affiliations of the voters, were white-majority districts with varying concentrations of black voters.

Because of North Carolina's history of inhibiting the political participation of its African-American citizens, forty of its counties are covered by Section 5 of the Voting Rights Act, requiring the state to submit all redistricting plans to the Justice Department for approval. The Justice Department objected to the initial plan on the basis that an additional minority-majority district could be drawn to increase African-American representation. Although relatively "compact" in shape, the district suggested by the Justice Department lumped together black voters of all demographic and socio-economic backgrounds—urban and rural, middle-class and poor, white collar and blue collar.

Rather than adopt the district suggested by the Justice Department,


137. See Hodges, supra note 135, ¶ 16; Clayton, supra note 135, ¶ 2(A).

138. See Hodges, supra note 135, ¶¶ 6-8, 12-13, 15-16.


140. This suggested district in the southeastern part of the state was to run from Charlotte toward Wilmington along the South Carolina border. It thus included both North Carolina's largest city and numerous poor, rural areas stretching toward the coast.
North Carolina legislators reconsidered the entire plan, taking into account not only the differentiating factors overlooked by the Justice Department, but also the political implications for incumbents. The resulting additional minority-majority district, the Twelfth District, was drawn along Interstate Highway 85, linking urban industrial areas across several counties.\footnote{141. Much has been made of the fact that the Twelfth District follows I-85, and crosses several counties. However, as redistricting veteran William Hodges points out, district lines are often drawn along or up to recognizable landmarks such as rivers or main streets, and "county-splitting" has been a fact of North Carolina's districting plans since the 1980s. See Hodges, supra note 135, ¶¶ 9, 10, 14. Moreover, a district's shape is not the only possible touchstone of legitimacy for a voting scheme. As discussed extensively, supra, the political outlook, economic experience, or common history of voters can provide an equally compelling, if not more compelling, basis for districting. Indeed, making these considerations paramount in districting (and rendering shape of little significance) would align the districting process with an effort to identify and give voice to a wider spectrum of political communities. See Dillard v. Baldwin County Bd. of Edu., 686 F. Supp. 1459, 1465-66 (M.D. Ala. 1988) (recognizing that compactness "does not mean that a proposed district must meet, or attempt to achieve, some aesthetic absolute, such as symmetry or attractiveness" but rather "that a district is sufficiently geographically compact if it allows for effective representation").

142. Indeed, when evaluated using two well-accepted measures of population distribution, these two districts are the most heterogeneous of North Carolina's districts. See David A. Bositis, Joint Center for Pol. & Econ. Stud., Statistical Measure of Racial Heterogeneity, U.S. Congressional Districts of the 103rd Congress, North Carolina (Apr. 1994) (prepared as part of the study, Redistricting and Representation) (on file with the Fordham Law Review).

143. See Southern U.S. Congressional Districts by Party and Black Vote, 103rd Congress, First Session, infra app. B.

144. See id.

145. See id.

146. See North Carolina 12 Voting-Age Population by Race, and by Race and Turnout, infra app. D.}

Although nominally "minority-majority" districts, the First and Twelfth Districts—as well as the plan as a whole—are more accurately characterized as "integrated."\footnote{142. The majority of North Carolina's eligible black voters do not live in the state's two minority-majority districts. In fact, less than one-half—only 43%—of North Carolina's eligible black voters live in these two districts.\footnote{143. Most of North Carolina's black voters—57%—vote in white-majority districts, with 45.8% in the state's six Democratic, white-majority voting districts and 11.2% relegated to the four Republican, white-majority districts.\footnote{144. African-American voters typically represent 18% of the eligible voting strength of the Democratic, white-majority districts.}} The majority of North Carolina's eligible black voters do not live in the state's two minority-majority districts. In fact, less than one-half—only 43%—of North Carolina's eligible black voters live in these two districts.\footnote{143. Most of North Carolina's black voters—57%—vote in white-majority districts, with 45.8% in the state's six Democratic, white-majority voting districts and 11.2% relegated to the four Republican, white-majority districts.\footnote{144. African-American voters typically represent 18% of the eligible voting strength of the Democratic, white-majority districts.}} Most of North Carolina's eligible black voters do not live in the state's two minority-majority districts. In fact, less than one-half—only 43%—of North Carolina's eligible black voters live in these two districts.\footnote{143. Most of North Carolina's black voters—57%—vote in white-majority districts, with 45.8% in the state's six Democratic, white-majority voting districts and 11.2% relegated to the four Republican, white-majority districts.\footnote{144. African-American voters typically represent 18% of the eligible voting strength of the Democratic, white-majority districts.}} The majority of North Carolina's eligible black voters do not live in the state's two minority-majority districts. In fact, less than one-half—only 43%—of North Carolina's eligible black voters live in these two districts.\footnote{143. Most of North Carolina's black voters—57%—vote in white-majority districts, with 45.8% in the state's six Democratic, white-majority voting districts and 11.2% relegated to the four Republican, white-majority districts.\footnote{144. African-American voters typically represent 18% of the eligible voting strength of the Democratic, white-majority districts.}}

Furthermore, the fact that these districts are "minority-majority" by no means ensures minority representation, even assuming a viable African-American candidate seeks office. Once the voting profile is adjusted for voter turnout, the black voting strength is only 49.7%,\footnote{146. See North Carolina 12 Voting-Age Population by Race, and by Race and Turnout, infra app. D.} and no candidate can rely on receiving 100% of that voting bloc. In reality, the lines of the Twelfth District only ensure that its congressional representa-
tive—regardless of his or her race—will be more responsive to the needs of African-American voters than representatives have been in the past.

In a state with the reprehensible history, and continuing practice, of excluding and marginalizing African-Americans from the political process, as detailed above, this achievement is almost embarrassingly modest. Notably, these two districts—from which two African-Americans were elected to Congress—represent only 16.67% of North Carolina's congressional delegation, while African-Americans comprise 20.1% of North Carolina's voting-age citizens. Ten of the twelve districts remain white-majority, and, through bloc voting by whites—often encouraged by race-baiting campaigns—are represented by white congressmen. The concerns of the black voters living in those districts have historically been ignored by the elected representatives, and in those districts, black voters have little hope of electing more responsive leaders.

V. THE MISGUIDED PRESUMPTIONS UNDERLYING SHAW V. RENO

In Shaw v. Reno, the Supreme Court failed to focus on the realities of racial bloc voting and race-baiting campaigns. Instead, they impugned minority-majority districts, utilizing inexpert, inaccurate, and inappropriate analogies.

A. "Political Apartheid"—A Profoundly Flawed Comparison

Since Guinn & Beal v. United States, the Supreme Court has developed a body of understandable and reasonably precise terminology in construing the Fourteenth and Fifteenth Amendments, and later, in construing the Voting Rights Act. Until its opinion in Shaw, however, the Supreme Court had never used the term "political apartheid." While

147. See Southern U.S. Congressional Districts by Party and Black Vote, 103rd Congress, First Session, infra app. B.

148. North Carolina Representatives Valentine (D-2nd Dist.) and Hefner (D-8th Dist.) represent districts with the largest share of African-American voters, 20.1% and 20.9% respectively. See Voting Scores, White Non Hispanic Democratic Congressmen, Southern States by District Black and Hispanic Voting-Age Populations, 103rd Congress, First Session, infra app. E. Both have consistently voted with the Conservative Coalition of Southern Democrats and Republicans, with Conservative Coalition voting support scores of 76% and 67% respectively. See id. Representative Valentine voted against the Democratic party for 28% of his votes cast during the first session. See id. In contrast, during the same period Representatives Clayton and Watt cast only 14% and 7%, respectively, of their votes with the Conservative Coalition. See Voting Scores, CBC Members, Southern States by District Black and Hispanic Voting-Age Populations, 103rd Congress, First Session, infra app. F.

149. 238 U.S. 347 (1915). In Guinn the Supreme Court invalidated an amendment to the Oklahoma constitution that had restricted suffrage to those who could read and write the state constitution, or who were descendants of someone entitled to vote in 1866. See id. at 365. Although the Court only relied on the provisions of the Fifteenth Amendment, it found the provision, intended to prevent most blacks from voting while permitting the right of illiterate whites to vote, constitutionally invalid. See id. at 364-65.
explaining the relevance of an irregularly shaped district's "appearance," the majority argued that

[a] reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.150

Whenever the Supreme Court uses a new term, scholars ask whether the term was chosen pursuant to a carefully considered analysis as to its meanings and implications, or merely in order to add a stylistic flourish to "liven up" an otherwise drab opinion. We assume that the phrase "resemblance to political apartheid" was used to convey some significant insight. In considering North Carolina's redistricting plan, however, the Court's analogy to political apartheid adds no insight but rather obscures the issues of whether North Carolina's minority-majority districts are justified and constitutionally permissible.

The most significant analysis of apartheid written in the last fifteen years is the report of the Study Commission on U.S. Policy Toward Southern Africa entitled South Africa: Time Running Out.151 That work notes the words of Professor G.A. Cronjes of the University of Pretoria, a leading proponent of apartheid, in endorsing that policy:

The racial policy which we as Afrikaners should promote must be directed to the preservation of racial and cultural variety. This is because it is according to the Will of God, and also because with the knowledge at our disposal it can be justified on practical grounds. . . . The more consistently the policy of apartheid could be applied, the greater would be the security for the purity of our blood and the surer our unadulterated European racial survival. . . . Total racial separation . . . is the most consistent application of the Afrikaner idea of racial apartheid.152

Apartheid required drastic social engineering, which in turn required political engineering:

[A] Nationalist leader, spelled out the ways in which his government


The Commissioners of the study were: Franklin A. Thomas, Chair; Robert C. Good; Charles V. Hamilton; Ruth S. Hamilton; Alexander Heard; Aileen C. Hernandez; Constance Hilliard; C. Peter McColough; J. Irwin Miller; Alan Pifer; and Howard D. Samuel.

152. Time Running Out, supra note 151, at 41 (emphasis added) (quoting Professor G.A. Cronjes of the University of Pretoria).
would apply apartheid. It would . . . abolish the Natives' Representative Council (which had refused to cooperate with the government) and the limited indirect African representation that still existed in the House of Assembly, treat the reserves as the true African homelands, control the African influx into the cities, protect white workers from African competition, prohibit African trade unions, and generally segregate whites and blacks as much as possible.

The election took place on May 26, 1948. The results surprised almost everyone: Despite obtaining a minority of the popular vote, the Nationalists and their ally, the small, ephemeral Afrikaner party, won a working majority in Parliament. The word apartheid would soon become notorious around the globe.  

Other commentators similarly describe the far-reaching, invidious nature of apartheid. In his classic treatise, *Human Rights and the South African Legal Order*, John Dugard has defined the fundamentals of apartheid:

Parliamentary supremacy is basic to the constitutional structure of South Africa. Parliament may make laws on any subject it pleases and no court of law may enquire into the validity of any act of Parliament except one which affects the equal language rights. . . .

The twenty-one million black people enjoy no representation in the central Parliament. Nor are they represented in the Provincial Councils which have limited legislative powers over the provinces. African political power is confined to the six homelands, each of which has a legislative assembly with powers substantially similar to those of the Provincial Councils. The Colored Persons Representative Council, which has a very limited law-making capacity, caters for the political aspirations of the colored people, while a largely advisory body, the South African Indian Council, constitutes the Indian people's sole political institution in the body politic.  

As Professor Dugard makes clear, this discriminatory political structure was essential to the perpetuation of the supremacy of South Africa's white population:

[T]he laws which constitute the foundation of modern South African society are discriminatory in the sense in which this term is generally understood. Some laws, such as the pass laws and the job-reservation laws, openly discriminate by allocating rights unequally to blacks. Some, such as the Reservation of Separate Amenities Act and the Group Areas Act, do not expressly provide for unequal treatment for blacks but in practice there is no question about their discriminatory effect, which has been acknowledged by the courts. Some, such as those dealing with education, create separate facilities for blacks that are either in fact inferior or produce a sense of inferiority among blacks. Others, such as the race classification laws, the Prohibition of

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153. *Id.* at 41.

Mixed Marriages Act, and the Immorality Act, provide for racial separation but produce a sense of humiliation among blacks on account of their professed goal to preserve the "racial purity" of the whites. On the political front, too, there is discrimination. Even if the homelands policy is accepted as a genuine, fair political dispensation to Africans in the homelands, it is difficult to explain the grossly unequal allocation of land other than in terms of discrimination. As far as Africans in the common area, coloreds, and Indians are concerned, however, there is a clear denial of full political rights on account of their race.  

The effect of the laws of apartheid is to "create a sense of inferiority or humiliation among blacks stemming from their professed aim to promote the interests of the white group as a primary goal."  

Apartheid, as described above, is in no way analogous to minority-majority redistricting plans in North Carolina—however irregular the shape of the boundaries. The essence of South African apartheid has been the exclusion of vast numbers of the population—more than 85%—from having the right to vote for any representation in Parliament and the National Government. The first time Dr. Nelson Mandela, like all other black South Africans, had the opportunity to vote in a national election of that country was April 26, 1994. "Coloured" and "Indian" South Africans, permitted to vote in South Africa only recently, were mandated to choose representatives of their own race to represent them in separate legislative bodies which could always be overruled by the national parliament.  

In sharp contrast, the minority-majority districts in the United States foster inclusion into political life; these districts do not exclude any segment of the population. Instead, race-consciousness is used as a means of

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155. Id. at 102-03.
156. Id. at 103.
158. In the late 1970s, notably after P.W. Botha became prime minister, the National Party government devised a new constitution that co-opted Coloureds and Indians into the parliamentary system while enabling the whites to maintain political control. The Republic of South Africa Constitution Act of 1983 enfranchised Coloureds and Indians—but not Africans—and established a tricameral Parliament consisting of separate legislative chambers for whites, Coloureds, and Indians. Although this constitution was heralded by the government as an exercise in democracy, it maintained white domination of the political system.

The 1983 Constitution established three chambers:
- House of Assembly, with 178 white members elected by whites to represent some five million whites;
- House of Representatives, with 85 Coloured members elected by Coloureds to represent three million Coloureds; and
- House of Delegates, with 45 Indian members elected by Indians to represent nine hundred thousand Indians.

Dugard, supra note 151, at 6. Although provision was made for joint sessions of the three houses, when adopting legislation, each chamber deliberated separately. In the event of disagreement, the will of the majority in the white House of Assembly—i.e., the ruling National Party—prevailed. See id. at 5-6.
enhancing the possibility that African-Americans, who constitute a significant percentage of the population, may have responsive representation and the chance of some members of their race elected to the United States Congress.\textsuperscript{159}

In the course of his trial for inciting an illegal strike, Dr. Nelson Mandela made the following statement about the pervasiveness of apartheid:

\begin{quote}
In its proper meaning equality before the law means the right to participate in the making of the laws by which one is governed, a constitution which guarantees democratic rights to all sections of the population, the right to approach the court for protection or relief in the case of the violation of rights guaranteed in the constitution, and the right to take part in the administration of justice as judges, magistrates, attorneys-general, law advisers and similar positions.

In the absence of these safeguards the phrase "equality before the law," in so far as it is intended to apply to us, is meaningless and misleading. All the rights and privileges to which I have referred are monopolised by whites, and we enjoy none of them.

The white man makes all the laws, he drags us before his courts and accuses us, and he sits in judgement over us.

It is fit and proper to raise the question sharply, what is this rigid colour-bar in the administration of justice? Why is it that in this courtroom I face a white magistrate, am confronted by a white prosecutor, and escorted into the dock by a white orderly? Can anyone honestly
\end{quote}

\textsuperscript{159} No one has analyzed this issue better than Professor Charles V. Hamilton who has said:

The macro-historical perspective seems to me to be eminently sound. Looking at Justice Souter's language of dissent in \textit{Shaw v. Reno}, and recognizing that very much will turn around the color-blind/color conscious debate, it is crucial to put this issue in well-grounded historical context. That is, to indicate precisely why it is important to take race into account. There are certain 'realities' of developments over time that should not be overlooked. The courts (in the earlier white primary cases, the dilatory voter registration practices of southern boards of registrars, \textit{Gomillion v. Lightfoot}) have faced these matters head-on and honestly. When ostensibly race-neutral practices were adopted or district lines drawn, the courts were not blind to the historical purpose of continuing racial exclusion.

Today (on the flip side), we should not be blind to the need to take race into account for the ultimate purpose of inclusion. It is this constitutional intent—INCLUDEATION—that remains the goal.

A good macro-historical perspective on the districts involved will illuminate this argument.

The purpose is not to exclude, but to include. This is the historical journey as it brings us to present circumstances. It is a route 'political realities' require our country to take. Neither do we want these to be prescriptions for all time, but for these evolving times.

and seriously suggest that in this type of atmosphere the scales of justice are evenly balanced?  

As Nelson Mandela recognized, political apartheid is the complete exclusion of one race from governance and the domination of that race by another. Anyone conversant with the origins and development of apartheid would be shocked with the Supreme Court’s suggestion that the North Carolina plan resembles “political apartheid.” Apartheid in South Africa is totally dissimilar to the voting rights issues in Shaw v. Reno.

B. “Little in Common with One Another But the Color of Their Skin”

Equally disturbing is the premise supporting the Court’s political apartheid analogy—that skin color is, or should be, irrelevant. In suggesting that minority-majority districts bring together those “who may have little in common with one another but the color of their skin,” the Court implicitly hypothesizes that skin color is not relevant in American politics. That supposition, however, is insupportable in light of this country’s racial history, and the past and current socio-economic conditions afflicting large segments of the African-American population, all of which uniquely inform African-American politics. Blackness is culturally and politically relevant. To suggest otherwise is not only naive, but demeaning.

For African-Americans, there is a commonality in the immutable characteristic of the “color of their skin.” It is skin color that rationalized the enslavement of African-Americans, and since emancipation, race has remained more significant an identifying factor than religion, region, age, class, or status. The history of race has been more important to African-Americans than to any other component in this society.

The commonality of the African-American experience has its origins, of course, in the abducting of Africans for slave labor in the New World. Color was the common denominator in the following advertisement, typical of thousands of advertisements posted in newspapers and bulletin boards throughout our land:

One hundred and twenty Negroes for sale—The subscriber has just arrived from Petersburg, Virginia, with one hundred and twenty likely

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162. 113 S. Ct. 2816 (1993).
163. Id. at 2827.
164. Id.
165. Critics of minority-majority districting have challenged the commonality of black interests, contrasting the experiences and concerns of those African-Americans who are descendants of American slaves and those emigrating from the West Indies and South America. See Supreme Court Amicus Brief of American Jewish Congress, Wetherell v. De Grandy (No. 92-519), at 5-6, 113 S. Ct. 1249 (1993). Of course, in all of the New World, Africans were kidnapped to serve as slaves and servants to those of European ancestry.
young Negroes of both sexes and every description, which he offers for
sale on the most reasonable terms. The lot now on hand consists of
plough-boys, several likely and well-qualified house servants of both
sexes, several women and children, small girls suitable for nurses, and
several small boys without their mothers. Planters and traders are ear-
nestly requested to give the subscriber a call previously to making
purchases elsewhere, as he is enabled to sell as cheap or cheaper than
can be sold by any other person in the trade.

—Hamburg, South Carolina, Benjamin Davis.  

Even after slavery was abolished, simply because of "the color of their
skin," blacks were denied all rights of citizenship, the least of which
were rights to participate in the political process. As the tools for the
economic advancement of the white population, blacks were systemically
deprived of fair treatment by the legislatures, executives, and judiciaries
of every level of government from the county-level to the country-
level. In the context of slave codes, criminal codes, and post-Recon-
struction Jim Crow legislation, laws defining the races were enacted to
ensure that anyone who was "black" would—simply because of the color
of his or her skin—be relegated to second-class citizenship.

166. A. Leon Higginbotham, Jr., In the Matter of Color: Race and the American
Similarly, a New Orleans Bee advertisement noted:

Negroes for sale—a Negro woman, 24 years of age, and her two children, one
eight and the other three years old. Said Negroes will be sold separately or
together, as desired. The woman is a good seamstress. She will be sold low for
cash, or exchange for groceries. For terms apply to Matthew Bliss and Com-
pany, 1 Front Levee.

Id.  

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


169. See generally John H. Franklin, From Slavery to Freedom, A History of African-
Americans 236-77 (7th ed. 1994) (discussing the post-Civil War development of "Jim
Crow" laws and "Black Codes"). In Plessy v. Ferguson, 163 U.S. 537 (1896), the plain-
tiff, Homer Plessy, who alleged that he was seven-eighths white, asserted that racial seg-
regtion by the state was per se unconstitutional and that being considered a white man
was property "which [had] an actual pecuniary value" that could not be taken without
due process of law. Brief for Plaintiff in Error at 8, Plessy v. Ferguson, 163 U.S. 537 (No.
210). He stated:

How much would it be worth to a young man entering upon the practice of law
to be regarded as a white man rather than a colored one? Six-sevenths of the population are white. Nineteen-twentieths of the property of the country is owned by white people. Ninety-nine hundredths of the business opportunities
Indeed, *de jure* segregation was the norm until very recently. And, as the Supreme Court itself has recognized, African-Americans continue to suffer from the effects of slavery, segregation, and prejudice. As a direct result of hundreds of years of oppression, African-Americans are at the bottom of every socio-economic indicator. For example, according to information about North Carolina collected by various state and federal agencies, 61% of black households are classified as low income or very low income, in comparison to 36% of the white population. In North Carolina's five major metropolitan areas there are at least four black children living in poverty for every white child living in poverty even though blacks are only 21.9% of the state's population. African-American mothers are more likely to be "at risk" than white mothers, and more likely to receive sub-standard health care during pregnancy. Large numbers of North Carolina's African-American population are on public assistance; the unemployment rate for blacks in North Carolina is disproportionately high; and the scholastic achievements of blacks in North Carolina are disproportionately low.

In the course of his trial for sabotage and treason, Dr. Nelson Mandela described the link between socio-economic deprivation and political empowerment:

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170. It is only forty years since the Supreme Court overruled *Plessy* in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), holding that in the context of public education, separateness fostered inequality. Statutes requiring segregation in a variety of other contexts remained in force for a significant period after *Brown* was announced.


Africans want to be paid a living wage... to perform work which they are capable of doing, and not work which the government declares them to be capable of... to be allowed to live where they obtain work... to be part of the general population, and not confined to living in their own ghettos... Africans want to be allowed out after eleven o'clock at night and not to be confined to their rooms like little children... to be allowed to travel in their own country... Africans want a just share in the whole of South Africa; they want security and a stake in society.

_Above all, we want equal political rights, because without them our disabilities will be permanent._

Even the cultural experience of African-Americans has political significance. African-Americans share a cultural tradition with roots reaching back to slavery. Black churches, which during slavery were centers for illicit learning and part of the network of freedom, nourished the civil rights movement and continue today as centers of political activism.

Black music, rooted in the tradition of slave spirituals of freedom, continues today as a means of communicating political and social ideas. Black writers, excluded from the white press, created separate newspapers and magazines, used to call the government to respond to the plague of lynching, to inform black citizens of significant political events, and to advertise civil rights activities, traditions which continue today.

Culturally and politically, it is likely that two African-Americans will have more in common simply because of the color of their skin than will random persons who happen to live within the same compact district.

Ultimately the Supreme Court majority accomplishes what it cautions the plaintiffs not to do: it confuses the ideal of a color-blind society with the reality of our race-conscious society. The _Shaw_ majority put on blinders to dream of a world that Langston Hughes once described:

_I Dream a World_

I dream a world where man
No other will scorn,
Where love will bless the earth
And peace its paths adorn.
I dream a world where all
Will know sweet freedom's way,
Where greed no longer saps the soul


180. Journalist Ida Wells-Barnett regularly published articles chronicling the lynchings plaguing the South and calling for action. _See_ Flexner, _supra_ note 81, at 192-93. That tradition was continued by _Crisis_, the magazine of the NAACP.

Though Langston Hughes dreamt of a world where race was irrelevant, he described the contrasting reality of being black in America:

*Let America Be America Again*

Let America be America again.
Let it be the dream it used to be.
Let it be the pioneer on the plain
Seeking a home where he himself is free.
(America never was America to me.)
Let America be the dream the dreamers dreamed—
Let it be that great strong land of love
Where never kings connive nor tyrants scheme
That any man be crushed by one above.
(It never was America to me.)
O, let my land be a land where Liberty
Is crowned with no false patriotic wreath,
But opportunity is real, and life is free,
Equality is in the air we breathe.
(There's never been equality for me,
Nor freedom in this "homeland of the free."*)

On another occasion he wrote:

*Merry-Go-Round*

Where is the Jim Crow section
On this merry-go-round,
Mister, cause I want to ride?
Down South where I come from
White and colored
Can't sit side by side.
Down South on the train
There's a Jim Crow car.
On the bus we're put in the back —
But there ain't no back
To a merry-go-round!
Where's the horse
For a kid that's black?*

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183. *Id.* at 193.
184. *Id.* at 192.
For African-Americans in North Carolina, for most of their lives, there has been no "merry-go-round" to ride in national political life. The 1991 Redistricting Act, which finally made it possible to have a concerned congressman "for a kid that's black," was necessitated by the continuing race-consciousness in our country and by the bonds of history, economics, and culture that still inexorably link African-Americans.

In our society, there is racial bloc voting; campaigns focus on civil rights initiatives, and political ads play on the most blatant stereotypes and fears surrounding race relations. We doubt that the immutable characteristic of skin color will ever become irrelevant to politics. But even if that ideal is motivating the Shaw majority, to deem irregularly shaped minority-majority districts subject to strict scrutiny as overly "race-conscious" is counter-productive. As Justice Blackmun stated in Bakke, "[i]n order to get beyond racism, we must first take account of race. There is no other way." We submit that American society has not yet reached a moment where African-Americans have "little in common with one another but the color of their skin." The Supreme Court's voting rights law should not be based on a politically appealing dream that denies all of American history. The law should not distort that history such that the concept of "color blindness" is used—like a surgeon's scalpel—to excise African-Americans from significant political power.

C. "Segregation" . . . "Stereotypes" . . . "Representative Democracy" and Federalism

The Supreme Court's majority opinion, with its comments on racial "segregation," "stereotypes," and "representative democracy" also suggests naiveté about the history of American race relations and the competence of African-American congresspersons. The majority concludes that "an effort to segregate voters into separate voting districts because of their race [violates equal protection if] the separation lacks sufficient justification." The Court reasoned:

If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury. . . . By perpetuating such notions, a racial gerrymander may exacerbate the

185. See supra notes 99-133 and accompanying text.
And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.
Id. See also David A. Strauss, The Myth of Colorblindness, 1986 Sup. Ct. Rev. 99, 114 ("[W]e do not have a choice between colorblindness and race-consciousness; we only have a choice between different forms of race-consciousness.").
188. Id. at 2832 (emphasis added).
very pattern of racial bloc voting that majority-minority districting is sometimes said to counteract . . .

When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their **constituency as a whole.** This is altogether antithetical to our system of **representative democracy.**”

The Supreme Court majority also suggested the irregular shape of the Twelfth District was possibly **de jure** segregation, writing that “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.”

The South’s long-term oppression of African-Americans required and sanctioned racial separation and racial discrimination. This segregation involved, *inter alia,* denying blacks first-rate public accommodations in restaurants, hotels, and public facilities. It existed in housing, educational policies, and employment—in nearly every facet of life. It notoriously required black children to attend separate schools, and blacks to ride in the back of buses, use separate bathrooms, and drink from separate water fountains.

Racist segregation, however, is not analogous to a white voter’s residence in a congressional district where a slight majority of the voting population is African-American. No person residing in either District One or District Twelve is required to live in those districts; nor is anyone precluded from moving to any of the other ten congressional districts in North Carolina. Nor has any person had his or her vote diluted by reason of living in either District One or District Twelve.

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189. *Id.* at 2827 (quoting Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088 (1991)) (emphasis added).

190. *Id.* at 2826-27 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)) (emphasis added). The majority went on to liken District Twelve to the district at issue in *Gomillion*:

> *Gomillion*, in which a tortured municipal boundary line was drawn to exclude black voters, was such a case. So, too, would be a case in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions.

*Shaw*, 113 S. Ct. at 2826-27. But as Justice Souter notes, *Gomillion* is distinguishable from *Shaw* in that the *Gomillion* plaintiffs alleged a constitutional harm—being excluded from voting within the municipality in which they lived. *See id.* at 2846 (Souter, J., dissenting) (“[R]ace-based discrimination places the disfavored voters at the disadvantage of exclusion from the franchise.”).


192. As Justice Souter explained:

The majority’s use of ‘segregation’ to describe the effect of districting here may suggest that it carries effects comparable to school segregation making it subject to like scrutiny. But a principal consequence of school segregation was inequality in educational opportunity provided, whereas use of race (or any other...
White voters who live in District One or District Twelve have no fewer rights than African-Americans living in any of the ten other congressional districts of North Carolina, where the African-American population is less than 50%, but in some instances as high as 20%. The use of the term "segregation" thus reveals a certain naiveté by the majority of the Court: as long as African-Americans constitute less than a majority of a district, the Court suggests, the district is "integrated," but once the black presence exceeds 50%—however slightly—the district is "segregated."

But it is not rational to equate districts having 53% black voters with the oppression of racial segregation that America sanctioned for decades.

**D. North Carolina's Integrated Districts Are Neither Apartheid Nor Segregation**

Suggestions that Districts One and Twelve amount to political apartheid or segregation are poorly reasoned. Apartheid, an official policy designed to exclude the members of one racial group from participating in government, is instituted by the promulgation of restrictive legislation adversely impacting a disenfranchised population.

By contrast, North Carolina's First and Twelfth Districts are not the black "homelands"—they are not isolated or segregated black ghettos. They are integrated districts, where African-Americans constitute only slight majorities and voters are not required to vote for representatives of a particular race. Indeed, candidates in these districts have as much of a probability of facing a diverse field of opponents as do candidates in any of the other ten districts. Once elected, all representatives sit in Congress, not in a separate legislative body, where they vote on a national legislative agenda. African-American representatives do not speak only to "black" interests, any more than representatives from Iowa farmlands speak only to "farming interests" and representatives from New York City or Chicago speak only to "urban interests." Indeed, Congressman Watt and Congresswoman Clayton have distinguished themselves with service in the House for their constituents on a broad range of issues.

In this last regard, it is worth remembering that many of the interests

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193. See supra notes 141-45 and accompanying text.
195. In fact, Congresswoman Clayton was not only elected president of the Democratic freshman class but also was recently voted "most influential newcomer to the Hill." See Shaw, 113 S. Ct. at 2846 n.4 (Souter, J., dissenting).
of particular concern to North Carolina’s African-American voters are shared by the state’s whites of similar socio-economic deprivation. High unemployment and poverty, increased incidents of violent crime and police brutality, and limited health care resources—although issues that disproportionately impact the African-American community—are not issues limited to the black community. Indeed, in creating the First and Twelfth Districts, North Carolina legislators, while preserving the interests of incumbents and the balance of political power within the state, created districts that, although awkwardly shaped, gracefully unite a multi-racial coalition of interests. What is significant then about the voters of the First and Twelfth districts is that their interests are similar on many key issues—regardless of race. These districts are not “black” districts, are not political apartheid, and are not racially segregated. In fact, the opposite is true.

At a minimum, the First and Twelfth Districts ensure representation that will fairly effectuate the concerns of African-American and white voters, without fear of neglect or intimidation. They cause in effect the

When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy. Shaw v. Reno, 113 S. Ct. 2816, 2827 (1993) (emphasis added). Mel Watt is a Phi Beta Kappa graduate of the University of North Carolina and a Yale Law School graduate. Eva Clayton holds Bachelor's and Master's degrees from Johnson C. Smith University and North Carolina Central University. Both are able to represent their “constituency as a whole,” certainly as well as the white congressmen who for nine decades, the Supreme Court apparently assumes, represented their “constituency as a whole.” Mel Watt and Eva Clayton, no doubt, will more steadfastly protect the rights of their white constituents than did Senators Willis Smith and Jesse Helms protect the rights of their black constituents. See supra notes 5, 99-107, 120-22 and accompanying text. Unless the Court truly believes that African-American representatives are inherently less capable than their white counterparts, it should exercise caution when making suggestions about black representatives' abilities “to represent only the members of [their] group.” Shaw, 113 S. Ct. at 2827.

196. District One connects voters in several sparsely populated, largely rural counties. See Clayton, supra note 135, ¶ 2. The district's inhabitants include the state's largest concentration of small farmers, as well as many small business proprietors, government and military employees, and employees at several area colleges. The district has a large proportion of "working poor families." Id. ¶ 2.B. Economic development and increased community services, like health care, housing, and utilities delivery, are issues that unite the voters of the First District. See id. ¶ 2.B-C.

Similarly, the Twelfth District brings together voters with common socio-economic backgrounds and interests. These voters are largely urban and dependent upon an industrial economic base. See Affidavit of Jose F. Alvarez, ¶¶ 4-6, 9-14 (sworn to Mar. 23, 1994) (submitted as evidence in Shaw v. Hunt, No. 92-202-CIV-5-BR (E.D.N.C.)); Watt, supra note 13, ¶ 18. In addition to shared concerns about labor and foreign trade arising from the textile industry, which dominates the district, as urban dwellers the voters of District Twelve share concerns about crime, housing, and community investment. See generally, Lonni Guanier, Groups, Representation, and Race-Conscious Redistricting: A Case of the Emperor's New Clothes, 71 Tex. L. Rev. 1589, 1593 n.18 (1993) (criticizing Shaw and arguing that North Carolina's African-American constituency is politically cohesive).
inclusion of African-Americans in the political process. The presence of two representatives from North Carolina who are responsive to the concerns of their constituents will go far towards preventing the continued promulgation of policies that, at best, are insensitive to the plight of African-Americans, and, at worst, exacerbate the deteriorating condition of blacks in America.

VI. PLURALISM IN CONGRESS: A BARRIER TO PERPETUATING "HISTORIC WHITE SUPREMACY" 197

In Shaw, the Supreme Court relies on an ideal of democracy that the United States has yet to, and might never, attain. Wielding this vision, the Court has created a dynamic that might undermine the recent strides toward pluralism made in Congress.

A. Defining “Representative Democracy”

In Shaw, the majority speaks of “our system of representative democracy,” 198 resurrecting a view of democracy expressed by Justice Douglas in his dissent in Wright v. Rockefeller. 199 Under this view, the 1991 redistricting puts at risk “‘the multiracial, multireligious communities that our Constitution seeks to weld together as one,’” by “‘emphasizing differences between candidates and voters that are irrelevant in the constitutional sense.’” 200 The Court’s reliance on Justice Douglas’s dissent is fitting, as he would have invalidated the districting plan that had enabled Adam Clayton Powell, Jr. to return to Congress. Justice Douglas, in the guise of ensuring that “race . . . creed or . . . color” would not be inappropriately interjected into the “‘democratic ideal,’” 201 would have denied minority voters an important voice in Congress during the height of the Civil Rights movement, a time when race, creed, and color were of paramount concern to the nation. Those issues still inform American politics. Accordingly, the Shaw majority’s belief in “our system of representative democracy” is no more realistic than Justice Douglas’ faith in a democratic ideal in which “the individual[‘s] . . . race, his creed or his color” is not important.

What does the Shaw majority envision when it speaks of “our system of representative democracy”? Was our system a “representative democracy” when the Supreme Court declared in Dred Scott that a black man “had no rights which the white man was bound to respect”? 202 Was our system a representative democracy from 1901 to 1927 when there were no African-Americans in the United States House of Representatives, or

197. Franklin, supra note 169, at 259.
198. Shaw, 113 S. Ct. at 2827.
200. Shaw, 113 S. Ct. at 2827 (quoting Wright v. Rockefeller, 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting)).
201. Wright, 376 U.S. at 66-67 (Douglas, J. dissenting).
from 1929 to 1944, when there was only one African-American voice in Congress. The voice of that one representative, Congressman Arthur Mitchell, was all but drowned out by the antagonistic posturing of his white colleagues. During the 1936 Democratic convention, for example, his own party rejected his participation in the electoral process: "Congressman Mitchell's presence on the podium... was used as an excuse for a U.S. senator from South Carolina and eight other delegates to stage a walkout in protest. But even that demonstration was mild compared to what had happened in previous conventions..."204

In fact, Congressman Mitchell was a second class citizen to Congress, his party, and his country. On April 30, 1937, he boarded a Pullman car in Chicago with a first class ticket to Hot Springs, Arkansas. When the conductor told him that he could no longer ride in the first class section (the train had crossed state lines), Mitchell, as he later testified, "thought it might do some good for me to tell him who I was."205 After he identified himself as a United States Congressman, according to Mitchell, the conductor said "it didn't make a damn bit of difference who I was, that as long as I was a nigger I couldn't ride in that car."206 Mitchell testified:

"[F]or a moment I decided that I wouldn't go, that I would let them put me in jail down there and see how the thing would finally come out.

But I happened to think that I was in Arkansas, and sometimes they don't keep them in jail for trial down there, but they take them out and lynch them after they put them in jail; so I thought maybe I had better not; being the only negro in Congress, that I had better not be lynched on that trip."207

Mitchell retreated to the decrepit black coach.208

Was our system a representative democracy when from 1945 to 1955

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203. See African-Americans in the U.S. Congress, 1870-1993, infra app. A.


207. Id. at 1103-04 (testimony of Arthur W. Mitchell).

208. See id. "The conductor's behavior was in clear violation of a 1914 Supreme Court ruling that the denial of first class accommodations on trains to blacks violated the Fourteenth Amendment." Id. at 1103; see McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151, 161-62 (1914). "In 1941, the Supreme Court declared that the railroad's treatment of Mitchell violated his rights under the Interstate Commerce Act." Higginbotham, supra note 205, at 1103; see Mitchell v. United States Interstate Commerce Comm'n, 313 U.S. 80, 97 (1941). The Mitchell Court concluded that "the discrimination shown was palpably unjust and forbidden by the [Interstate Commerce] Act." Mitchell, 313 U.S. at 97. Mitchell eventually received $1,250 in settlement. See Higginbotham, supra note 205, at 1103.
there were only two African-Americans in the United States Congress? The feelings of helplessness many African-Americans experienced in these decades was expressed poignantly by Richard Wright in his introduction to the classic sociological treatise, Black Metropolis. Wright wrote:

[I]n the 1920's, when racial hate was at a hysterical pitch, and after the grinding processes of history had forged iron in the Negro's heart, we hear a new and strange cry from another Negro, Claude McKay. In his sonnet, If We Must Die, he seems to snarl through a sob:

If we must die—let it not be like hogs
Hunted and penned in an inglorious spot,
While round us bark the mad and hungry dogs,
Making their mock at our accursed lot.
If we must die—oh, let us nobly die,
So that our precious blood may not be shed
In vain; then even the monsters we defy
Shall be constrained to honor us though dead!
Oh, kinsmen! We must meet the common foe;
Though far outnumbered, let us still be brave,
And for their thousand blows deal one death-blow!
What though before us lies the open grave?
Like men we'll face the murderous, cowardly pack
Pressed to the wall, dying, but—fighting back!

What has America done to people who could sing out in limpid verse to make them snarl about being 'pressed to the wall' and dealing 'one death-blow?' Is this the result of a three-hundred-year policy of 'knowing niggers and what's good for 'em?' Is this the salvation which Christian missionaries have brought to the 'heathen from Africa?' That there is something wrong here only fools would deny.

White America has reduced Negro life in our great cities to a level of experience of so crude and brutal a quality that one could say of it in the words of Vachel Lindsay's The Leaden-Eyed that:

It is not that they starve, but they starve so dreamlessly,
It is not that they sow, but that they seldom reap,
It is not that they serve, but they have no gods to serve,
It is not that they die, but that they die like sheep.

The presence of two African-Americans in Congress contributed little towards efforts to shed the African-American community of its outsider status. Even in 1957, when four of 545 members of Congress were African-Americans, did not the significant lack of racial pluralism in Congress signify that America was not a representative democracy? During that period, congressmen from the South almost uniformly joined the Southern Manifesto expressing in chorus resistance to Brown

209. See Congressional Representation (House and Senate), 1871-1993, infra app. C.
211. Id.
212. See African-Americans in the U.S. Congress, 1870-1993, infra app. A.
and its anti-segregation signal.\footnote{193} In 1965, Adam Clayton Powell, Jr., a representative of Congress (despite Justice Douglas' opposition in \textit{Wright}), and three other sitting black congressmen, voted in support of the Voting Rights Act of 1965.\footnote{194} As a direct result of that Act, African-American voters were no longer barred from the polls, and the number of African-American representatives began to increase. The input of these representatives, who have included John Conyers, Jr. (D-Mich. 1965-present), William L. Clay (D-Mo. 1969-present), Shirley Chisholm (D-NY 1969-82), Charles Rangel (D-NY 1970-present), Ron Dellums (D-Ca. 1971-present), Barbara Jordan (D-Tx. 1973-78), and Andrew Young (D-Ga. 1973-77), among others, has been influential in focusing at least some attention on issues of importance to African-Americans.

Yet, these voices did not begin to make the Congress "look like America" until recent elections, which brought the tally of members of the Congressional Black Caucus to forty.\footnote{195}

These new congresspersons finally have the possibility of insuring that issues of African-American concern are brought before the Congress. For example, because of the influence of African-American voters in North Carolina's minority-majority districts, their representatives are responsive to issues of special concern to \textit{all} black North Carolinians. As long as these districts remain minority-majority black, it is likely that the interests of the historically black colleges will be aggressively addressed,\footnote{196} and that redlining practices of banks affecting black neighborhoods will be closely scrutinized.\footnote{197} Funding for Head Start programs will be vigorously pursued, and cutbacks to social services will be challenged by representatives ready to dispute the stereotypes of lazy black men and "welfare mothers." Furthermore, unlike some of their predecessors who attempted to thwart the interests of African-American voters, these representatives can support civil rights initiatives without fear that taking a principled stand will end their political careers.

But the importance of a pluralistic Congress is not only bringing "African-American" issues to the fore; a pluralistic Congress, perhaps more importantly, also nurtures a truer representative democracy. A Congress with members of all colors brings more American citizens into the political system, as it announces that government is for \textit{all} Americans, increases the confidence of \textit{all} American voters in the government, and...

\footnote{193} Nineteen senators and 83 representatives from the South joined the Manifesto. \textit{See} Norman Dorsen et al., 2 Political and Civil Rights in the United States 700 n.2 (4th ed. 1979).
\footnote{195} \textit{See} African-Americans in the U.S. Congress, 1870-1993, \textit{infra} app. A.
\footnote{196} \textit{See} Affidavit of Dr. Robert Albright, §§ 7-8 (sworn to Mar. 19, 1994) (submitted in Shaw v. Hunt, No. 92-202-CIV-5-BR (E.D.N.C.)).
\footnote{197} \textit{See} Affidavit of J.C. Harris, §§ 7-8 (sworn to Mar. 23, 1994) (submitted in Shaw v. Hunt, No. 92-202-CIV-5-BR (E.D.N.C.)).
thereby cultivates political participation of all Americans.\textsuperscript{218}

Thus, the challenge in these present voting rights cases is whether the significant racial pluralism finally occurring in the United States Congress will prevail—whether the voices and interests of minorities and, indeed, all Americans will be welcomed in the public debate—or whether the voices of minorities again will be silenced.

\section*{B. The Problems of an Unrepresentative Congress}

Some people might ask what is wrong in having an unrepresentative Congress. They may prefer boundary lines that are compact and neatly drawn at the expense of racial pluralism in Congress. Minimizing pluralism in Congress, however, comes at a high cost: the confidence of large segments of the population in the government is undermined and the insight of the body is significantly limited. Those groups that are the most tolerant of an unrepresentative Congress, we believe, are composed primarily of individuals who have been the major beneficiaries of a congressional system that is not pluralistic in its composition.\textsuperscript{219} They are content with the system as long as their “group” enjoys a more advantageous position than it would were the Congress more representative of the population. However, the adverse impact of an unrepresentative Congress on both the public’s perception of the Congress and the Congress’ perception of the public is significant.

The Armed Services, which are disproportionately black and poor, provide a palpable example of the necessity that all Americans have confidence in a government that they perceive to be representative, particularly when that government makes decisions impacting that group. As was noted in \textit{The New York Times} during the Gulf War:

\begin{quote}
Close to 30 percent of the Army’s troops in Operation Desert Storm are black, though blacks are just 14 percent of the nation’s population between the ages of 18 and 24. In a land war, black casualties will be similarly disproportionate. Is it fair? Is it inevitable? For answers, one must search the soul of American society.\textsuperscript{220}
\end{quote}

The decision to commit forces to combat bears much less legitimacy when the legislative body acting in support of that decision does not well represent soldiers sent to combat, in other words, when Congress is not pluralistic.\textsuperscript{221}

\textsuperscript{218} For a thoughtful review of these and other issues, see Kathryn Abrams, \textit{Raising Politics Up: Minority Political Participation and Section 2 of the Voting Rights Act}, 63 N.Y.U. L. Rev. 449 (1988).

\textsuperscript{219} As an example, in a somewhat different context, most Americans seemed oblivious or indifferent to the fact that until October 1992, Presidents Reagan and Bush between them had appointed 115 court of appeals judges, only two of whom were African-American. \textit{See} A. Leon Higginbotham, Jr., \textit{The Case of the Missing Black Judges}, N.Y. Times, July 29, 1992, at A21.


\textsuperscript{221} The fears of African-American servicemen and women and their families were surely lessened by the participation of General Colin Powell, America’s first African-
Further, in the context of the Gulf War, the value of a pluralistic body deciding whether to send soldiers into combat was particularly acute. Public opinion was sharply divided on race (and gender) lines. In fact, although most black voters supported the war effort, twice as many blacks as whites—39% vs. 19%—thought President Bush should have given sanctions more time to work.222

Some persons might argue that it is possible to have a viable, fair, and effective congressional system even when there is no significant correlation between the composition of the Congress and the nation’s population. Nevertheless, we submit that it is difficult to have a Congress that in the long run has the respect of most segments of the public unless it has significant pluralistic strands in its composition. Although the values held by each individual congressperson are important, and although mere pluralism does not guarantee an effective Congress, pluralism is nevertheless an important virtue, a sine qua non to building a Congress that is both substantively excellent and also respected by the general population. A pluralistic Congress brings a variety of backgrounds and experiences to pressing issues of social policies, which demand innovation to solve. More often than not, congressional homogeneity and exclusivity are deterrents to, rather than promoters of, such innovation.223 In contrast, a pluralistic Congress raises the likelihood that that body will identify the concerns of all Americans. As was recently demonstrated in the debate over whether to retire at full rank the Navy’s top admiral—who commanded that organization at the time of the infamous “Tailhook Scandal”—the presence of women in the Senate stirred unprecedented soul searching and insight on that gender-related issue.224

American Joint Chief of Staff, in the command decision-making process. General Powell’s sentiment that the soldiers fighting in the Gulf “were family . . . [no matter] what color they were, where they came from, whether they were rich or poor” was a poignant statement, a marked departure from prior commanders of an institution which had perpetuated segregation in its ranks. African Americans: Voices of Triumph—Perseverance 177 (Time Life Books ed., 1993).


While some successful black businessmen support the war, for instance, others oppose it. Thomas Hightower, a businessman in Burbank, Calif., says, ‘It’s not about civil rights, but about oil. And look who’s at the heart of the decision-making process: wealthy white males who are sending minorities to their death.’

223. The essence of pluralism in Congress is the influence of myriad individual experiences. As Justice Benjamin Cardozo has advised us with respect to judges:

We do not pick our rules of law full-blossomed from the trees. Every judge [and congressperson] consulting his own experience must be conscious of times when a free exercise of will, directed of set purpose to the furtherance of the common good, determined the form and tendency of a rule which at that moment took its origin in one creative act.


224. See Maureen Dowd, Senate Approves a 4-Star Rank for Admiral in Tailhook Af-
Professor Charles Warren categorized the problem, with respect to courts, this way:

The Court is not an organism dissociated from the conditions and history of the times in which it exists. It does not formulate and deliver its opinions in a legal vacuum. Its Judges are not abstract and impersonal oracles, but are men whose views are necessarily, though by no conscious intent, affected by inheritance, education and environment and by the impact of history past and present.225

Warren’s analysis is equally applicable to a legislature and its members. A vastly unrepresentative legislature may articulate precepts or laws that seem appropriate to its members, who never imagine that their views may be nothing more than the “prejudices” they “share with [some of] their fellow-men.”226 The American experience is replete with examples of such legislative biases.227

The courts provide a provocative example of the problems of unrecognized prejudices. On a homogeneous court, no “outsider” challenges the biases the dominant group accepts as “self-evident” truths. As Justice Sandra Day O’Connor, the first woman on the U.S. Supreme Court, has

fair: 54-43 Vote Follows Heated Debate on Floor, N.Y. Times, Apr. 20, 1994, at A1, B10. As was reported:

[A]ll seven women in the Senate joined in trying to stop Admiral Kelso, the Chief of Naval Operations from retiring at four-star rank.... The women in the Senate were angrily opposed in the debate by other Senators from both sides of the aisle.... There were vivid signs in the chamber of women’s progress.... But the women in the chamber clearly felt more progress was needed.

Id. We need not spend much time wondering whether the result of that debate would have differed had women been closer to their 50% proportionate share of Senate members rather than merely 7%.

225. 1 Charles Warren, The Supreme Court in United States History 2 (1926).
226. Oliver W. Holmes, The Common Law 1 (1881) (“[E]ven the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”) As Professor David A. Strauss has noted:

If a person is prejudiced against black people, his prejudice will manifest itself whenever he deals with a black person. It follows that if a legislator is prejudiced, his prejudice will manifest itself whenever he votes on legislation affecting black people, at least so long as he knows it affects them. If, for example, he has—as one theory holds—a tendency to be insufficiently sympathetic to the burdens placed on blacks, this tendency will manifest itself whenever legislation places burdens on blacks. Whether the explicit terms of the legislation happen to mention blacks is immaterial.

227. The Congressional Quarterly, describing the passage of the 1965 Voting Rights Act, detailed twelve critical civil rights initiatives defeated in Congress, including two anti-lynching statutes, five initiatives addressing poll taxes and literacy tests, three bills concerning fair employment practices, and two Civil Rights Acts. See Cong. Q. Almanac 551 (1965). Similarly, gender prejudice influenced Congress and state legislatures, which in 1871 incorporated gender in the Fifteenth Amendment to ensure women did not gain suffrage. See Flexner, supra note 81, at 152 (discussing greater support for black suffrage than for female suffrage). Sexist attitudes successfully thwarted efforts to incorporate women into the electorate until the passage of the Nineteenth Amendment in 1920.
recently written of Justice Thurgood Marshall, the first black on the Supreme Court:

At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.\textsuperscript{228}

Justice O'Connor concluded that the stories of such outsiders "made clear what legal briefs often obscure: the impact of legal rules on human lives."\textsuperscript{229}

Pluralism allows a mutual education process between individuals. Minorities learn of the concerns and fears of majorities, while majorities learn of the lives of others and experiences that they may well be unable to imagine. The sharing of such life experience is indisputably necessary if American democracy is to thrive.

We do not want to be misunderstood. Pluralism does not mean that only a person of one race will be able to legislate a matter fairly when his or her race is involved. Pluralism is not grounded on the premise that a person of a specific race, religion, ethnic background, gender, or region is able to decide an issue more appropriately than a person of another race, religion, ethnic background, gender, or region.\textsuperscript{230} Instead, we are suggesting that pluralism guards against the influences of individual prejudice,\textsuperscript{231} and further creates a milieu in which the entire congressional system benefits from the multi-faceted experiences of its members. A pluralistic Congress insures that the public does not perceive the legislature as having a vested interest in the preservation of the status quo, and all Americans, whether victims of discrimination or not, can believe that


\textsuperscript{229} O'Connor, \textit{Story}, supra note 228, at E7.

\textsuperscript{230} Similarly, we are not suggesting that all persons of the same racial, religious, or ethnic background share a monolithic view of every issue. There is almost as much difference between the views of Justice Thurgood Marshall, the first African-American to serve on the U.S. Supreme Court, and Justice Clarence Thomas, the second African-American to hold that honor, as there is between what mathematicians would call the difference between infinity and zero. Justice Thomas's views, in fact, are antithetical to those of most African-Americans. \textit{See Race-ing Justice, En-Gendering Power: Essays on Anita Hill, Clarence Thomas, and the Construction of Social Reality} (Toni Morrison ed., 1992).

\textsuperscript{231} As is detailed in one article, newly appointed Justice Ginsburg experienced the effects of discriminatory practices based on her ethnicity and gender. \textit{See Elizabeth E. Gillman & Joseph M. Micheletti, Justice Ruth Bader Ginsburg}, 3 Seton Hall Const. L.J. 657, 657 (1993). When a Harvard student, she was considered a usurper of a seat more appropriately filled by a male, and in every class she was forced to prove her worth. Although a top student, she was refused work by New York law firms, who feared as a wife and mother she would not be able to devote her "full mind and time to a law job." \textit{Id.} at 658. The New York law firms of today, now reflecting the influence of capable women associates and partners, would consider carefully before rejecting such an able graduate on the basis of outmoded "mommy" stereotypes.
the legislature is foremost concerned with advancing the good of the nation.

C. Racial Pluralism and Leverage in Congress

The number of African-Americans in the United States Congress became truly significant when their number rose from 26 in 1991 to 40 in 1993. Yet Shaw v. Reno and its progeny have challenged this progress. These lawsuits threaten to reduce the number of African-Americans in Congress by thirty percent, and once again, to diminish the political impact of black citizens.

Pluralism serves more than merely an educational function—it also has a leveraging factor and determines the scope of political influence, as Dr. David Bositis suggests:

If all diversity of experience brings to the Congress are other voices and anecdotes that the traditional membership might sample and consider in their deliberations, that is not enough. Political leverage requires [that] those traditional members—typically white middle class males—must seriously regard those new representatives as full partners, and as in the past (principally in dealing with their white peers), fear the repercussions that come with overlooking the just and reasonable demands of these new and different members.232

A manifestation of leveraging has already occurred. The House Democratic Caucus met on July 11, 1993 to consider disciplining eleven Democratic subcommittee chairmen, who voted against President Clinton's budget. This meeting was summoned at the behest of eighty-one Democratic members, a majority of whom were minority group members and women. While no action was taken against these chairmen, this is the first time such an attempt was made, and further, it clearly signaled the new influence of the expanded Black and Hispanic caucuses.233

In the 103rd United States Congress there are twenty-two standing House committees.234 Except for the Committee on Natural Resources, there is at least one African-American on each committee.235 If the freshman congressmen of 1993 return in substantial numbers, with their seniority increasing, African-American congressmen will be a formidable group in assisting to shape the federal government's national policies. It is that breadth of power that Shaw v. Reno threatens.

233. See id.
234. Agriculture; Appropriations; Armed Services; Banking, Finance and Urban Affairs; Budget; District of Columbia; Education and Labor; Energy and Commerce; Foreign Affairs; Government Operations; House Administration; Judiciary; Merchant Marine and Fisheries; Natural Resources; Post Office and Civil Service; Public Works and Transportation; Rules; Science, Space and Technology; Small Business; Standards of Official Conduct; Veterans Affairs; Ways and Means.
235. See Bositis, supra note 57, at 6 & tbl. 8.
The 1969 report of the National Commission on the Causes and Prevention of Violence warned the nation:

When in man's long history other great civilizations fell, it was less often from external assault than from internal decay. Our own civilization has shown a remarkable capacity for responding to crises and for emerging to higher pinnacles of power and achievement. But our most serious challenges to date have been external—the kind this strong and resourceful country could unite against. While serious external dangers remain, the graver threats today are internal: haphazard urbanization, racial discrimination, disfiguring of the environment, unprecedented interdependence, the dislocation of human identity and motivation created by an affluent society—all resulting in a rising tide of individual and group violence.

The greatness and durability of most civilizations has been finally determined by how they have responded to these challenges from within. Ours will be no exception.\(^{236}\)

The challenge to America is to solve our problems from within—in the legislative halls, in the courts, and in government, rather than to allow increased deterioration from within so that the rule of law becomes less relevant because the weak, the poor, and the dispossessed feel they have no advocates pleading their cause. We cannot close our eyes to crisis in American society today. When there is no dilution of the white vote, the Supreme Court should not preclude states from working toward significant minority representation, as a means of solving problems in legislatures.\(^{237}\)

**CONCLUSION**

Ninety-eight years ago, the United States Supreme Court decided *Plessy v. Ferguson*,\(^ {238}\) triggering the legitimization of racism and retarding racial progress for almost a century. Last year, Justices Kennedy, O'Connor, and Souter said "we think *Plessy* was wrong the day it was decided."\(^ {239}\) Other justices, including Chief Justice Rehnquist, have

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237. As Justice O'Connor has noted:

[State innovation is no judicial myth. When Wyoming became a State in 1890, it was the only State permitting women to vote. That novel idea did not bear national fruit for another thirty years. Wisconsin pioneered unemployment insurance, while Massachusetts initiated minimum wage laws for women and minors. After decades of academic debate, state experimentation finally provided an opportunity to observe no-fault automobile insurance in operation. Even in the field of environmental protection, an area subject to heavy federal regulation, the States have supplemented national standards with innovative and far-reaching statutes.

238. 163 U.S. 537 (1896).
agreed. We feel strongly that Shaw v. Reno also "was wrong the day it was decided" and hope that the Court will correct this error and not perpetuate a questionable and newly-imposed legal standard that one district court already has used to invalidate a congressional districting plan. Absent a change in direction, as other courts struggle with applying strict scrutiny to legislative districting plans, Shaw, like Plessy before it, may have devastating racial consequences.

Shaw is fundamentally flawed. The decision, at least in part, is premised on the notion that irregularly shaped, minority-majority congressional districts are somehow akin to apartheid and segregation. But apartheid and segregation are invidious policies intended, at bottom, to exclude citizens from civic life because of their race. Minority-majority districts, intended to include racial minorities into the politics from which they were for so long locked out, are neither similar nor analogous to apartheid or segregation. Shaw's misguided suggestion otherwise limits the legitimacy of that decision.

Yet, even under the strict scrutiny required by Shaw, we believe—in light of the peculiar history of the southern states where challenges to minority-majority districts are pending—that race-conscious redistricting used to insure the fair representation of African-Americans will meet the burdens of that standard. As the North Carolina experience well demonstrates, only such districting (or other effective means of empowering African-American voters) will unravel the burdens of history and nurture the experiment of a pluralistic democracy.

Until 1992, with respect to the United States Congress, North Carolina implemented for ninety years the wishes of its former governors to take the "negro... out of politics" and to assure "that white government shall be supreme and unchallenged in [North Carolina's] borders." When stripped to its essence, the fundamental issue in the current North Carolina voting case, as well as in similar cases in other states, is whether whites and blacks will share in political power. Either North Carolina—and our nation—will revert to politics akin to the former "historic white supremacy," where African-Americans were a relatively minuscule power in shaping and directing the policies of our government, or North Carolina will now—though belatedly—fulfill the vision expressed by Martin Luther King thirty-five years ago when he said:

240. See supra note 53.
241. As Justice White noted in Shaw, the Court's opinion that the redistricting plan "might have violated appellants' constitutional rights is both a fiction and a departure from settled equal protection principles." Shaw v. Reno, 113 S. Ct. 2816, 2834 (1993) (White, J., dissenting).
243. Supra note 2.
244. Supra note 3.
245. Franklin, supra note 169, at 259.
Give us the ballot and we will no longer have to worry the federal government about our basic rights.

Give us the ballot and we will no longer plead to the federal government for passage of an antilynching law; we will by the power of our vote write the law on the statute books of the southern states and bring an end to the dastardly acts of the hooded perpetrators of violence.

Give us the ballot and we will transform the salient misdeeds of bloodthirsty mobs into the calculated good deeds of orderly citizens.

Give us the ballot and we will fill our legislative halls with men of good will . . .

Give us the ballot and we will place judges on the benches of the South who will 'do justly and love mercy' . . .

Give us the ballot and we will quietly and nonviolently, without rancor or bitterness, implement the Supreme Court's decision of May 17, 1954.246

The Supreme Court's majority opinion in Shaw v. Reno, applying the Equal Protection Clause to preclude African-Americans from attaining significant political power in this nation, turns the intent and meaning of the Fourteenth Amendment on its head.247 In the 1873 case first construing the Fourteenth Amendment, the Slaughter-house Cases,248 the Supreme Court declared:

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth. . . .


247. The only African-American scholar that we know who supports the majority's opinion is Carol Swain. In our opinion, her argument is flawed, and we agree with Professor Randall Kennedy's insightful analysis of her work. See Randall Kennedy, Blacks in Congress: Carol Swain's Critique, 2 Reconstruction, No. 2, at 34 (1993). Cf. Guanier, supra note 196 (generally critiquing minority-majority districts).

Of the disheartening factors in Shaw v. Reno, none is more so than the decisive vote of Justice Clarence Thomas—who succeeded Thurgood Marshall—in favor of the 5-4 decision. It is inconceivable that Justice Thurgood Marshall would have so interpreted the Fourteenth Amendment, risking a significant set-back to African-Americans' recent political progress.

248. 83 U.S. (16 Wall.) 36 (1873).
We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. 249

Now, 120 years after the Slaughter-house Cases, the Fourteenth Amendment may be used to thwart rather than to assure effective use of the ballot by African-Americans. Now, ninety years after George White was driven from Congress, the Fourteenth Amendment may be used to undermine rather than to guarantee the racial pluralism that has been occurring in the Congress.

But, with respect to North Carolina, the history of state-imposed and state-condoned exclusion of African-Americans from meaningful participation in the political process is compelling justification for the creation of the two minority-majority congressional districts included in the 1991 redistricting, and the 1991 redistricting is narrowly tailored to meet that interest. The redistricting creates only two minority-majority districts that still provide African-Americans less than proportional representation. Further, these two districts are well-integrated—whites comprise just less than half of the voting-age citizens in each; they pool together individuals with similar political interests; they do not simply band together voters based on the color of their skin; and, only 43% of North Carolina’s African-American citizens reside in these districts.

North Carolina’s two minority-majority districts have brought to Congress two African-American legislators of particular acumen and experience, who are quite capable of representing all of their constituents. At the time of Reconstruction, racists distorted the truth to impugn the intelligence of African-American members of Congress. Today, the record establishes that the African-American representatives in Congress are every bit as talented and more diverse than their white peers, 250 as well as similarly committed to making the United States a land of freedom and basic justice.

The bizarreness in this case thus is not the shape of the district boundaries but rather the challenge itself, where the white vote is not diluted and where talented legislators represent the districts. 251 These cases

249. Id. at 71.

250. Of the 40 members of the Congressional Black Caucus, 10 are women. See African-Americans in the U.S. Congress, 1870-1993, infra app. A. A comparison of education levels of African-American and white members of Congress reveals that African-American members essentially match the accomplishments of their white peers. Nearly all have completed secondary education and over 60% have completed post-graduate degrees. See Bositis, supra note 57, at 4 & tbl. 4; Educational Background of CBC Members, 103rd Congress, infra app. G.

251. John Hope Franklin recently noted:

It is curious, but characteristic I fear, that as the new apportionment of 1991 made it possible for more African Americans to gain seats in Congress in 1992, opposition to those gains would go all the way to the Supreme Court. Justice O’Connor called the 12th North Carolina Congressional District “bizarre” in
strike at the heart of race relations in America. While white America apparently approves of African-Americans serving in entertainment roles, such as basketball players Michael Jordan at the University of North Carolina and Grant Hill at Duke, anxiety appears to rise when avenues open for African-Americans to attain significant political power and to determine the public policy rather than the entertainment policy of this nation.

*Shaw v. Reno* notwithstanding, African-Americans have a right to full participation in American politics and a right to be heard in determining the public policy of the nation. Full participation includes the right to have African-American interests articulated, protected, and advanced in Congress. Minority-majority districting—like that of North Carolina—not only is one successful means of insuring these rights but also provides pluralism to Congress, a body instituted to serve *all* Americans. Encouraging pluralism in Congress, in turn, is a starting point toward bringing American politics a step closer to that democratic ideal.

shape. Perhaps it is, but not merely because blacks live along I-85. It is also because industrial and urban developments trace that same route. Thus, it has a homogeneity that is as legitimate as a district that enjoys so-called compactness and contiguity. After all, in order to preserve six Democratic districts and four Republican districts, those responsible for redistricting the state and adher[ing] to the principles of the Voting Rights Act of 1965 had few choices. . . . One must remember, moreover, that gerrymandering was invented in 1810 in Massachusetts and not in 1992 in North Carolina.

### APPENDIX A:
African-Americans in the U.S. Congress, 1870-1993

#### TABLE 1. African-Americans in the U.S. Congress, 1870-1993

<table>
<thead>
<tr>
<th>United States Senate</th>
<th>United States House of Representatives, continued</th>
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<tr>
<td><strong>Member</strong></td>
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<td>Hiram R. Revels</td>
<td>R-MS</td>
</tr>
<tr>
<td>Blanche K. Bruce</td>
<td>R-MS</td>
</tr>
<tr>
<td><strong>United States House of Representatives</strong></td>
<td></td>
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<tr>
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<td>R-SC</td>
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<td>R-AL</td>
</tr>
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<td>R-AL</td>
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<td>R-NC</td>
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<tr>
<td>Charles E. Nash</td>
<td>R-LA</td>
</tr>
<tr>
<td>Robert Smalls</td>
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<td>John M. Langston</td>
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<td>Thomas E. Miller</td>
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<td>George W. White</td>
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<tr>
<td>Oscar DePriest</td>
<td>R-IL</td>
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<td>U. S. House of Representatives, continued</td>
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<td>-------------------------------------------</td>
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<td>Gus Savage</td>
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<td>Katie B. Hall</td>
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Joint Center for Political and Economic Studies
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<tr>
<th>State</th>
<th>Black Voting-Age Population (%)</th>
<th>Black Districts</th>
<th>White Democratic Districts</th>
<th>White Republican Districts</th>
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<td></td>
<td>(N)</td>
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<td>Average District Eligible Black Vote (%)</td>
<td>Share of Statewide Eligible Black Vote (%)</td>
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<td>Florida</td>
<td>11.4</td>
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<td>50.1</td>
<td>7 23.8</td>
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<td>Tennessee</td>
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<td>2 28.9</td>
<td>47.9</td>
<td>4 Hispanic 5.1</td>
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<td>Virginia</td>
<td>17.6</td>
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<td>6 47.4</td>
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<td>Totals 125 Districts</td>
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<td>42.1</td>
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### APPENDIX C:

**Congressional Representation (House and Senate), 1871-1993**

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<th>CONGRESS YEAR</th>
<th>TOTAL MEMBERS OF CONGRESS</th>
<th>WHITE &amp; OTHER MEMBERS OF CONGRESS</th>
<th>BLACK MEMBERS OF CONGRESS</th>
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**SOURCE:**
- Inter-University Consortium for Political and Social Research
- Merced Richter: Ritter
- United States Congress, 1789-
- Ed. Ann Arbor, M. The tabulations were produced using SAS.
APPENDIX D: NORTH CAROLINA 12 VOTING-AGE POPULATION BY RACE, AND BY RACE AND TURNOUT

North Carolina 12 Voting-Age Population By Race, and By Race and Turnout

Voting-Age Population (Unadjusted)

- White: 53.3%
- Black: 46.7%

Voting-Age Population (Adjusted for Turnout Differences)

- White: 50.3%
- Black: 49.7%

North Carolina Turnout, 1992:
White 62.4%, Black 54.1%

Voting and Registration, 1992, p. 27

1990 Census Population and Housing Profile: Congressional Districts, p. 14

Census Population Reports.
### TABLE A: Voting Scores, White NonHispanic Democratic Congressmen, Southern States By District Black and Hispanic Voting-Age Populations, 103rd Congress, First Session

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<td>Texas 18</td>
<td>48.6</td>
<td>13.7</td>
<td>Washington</td>
<td>68</td>
<td>5 63 70</td>
<td>90 100 5</td>
</tr>
<tr>
<td>Texas 50</td>
<td>47.1</td>
<td>15.1</td>
<td>Johnson</td>
<td>74</td>
<td>34 90 94</td>
<td>90 92 0</td>
</tr>
<tr>
<td>Virginia 3</td>
<td>61.2</td>
<td>1.2</td>
<td>Scott</td>
<td>79</td>
<td>30 89 93</td>
<td>100 100 8</td>
</tr>
<tr>
<td><strong>Average (N = 17)</strong></td>
<td><strong>63.1</strong></td>
<td><strong>4.6</strong></td>
<td></td>
<td><strong>72.7</strong></td>
<td><strong>23.3 79.5 89.1</strong></td>
<td><strong>89.9 97.2 5.4</strong></td>
</tr>
</tbody>
</table>
## TABLE 4. Educational Background of CBC Members, 103rd Congress

<table>
<thead>
<tr>
<th>Type of Degree</th>
<th>CBC Members</th>
<th>All Members</th>
</tr>
</thead>
<tbody>
<tr>
<td>Doctoral</td>
<td>01 (0%)</td>
<td>26 (6%)</td>
</tr>
<tr>
<td>Law</td>
<td>16 (42%)</td>
<td>189 (43%)</td>
</tr>
<tr>
<td>Masters</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>8 (20%)</td>
<td>73 (17%)</td>
</tr>
<tr>
<td>MBA</td>
<td>2 (5%)</td>
<td>20 (5%)</td>
</tr>
<tr>
<td>Bachelors</td>
<td>12 (32%)</td>
<td>100 (23%)</td>
</tr>
<tr>
<td>No College Degree</td>
<td>2 (5%)</td>
<td>28 (6%)</td>
</tr>
</tbody>
</table>

**NOTES:** The percentages for CBC members do not sum to 100% because Earl Hilliard (D-AL) has both a Law and an MBA degree. 1. Cynthia McKinney (D-GA) is a doctoral candidate.

**SOURCE:** CQ. Weekly Reports.
APPENDIX H: ACKNOWLEDGEMENTS

The Congressional Black Caucus Foundation has had two meetings of scholars and practitioners who have given us considerable insight on these matters. They are:

Dr. David A. Bositis                      Professor Pamela S. Karlan
Professor John Hope Franklin              Dr. Robert Korstad
Amelia L. Parker                          Quentin Lawson
Dr. Harry L. Watson                        Dr. Steven Lawson
Barbara Arnwine, Esq.                     Dr. Allan Lichtman
Dr. Mary Frances Berry                    Laughlin MacDonald, Esq.
Honorable Corrine Brown                   Dr. Percy E. Murray
Dr. Orville Vernon Burton                 Robin Nesbitt, Esq.
Professor Jerome Culp                     Hon. Eleanor Holmes Norton
Dayna Cunningham, Esq.                    Professor Charles Ogletree
Dr. Helen G. Edmonds                     Professor Frank Parker
James Ferguson, Esq.                      Dr. Julian M. Pleasants
Honorable Cleo Fields                    Dr. H. Leon Prather
Dr. Glenda E. Gilmore                   Theodore Shaw, Esq.
Dr. David Goldfield                      Michael P. Sistrom
Rodney Gregory, Esq.                     Flora J. Hatley Wadlington
Professor Charles Hamilton              Dr. Ronald Walters
Tony Harrison                            Honorable Mel Watt
Wade Henderson, Esq.                     Eddie Williams
Professor F. Michael                     Dr. Linda Williams
Higginbotham                              Brenda Wright, Esq.
Anita Hodgkiss, Esq.                     Colleen Adams
Professor Sherrilyn Ifill                Anton A. Bell
Jeh C. Johnson, Esq.                     Erica Foster
Elaine Jones, Esq.                       Shirley Jones, Esq.