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I. FACTS

Residents in North Carolina brought suit against the U.S. Attorney General alleging that North Carolina's redistricting plan contained impermissible racial gerrymandering.[1] A three-judge panel of the United States District Court for the Eastern District of North Carolina dismissed the action.[2]

In 1993, the Court in *Shaw v. Reno*[3] held that "plaintiffs whose complaint alleged that the deliberate segregation of voters into separate and bizarre-looking districts on the basis of race stated a claim for relief under the Equal Protection Clause of the Fourteenth Amendment."[4] Furthermore, the Court held that bizarre voting districts, unexplainable in terms other than race were subject to strict scrutiny.[5] Hence, the Court stated that redistricting plans must be "narrowly tailored to further a compelling state interest.[6]

The Court reversed and remanded to the district court for consideration of the claim.[7] On remand, the district court held that the plan's lines were drawn to produce districts which reflected the racial makeup of the populations within them. Although the plan was race-based, the Court found that it was narrowly tailored to further the state's compelling interest in complying with sections 2[8] and 5[9] of the Voting Rights Act.[10]

II. HOLDING

The Supreme Court, in a five to four decision, held that North Carolina's redistricting plan violated the Equal Protection Clause because it was not narrowly tailored to serve a compelling state interest.[11]

III. ANALYSIS/APPLICATION

In *Miller v. Johnson*,[12] the Court held that a racially gerrymandered districting scheme was constitutionally suspect. If race was found to be the dominant and controlling consideration in redistricting, the classification would be unconstitutional, regardless of whether the classification was benign or remedial.[13] A plaintiff could prove a race-based motive by using either circumstantial evidence relating to the district's shape and demographics or direct evidence connected to the legislature's purpose.[14] A state could overcome a suspect classification if it showed a legitimate and compelling interest.[15] In

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[1] Suit was brought against the assistant Attorney General, various state officials and agencies.

[2] *Shaw v. Reno*, 861 F. Supp. 408 (1994).

[3] *Shaw v. Reno*, 509 U. S. 630 (1993).

[4] *Shaw v. Hunt*, 116 S. Ct. 1894, 1899 (1996). (citing *Shaw v. Reno*, 509 U.S. 630 (1993)). The Court in *United States v. Hays*, 115 S. Ct. 2431, 2436 (1995), limited standing in racial redistricting cases to those persons residing within the particular district(s) at issue. The *Hays* Court did make an exception for individuals residing outside the state who demonstrated a specific harm suffered.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] 42 U.S.C. § 1973b (1988) under section 2 North Carolina must show that a minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," the group is "politically cohesive"; and that the white majority votes sufficiently in a bloc to prevent the candidate preferred by the minority group. All relevant circumstances must be consider by the court and based upon the totality of the circumstances the protect class must be found to "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

[9] 42 U.S.C. § 1973c (1988) under section 5 North Carolina has two options. North Carolina can submit a redistricting plan to the Attorney General or file it with the United States District Court for the District of Columbia in order to gain approval of a redistricting plan. Upon submission to the Attorney General the plan will either be approved or disapproved. If within 60 days the Attorney General has failed to give a response, the plan is approved by default. In the context of a redistricting plan submitted to the United States District Court of the District of Columbia, a three judge panel must sit to hear challenges brought by oppositions to the plan in areas stipulated by the Act.

[10] *Shaw v. Hunt*, 116 S. Ct. at 1899-1900 (citing *Shaw v. Reno*, 861 F.Supp. 408, 473-474 (1994)). *See also* 42 U.S.C. § 1973, 1973c.

[11] *Shaw v. Hunt*, 116 S. Ct. at 1899-1900 (citing *Shaw v. Reno*, 861 F. Supp. 408, 474 (1994)). *See also* 42 U.S.C. § 1973, 1973c.

[12] 115 S. Ct. 2475 (1995).

[13] *Miller v. Johnson*, 115 S. Ct. 2475, 2488-2491 (1995).

[14] *Id.* at 2488.

[15] *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494

order to be a compelling interest, the discrimination at issue must be "identified discrimination."[16] Moreover, the state must have a "strong basis in evidence" to conclude that a redistricting program was necessary.[17] However, this "compelling interest" must be "specifically and narrowly tailored" in order to meet strict scrutiny.[18]

The Court agreed in *Shaw v. Reno* that the district's shape, demographics, and legislative purpose all showed that race was a dominant and controlling factor in the redistricting plan.[19] Therefore, the standards set forth in *Miller* applied to North Carolina's redistricting plan. Revisiting the issue in *Hunt*, Chief Justice Rehnquist, speaking for the plurality of the Court, invalidated the redistricting plan using the guidelines established in *Miller*.[20]

North Carolina asserted three distinct compelling interests to sustain the creation of a black majority district: "to eradicate the effects of past and present discrimination; to comply with section 5 of the Voting Rights Act, and to comply with section 2 of that Act."[21]

A. EFFECTS OF PAST AND PRESENT DISCRIMINATION

In order for North Carolina's assertion of eradicating past or present discrimination to rise to a compelling interest, its redistricting scheme had to meet two conditions before warranting racial distinctions.[22] First, past or present discrimination had to be "identified" with specificity before relief based on race could be granted.[23] Second, North Carolina must have had a "strong basis in evidence" to conclude that the redistricting scheme was necessary.[24]

In the present case, the Court found a discrepancy between North Carolina's proffered purpose of eliminating past discrimination and its use of race in the redistricting plan. To support its claim of remedying past discrimination, North Carolina relied on two reports prepared by a social scientist and a historian.[25] However, the reports were dated after North Carolina's General Assembly had adopted the redistricting plan.[26] The Court found it difficult to believe that the legislature had the historical and social-science data before them when considering the creation of the new district.[27] The Court determined that, instead, North Carolina's legislators had relied impermissibly on their personal experiences alone: "A generalized assertion of past discrimination in a particular industry or region is not adequate because it provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."[28] Therefore, the Court held that North Carolina failed to prove that any past or present discrimination existed.

B. SECTION 5 OF THE VOTING RIGHTS ACT

The Court also acknowledged that *Miller* left open the question of whether compliance with the Voting Rights Act alone could be a compelling interest under the proper circumstances.[29] However, the *Hunt* Court noted in *Miller* that section 5[30] did not require race-based redistricting.[31]

The *Hunt* Court held that it would not reach the issue again of whether compliance with the Voting Rights Act could be a compelling interest; for North Carolina's creation of "an additional majority-black district was not required under a correct reading of § 5 . . . ."[32] In North Carolina's submission to the Department of Justice, North Carolina's General Assembly explained that it did not initially create a second minority district in order "to keep precincts whole, to avoid dividing counties into more than two districts, and to give black voters a fair amount of influence by creating at least one district that was majority black in voter registration and by creating a substantial number of other districts in which black voters would exercise a significant influence over the choice of congressmen."[33] More-

(1989).

[16] *Id.* at 469.

[17] *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 274-275 (1986).

[18] *Wygant*, 476 U.S. at 280.

[19] *Shaw v. Hunt*, 116 S. Ct. at 1901.

[20] *Id.*

[21] *Id.* at 1902.

[22] *Id.*

[23] *Id.* (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499-506 (1989)).

[24] *Id.* at 1903 (citing *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 277 (1986)).

[25] *Id.* (citing H. Watson, *Race and Politics in North Carolina*, 1865-1994, but the report was not completed until after *Shaw v. Reno* which was heard before the Court in 1993).

[26] *Id.*

[27] *Id.*

[28] *Id.* at 1902-1903. (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989)).

[29] *Id.* at 1903.

[30] 42 U.S.C. §1973c. For full description *see supra* note 9.

[31] *Id. See also Miller*, 115 S. Ct. 2475, 2491 (1995).

[32] *Id.*

[33] *Id.* at 1904.

over, North Carolina pointed out that no consensus of African-American and Native-American voting patterns existed which established the creation of a minority district.[34] Additionally, creating a black majority district, in practice, would decrease black influence in four other districts.[35]

Miller recognized that a state's policy of adhering to traditional districting principles, as opposed to unlimited creation of majority-minority districts, did not alone create the inference of discrimination on the basis of race.[36] Therefore, a redistricting plan "[could] violate section 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution."[37] As in *Miller*, the *Hunt* Court concluded that compliance with section 5 and the Department of Justice's authority was an improper basis for North Carolina's maximization policy.[38] The Court held that North Carolina's creation of an additional majority-black district was not a remedy narrowly tailored to North Carolina's professed interest in avoiding section 5 liability.

C. SECTION 2 OF THE VOTING RIGHTS ACT

In order to mount a section 2[39] challenge, the plaintiff must allege manipulation and dilution of a minority population in a single-member district.[40] The plaintiff must show that the manipulation of the district lines "fragments politically cohesive minority voters among several districts or packs them into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority population."[41]

To prevail on a section 2 claim, North Carolina must have proved that the minority group was "sufficiently large and geographically compact to constitute a majority in a single-member district."[42] Second, the minority group must have been "politically cohesive."[43] Third, North Carolina had to prove that the white majority "usually . . . defeat[ed] the minority's preferred candidate."[44] Based upon the totality of the circumstances, the Court ultimately had to find that members of a protected class "ha[d] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[45]

The Court assumed arguendo that compliance with section 2 could be a compelling interest, and that "a second majority-minority district was needed in order not to violate § 2 . . . ."[46] The Court, however, held that the North Carolina plan did not survive strict scrutiny because the means, race-based redistricting, was not narrowly tailored to achieve the ends, compliance with section 2.[47]

The Court conceded that it could find no clear guidelines as to how close the means and ends chosen must be in redistricting cases.[48] However, the Court expected the action taken by the legislature to substantially address or achieve the asserted purpose.[49] Therefore, the action by the legislature must, at the very least, "remedy the anticipated violation or achieve compliance to be narrowly tailored."[50]

North Carolina failed to assert that the district was "geographically compact."[51] Instead, it contended that "once a legislature has a strong basis in evidence" of a section 2 violation, "it may draw a majority-minority district anywhere," even if the district is not compact.[52]

The Court found North Carolina's argument unpersuasive. Based upon the record, the Court stated that the newly created district had no "geographically compact" minority group to warrant a remedy under section 2.[53] If a section 2 violation had existed, a majority-minority district still could not be drawn anywhere.[54] The Court determined that North Carolina's assertion was implausible because any discrimination in a particular geographical area would go unchecked if a minority-majority district was set up somewhere else in North Carolina.[55] Therefore, the Court held that the redistricting plan was not narrowly tailored to North

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[34] *Id.* (citing *Shaw v.Reno*, 861 F. Supp. 408, 480-481(1994)).

[35] *Id.*

[36] *Miller v. Johnson*, 115 S. Ct. 2475, 2492 (1995).

[37] *Miller*, 115 S. Ct. at 2492.

[38] *Shaw v. Hunt*, 116 S. Ct. 1894, 1904 (1996).

[39] 42 U.S.C. §1973b. For full description *see supra* note 8.

[40] *Id.* at 1905.

[41] *Id.* (citing *Johnson v. De Grandy*, 114 S. Ct. 2647, 2655 (1994)).

[42] *Id.* at 1905 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)).

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* (citing *Miller v. Johnson*, 115 S. Ct. 2475, 2491 (1995)).

[50] *Id.* at 1906.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

Carolina's interest in complying with section 2 of the Voting Rights Act.[56]

IV. DISSENT

Justice Stevens dissented in part due to the majority's tendency to view legitimate attempts by states to correct past discriminatory wrongs against historically disadvantaged minority groups "with the same hostility that is appropriate for oppressive and exclusionary abuses of political power."[57] Stevens felt that party politics, not race, was the "predominant" concern in *Shaw v. Hunt*, and that the majority's opinion was less a barrier "against racial discrimination than . . . a means by which state residents may second-guess legislative districting in federal court for partisan ends."[58] The plaintiff-intervenors in this case were Republicans. Stevens indicated that, based upon the record, these plaintiff-intervenors were upset due to the dominance of the Democratic representation in Congress.[59] The Republicans made no opposition to the initial creation of more than one majority-minority districts.[60] However, once North Carolina designed a district that would have preserved Democratic incumbency, the plaintiff-intervenors have joined the racial gerrymandering challenge.[61] According to Stevens, *Shaw v. Hunt* established a standard by which allegations of racial gerrymandering would become a "means by which unsuccessful majority-race candidates, and their parties, will seek to obtain judicially what they could not obtain electorally."[62]

To rebut the majority's argument that the redistricting plan did not have a "geographically compact" minority group, Stevens pointed out that North Carolina makes no such geographical compactness requirement in its own electorial districts.[63] Although the redistricting plan "may give rise to an inference that traditional districting principles were subordinated to race in determining its boundaries, it cannot fairly be said to prove that conclusion in light of the clear evidence demonstrating race-neutral explanations for the district's tortured shape."[64] Stevens found that the omission of a geographic compactness requirement indicated that the creation of a noncompact district was not a deviation from North Carolina's district-creating principle.[65] In fact, Stevens found that nothing in the record revealed that race was the dominant factor in the redistricting plan. Instead, he found two race-neutral criteria in forming the districts.[66]

After assuming, as the majority held, that strict scrutiny applied, Stevens found that North Carolina had three compelling interests. First, some of the North Carolina legislators felt that the history of poor race relations in their state's history would best be amended by facilitating African-American participation in voting and by increasing representation of African-Americans in Congress.[67] Second, regardless of whether section 5 was violated, North Carolina's interest in overcoming the Attorney General's objection was acceptable for the second majority-minority district creation.[68] Third, North Carolina's interest in avoiding the "expense and unpleasantness" of section 2 litigation was a compelling interest.[69]

Justice Stevens also stated that the majority failed to adequately address the issue of plaintiff's standing.[70] According to Stevens, the majority had failed to show the nature of the plaintiff's constitutional challenge or why the issue before the Court should be considered an equal protection problem.[71] The majority's vagueness, in Steven's opinion, allowed the plaintiff to assert pretextual objections and to avoid revealing their real basis for objecting, partisan politics.[72]

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[56] *Id.* at 1907.

[57] *Id.*

[58] *Id.* at 1908.

[59] *Id.*

[60] *Id.*

[61] *Id.* Stevens also noted that the plaintiff-intervenors joined the racial gerrymandering suit only after their partisan gerrymandering suit was dismissed for failure to state a claim.

[62] *Id.*

[63] *Id.* at 1915.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 1916. Stevens found that 1) the incumbent's interest in staying in the same district and 2) the interest in placing rural voters in one district and urban voters in another, were race-neutral reasons for creating the districts.

[67] *Id.* at 1918.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 1907, 1910-1911. For further discussion on the standing issue, *see Miller v. Johnson*, 115 S. Ct. 2475, 2497-2499 (1995). *See also United States v. Hays*, 115 S. Ct. 2431, 2436 (1995).

[71] *Id.* at 1907-1908.

[72] *Id.* Justice Stevens asserted that the Court's ruling would set a bad precedent. After *Shaw v. Hunt*, a majority candidate who lost would still have the courts to achieve what he could not through an election.

V. CONCLUSION

In *Miller v. Johnson* and *Shaw v. Hunt*, the Court faithfully required any racial element as a minor consideration in the context of redistricting. For years, redistricting was a familiar tool of those who wished to suppress the vote of racial minorities. Many of the redistricting plans of the past had irregular shapes. Besides being created to dilute the minority vote, many districts were, and still are, drawn for political reasons. However, in the context of *Shaw v. Hunt*, an assertion of race-based considerations overshadowed and obscured any political purposes for redistricting.

It appears from cases like *Miller v. Johnson* and *Shaw v. Hunt* that the Department of Justice and the Court are caught in a tug-of-war when it comes to compliance with the Voting Rights Act in the context of redistricting. The DOJ knows that there are problem areas where minority groups are not being represented adequately. The states in which the problems exist, like Georgia and North Carolina, also acknowledge the lack of representation. The DOJ puts pressure on the problem areas to comply with the Act. The only sensible solution is to redistrict in order to gain better minority representation. Unfortunately, while the remnants of past discrimination still exist, the Court has adopted a color-blind attitude. The Court requires specific evidence of state action in causing minority voter dilution. In many cases, evidence of the source of manipulation of the minority votes is lost over time. Most legislatures rely on personal knowledge. Unfortunately, under *Shaw v. Hunt*, personal knowledge is not good enough.

The Voting Rights Act of 1965 was passed to insure that one's race would not be a barrier to one's freedom to express his or her political voice. *Shaw v. Hunt* adds several elements to the ever-growing racial redistricting precedent. While *Shaw v. Hunt* mirrors the reasoning in *Miller*, it also takes a step further toward the total exclusion of race in all redistricting considerations.

The prudence of holding redistricting plans to the same level of scrutiny as affirmative action programs is questionable. Redistricting plans like the one in *Hunt* and affirmative action programs share a common purpose of remedying past discrimination. The Court now requires, in order for affirmative action programs to survive strict scrutiny, direct evidence of discrimination and present harm. Allegations of past discrimination will not alone allow a redistricting program to survive strict scrutiny.

Several elements within the redistricting cases, like *Miller* and *Shaw v. Hunt*, warrant a lower level of scrutiny by the Court. The original purpose of the Voting Rights Act was to give equal opportunity for voting and representation. The DOJ, after investigation, finds violations of the Act and pressures the violating state to fix the problem. The state, one would reasonably think, is in the best position to eliminate voting barriers. However, the Court will not allow these changes without direct evidence of discrimination. No general assertions by legislatures of past discrimination will be sufficient. Instead, the legislature must identify a specific harm and narrowly tailor the remedy. The Court fails to realize that discrimination is institutional. In most cases, pinpointing exactly where the harm ends and the remedy begins is impossible.

After *Shaw v. Hunt*, legislatures will find it very hard to survive judicial scrutiny if its considerations are not color-blind. Yet color-blind legislation may not be realistic in this context. Even today, there are those who are not represented due to oppressive district-drawing of the past. If the past is to be remedied by social advances in the present, how should legislatures to proceed? If the future laws are color-blind then past discrimination, based on race-guided laws, cannot be realistically remedied. Clearly, Stevens did not think total exclusion of race was possible. With state legislatures' hands being tied by the Court, a state will rarely if ever satisfy the DOJ under the Voting Rights Act.

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