Washington and Lee Journal of Civil Rights and Social Justice

Volume 2 | Issue 1 Article 12

Spring 4-1-1996

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FACTS

Following the 1990 census, Louisiana's congressional representation fell from eight to seven. The Louisiana State Legislature responded by enacting a redistricting plan, Act 42 of 1992 ("Act 42"). The plan increased the number of majority-minority districts[1] from one of eight (District 2) to two of seven (Districts 2 and 4).[2] District 2 resembled in shape the majority-minority district which had previously existed.[3] District 4, was a "Z-shaped creature that zigzag[ged] through all or part of twenty-eight parishes and five of Louisiana's largest cities."[4] Four plaintiffs brought suit alleging that Act 42 violated the Equal Protection Clause[5] by employing impermissible racial gerrymandering to create a new majority-minority voting district.[6] All four plaintiffs lived in Lincoln Parish, a parish split between two districts. Three of the four lived in District 4.[7] Relying on *Shaw v. Reno*,[8] the district court found that the redistricting plan, particularly District 4, was a product of racial gerrymandering and was "not narrowly tailored to further any compelling governmental interest" thus, "the Plaintiffs' right to equal protection as guaranteed by the United States Constitution" was violated.[9]

Louisiana and the United States, as defendant-intervenor, appealed to the Supreme Court. While the appeal was pending, the Louisiana Legislature repealed Act 42 and enacted Act 1 of the 1994 Second Extraordinary Session ("Act 1"), a new districting plan.[10] The Supreme Court vacated the district court's judgment in *Hays I* and remanded the case "for further consideration in light of Act 1."[11] Though the districts had been altered in shape, Districts 2 and 4 remained majority-minority.[12] Under Act 1, the new act, Lincoln Parish is entirely included in District 5, a majority-majority district. Therefore, none of the plaintiffs lived in the challenged district.[13] The district court found that Act 1's District 4 was also racially gerrymandered and violated the Equal Protection Clause.[14]

HOLDING

The United States Supreme Court, Justice O'Connor writing the opinion for five justices with four concurring in the judgment, held that the appellees lacked standing to challenge the redistricting plan because they failed to show individualized harm. The Court vacated the judgment of the remanded the case with instructions to dismiss the complaint.[15]

ANALYSIS/APPLICATION

I. REPRESENTATIONAL HARM FULFILLS STANDING REQUIREMENT

Standing is perhaps the most important of the jurisdictional doctrines.[16] The question of standing is not subject to waiver; the court cannot proceed if standing is not established.[17] *Shaw*, the landmark case that recognized racial gerrymandering as a cause of action, did not specifically address the issue of standing. The *Shaw* plaintiffs resided in the district in question;[18] therefore, individualized harm could be found.[19] The district court found standing in *Hays I* and did not reconsider the issue in *Hays II*.[20] Nevertheless, the Supreme Court must address the issue even when it was not raised in the lower court.[21]

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[1] A majority-minority district is a district "in which a majority of the population is a member of a specific minority group." *Voinovich v. Quilter*, 113 S. Ct. 1149, 1151 (1993).

[2] *Hays v. Louisiana (Hays I)*, 839 F. Supp. 1188, 1190 (W.D. La. 1993).

[3] *United States v. Hays*, 115 S. Ct. 2431, 2434 (1995).

[4] *Id.*

[5] Section 1 of the Fourteenth Amendment states: "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, sec. 1.

[6] *Hays*, 115 S. Ct. at 2433.

[7] *Id.* at 2434.

[8] 113 S. Ct. 2816 (1993) (holding that Equal Protection Clause claim can be stated by alleging reapportionment scheme is "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.").

[9] *Hays I*, 839 F. Supp. at 1209.

[10] *Hays*, 115 S. Ct. at 2434.

[11] *Louisiana v. Hays*, 114 S. Ct. 2731 (1994).

[12] *Hays*, 115 S. Ct. at 2434.

[13] *Id.*

[14] *Hays v. Louisiana (Hays II)*, 862 F. Supp. 119, 129 (W.D. La. 1994).

[15] *Hays*, 115 S. Ct. at 2437.

[16] *Id.* at 2435 (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-231 (1990)).

[17] *Id.*

[18] *Shaw*, 113 S. Ct. at 2820.

[19] *Id.* at 2828.

[20] *Hays*, 115 S. Ct. at 2435.

[21] *Id.* (citing *FW/PBS*, 493 U.S. at 230-31).

The party seeking jurisdiction has the burden of establishing standing.[22] In *Hays*, the Court utilized the "now well settled" constitutional minimum of standing. First, the plaintiff must have suffered an "injury in fact," an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a nexus between the injury and the challenged conduct. Finally, it must be likely that the injury is redressable.[23] These requirements support the Court's continued refusal to "recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power."[24] These considerations apply in the equal protection context as well. For example, in *Allen v. Wright*, the Court held that the injury "accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct."[25] On this basis, the Court denied the appellees' argument that all citizens of the state of Louisiana had standing to pursue a claim for racial classification as established in *Shaw*.[26]

II. POTENTIAL SPECIFIC HARMS

Shaw presented examples of the harm an individual residing within the racially gerrymandered district might suffer. According to the *Shaw* Court, reapportionment is nothing more than an effort to classify and separate voters by race. It injures the voters in that it "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole."[27] This type of racial classification threatens to "stigmatize individuals by reason of their membership in a racial group and to incite racial hostility."[28] The *Hays* Court noted that if voting districts are based on racial classifications, individuals may suffer "representational harms."[29] "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."[30] In a *Shaw* equal protection claim, any citizen able to demonstrate either an individual harm or a representational harm has standing to challenge the racial classification in court.[31]

In *Shaw*, the Court recognized that demonstrating the "individualized harm" required by the standing doctrine is not easy in the redistricting context. It is difficult to show why a particular citizen was placed in a particular district. When drawing districts, legislatures take many factors into consideration, including race. Nevertheless, *Shaw* claims are based upon the principle that "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race' demands the same close strict scrutiny that we give other state laws that classify citizens by race."[32] Thus, the Court stated, "[w]here a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action."[33] If a plaintiff does not reside in the racially gerrymandered district, the plaintiff does not suffer the special harms delineated in *Shaw*. To establish standing, the plaintiff must present specific evidence to show he or she has been personally subjected to a racial classification. Otherwise, the plaintiff would be "asserting only a generalized grievance against government conduct of which he or she does not approve."[34]

III. GENERALIZED HARM INSUFFICIENT FOR STANDING

The Court searched for an individualized, specific harm (the continuation of racial stigma or a representational harm) but found no evidence that plaintiffs had been injured. Nothing in the record showed that the legislature was aware of the racial composition of District 5 (the district in which all the plaintiffs reside).[35] Even if the plaintiffs had established that the legislature knew of the racial make-up of District 5, proof of "that sort of racial consciousness" in the redistricting process

[22] *Id. See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Warth v. Seldin*, 422 U.S. 490, 518 (1975).

[23] *Lujan v. Defenders of the Wildlife*, 504 U.S. 555, 560-61 (1992).

[24] *Hays*, 115 S. Ct. at 2434.

[25] 468 U.S. at 755. (quoting *Heckler v. Mathews*, 465 U.S. 728, 740 (1984)). In *Allen*, parents of black children brought a class action alleging that the IRS failed to deny tax-exempt status for private schools which discriminate on basis of race. The Court that found the plaintiffs did not have standing. *Id.* at 755-56.

[26] *Hays*, 115 S. Ct. at 2435-36 (citing Transcript of Oral Argument at 36).

[27] *Shaw*, 113 S. Ct. at 2828

[28] *Id.* at 2824.

[29] *Hays*, 115 S. Ct. at 2436.

[30] *Shaw*, 113 S. Ct. at 2827.

[31] *Hays*, 115 S. Ct. at 2436.

[32] *Id.*

[33] *Id. Cf. General Contractors v. Jacksonville*, 113 S. Ct. 2297 (1993). In *General Contractors*, members of a contracting association brought suit challenging a city ordinance which gave preferential treatment to certain minority owned businesses in awarding city contracts. The city set aside certain contracts for the minority-owned businesses. Since no member of the association could apply for the contract, the injury component of standing was brought into question. The Court found that the "'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.* at 2303.

[34] *Hays*, 115 S. Ct. at 2436.

[35] *Id.* at 2436.

[36] *Id.*

is insufficient to establish injury in fact.[36] An individual must be able to establish they were personally injured by the racial classification.[37] In this case, the appellees could not establish an individualized harm.

The appellees argued that a generalized harm existed that allowed anyone within the state to bring suit.[38] First, appellees argued that District 5 was a segregated voting district and that their position was no different than that of a student in a segregated school district.[39] The Supreme Court disagreed. Again, the Court said that racial composition of a district is not enough to establish a violation of the Equal Protection Clause. The legislature may rely upon historical boundaries to provide compact districts of contiguous territory (like District 2).[40] Establishing a *Shaw* claim for District 4 says nothing about the intent of the legislature for the composition of District 5.[41]

Appellees also insisted they were challenging Act 1 in its entirety and not just District 4 alone.[42] The Court gave this argument even less attention than the first. Though all Louisiana voters are placed in a particular district, only some are injured. Not every Louisiana voter has standing to challenge the racial classification of some. A suit may be brought by "[o]nly those citizens able to allege injury 'as a direct result of having been personally denied equal treatment.'"[43] In *Hays*, the appellees failed to meet that obligation.

The Court stated that appellees reliance on *Powers v. Ohio*[44] was incorrect.[45] *Powers* established that a juror suffers harm as a result of racially discriminatory preemptory strike and therefore could not be excluded from a petit jury because of his or her race. Appellees argued they have a right not to be excluded from a district because of their race. In *Powers*, however, the juror actually suffered a personal harm. The appellees in *Hays* failed to establish that they suffered any harm or discriminatory treatment because they did not establish they were placed in District 5, or excluded from District 4, on the basis of their race.[46] Because the Court found the appellees lacked standing, it did not reach the merits of the case.

Justice Stevens in a concurring opinion stated that plaintiffs who do not live in the district suffer no injury.[47] Furthermore, he believes that even if the plaintiffs had resided in the challenged district they would not have suffered any legally cognizable injury sufficient to establish standing.[48]

Justice Breyer, joined by Justice Souter, concurred in the Court's opinion to the extent that it addressed voters who do not reside within the district that they challenge.[49] Justice Breyer did not address the issue of voters challenging a district in which they reside. Justice Ginsburg concurred in the judgment of the Court without writing a separate opinion.[50]

CONCLUSION

In *Shaw*, the Supreme Court recognized a cause of action for individuals residing in a racially gerrymandered district and found that the injuries those individuals suffered were sufficient to establish standing. The question left unanswered is how far the *Shaw* injuries reach. *Hays* provides a preliminary answer to that question. In *Hays*, the Court determined that no "specific harm" existed for which an individual residing in the state, but outside the district, may bring an equal protection claim. The injuries required by *Shaw* are suffered only by those individuals who reside in the district. An individual who is residing within the district has suffered an injury and does have standing to bring the action.[51] It is important to note that an individual not residing within the district may still establish standing by showing they have suffered a specific harm. The appellees in *Hays*, however, failed to do so.

Summary and Analysis Prepared by:
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[37] *Id.*

[38] *Id.* at 2435-36 (citing Transcript of Oral Argument at 36).

[39] *Id.* at 2436. (citing Brief for Appellees at 17).

[40] *Shaw*, 113 S. Ct. at 2826.

[41] *Hays*, 115 S. Ct. at 2436-37.

[42] *Id.* at 2437.

[43] *Id.* (quoting *Allen*, 468 U.S. at 755).

[44] 499 U.S. 400 (1991).

[45] *Hays*, 115 S. Ct. at 2437.

[46] *Id.*

[47] *Id.* at 2439 (Stevens, J., concurring).

[48] *Id.* at 2440.

[49] *Id.* at 2439 (Breyer, J., concurring).

[50] Id. at 2437. (Ginsburg, J., concurring)

[51] *See Miller v. Johnson*, 115 S. Ct. 2475, 2485 (1995). *See also* this Digest, page 97.