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SHAW v. RENO AND ITS PROGENY

509 U.S. 630 (1993)

North Carolina is subject to the preclearance provisions of section 5 of the VOTING RIGHT ACT OF 1965 [4]. The Voting Rights Section of the Civil Rights Division of the U.S. Department of Justice (DOJ) rejected a North Carolina congressional plan that provided for only a single black-majority congressional district, insisting that two such districts be drawn and suggesting several hypothetical configurations. A resubmitted plan with two majority–minority districts was given DOJ preclearance, but the new district in that plan looked nothing like any of the DOJ suggestions. The proposed North Carolina Twelfth Congressional District stretched 200 miles, included parts of numerous cities, and achieved contiguity of some of its parts only via connection along a single road, Interstate 85.

Because a majority of Supreme Court Justices, including SANDRA DAY O'CONNOR [3,I,II], had previously seemed willing to assent to race-conscious ELECTORAL DISTRICTING [II] to safeguard the fundamental right to vote, the Court's 5–4 decision invalidating North Carolina's districting plan in *Shaw v. Reno* (*Shaw I*) came as a surprise to many experts. In a MAJORITY OPINION [3] authored by O'Connor, and joined by WILLIAM H. REHNQUIST [3,I,II], ANTONIN SCALIA [I,II], ANTHONY M. KENNEDY [I,II], and CLARENCE THOMAS [II], the Court explained that it was troubled by the peculiar configuration of the Twelfth Congressional District, the least compact in the nation, and by the history that led to its creation, in which race appeared to play a major role. The majority also enunciated a new legal standard for legislative action on REPRESENTATION [3], in which an excessive reliance on race as a criterion in drawing electoral district was unconstitutional. In plans in which race was implicated, states were now required to prove that there was a COMPELLING STATE INTEREST [I] in establishing the plan and that the districts were "narrowly tailored" to serve that interest.

While *Shaw I* merely remanded the North Carolina congressional plan to the district court for consideration under the new legal standard, *Shaw v. Hunt* (*Shaw II*) (1996), also decided 5–4 with the same lineup of Justices, declared North Carolina's congressional plan to be uncon-

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stitutional, rejecting claims that aspects of its peculiar configurations could better be assigned to political than to racial considerations. Even before *Shaw II*, however, *Shaw I* inspired similar challenges to race-based districting in other jurisdictions.

Most *Shaw*-type challenges came in jurisdictions that fell under the section 5 preclearance provisions (affecting sixteen states in whole or in part, including all states in the deep South). In covered jurisdictions, the failure to create as many majority–minority districts as the DOJ viewed as required by the act risked a preclearance denial and time-consuming litigation that was unattractive to politicians. By 1998, lower courts in states such as Louisiana, Georgia, South Carolina, and Texas had rejected plans precleared by DOJ; and when these cases were appealed to the Supreme Court the lower court decision was left standing, as in MILLER V. JOHNSON (1995) [II]. In these decisions the courts refused to excuse the majority–minority districts created to secure section 5 preclearance, and some of the opinions chastised the DOJ for its excessive zeal in pursuing race-conscious districting. Only in California were plans sustained against a *Shaw*-type challenge, by a PER CURIAM [3] decision upholding a lower court. But, in that state, the plans under challenge were drawn by former state judges and plausibly defended as fully meeting traditional districting criteria.

Shaw I and subsequent decisions met a mixed reaction among legal scholars. The most important legal criticisms of the opinions concerned the logic underlying the court's broadening of STANDING [4,II] to sue to include voters outside the challenged district; the Court's failure to specify the exact nature of the constitutional harm to white voters whose votes were not diluted; the murkiness and inherent judicial unmanageability of discerning when race is a "predominant factor"; and the use of a sledgehammer (a new constitutional standard) to solve a problem that could have been dealt with merely by tightening the criteria for enforcement of the Voting Rights Act. Ironically, the black-majority districts in question were actually more racially integrated than the white-majority districts in their states. Reaction to *Shaw* in the CIVIL RIGHTS [1,I,II] community was more visceral, as some saw the *Shaw* line of cases as a further retreat from the Second Civil Rights Reconstruction (that of the 1960s), paralleling the betrayal of the First Reconstruction (in the late 1880s).

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