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Race and Place: Geographic and Transcendent Community in the Post-Shaw Era*

*Lisa A. Kelly***

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I remember that once we were walking in Washington, D.C., heading for the National Zoo, and you asked me if I had known the man to whom I had spoken. I said no. And, Liza, you volunteered that you found it embarrassing that I would speak to a complete stranger on the street. It called to mind a trip I'd made to Pittsburgh with my father. On the way from his friend Mr. Ozzie Washington's sister's house, I heard Daddy speak to a colored man, then saw him tip his hat to the man's wife. (Daddy liked nice hats: Caterpillar hats for work, Dobbs hats for Sunday.) It's just something that you do, he said,

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** Associate Professor of Law, West Virginia University. Before I began full-time teaching in 1992, I practiced law for ten years in Arkansas, seven of them in a relatively small place, rich in its own sense of historical community: Pine Bluff, Arkansas. I would not have been able to write this Article were it not for the hospitality of many people there and throughout the state who nurtured my sense of place, awakened me to the full realities of race, and invited me to partake in a community both rooted in and transcendent of place. If I were to name every person who is somehow mixed up in the characters who found their way into this Article, it would be quite a litany, indeed. But there are a few whose names should not be left unspoken. I want to say thank you to Mr. C.W. Olloway, Reverend Chester Jones, and Brother Robert C. Pierce for teaching me how to dance with the bear. As Reverend Jones would say, "When you are dancing with a bear, you can't get tired and sit down; you must wait until the bear gets tired, then you sit down." All three men have been dancing with the bear longer than I have been living, and I thank them for showing me the few steps I know. I also want to thank Randy Berkey, Emily Spieler, Frank Cleckley, Fred Shelley, Ken Martis, Edward Still, Brenda Wright, and Don Lively, who read early drafts of this Article and offered helpful and supportive comments. I also want to thank Derrick Bell for the body of his work and the kind encouragement he has offered me in mine.

when I asked him if he had known those people and why he had spoken to them.

Last summer, I sat at a sidewalk cafe in Italy, and three or four "black" Italians walked casually by, as well as a dozen or more blacker Africans. Each spoke to me; rather, each nodded his head slightly or acknowledged me by a glance, ever so subtly. When I was growing up, we always did this with each other, passing boats in a sea of white folks.¹

I. INTRODUCTION

In the Preface to *Colored People*, Henry Louis Gates, Jr., describes and explains for his daughter, Liza, communities characterized by race. Throughout his memoir, Professor Gates recreates communities local and communities transcendent. In one passage, he insists that he is "from and of a time and place—Piedmont, West Virginia . . . slathered along the ridge of 'Old Baldie' mountain like butter on the jagged side of a Parker House roll."² The geography of place, even within the small town of Piedmont, is central. Italian neighborhoods in the west, Irish neighborhoods up on "Arch Hill,"³ wealthy white neighborhoods defined by the block of "upper East Hampshire street," poor white neighborhoods inhabiting Pearl Street, and three separate black neighborhoods—"Downtown," "Up on the Hill," and "down Rat Tail Road"—geographically bounded the "social topography" of Piedmont.⁴ Ethnicity together with place formed the living map embedded in the community's consciousness.

In many other passages, Gates vividly describes how his racial identity, nurtured locally, generated a broader sense of community, one that makes easy the nod, the glance, the tip of the hat, whether in Piedmont, Pittsburgh, or Italy. Central to even the title of his memoir

1. Henry Louis Gates, Jr., *Colored People: A Memoir* xii (Knopf, 1994).

2. *Id.* at xv, 3.

3. *Colored People* is peppered with descriptions of place rendered in the tone of the friendly soul giving directions to the lost. Gates lovingly reveals the way that both ethnicity and geography simultaneously define oddly shaped neighborhoods which are given names that evolve over time both in spelling and pronunciation and vary according to the ethnic group that speaks of them. For example:

Now, the whole west side of Piedmont, "Up on the Hill," as the people "Downtown" still say, was called "Arch Hill." I figured that it was called that because it was shaped like the arch of your foot. Twenty-five years later, I learned that what the people called "Arch Hill" had all along been "Irish Hill." Cracked me up when Pop told me that. "Dummy," was all he said.

Id. at 5.

4. *Id.* at 5-7.

is the honoring of a community that exists among minority people in a dominant culture defined by the color of one's skin.

Recognizing the possibility of a geographic and transcendent community should inform the debate that has arisen over challenges to majority-minority voting districts. Like the Rat Tail Road snaking "down around the hill to the bottom of the valley,"⁵ a community of color or ethnicity is no less real for the winding turns it takes; and the quieter but larger racial community of the glance and vote often needs no map at all to find its way home.

The racial redistricting cases recently decided by the Supreme Court speak of communities of interest while ignoring or distorting the realities of both geographic and transcendent African-American⁶ communities. A central question underlying the surface debate is how and whether the state should define geographic communities to transform permanent minorities⁷ into majorities in order to give voice to their political needs. Lurking beneath the political empowerment question is the issue of whether community should be defined primarily by geography or by some other criterion.

5. *Id.* at 6.

6. The Voting Rights Act extends its protection not only to African-Americans but also to other racial and language minorities. 42 U.S.C. §§ 1973, 1973aa-1a, 1973b (1988 ed. & Supp. V). I do not mean to slight the important case law and interests advocated on behalf of other minority groups. My focus upon the African-American community here is the product both of my experience as a lawyer as well as the historical predominance of the African-American community as a force for constitutional and statutory evolution.

Throughout this Article, I will use the terms "African-American" and "black," as well as "Negro" when historically appropriate. I believe that "African-American" more closely approximates accurate ethnic origins, although I also recognize that Africa is a continent, and to group its many people together ignores their diversity in ways that seem both ignorant and troubling. However, given the history of slavery and the difficulties it presents in tracing true origins, it is difficult to be more accurate than this. "Black" remains the language that many people use, and to the extent that my concerns run toward accurate depictions of characters in the narrative, I may use that term as well. In some ways, "black" is a better metaphor for explaining the impact that race and skin color has had on the law and history of the United States.

7. Professor Lani Guinier's work has focused upon the threat to true democracy posed by solidified, recurring majorities acting consistently in disregard of the permanent minority's interests or desires. The permanent minority consistently remains without a political voice, and the majority consistently is the winner taking all of the power. Professor Guinier has traced these concerns for the powerless and permanent minority back to James Madison who warned that the accumulation of all of the power into the same hands, "whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny." Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* 3 (Free Press, 1994) (quoting James Madison). In those voting politics characterized by racially polarized voting, the racial minority becomes the permanent minority whose voice can be ignored and interests left unserved.

*Shaw v. Reno*⁸ and its most recent supreme court progeny⁹ give rise to the need for further consideration of both geographic and transcendent African-American communities. Through *Shaw*, the Supreme Court empowered white voters to challenge the constitutionality of majority-minority districts, even where the plaintiffs could not allege that their vote had been diluted.¹⁰

The Court left ill-defined the precise reach of the new *Shaw* equal protection claim. The *Shaw* opinion focused upon the shape of the North Carolina districts under challenge, particularly District Twelve. By fixing upon what the Court considered to be the district's bizarre shape, the Court's approach highly valued lines drawn in accordance with "traditional districting principles such as compactness, contiguity, and respect for political subdivisions."¹¹

The Court was less than clear, however, about the specific role that traditional districting principles should play in the analysis. The opinion's ambiguities led to various constructions among both scholars and district courts as they wrestled to apply the Court's new standard. Was a district's highly irregular shape an expressive harm of constitutional proportions?¹² Was any district line-drawing in

8. 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993).

9. See *Miller v. Johnson*, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995); *U.S. v. Hays*, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995). The Court also rendered a summary decision in the California redistricting case, *DeWitt v. Wilson*, 115 S. Ct. 2367, 132 L. Ed. 2d 520 (1995).

10. Racially gerrymandered districts have been subject to constitutional attack since *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that the fencing out of black voters by the redrawing of Tuskegee's municipal boundaries violated the Fifteenth Amendment). Equal protection challenges to minority vote dilution have been recognized since *White v. Regester*, 412 U.S. 755 (1973). *White* required black plaintiffs to prove that their vote was diluted by the districting scheme under attack. *Id.* at 766. In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Court further heightened the standard for minority voters by requiring proof not only that the challenged districting plan resulted in a dilution of their voting strength, but also that the legislature enacted or maintained the districting plan *with the purpose of* depriving the minority plaintiffs of voting power. *Id.* at 62. The intent standard set forth in *White* has been heralded as the Supreme Court's retreat from minority voters' constitutional challenges to voting systems. See Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv. C.R.-C.L. L. Rev. 173, 192 (1989).

Shaw created a new constitutional claim, distinct from the claims made in racial gerrymander cases of the past. In so doing, the Court established two separate constitutional challenges to racially gerrymandered districts: one for African-Americans in which plaintiffs are held to a high standard of proof requiring the showing of intentional vote dilution, and another for white voters in which strict scrutiny of the districting process could be triggered by a showing that the district was drawn with "lines of dramatically irregular shape." *Shaw v. Reno*, 113 S. Ct. 2816, 2820 (1993). It remains to be seen whether African-American plaintiffs can utilize *Shaw* to forego the more stringent requirements imposed upon them in the racial gerrymander cases of the recent past.

11. *Shaw*, 113 S. Ct. at 2827.

12. See Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483 (1993). Professors Pildes and Niemi understand the decision in *Shaw* as an attempt to

which race was found to be a motivating factor subject to strict scrutiny without regard to district appearance?¹³ Was district shape merely one type of circumstantial evidence of an improper racial intent sufficient to trigger strict scrutiny?¹⁴ Or were only “bizarre” districts subject to strict scrutiny?¹⁵

The *Shaw* Court disregarded both the geographic and transcendent nature of African-American communities by elevating geographic compactness to constitutional dimensions while deriding majority-minority districts as “racial gerrymandering”¹⁶ and “political apartheid.”¹⁷ In effect, the Court’s opinion privileged political subdivisions over real community boundaries and aesthetically pleasing lines over the actual but sometimes “ugly” or “bizarre” lines drawn by a history of segregation, thereby placing irrelevant obstacles

enunciate an expressive harm that can exist apart from an actual harm to the plaintiffs in the form of vote dilution. The harm is a generalized one that speaks to the dangers of racial stereotyping and an increased risk of the perpetuation of racially polarized voting, which the Supreme Court perceives as flowing from districts intentionally drawn to empower racial groups. The existence of “bizarrely shaped” districts in this context creates an expressive harm that can be read by the citizenry as a state’s actions straining toward the racial grouping of its citizens for voting purposes. *Id.* at 486-527. After articulating this theory of expressive harm based upon district appearance, Professors Pildes and Niemi urge the Court to adopt a standard for what constitutes a “bizarre” district based upon a relative measure of the challenged district’s shape and other districts within the plan. *Id.* at 575-587. See *Houston v. Lafayette County, Mississippi*, 56 F.3d 606, 611 (5th Cir. 1995) (adopting a relativist approach to bizarreness in a Section Two case); *Vera v. Richards*, 861 F. Supp. 1304, 1309-10 (S.D. Tex. 1994), prob. juris. noted sub. nom. *Vera v. Bush*, 115 S. Ct. 2639 (1995) (fixing upon the contentions and distortions of Texas congressional Districts Eighteen, Twenty-nine, and Thirty as hearing the “odious imprint of racial apartheid” and finding they are therefore not only unconstitutional but morally wrong).

13. A Louisiana District Court construed *Shaw* to mean that a districting plan is subject to strict scrutiny whenever the state takes race into account to draw district lines. *Hays v. Louisiana*, 839 F. Supp. 1188, 1194 (W.D. La. 1993), vacated 114 S. Ct. 2731 (1994), on remand 862 F. Supp. 119, 122 (W.D. La. 1994). The original district court opinion resulted in a vacated judgment because the state revised the legislative redistricting plan while the appeal was pending; nevertheless, the plaintiffs continued their challenge against the revised plan, and the district court, on remand, adopted by reference its original 1993 opinion.

In *Shaw v. Hunt*, 861 F. Supp. 408, 431 (E.D.N.C. 1994), the district court on remand also employed a “race-as-a-motivating factor” test to trigger strict scrutiny. The court, nevertheless, found the plan to be narrowly tailored to the compelling state interest in complying with the Voting Rights Act. *Id.* at 437-38. The Supreme Court will review the district court’s opinion this term. *Shaw v. Hunt*, prob. juris. noted 115 S. Ct. 2639 (1995).

14. See *Shaw*, 861 F. Supp. at 430-31.

15. See *DeWitt v. Wilson*, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994), judgment affd. in part and appeal dismd. in part 115 S. Ct. 2367 (1995) (“*Shaw* applies to redistricting plans that on their face are so dramatically irregular that they can be explained only as attempts to segregate by the races for purposes of voting without regard to traditional redistricting principles”).

16. 113 S. Ct. at 2824.

17. *Id.* at 2827.

in the way of full African-American participation in the electoral process.

The Court's recent decisions in the Georgia redistricting case, *Miller v. Johnson*,¹⁸ and in the Louisiana redistricting case, *United States v. Hays*,¹⁹ respectively broadened and constricted the ability of *Shaw* plaintiffs to challenge the creation of majority-minority districts. In *Johnson*, the Court shifted its focus away from district shape and established a broader standard under which strict scrutiny can be triggered by showing that

race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities of interests, to racial considerations.²⁰

In *Johnson*, the Court noted that the Eleventh District of Georgia was not necessarily bizarrely shaped when compared to white-majority districts in the plan.²¹ Nevertheless, the Court held that the Eleventh District was subject to strict scrutiny because "the General Assembly was motivated by a predominant, overriding desire to assign black populations to the Eleventh District and thereby permit the creation of a third majority-black district."²² The Court found that the Eleventh District could not survive strict scrutiny. Despite language in *Johnson* regarding the need for judicial restraint when reviewing the redistricting process,²³ the holding leaves vulnerable to attack all majority-minority districts intentionally created to empower permanent racial minorities, whether the courts find them to be bizarrely shaped or not.²⁴

18. 115 S. Ct. 2475 (1995).

19. 115 S. Ct. 2431 (1995).

20. 115 S. Ct. at 2488.

21. *Id.* at 2489.

22. *Id.*

23. *Id.* at 2488.

24. Justice O'Connor's concurring opinion attempts to soften *Johnson*'s blow. In an apparent effort to reassure those worried about the effect of *Johnson*—I can certainly be counted among the number in need of such reassurance—Justice O'Connor promises that

[a]pplication of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may well have been considered in the redistricting process.

Id. at 2497.

It remains to be seen whether the swing vote so often cast by Justice O'Connor in this closely divided Court will serve to preserve or destroy the ability of African-Americans to elect

In *Hays*, the Court narrowly conferred standing upon only those who reside within the challenged district or who can prove “injury ‘as a direct result of having personally been denied equal treatment.’”²⁵ The Court characterized the injury experienced by the *Shaw* plaintiffs as “representational” or “stigmatiz[ing]” harms.²⁶ For those living outside of the majority-minority district, such harms cannot be inferred but must be proven by specific evidence.²⁷

The *Hays* plaintiffs lived outside of the majority-minority district, and the Court easily found that they did not have standing.²⁸ In *Johnson*, however, the Court addressed the plaintiffs’ standing in one single declarative sentence: “As residents of the challenged Eleventh District, all appellees had standing.”²⁹

Given the Court’s summary consideration of standing in *Johnson* coupled with its quickness to dismiss the *Hays* case even though the standing issue had not been raised by the parties on appeal,³⁰ a fair prediction of the effect of these two decisions is that they establish two levels of proof on the standing issue. For those living within the district, simple proof of residency will be enough, and their claims will survive to be judged on the merits. For those living outside the district, the plaintiffs will labor under a more demanding burden to prove how the districts have resulted in any actual representational harm to them, and those claims will be less likely to survive.

The Court has held that traditional districting principles include a concern for communities of interest. In *Johnson*, the Court viewed racially identifiable communities as though mere coincidence had aggregated racially similar people together; race must be secondary to some other feature in order for such communities to have

their preferred representatives. In a term that invited the destruction of majority-black subdistricts in three states—California, Georgia, and Louisiana—only one state suffered a loss. Nevertheless, the standard enunciated in that case casts a net wide enough to snare more than the prior narrow reading of *Shaw*, which confined the holding to bizarrely shaped districts. As Professor Eric Schnapper commented after the Court delivered *Johnson*, “O’Connor votes with the majority but writes a concurring opinion that basically agrees with the dissent. She hasn’t made up her mind yet.” Linda Greenhouse, *On Voting Rights, Court Faces a Tangled Web*, N.Y. Times A1, A16 (July 14, 1995).

25. 115 S. Ct. at 2437 (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)).

26. *Id.* at 2436.

27. *Id.*

28. *Id.*

29. 115 S. Ct. at 2485.

30. *Hays*, 115 S. Ct. at 2435.

political representation.³¹ However, this approach ignores the reality that race continues to be the most determinative factor in residency for African-Americans.³²

The perpetuation of historical racial segregation and other forces emanating from the racial history of the United States mean that race and place have been and continue to be inextricably intertwined. Geographical communities of color have been created and continue to exist for most African-Americans.³³ The local community's political needs are sometimes grave, deepened by a history of political abuse and neglect that arose from the community's status as the permanent minority.³⁴ One can argue that those communities require knowledgeable and localized political leadership.

However, the importance of race also transcends place, creating a community that has little to do with geography but everything to do with the larger political and cultural community of color. This larger community generally recognizes the reality of racism, the pleasure of a common culture, and the need to act

31. "A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests." 115 S. Ct. at 2490.

32. Research examining housing patterns has found little or no relationship between socioeconomic variables and black/white residential segregation. Controlling for all other variables, including the cost of housing, race remains the most salient determinant of where African-Americans will live. See Joe T. Darden, *Accessibility to Housing: Differential Residential Segregation for Blacks, Hispanics, American Indians, and Asians*, in Jamshid A. Momeni, ed., *Race, Ethnicity and Minority Housing in the United States* 111 (Greenwood, 1986). Blacks and whites continue to compete in different housing markets. See Karl E. Taeuber and Alma F. Taeuber, *Negroes in Cities: Residential Segregation and Neighborhood Change* 24-25 (Aldine, 1965); Scott J. South and Glenn D. Deane, *Race and Residential Mobility: Individual Determinants and Structural Constraints*, 72 *Social Forces* 147-67 (1993).

33. One-third of all African-Americans, particularly those living in metropolitan areas, live under conditions of "hypersegregation." These African-Americans are unambiguously among the nation's most spatially isolated and geographically secluded people, suffering extreme segregation across multiple dimensions simultaneously. . . .

Typical inhabitants of one of these ghettos are not only unlikely to come into contact with whites within the particular neighborhood where they live; even if they traveled to the adjacent neighborhood they would still be unlikely to see a white face; and if they went to the next neighborhood beyond that, no whites would be there either.

Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 77 (Harvard U., 1993). Neither are black suburbanites likely to be living in integrated communities. Typically, those suburbs that accept African-Americans in significant numbers are located adjacent to the central city. They are the frayed edges of a widening urban boundary. Consequently, suburban African-Americans continue to experience considerable segregation and isolation as well. *Id.* at 69-74.

34. As Professor Karlan has noted regarding the often serious inequality in the provision of governmental services to segregated minorities, "geographic insularity may provide the mechanism for discrimination, since it permits the majority to deny services to the minority without incurring the injury itself." Karlan, 24 *Harv. C.R.-C.L. L. Rev.* at 181 n.30 (cited in note 10).

together to effectuate common interests and to remedy common problems that repeat themselves across geographical divides.

Transcendent community interests should not be confused with a simplistic belief that the African-American community is a monolithic entity in which all people of color live identical lives in every respect, agree with one another, or even like one another. Nevertheless, color is an immutable physiological fact packed with cultural, historical, and sociological significance that shapes the contours of individual daily lives in ways sometimes subtle and sometimes all too brutally clear. Rhetorical devices that label the recognition of transcendent community interests as "stereotyping" or "stigmatizing" are often used to silence important discussions of race that need to be had, and their silencing effects will be resisted here.

The narrative that follows explores the transcendent and geographic dimensions of community within the context of voting rights theory. I employ narrative to depict the dual dimensions of community in a fictionalized meeting of advocates who have come together in a small place called Cotton Plant. I chose the narrative method because it mirrors and elucidates the complexities inherent in a community that is rooted in place and yet exists apart from it.³⁵ I hope that, through narrative, my audience will understand not only the legal questions involved but also the effect that the answers have on those who must live with the outcomes.

The conversation in the narrative addresses the possible effects of *Shaw* and *Johnson* from an African-American community perspective, a perspective that should be central to any discussion of voting rights jurisprudence. Emphasizing the particular needs of the minority community also sheds light on the practical benefits, disadvantages, and viability of other approaches that avoid the districting dilemma, such as alternative at-large remedies.

The Court's opinions in this developing area of the law are nascent and, one hopes, malleable. The Court has the opportunity to clarify its thinking in this term's redistricting cases.³⁶ I join others who have encouraged the Court to rethink its direction in future redistricting cases.³⁷

35. For a more extended work of narrative nonfiction telling the specific story of McIntosh County, Georgia, and its struggle for racial equality through electoral change, see generally Melissa Fay Greene, *Praying for Sheetrock* (Addison-Wesley, 1991).

36. See *Shaw*, 861 F. Supp. at 408; *Vera*, 861 F. Supp. at 1304.

37. *Shaw* has been criticized as presenting an elusive and uncertain holding, Pildes and Niemi, 92 Mich. L. Rev. at 586-587 (cited in note 12), as a tremendous failure of "intellectual

II. COMMUNITY: MEETING AS METAPHOR

The main highway begins as a four-lane but narrows to two some twenty-five miles before the turn-off to the meeting place. The traveler sees a long straight stretch of blacktop, flat delta lands, and cotton snowing when the breezes stir. Folks up North don't seem to believe that cotton grows anywhere anymore, but then when you tell them it does, they remember those cotton grower commercials—you know, *the touch, the feel of cotton, the fabric of our lives*, with those slow motion shots of people who likely have never seen a cotton field in their entire lives luxuriating in soft brushed blankets and men's dress shirts held up to their faces—and they assume that it must be so. Yes, cotton still is an American crop.³⁸ The fields are flat except for the slightly elevated rise of dry dirt the railroad tracks rest upon and the gully that dips down from them to form the ditch beside the highway. The tracks run for a long time on the west side of the road, then cross over to the east, then back again. The gentle switching is marked by the rocking of vehicles over the tracks in the road and the white wooden arms of the railroad crossings standing like woru sentries.

Out the car window you see small houses butting up no more than twenty yards from the tracks, with fields as far back behind them as the eye can go, brown stems holding the cotton up to the clouds. Cotton blowing like snow in late July, houses the shape of shoe boxes with tin roofs, and each one with its own small porch. People are out on their porches as you drive by. Some stare like they don't see you while they fan and shoo grandchildren out from under their feet; some smile and nod like they've known you all your life. And some search your face behind the wheel, hoping to spot the return of someone thought of but gone. Some houses no longer are

coherence," T. Alexander Aleinikoff and Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 Mich. L. Rev. 588, 650 (1993), as a manipulation of the color-blindness concept resulting in the reinforcement of existing power imbalances, Jerome McCristal Culp, Jr., *Color-Blind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. Rev. 162, 182-92 (1994), and as "wrongly decided," A. Leon Higginbotham, Jr., Gregory A. Clarick, and Marcella David, *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 Fordham L. Rev. 1593, 1604 (1994).

38. According to data collected from the U.S. Department of Agriculture in 1993, cotton remains characterized as a "principal crop" of the U.S. In terms of the number of acres planted, cotton is the fifth most plentiful crop in the U.S., behind corn, soybeans, hay, and wheat. The number of acres planted in cotton has actually grown from 10.6 million in 1989 to 13.4 million in 1993. U.S. Dept. of Commerce, Bureau Of the Census, *Statistical Abstract Of The United States: 1994* at table 1113 ("*Statistical Abstract*").

homes but they persist as part of the landscape, made of wood and all grown up with wisteria vines, so rooted in this place. The houses move from this side of the road to that with the tracks, and white frame churches appear every few miles. Signs mark the names of the places the traveler is passing through, little green signs denoting populations in the hundreds. Speed limit reductions are ordered up on white signs, with no noticeable slowing in speed. No one pays much mind.

There was obviously more than one route taken by those of us going to the meeting place, depending on what part of the state we started from. We³⁹ were coming from all over, from those parts that knew nothing about cotton and everything about cities and from those parts that knew everything about swirling rice fields⁴⁰ and even from some parts that knew about quarries and mountains and the fast-running streams that cut through them. We may have come from every crooked turn, from every niche in the jagged boundary of that state and many of its seventy-three counties with boundaries as ragged as poorly torn postage stamps, but to finally get where we were going that day, we all had to drive down that same dusty road to the Cotton Plant Community Center. The hidden road that stole away from the two-lane was shrouded on both sides by overgrown weeds and brush. A knee-high hand-painted sign, which only the wary traveler would notice, marked the entrance.

The dirt road cut through the cotton fields and led deeper and deeper into a grove of shade trees, with long roots rambling into the road like ashy fingers. We all had to bump over those same old roots

39. Professor Kim Scheppelle has written about the way legal scholars often use the word "we" to constitute or create a normative reality, often majoritarian in its connotations. She refers to this use of "we" as the "constitutive we" that can have the effect of marginalizing the outsider as "them." See Kim Lane Scheppelle, *Foreword: Telling Stories*, 87 Mich. L. Rev. 2073 (1989). I believe that insider/outsider categorizations are useful to track the ways that the law reflects the norms and, in no small part, the self-interests of those with the power to decree it. In this narrative, however, I consciously constitute a "we" out of what critical race scholars would characterize as the outsider. I do this to honor the ways that the minority community is not just the uninvited guest to some splendid majoritarian picnic. In this "we," the majoritarian insider is transformed into the outsider by a community sufficient to stand on its own in its physical and metaphysical place. Of course, all readers are invited to join in the meeting as empathic guests.

40. Rice is the U.S.'s eighth principal crop. Production has remained steady at between 2.7 and 3.2 million acres harvested each year between 1989 and 1993. *Statistical Abstract* at table 1113 (cited in note 38). For a history of rice cultivation in the South and the role that Africans had in developing the agricultural techniques for rice cultivation in the very early South, see generally Ameha Wallace Vernon, *African-Americans At Mars Bluff, South Carolina* (L.S.U., 1994).

to find a place to park. This was a place built before parking lots had figured much into the design. A small gravel lot beside the building was already full, leaving the rest of the late-comers to deposit their cars as best they knew how. Trucks and cars, an odd collection of them, were scattered under the trees, some diagonally this way, some diagonally that. There were old rusty trucks with wide beds and wooden slats for tailgates; old Chevies; new Buicks; a champagne-colored Mercedes, its shine muted only by the thin coat of dust it had acquired on the last leg of its journey; nondescript rental cars taken from the airport by today's out-of-state travelers; and zippy hatchback Hondas that must have percolated wildly over and around the deep turn-rows in the road. Even a hunter-green Jaguar slept sleekly there under the trees, the sun glinting through the leaves and off its hood ornament, poised and ready to leap.

The Cotton Plant Community Center was once part of an agricultural school formed in the early 1900s by a student of Booker T. Washington⁴¹ who believed the only way African-Americans could progress was through community service and education, particularly the learning of modern agricultural skills brought to bear upon their own lands.⁴² Cotton Plant's founder believed in the importance of hard work, and the old iron archway above the entrance to the building was a testimony to that credo: *Work Will Win*. At the peak of its

41. The life and times of Booker T. Washington, a man born into slavery and who became the founder of Tuskegee Institute, are charted in his autobiography. The front inset page bears his credo:

I had rather be what I am, a Negro, than be able to claim membership with the most favored of any race. I have always been made sad when I have heard members of any race claim privileges, or certain badges of distinction, on the ground simply that they were members of this or that race, regardless of their own individual worth or attainments. . . .

Every persecuted individual and race should get consolation out of the great human law, which is universal and eternal, that merit, no matter under what skin found, is in the long run recognized and rewarded. I say this here not to call attention to myself as an individual, but to the race to which I am proud to belong.

Booker T. Washington, *Up From Slavery: An Autobiography* (Doubleday, 1901).

42. In 1910, the peak year of black landownership in the U.S., it is estimated that African-Americans owned 15 million acres of land. By 1969 the number of acres had plummeted to 5.7 million. Leo McGee and Robert Boone, *Black Rural Land Decline in the South*, 8 *Black Scholar* 8-11 (May 1992). In 1987 only 23,000 farm operators were black, only 4,000 of whom operated farms with annual sales of \$10,000 or more. By contrast, in the same year, 2,043,000 white farmers operated 1,046,000 farms with annual sales equal to or in excess of \$10,000. *Statistical Abstract* at table 1081 (cited in note 38). According to the Department of Agriculture, in 1992, 82,000 people of color were employed as hired farmworkers with median weekly earnings of \$190. Median weekly earnings for white farmworkers were 16% higher than the earnings of African-American farmworkers. *Id.* at table 1102. For an historical overview discussing the link between today's agricultural labor and market control policies and yesterday's slavery, see Jim Chen, *Of Agriculture's First Disobedience and Its Fruit*, 48 *Vand. L. Rev.* 1261 (1995).

success, the school owned over five hundred acres of land and several buildings. Today, even though the school no longer operates and much of the land and buildings have been sold, the central meeting hall and about forty acres have been retained by those who continue to work in community development. People have been meeting here for nearly one hundred years to discuss the challenges of the times, whether it was the need to own land, the need for medical care, the right to register and vote, and later the right to vote for the candidate of one's choice. These are the walls that have heard the arguments and rallying calls of every generation's struggle.⁴³ Today we were meeting to discuss the latest challenges to the right to cast effective ballots, free from minority vote dilution.⁴⁴

In the meeting room, lawyers and ministers, farmers and business owners, community organizers and newly elected representatives at nearly every level of government had been brought together. Thanks to voting rights cases successfully challenging at-large elections under Section Two,⁴⁵ black voters throughout the state had been

43. For the history and present-day use of similar centers in the rural South, particularly in Tennessee, Arkansas, Alabama, and South Carolina, see Richard A. Couto, *Ain't Gonna Let Nobody Turn Me Round: The Pursuit Of Racial Justice In The Rural South* (Temple U., 1991).

44. "Minority vote dilution" refers to a "process whereby electoral laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable group to diminish the voting strength of at least one other group." Chandler Davidson, ed., *Minority Vote Dilution* 4 (Howard U., 1984). Specifically, in voting rights cases, it refers to the occurrence in which an ethnic or racial minority group's voting strength is canceled out by the bloc vote of the white majority, often resulting in the near total exclusion of the racial minority group from meaningful participation in the political system. *Id.*

45. The statutory authority for bringing a voting rights case on a minority vote dilution claim can be found at 42 U.S.C. § 1973, commonly referred to as Section Two of the Voting Rights Act of 1965. Section Two reads as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Thornburg v. Gingles, 478 U.S. 30 (1986), was the first case after the amendment of the Act to construe the above statutory language as it applies to a minority vote dilution claim. Under *Gingles*, in order for a plaintiff to succeed on her claim, she must prove (1) that the minority

able to elect the candidates of their choice in numbers never before seen in the South.⁴⁶ As a result of subdistricting, the remedy of choice, representatives of the black community now sat on city councils,⁴⁷ county commissions,⁴⁸ local school boards,⁴⁹ and state trial courts.⁵⁰ The Justice Department's purposeful gaze pursuant to Section Five⁵¹ of the Voting Rights Act had been cast upon the state as

group is "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) that it is politically cohesive, and (3) "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 50-51. It is the first prong, what is sometimes known as the "geographical compactness test," that is most pertinent to this discussion of community and the meaning of *Shaw*.

46. For a thorough study of the impact of the Voting Rights Act throughout the South, see generally Bernard Grofman and Chandler Davidson, eds., *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton U., 1994).

47. In an analysis of the effect of municipal structure on black representation in eight Southern states (Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia), Bernard Grofman and Chandler Davidson found that in the 217 cities with populations of at least 10,000 a change from at-large to single member districts resulted in the election of two hundred more black city council members in 1989-1990. *Id.* at 320.

48. The findings with regard to the shift from multimember at-large county commissioner systems to single-member subdistricts in the South parallel those pertaining to city councils discussed in note 47. *Id.* at 383-84.

49. Examples of published opinions involving Section Two challenges to school board electoral systems include *Jenkins v. Red Clay Consol. School Dist.*, 4 F.3d 1103 (3rd Cir. 1993), *Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990), *U.S. v. Dallas County Commission*, 850 F.2d 1433 (11th Cir. 1988), and *Jackson v. Edgefield County, South Carolina*, 650 F. Supp. 1176 (D.S.C. 1986). In Arkansas, the State grew so weary of the constant Section Two litigation targeted at converting the many at-large school boards to subdistricts that it finally passed legislation expressly requiring all school boards in districts with a minority population in excess of 10% be elected from single-member districts consistent with the purposes of the Voting Rights Act. See Ark. Stat. Ann. § 6-13-631 (1993); *Conway School District v. Wilhoit*, 854 F. Supp. 1430 (E.D. Ark. 1994) (rejecting a *Shaw*-based challenge to the Arkansas statute).

50. The Supreme Court has held that judicial elections are subject to Section Two challenge under the Voting Rights Act. *Chisom v. Roemer*, 501 U.S. 380 (1991) (allowing a Section Two challenge of a system used to elect Louisiana's Supreme Court Justices from a multimember district); *Houston Lawyers' Assn., et. al. v. Attorney General of Texas*, 501 U.S. 419 (1991) (allowing a Section Two challenge of a system used to elect trial court judges in certain Texas counties). Plaintiffs bringing challenges to judicial election systems have had less success than those challenging legislative elections because it is difficult to find a remedy that maintains the integrity of the judicial office. See *SCLC of Alabama v. Sessions*, 56 F.3d 1281, 1295-97 (11th Cir. 1995); *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994); *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831 (5th Cir. 1993) ("*L.U.L.A.C.*"); *Cousin v. McWhorter*, 840 F. Supp. 1210 (E.D. Tenn. 1994), vacated 46 F.3d 568 (6th Cir. 1995); *Brooks v. State Board of Elections*, 848 F. Supp. 1548 (S.D. Ga. 1994) (failing to approve a settlement as violating the Equal Protection Clause). Cases in which plaintiffs have been successful include *Clark v. Roemer*, 777 F. Supp. 471 (M.D. La. 1991), and *Hunt v. State of Arkansas*, E.D. Ark. Case no. PB-C-89-406 (unreported case) (settled by a consent decree) (on file with the Author).

51. Section Five refers to the preclearance provisions of the Voting Rights Act. 42 U.S.C. § 1973c. Under Section Five, certain jurisdictions have been placed under the supervision of the United States Attorney General and the Justice Department. Coverage under Section Five reflects the congressional belief that the jurisdiction in question has committed identified violations of the Fifteenth Amendment in the relatively recent past. See *McCain v. Lybrand*, 465 U.S. 236, 243-45 (1984). As a result of the covered jurisdiction's history of obstreperousness

its districts were redrawn in 1990. Past practices of splintering the black vote were halted, allowing new representatives to enter the state house.⁵² In the same way, United States congressional districts also were redrawn to empower one majority-minority district to elect the state's first African-American Congresswoman.⁵³ Many of these victories were accomplished by careful compromises that protected the most prominent incumbents; some, the more hard-won, were achieved by pitting two strong former incumbents against one another to make room for the minority-preferred candidate.⁵⁴

with regard to voting rights, all proposed changes pertaining to any "standard, practice or procedure with respect to voting," 42 U.S.C. § 1973c, must be precleared through the Civil Rights Division before being implemented. In the alternative to the administrative preclearance process, the jurisdiction may obtain a judgment from the United States District Court for the District of Columbia, declaring that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on the account of race or color." *Id.* If the jurisdiction elects to go through the administrative preclearance process, the jurisdiction still remains free to seek declaratory judgment from the D.C. District Court if it is unhappy with the results of the preclearance process. *Id.* Whether through administrative preclearance or action taken before the D.C. District Court, the jurisdiction must prove that the proposed plan has neither the "purpose . . . [nor] the effect of denying or abridging the right to vote on account of race." *Id.* See *Georgia v. United States*, 411 U.S. 526 (1973) (applying Section Five to Georgia's 1971 reapportionment plan); *McDaniel v. Sanchez*, 452 U.S. 130 (1981) (finding the preclearance requirements of Section Five applicable).

52. "In the 1970s, Section Five preclearance demials reduced or eliminated multimember districts in the legislative districts of Georgia, Louisiana, Mississippi, and South Carolina. Then in 1981 and 1982 a series of Justice Department objections also eliminated multimember legislative districts in the covered area of North Carolina." Grofman and Davidson, eds., *Quiet Revolution In The South* at 340 (cited in note 46). Section Two litigation in states or the parts of states not subject to preclearance also resulted in the elimination or reduction of multimember districts in favor of single-member subdistricts. *Id.* The switch from multimember to single member districts resulted in a mean gain of 6.3 black state representatives in each Southern state. The mean gain in black state senators per state was 1.1. *Id.* at 341. Of the eleven Southern states studied, only two, Teunessee and Florida, switched from multimember to single-member districts voluntarily. *Id.* at 341-342.

53. Progress in minority representation at this level has been slow and erratic. "Only 3 percent of all southern U.S. representatives in 1990 were black, despite the fact that this region was almost 20 percent black in population. On the other hand, prior to 1973 there had been no black representatives from the South. . . . Three of the four black representatives serving in 1990 came from majority-black congressional districts." *Id.* at 343. Prior to the 1992 congressional elections, there were still five Southern states with substantial African-American populations that had not elected a single African-American to Congress: Alabama, Florida, North Carolina, South Carolina, and Virginia. As a result of newly drawn majority-minority districts, these five states sent a total of eight African-Americans to Congress in 1992. Georgia, Louisiana, and Texas also carved out new majority-minority districts from which African-Americans were elected. See Voting Rights Act, Hearings before the Subcommittee On Civil And Constitutional Rights of the House Committee On the Judiciary, 101st Cong., 1st Sess. (May 25, 1994) (statement of Brenda Wright, Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law).

54. Either as a result of Section Five pressure or Section Two litigation, states are often required to acknowledge a previously unconsidered variable in the redistricting process, such as the empowerment of African-Americans. This value is often pitted against other, more tradi-

Each challenge to these electoral institutions had educated the plaintiff class further about the dynamics of power and office holding. And each new contest had brought out more black candidates and increased black voter participation; political leadership that had been stifled in the past had just begun to flourish.⁵⁵ The oratory previously confined to church and social gatherings burst out into the public sphere. The politicians at the pulpit come election time finally were also members of the congregation.

Even with all of the recent successes, the feeling in the meeting room was serious, concerned. Word was out that future cases would be met with a renewed resistance and there were rumors that gains won would be affirmatively challenged by others. Those governmental entities that had been defendants before would be defendants again, but with a different set of plaintiffs this time: white voters challenging the lines that resulted in majority black districts. Those in this room knew how grudgingly many of the defendants had drawn those districts in the first place and wondered whether the districts would fall like a house of cards to the slightest breeze.

The meeting was ready to begin. The obligatory forty-five minutes after the appointed starting time had passed. Folks had finished hugging and kissing, asking after absent family members and mutual friends, and were now pouring coffee out of the big stainless steel pot in the far corner of the room. People began to settle into their screeching folding chairs. Those with histories of conflict carved out spaces safely distant from one another and nodded

tional districting factors, such as party loyalties and incumbency protection. For a case that describes the political process resulting from the juggling of old and new districting tensions, see *Shaw*, 861 F. Supp. at 408. For newspaper articles describing the tensions created by compliance with the Voting Rights Act and incumbency protection, see Jeanne Cummings, *Georgia Senate Could Gain Four Blacks; Likely One Will Hail from a New DeKalb District*, Atlanta Const. C1 (July 17, 1991) (covering Georgia's struggle to comply with the Voting Rights Act when such compliance unavoidably involves placing incumbents in the same district and quoting Lt. Governor Pierre Howard as saying, "you never like to see incumbents rolled into the same district. It's not something we desire, but we have to comply with the Voting Rights Act"); Gary Hendricks, *Senate's Patchwork Quilt; Districting Plan's Effect on Clayton*, Atlanta Const. I1 (July 25, 1991) (detailing Georgia's struggle to keep incumbents from facing one another while satisfying the Voting Rights Act); Joan I. Duffy, *New Black Districts Barred as Reverse Bias*, Commercial Appeal 1A (March 11, 1994) (noting that in the past African-American plaintiffs had proved that the 1981 Arkansas reapportionment plan did more to protect predominantly white incumbents than to create districts free of minority vote dilution).

55. The growth in the number of black elected officials, while still nowhere near proportional at all levels of government, nonetheless has been impressive since the passage of the Voting Rights Act. In 1970 there were fewer than 1,500 black elected officials. In 1990 there were over 7,300. Harold W. Stanley and Richard G. Niemi, *Vital Statistics On American Politics* 393 (Cong. Quarterly, 1992).

tentatively in each other's general direction, trying their best to sweep old memories aside, for now at least.

Floyd Garrison, a lawyer from Cotton Plant, moved to the front of the room. Just the way he moved through the group, with purpose, with dignity, took all attention with him and signaled the onset of the meeting. Whatever disputes any of the members might have had with each other over the years, not one of them could recall ever having a dispute with Lawyer Garrison. Somehow, he had managed to navigate waters of conflict, both external and internal, without ever having taken a shot across his bow. That fact in itself was enough to make people look up and listen, but he had also used his profession in ways that the community here could appreciate.

Floyd Garrison's law practice largely consisted of credit counseling and writing wills for land-owning black farmers. While he did much of this work for free or on an installment plan because the people often couldn't afford it, Garrison also had a deep-seated belief that landownership must be protected in the black farming community. Passage of title to those in the family who would actually keep the land was critical because many of the landowners were now elderly.⁵⁶

Lawyer Garrison also had been active in many of the voting rights cases that had been brought throughout the state, claiming for his clients not only the right to pull the lever but to participate fully in the electoral process. Even though he was a lawyer, at meetings

56. African-American rural landownership has declined by over two-thirds since 1910. U.S. Commn. on Civil Rights, *The Decline of Black Farming in America* (1982). Cultivation of dwindling black-owned farmland is also on the decline, in part, because of the advanced age of those holding title as compared to the age of farm owners generally. Robert Browne, *Black Land Loss: The Plight of Black Landownership*, 2 *Southern Exposure* 112-121 (1974); Leo McGee and Robert Boone, eds., *The Black Rural Landowner—Endangered Species—Social, Political, And Economic Implications* (Greenwood, 1979). However, for those elderly people who do retain their lands, benefits other than farm income exist. A sociological study of a rural North Carolina community illuminated the reciprocal benefits of landownership for elderly African-Americans and for their younger family members and other potential helpers. Landowning elders are able to obligate children and others by allowing them to settle on their land. These residential enclaves thus become a source of informal support for the elderly landowner. Landless elders, on the other hand, are tied to landowners and to each other in various relationships but have differing abilities to mobilize informal support. Lisa Groger, *Tied to Each Other Through Ties to the Land: Informal Support of Black Elders in a Southern U.S. Community*, 7 *J. Cross-Cultural Gerontology* 205, 205-20 (1992).

Even in more urban areas, African-American property ownership is threatened by eminent domain actions. These takings, often for toxic waste dumps and highways, result in public harm and decreased property values to the remaining disrupted community. See David H. Harris, Jr., *The Battle for Black Land: Fighting Eminent Domain*, *Natl. Bar Assoc. Mag.* 12, 12-27 (March/April 1995).

such as these he dressed like a farmer ready to conduct business. Neat but never slick, he wore a pressed tan work shirt open at the collar and khaki work pants.

He went to the old, battered desk at the front of the room, stood before it, and began to talk without hesitation or notes. "I want to thank y'all for coming. I know that my letter must have sounded more like an invitation to funeralize than to socialize. That being the case, I am glad to see so many of you. I asked you to come not to mourn or prematurely bury our dead. We have people here who bear witness to the health of our patient. We have many elected officials here this morning, and not a one of you looks the least bit sick. Why, judging from the specimens in this room, the patient is quite vigorous indeed. We might ask ourselves, *why* is it that whenever we begin to rise with such stamina something always seems to come 'round to try and wrestle us back on to that sick bed? But now is no time to ponder that particular *why*; now is the time to answer the *how*. How are we going to keep the strength we have and grow even stronger still?

"To school us on these issues and to help us chart our future course, we are fortunate to have with us today these fine lawyers, Sheryl Stowe, Crispus Allan, and Paul McLane. Many of you know them already because they have been active, sometimes up close and sometimes from afar, in sponsoring our litigation here. You've certainly seen them in action on those cases targeted at the federal congressional level and at state-wide change. Crispus, Sheryl, and Paul, thank you all for being with us today."

Floyd Garrison took his seat in the front row while the three lawyers assumed their places in the front of the room. Paul McLane, a silver-haired white man in a crisp blue seersucker suit, and Crispus Allan followed Sheryl Stowe to the desk. Her dark hair fell in sheets of braids beside her long angular face. She was young, fair, and distinctively dressed. Her clothes and jewelry were not from any store near here, not even the fancy shops in the capital. The fabric was soft, almost sheer; it moved gracefully as she moved. Her hand trembled slightly as she pulled the papers out of her soft leather case and placed them on the old desk. Her voice was contained and steady, with an accent plainly not Southern. If desire could make her a part of this state's community, then she already was ten times over. Yet she looked as though she had just stepped off the curb in Manhattan, only to put her foot down in Cotton Plant. Both men looked to Sheryl to start.

"Thank you for inviting us to attend this meeting. As you know, Paul, Crispus, and I come from three different organizations,

all of which have been active in representing African-Americans in national voting rights litigation.⁵⁷ Meetings of this kind are so meaningful to us because everything starts right here, in gatherings just like these, meetings of people committed to change.⁵⁸ Many of you here are lawyers and probably have already read *Shaw* and have heard about *Johnson*. Many of you who are not lawyers probably have read about both cases and the damage they have done. During the last two years, you've seen challenges brought against the majority-black congressional districts in Georgia, Louisiana, California, North Carolina, and Texas.⁵⁹ Today, it's my hope that we will acquaint ourselves with the force that threatens to silence us before we even have a chance to speak. We must come up with a way to meet and to beat these new challenges."

Sheryl paused to acknowledge those in the room whose heads were nodding and the voices murmuring in affirmation. Strengthened by the chorus of support, she continued, "I stand in this place. I see Ms. Waters who has walked with me as a plaintiff down so many courthouse halls. I see Judge Johnson who was elected as a result of Ms. Waters's tireless persistence, one among the first African-American trial court judges ever elected to serve in this state. Ben is here, elected to the state house as a result of the pressure brought to bear by the Justice Department. Many, many of you are here—city council people, school board members—all serving with distinction

57. Local counsel in voting rights cases find support from several national organizations: most notably, the NAACP Legal Defense and Education Fund, the Lawyers' Committee for Civil Rights under Law, the American Civil Liberties Union, and the Southern Regional Council. These organizations, based in Washington, D.C., New York City, and Atlanta, provide financial support as well as expertise in an increasingly technical area of the law. This national network is a crucial part of the political and often social transcendent community. The existence of this extensive network of national support becomes most visible at critical times. For instance, one need only look to the long list of counsel for intervenors and the authors of the many amicus briefs filed in cases following *Shaw* to realize that the community of lawyers stretches far beyond the states involved. See, for example, *Johnson v. Miller*, 864 F. Supp. 1354, 1358 (S.D. Ga. 1994).

58. The civil rights struggle has its roots in local communities sometimes organized into branches of more extensive networks, such as the NAACP, Southern Christian Leadership Conference ("SCLC"), and the Congress of Racial Equality ("CORE"). Local African-American church communities often serve as the haven for financial and political strategizing as well as a place of spiritual sustenance in a time of struggle. Many histories document the genesis of the civil rights movement in local African-American communities. See, for example, Margaret Edds, *Free At Last: What Really Happened When Civil Rights Came To Southern Politics* (Adler & Adler, 1987); Aldon D. Morris, *The Origins Of The Civil Rights Movement: Black Communities Organizing For Social Change* (Free Press, 1984).

59. See *Johnson*, 115 S. Ct. at 2475; *Hays*, 115 S. Ct. at 2431; *Dewitt*, 115 S. Ct. at 2637; *Shaw*, 113 S. Ct. at 2816; *Vera*, 861 F. Supp. at 1304.

after struggles in the courts. I see you and I can't help but feel like pressing on."

After the room settled to a quiet, Sheryl Stowe, who had been transformed from lawyer to *sister* by call and response, concluded, "And I know that some of you are here because we haven't gotten to your community yet. We were not finished with the journey before these folks asked us to put down our bags. But I promise you, we won't be unpacking our traveling shoes just yet.

"First we have to try to understand these decisions. In order to make sure we all arrive together and with the same level of understanding, Paul is going to explain *Shaw*, and Crispus will delve into the more recent *Johnson* decision and what it means to us."

"Thank you, Sheryl." Paul McLane had that old Southerner's accent that made the listener feel he had just hopped off his tractor instead of the leather chair in his Atlanta law office. "I can tell you folks right now that what the Supreme Court has done in the recent past to employment discrimination,⁶⁰ to affirmative action,⁶¹ and to

60. In *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 656-61 (1989), the Supreme Court eviscerated the plaintiff's ability to bring challenges under the disparate impact theory. Under the prior disparate impact theory, plaintiffs could bring actions against employment policies without proving discriminatory intent if those policies or practices could be shown to have a disparate impact on minorities or women. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971). The burden of proof would then shift to the defendant to prove the business necessity of the challenged practice. *Id.* at 433-36. Even if the employer did prove business necessity, the plaintiff was permitted to counter with proof that the employer's legitimate business needs could be protected by another practice with less impact upon the plaintiff class. *Albamarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). Under *Wards Cove*, the Supreme Court placed such heavy burdens upon plaintiffs to prove the causal link between a particular component of a practice and the alleged effect that many disparate impact cases were dismissed by trial courts before they ever reached trial. See *Lowe v. Commack Union Free School Dist.*, 886 F.2d 1364 (2d Cir. 1989) (affirming the dismissal of an age discrimination complaint); *Walls v. City of Petersburg*, 895 F.2d 188, 191 (4th Cir. 1990) (affirming summary judgment for the defendants on a plaintiff's disparate impact race-based employment discrimination claim); *Minority Employees of the Tennessee Dept. of Employment Sec., Inc. v. Tennessee Dept. of Employment Sec.*, 901 F.2d 1327, 1337 (6th Cir. 1989) (affirming summary judgment in favor of the defendants in a race discrimination disparate impact case); *Council 31, American Federation of State, County and Municipal Employees v. Ward*, 771 F. Supp. 247, 249 (N.D. Ill. 1991) (granting the defendant's motion for summary judgment finding insufficient evidence to make out a disparate impact claim of racial discrimination in employment); *EEOC v. Switching Systems Division of Rockwell Intl., Corp.*, 783 F. Supp. 369, 372 (N.D. Ill. 1992) (granting the defendant's motion for summary judgment in a disparate impact national origin employment discrimination case).

The Court also limited the rights of racial minorities to bring suit to challenge intentional employment discrimination under 42 U.S.C. § 1981 in the case of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Prior to *Patterson*, plaintiffs could challenge and claim punitive damages for intentional racial employment discrimination exercised by employers in a number of different types of employment decisions, including hiring, firing, promotion, harassment, compensation, and other terms and conditions of employment. See Joseph Rosson Pepper, *Section 1981 in the Wake of Patterson v. MacLean Credit Union: The Exclusion of Post-formation Conduct*, 58 Tenn. L. Rev. 289 (1991); Marc J. Fagel, *Section 1981 Promotion Claims*

After *Patterson v. MacLean Credit Union*, 57 U. Chi. L. Rev. 903 (1990). The Supreme Court in *Patterson* set forth a precedent that made all claims that did not relate directly to the formation of a contract for employment vulnerable to dismissal before trial. See *Harrison v. Home Savings Assn.*, 730 F. Supp. 298, 303 (W.D. Mo. 1989) (granting the motion for summary judgment against the plaintiff in a race and sex discrimination claim).

As a result of the Court's decisions in *Wards Cove* and *Patterson*, Congress amended the statutes upon which these claims are based in order to restore the ability to effectively challenge employment discrimination. See the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(A) (1994 ed.) (redefining unlawful employment practices based upon disparate impact); id. § 1981a (broadening the right to claim intentional discrimination and the forms of recovery allowed).

The Supreme Court's restrictive tendencies in the area of employment discrimination have not been completely deterred by congressional action. The Court has construed the Civil Rights Act of 1991 not to apply to cases pending at the time of its enactment. See *Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994); *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). A further example of the Supreme Court's continuing desire to make the plaintiff's burden heavier is the recent decision of *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), in which the Supreme Court altered the traditional analysis of intentional employment discrimination cases by allowing employers to put forth false reasons for their employment decision and still prevail against a challenge that the action was taken with a discriminatory purpose, unless the plaintiff can prove affirmatively that the explanations are pretextual.

61. The Supreme Court has made it increasingly difficult for employers or contractors to engage in affirmative action whether on a voluntary basis or as the result of court settlement. Employers who do so are subject to "reverse" discrimination actions by white employees.

In the Court's most recent pronouncement on affirmative action, it reversed prior law to hold that even federal affirmative action programs are subject to strict judicial scrutiny. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). *Adarand* overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), in which the Court held that federal affirmative action programs are "constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." Id. at 565.

The Supreme Court's holding in *Martin v. Wilks*, 490 U.S. 755 (1989), prompted congressional reaction in the Civil Rights Act of 1991. In *Wilks*, the Supreme Court allowed white firefighters to bring an action against the City of Birmingham, Alabama, for abiding by consent decrees that had been negotiated between the city, the county personnel board, and black plaintiffs who had filed suit alleging racial discrimination in hiring and promotion. *Martin* effectively discouraged settlement of employment discrimination cases in which the remedy might involve affirmative action.

The Supreme Court has also allowed challenges to voluntary affirmative action by state and local governmental employers under the Equal Protection Clause of the Fourteenth Amendment. Beginning with *City of Richmond v. Croson*, 488 U.S. 469 (1989), the Court has placed heavy burdens upon states and local governments to justify their voluntary affirmative action programs. *Croson* has resulted in the demise of several state and local governmental affirmative action programs, including minority scholarships in state-funded institutions of higher education. See *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (successfully challenging the University of Maryland's scholarship program open only to African-American students); *Quirin v. City of Pittsburgh*, 801 F. Supp. 1486 (W.D. Pa. 1992) (successfully challenging the city's hiring policy favoring female firefighters); *Concrete General, Inc. v. Washington Suburban Sanitary Commn.*, 779 F. Supp. 370 (D. Md. 1991) (successfully challenging a minority set-aside program); *Main Line Paving Co., Inc. v. Bd. of Education, School Dist. of Philadelphia*, 725 F. Supp. 1349 (E.D. Pa. 1989) (same).

school desegregation,⁶² it is now doing to voting rights. The idea of “reverse discrimination” has now made it to redistricting.

“As a lawyer, I’m always tempted to soft-peddle cases that spell danger to my clients by reading the opinion as narrowly as I can and hopefully confining the damage it can do. We tried to do this with *Shaw*.⁶³ But the problem with *Shaw* was that coming up with the holding was difficult to begin with, and then figuring out how to apply it, well, that’s near ‘bout impossible. The courts tried to make sense

62. The Supreme Court’s commitment to desegregation began to wane much earlier than did its commitment to the eradication of employment discrimination. Most commentators agree that the Court began to pull away from school desegregation at least as early as 1974 in *Milliken v. Bradley*, 418 U.S. 717 (1974) (reversing the district court ruling ordering school integration). See Joshua E. Kimerling, *Black Male Academies: Re-Examining the Strategy of Integration*, 42 Buff. L. Rev. 829, 840 (1994) (labeling *Milliken* the “deathnell of desegregation”); Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 Yale L. J. 1285, 1290 (1992) (same); Derrick A. Bell, Jr., *Race, Racism, and American Law* 567 (Little, Brown, 1992) (same); Gary Olfield, *Separate Societies: Have the Kerner Warnings Come True?*, in Fred R. Harris and Roger W. Wilkins, eds., *Quiet Riots: Race and Poverty in the United States* 115-17 (Pantheon, 1988) (same). In *Milliken*, the Court prohibited the imposition of area-wide remedies to counteract the impact of racially isolated schools. Consequently, *Milliken* disallowed busing across city and county lines even if the resulting school systems were predominantly African-American and predominantly white. 418 U.S. at 755-57.

In *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991), the Supreme Court launched a new trend in its retreat from school desegregation: releasing school boards from court-ordered desegregation plans even though districts remained segregated. In *Dowell*, the Supreme Court held that formerly segregated school districts may be released from court-ordered busing so long as all “practicable” steps to eliminate the vestiges of past discrimination had been taken. *Id.* at 249. In *Freeman v. Pitts*, 503 U.S. 467, 495-96 (1992), the Court made clear its position that the racial isolation of schools brought on by white flight was not the fault of the school districts and could not be remedied. In *Freeman* the Court allowed district courts to relinquish their supervision over school districts subject to desegregation orders in a piecemeal fashion before full compliance with those orders was achieved. *Id.* at 490-91.

Most recently the Court has placed further limits upon what a lower court may order to remedy the effects of de jure segregation. Specifically, the Court held that the district court’s funding remedy, which relied upon creating and maintaining “desegregative attractiveness” in order to fight white flight, was outside the scope of its remedial authority. See *Missouri v. Jenkins*, 115 S. Ct. 2038, 132 L. Ed. 2d 63 (1995).

63. In *Miller v. Johnson* and *United States v. Hays*, the advocates for the black-majority districts attempted to confine the holding in *Shaw* to bizarrely shaped districts. These advocates urged the Court to adopt a relative and historical standard for deciding what constitutes the “bizarre.” *Johnson*, 1995 WL 243458 (April 19, 1995) (transcript of the oral argument); *Hays*, 1995 WL 243450 (April 19, 1995) (transcript of the oral argument). Theirs undoubtedly was the narrowest possible reading of *Shaw*. In *Johnson*, if this interpretation had been adopted, Georgia’s District Eleven would have stood a better chance of survival, given that both its shape and consistency with other political boundaries comported more with traditional districting principles than many of the white-majority districts in the plan. See *Johnson*, 115 S. Ct. at 2503 (Ginsburg, J., dissenting) (noting that 83% of the Eleventh District’s geographic area is composed of intact counties and that the District’s boundaries follow precinct lines, compared to five other majority white districts that scored worse on these criterion).

of it too. They were equally confounded, and so the lower court decisions are all over the map, you might say, on what *Shaw* means.⁶⁴

"It might be helpful to start out by taking a look at the type of challenge that *Shaw* was. It was not brought under the Voting Rights Act, as most of our voting rights cases are. It was a constitutional challenge brought by five white North Carolina voters against the state's redistricting plan. North Carolina had gained population according to the 1990 Census and so it was entitled to one more congressional seat. This meant that all of the lines would be redrawn. The state submitted a plan to the Justice Department because, as you know, many of North Carolina's counties are subject to the preclearance requirements of Section Five.⁶⁵ The plan that North Carolina submitted created one new inajority-minority seat.

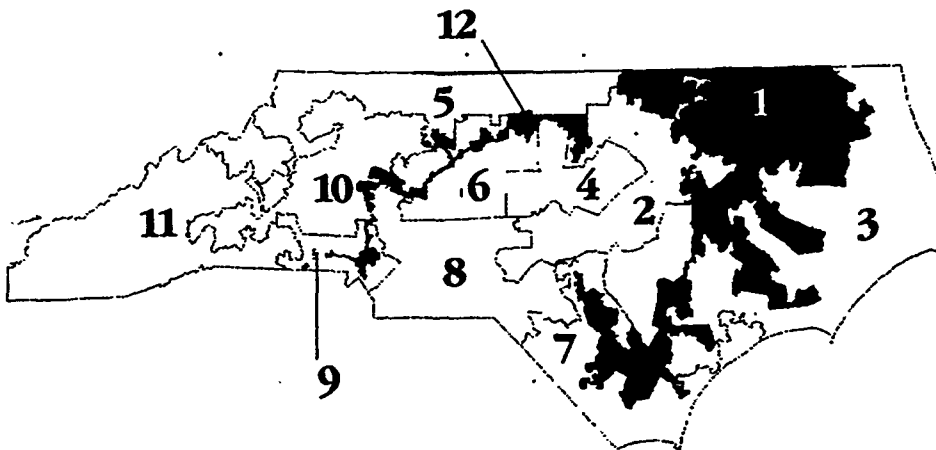
"Justice looked at this plan and told North Carolina, 'You can do better than this; you could draw another majority-black district in the south-central, southeastern region.' The state drew another district, District Twelve, but it didn't draw it in the suggested south-central area. Instead it drew the district in the north-central Piedmont region along I-85."⁶⁶

64. Some courts read *Shaw* broadly as holding that all race-conscious redistricting is subject to strict scrutiny. These courts required proof only that race was a motivating factor in determining the district's boundaries. See *Hays*, 839 F.Supp at 1188 (applying strict scrutiny to void the districting plan); *Shaw*, 861 F. Supp. at 408 (applying strict scrutiny but upholding the districting plan).

Other courts rejected such a broad approach. For example, in *Johnson*, 864 F. Supp. at 1371-74, the district court held that strict scrutiny applied only when race is the overriding factor in the creation of a district. In *Johnson*, the court found that strict scrutiny applied and found that the state could not overcome that standard of review. *Id.* at 1393. In *Vera*, 861 F. Supp. at 1344-45, the district court held that strict scrutiny applied only when districts reflected an extraordinary departure from the state's traditional redistricting practices. Three of the sixteen districts challenged in *Vera* did not survive the court's scrutiny. *Id.* at 1345. Finally, in *DeWitt*, 856 F. Supp. at 1411-13, the district court confined the ruling in *Shaw* to cases raising similar facts by holding that strict scrutiny applied only to districts that were dramatically irregular in their shape. In *DeWitt*, none of the districts were subject to strict scrutiny. *Id.* at 1415.

65. See *Shaw*, 113 S. Ct. at 2820.

66. See *id.* The map in Figure 1 is a reproduction originally published in Bernard Grofman, *North Carolina Plan More About Politics Than Race*, 32 *Voting Rights Rev.* 10, ___ (Fall 1993).



Paul set up a North Carolina map on the ledge of the chalk board. The majority-black districts were highlighted. “As you can see, the location of District Twelve that the state drew has shifted and is much narrower in shape than the one envisioned by Justice. Why, you might ask yourself, did the state choose to draw this district instead of the larger district the Justice Department suggested? If the state was interested only in pleasing Justice and in creating another majority-black district then why didn’t it just do what Justice suggested?”

“If you stop to think about it, those of you who have challenged or participated in the redistricting process in this state already know the answer to that question. The fact is that districting is nothing if it is not first and foremost an issue of politics. Where districts are drawn has to do with power—who has it, who will keep it, and who will be able to reach out and grab it.

“After much political wrangling, the I-85 district was drawn for many reasons. It satisfied Justice’s demand for another black district. It captured a community of interest that can be defined as the Piedmont industrial area. And it was no small thing that the district was less threatening to established Democratic Party interests than the district suggested by the Justice Department. Instead of breaking

up Democratic strongholds, District Twelve carved a Democratic community out of an otherwise Republican area.⁶⁷

“Nothing is simple in redistricting, and this plan reflected that. It is no coincidence that the plan was also challenged, unsuccessfully, by Republicans as a political gerrymander.⁶⁸ Even though the district was not specifically located where the Justice Department had envisioned it, the districting plan was approved and enacted.⁶⁹ Elections proceeded. History was made. North Carolina elected its first two African-American congressmen in ninety-two years.⁷⁰

67. On remand from the Supreme Court, the district court traced the many factors that led to the creation of the challenged District Twelve:

the equal-population requirements in relation to the population dispersions in the areas of their locations; the need for effective African-American voting majorities; the legislative intention to create one predominantly rural (First) and one predominantly urban (Twelfth) district, and concomitantly, two districts with distinctive and internally homogeneous commonalities of interest; incumbent protection; and the maintenance of territorial contiguity.

Shaw, 861 F. Supp. at 473. However, the decision to locate the Twelfth District in the center of the state as opposed to the location suggested by the Justice Department also had partisan motivations:

A final factor may well have tipped the decision of the Democratic leadership to accept the Attorney General's refusal to preclear the Chapter 601 plan and enact an alternative plan that would address the Attorney General's concerns by creating two majority-minority districts. It concerned the location of the additional remedial district that would have to be provided in such a plan. All the Republican-sponsored two majority-minority district plans that had been formally proposed during the 1991 Session and were again being proposed located that second district in areas decidedly unfavorable to Democratic interests. Particularly unfavorable was the one specifically suggested by the Attorney General . . .

During the critical period of this debate, an alternative location that favored rather than disfavored partisan Democratic interests surfaced. . . .

. . .

For the Democratic leadership, this Merritt/Peeler Plan had two great virtues which figured significantly in the decision to enact a plan with two remedial districts rather than challenge the denial of preclearance in court.

First, this plan perfectly trumped the Republican-favored plan with its Charlotte-to-Wilmington district which would effectively have packed the bulk of the state's heavily Democratic African-American vote into two Congressional districts located in already Democratic-leaning areas. In direct contrast, locating one of the remedial districts in the Republican-leaning Piedmont Crescent would insure that its traditionally African-American vote, now a potential majority, would no longer be diffused (or 'submerged,' . . .) in a Republican (hence, under present circumstances, white) majority voting population.

Id. at 465-466. Not surprisingly, the vote in the North Carolina General Assembly to approve District Twelve split along partisan lines with the Democrats in the majority. *Id.* at 469.

68. See *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992), *affd.* 113 S. Ct. 30 (1992).

69. *Shaw*, 113 S. Ct. at 2819-20.

70. Judge Higginbotham's critique of *Shaw* is grounded in a historical overview of North Carolina's racial electoral politics in this century. The article opens with excerpts from the stirring farewell speech of Congressman George White of North Carolina, the last African-

"And then, the *Shaw* plaintiffs filed their constitutional challenge. Their complaint was puzzling because, though they raised racial issues, they didn't even mention their own race.⁷¹ Furthermore, three of the five plaintiffs resided in District Two, which is a majority-white district. Only two of the plaintiffs lived in a majority-black district, District Twelve. No one lived in District One, the other majority-black district, and yet the complaint challenged both Districts One and Twelve.⁷² But in this opinion residence outside of the district did not seem to trouble the Court.

"Parenthetically, I might add that the Court now does consider residence in the challenged district to be important.⁷³ So in all of the *Shaw*-type complaints pending out there,⁷⁴ I'll bet you attorneys will be leafing through their address books to find out where their plaintiffs live. I foresee a rash of motions for substitution of parties on the way.

"Anyway, back to *Shaw*. It made sense when the district court threw out the complaint for failing to state a claim, especially given

American in Congress from the state of North Carolina for nine decades, given on 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.

Higginbotham, Clarick, and David, 62 *Fordham L. Rev.* at 1595 (cited in note 37).

71. For a critique of Justice O'Connor's treatment of the race or racelessness of the plaintiffs in *Shaw*, betraying the inconsistencies in the Court's use of the "color-blind" ideal, see Culp, 69 *N.Y.U. L. Rev.* at 184 (cited in note 37).

72. The Court revived the claims of all of the *Shaw* plaintiffs without regard to the undisputed facts that might have been used to question their standing to assert the claim, such as the location of three of the five plaintiffs' residences. For the recitation of those facts, see *Shaw v. Barr*, 808 F. Supp. 461, 473 (E.D.N.C. 1992), the original district court opinion granting the defendant's motion for summary judgment.

73. See *Hays*, 115 S. Ct. at 2431.

74. In the two cases now before the Supreme Court, there was not perfect identity between the plaintiffs and the districts that they challenged. As discussed in the narrative, only two of the five plaintiffs in *Shaw* lived in a majority-black district. In *Vera*, the six plaintiffs challenged at least 24 districts. Without alluding to the standing question, however, the district court found that only three districts were unconstitutional. Some of the plaintiffs did live in those three districts. *Vera*, 861 F. Supp. at 1309. Nevertheless, plaintiffs would have to be joined or additional proof taken as to harm if the *Vera* plaintiffs seriously wished to contest all of the districts originally named.

the fact that white voters still held more than their fair share of the seats.⁷⁵ Whites constituted seventy-six percent of the total population in the state and they remained a majority in eighty-three percent of the districts drawn.⁷⁶ So, there was no dilution of the white vote. These white plaintiffs had even less of a claim than white plaintiffs in most reverse discrimination cases. At least whites in employment cases usually contend that they are harmed in some way, that they didn't get a job or a promotion that they felt entitled to.⁷⁷ Here, white voters suffered no real harm because their voting power was not in the least bit diluted.⁷⁸

"Nevertheless, the plaintiffs took their case to the Supreme Court, and the Supreme Court ruled that they were entitled to their day in court. The Supreme Court set its sights on the shape of District Twelve and asked, 'Can white voters challenge a districting plan by saying that its district lines are of a dramatically irregular shape?'"⁷⁹ In short, the answer was yes.

"In *Shaw*, the Court talked bad about the way these black districts looked. They were ugly. They were bizarre. The opinion reads something like this: '*District Twelve is so ugly.*' '*How ugly is it?*' '*District Twelve is so ugly it looks like a snake gobbling up every black neighborhood in its path.*'⁸⁰ *And that ain't all. District Twelve is so skinny if you drove down I-85 with your car doors open you'd kill most the people in the district.*'⁸¹ '*Oh yeah? Well, District One looks like a nasty bug splattered all over your windshield.*'⁸² I'm not kidding. Imagine Justice O'Connor doin' the dozen⁸³ with Justice Scalia. If the decision weren't so harmful, it would be funny.

"In the end, the Court put a new challenge into the hands of white voters: a challenge that allows the shape of a majority-black district to trigger strict scrutiny under the Fourteenth Amendment, a

75. *Shaw*, 808 F. Supp. at 466-470.

76. *Shaw*, 113 S. Ct. at 2838.

77. See notes 60-61.

78. *Shaw*, 113 S. Ct. at 2810 (White, J., dissenting).

79. *Id.* at 2819.

80. *Id.* at 2821.

81. *Id.*

82. *Id.* at 2820.

83. "Playing the dozens," the "dirty dozens," or "doin' the dozen" refers to the volleying of witty insults between two friends or enemies. Some historians trace this practice back to the Tuareg and Galla game of two opponents cursing one another until one loses his temper and begins fighting physically instead of verbally. The one who throws the first punch is considered the loser. See Robert Hendrickson, *Whistlin' Dixie: A Dictionary of Southern Expressions* 90 (Facts on File, 1993).

scrutiny that the state can survive only if it can justify the district on the basis of a 'compelling governmental interest' and can prove that the district was 'narrowly tailored' to further that interest.⁸⁴ Most law school professors still do teach, I believe, that strict scrutiny spells death for the challenged practice.⁸⁵

"To pass strict scrutiny, the Court in *Shaw* appeared to require majority-black districts to be compact and contiguous, if not downright pretty.⁸⁶ One gets the distinct impression from the way the Court frames the argument that if your district looks funny, it's constitutionally doomed.⁸⁷

"The majority-black district is compared to white racial gerrymanders of the past. The Court repeatedly refers to them as segregationist.⁸⁸ And listen to this"—Paul lifted a tattered copy of the opinion from the desk, the dog-eared pages falling open to the right spot—"Some of the most often quoted rhetoric from the opinion reads:"

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. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidate at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.⁸⁹

Judge Johnson interrupted, standing up from his seat in the middle of the hall. "Excuse me, Mr. McLane? Now, you all know

84. *Shaw*, 113 S. Ct. at 2832.

85. "Strict scrutiny" is the most stringent constitutional standard of review to which state action is subject. In order for a statute to survive strict scrutiny, the state must come up with extraordinary justifications for its actions that demonstrate that the statute is narrowly tailored to serve a compelling state interest. Challenged state conduct rarely survives the strict scrutiny standard. See John E. Nowak and Ronald D. Rotunda, *Constitutional Law* § 14.3 (West, 4th ed. 1991).

86. Even though the Court stated that traditional districting principles, such as compactness, contiguity, and respect for political subdivisions, are not constitutionally required, the Court nevertheless stated that violations of these principles should be considered evidence of an unconstitutional practice. See *Shaw*, 113 S. Ct. at 2826-27. In making these distinctions, the Court is engaging in mere semantics. The practical effect upon those engaged in the districting process surely will be to concern themselves with the shape of districts drawn to contain majority-black populations if they wish to prevent or defend against constitutional attack.

87. *Id.* at 2819.

88. *Id.* at 2824.

89. *Id.* at 2827.

that, because of Section Two litigation, I was elected from a district that runs down the highway that brought most of you here today. My district loops back and forth across that road just as the railroad tracks do. It reaches into parts of slightly larger towns and finally takes in most of the county seat where the courthouse is. To me it is poetic justice that my district begins on the highway and ends at the seat of the courthouse to which I am elected. Portions of my district look like this North Carolina District Twelve,⁹⁰ and like North Carolina's District Twelve, mine has a slight majority black population—fifty-five percent black, forty-five percent white.⁹¹

“What I can't understand is, number one, how can the Court call that segregation? Sounds like perfectly balanced *integration* to me. Shoot, we've been trying for years to get numbers like these in our school desegregation cases, haven't we?⁹²

90. North Carolina's District Twelve runs along I-85 through the Piedmont region of the state. While similar in shape to the fictional rural district described in the narrative, District Twelve is more urban. The Piedmont region of North Carolina has been described as “the urban, economic and cultural heart and soul of the State.” *Shaw*, 861 F. Supp. at 459. District One, the other majority-minority district in the North Carolina plan, is located in the coastal plain region and is decidedly and intentionally rural in flavor. One of the virtues of the North Carolina districting plan as advanced by its proponents is that it allowed for “the creation of two remedial districts having distinctive and different urban and rural characteristics and communities of interest which historical forces had shaped for the state's African-American population.” *Id.* at 465. Dispersed population, by definition associated with rural areas, contributed to the more sprawling shape of North Carolina's District One, just as the denser populations of urban areas created the thinner shape of District Twelve. Many of the odder configurations in District One were the result of the effort to protect Democratic incumbents, just as the odder configurations in District Twelve were the result of the effort to protect Republican incumbents. *Id.* at 467-468.

91. In this respect, Judge Johnson's fictional district is more secure in electing the minority-preferred candidate than either of the majority-minority districts in the North Carolina plan. In the North Carolina plan, the First District's minority population is only 50.5% of the registered voters; in the Twelfth District, only 53.5% of the registered voters are African-Americans. *Shaw*, 861 F. Supp. at 472.

92. In *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968), the Supreme Court declared that “[t]he transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about.” *Id.* at 436. The Court placed the burden upon the school districts with a history of state-imposed segregation to achieve that unitary status. *Id.* at 437-38. While the precise meaning of the word “unitary” has been differently defined by various district courts, the focus upon “racial balance” has resulted in an emphasis upon the demographics of student assignment to various schools. See *Bd. of Ed. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 244 (1991); *Little Rock School District No. 1 v. Pulaski County Special School District*, 584 F. Supp. 328 (E.D. Ark. 1984) (recounting the history of student assignments state- and county-wide from pre-*Brown* to the time of the opinion in support of the decision to consolidate three school districts for purposes of achieving unitary status). However, as the Court in *Freeman*, 503 U.S. at 467, pointed out, maintaining racial balance is difficult given the fact that “racially stable neighborhoods are not likely to emerge because whites prefer a racial mix of 80 percent white and 20 percent black, while blacks prefer a 50 percent-50 percent mix.” *Id.* at 1447.

“Number two, how is such a population in which all people can vote and vote effectively anything like apartheid? My understanding of South Africa’s apartheid, before it fell, was that blacks had no right to vote in elections to Parliament or to the national government, period.⁹³ Here, everybody’s voting and there is still a white majority exercising a majority of the power to elect the majority of the judges or legislators they prefer.

“And third, how can this be called a racial gerrymander and be compared to what those Alabama folks did in Tuskegee? In *Gomillion*, the black plaintiffs were being *fenced out* of power.⁹⁴ Here, these white folks are being *fenced in* to a district in which they can vote just the same as anybody else. It seems to me that what these plaintiffs are really complaining about, but they’re just too proper to come out and say it, is that they are being represented by a black person.

“And lastly, there are reasons why my district looks the way it does. Some of those reasons have to do with incumbency and which judge wanted to retire to ‘make room’ for me, and some of those reasons have to do with who the state didn’t want to have run for judge—some of you out there oughta know what I’m talkin’ about. But the most important reason, in *my* book, was to finally empower those people who live along that highway, who for centuries in this plantation state have been relegated to their side of the tracks and tied to someone else’s electoral preferences. Certainly, theirs should be a community of interest not to be dismissed simply because the racial history of this place has relegated them to the edge of the cotton field and the side of the road.

“I don’t think we should have to apologize when these same people finally and for the first time in the history of this century have the right to participate effectively in the political process. What I don’t understand is how can that empowerment be characterized as ugly, pernicious, or in any way racially demeaning? It turns the whole world on its head to say so. It makes right wrong and wrong

93. “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.” Higginbotham, Clarick, and David, 62 *Fordham L. Rev.* at 1623 (cited in note 37) (citing Francis X. Clines, *After 300 Years, Blacks Vote in South Africa*, N.Y. Times A1, A8 (April 27, 1994)).

94. In *Gomillion*, the Court recognized a constitutional violation where the state altered Tuskegee’s borders (which had been 80% black) so as to fence out all but four or five of its black voters. 364 U.S. at 341, 347.

right. Have I woken up this morning to find justice reborn as injustice?"⁹⁵

McLane let the room absorb the quiet. Later, Ms. Waters would say that the room got so dad-blamed quiet you could've heard a rat pissin' in cotton. Judge Johnson was ordinarily a reserved man, one who during his short time on the bench had been characterized by most who practiced before him as having a perfect judicial temperament, not easy to rile or grow impatient. His presence on the bench made not only for the good administration of justice, but also gave a black professional an opportunity to improve race relations in the larger community. For the first time in many of the parties' lives, both black and white, an African-American was making decisions impacting their most deeply held concerns—the disputes that they had with one another—and he was doing it compassionately, fairly, and in a professional manner.⁹⁶ His tone today, however, was far from dispassionate.

Mary Pogue, a local community organizer, had been listening. The words *ugly* and *black* in the same sentence hit the raw places in her heart, the places that made her hear the taunts, the jeers that earlier in her life had made her try fade creams to lighten what seemed her impenetrable blackness. She was blacker than most, blue-black it used to be called, and African in every feature. White people often reacted to her with a slight startle, a ripple in the expression before they looked away or tried to pretend they didn't see her. Black people used to joke about how she could be mistaken for midnight. For her, the dirty dozen⁹⁷ was an anesthetic to numb the pain, like hammering at a frayed nerve until all the feeling was gone. She had learned early on to fight insults with equally stinging words, but it was not until much later in her life that she began to see her blackness as resistance, as a source of strength. The words knocked

95. Judge Higginbotham's article, cited throughout, develops further many of the points made by Judge Johnson in this narrative. See Higginbotham, Clarick, and David, 62 *Fordham L. Rev.* at 1593-1659 (cited in note 37).

96. As of 1991, there were 27,791 trial judges serving in courts of general and limited jurisdiction, only 742 of whom, or 2.66%, were African-American. See Conference of State Court Administrators, State Justice Institute, and the National Center for State Courts, *State Court Caseload Statistics: Annual Report of 1991* at 260-61 (Ct. Stats. & Info. Mgmt. Project, 1993); Joint Center for Political and Economic Studies & the Judicial Council of the National Bar Association, *Elected and Appointed Black Judges in the United States* (1991) (computing the number of African-American judges by hand-count by the National Center for State Courts) (copy on file with the Author).

97. See the explanation of "playing the dozens" in note 83.

around in her mind, making their connections, an improvisation of sure sense: *Appearances do matter, yes indeed, they sure enough do. Ugly. Uh-huh. Black. That's right. Power. 'Course they think our power's ugly. 'Specially when it's over them. Place, everybody talkin' about place. I'll tell you about place. We done stepped out of ours, that's all. That's what place means to them.*⁹⁸ *Ain't never nothin' new under the sun.* She shifted in her seat, crossed her arms across her chest and shook her head dramatically in disgust.

It was Crispus Allan who finally responded to the Judge. Judge Johnson had unbuttoned his suit coat, all riled by the heat and oratory, and sat down in exasperation. Crispus Allan, like Paul McLane, was from Georgia with an office in Atlanta, too. But he had grown up in Burke County, a massive county that looked something like the efforts of a novice potter attempting to throw his first pot onto the wheel. Its base was narrow and weighted heavily to one side, its mouth, uneven and frilled in a less than elegant way.⁹⁹

"You know, Judge," Crispus began, "I know what you're talkin' about. I know it where it counts—right here," Crispus hit his chest with the open palm of his right hand, "because the next case the Court took after *Shaw* was from my home state of Georgia, and I want to tell you the story of a place that the Court up and declared don't exist no more. But I know it still does. You know it does. We all know it does. Now it exists, as it has for most of its history, without power."

Crispus took down the map of North Carolina, and placed Georgia maps up instead. He then settled down, leaning against the wall near the old chalk board. He pointed to a map showing a portion

98. Molefi Kete Asante's autobiographical essay about his coming of age in Valdosta, Georgia, explores the Southern use and meaning of the word "place" as referring to one's social location on the power hierarchy:

Nothing in the Bible my father and mother kept on the small table alongside the wall of the front room could have prepared me for the shape, the deep grooves of the hatred whites held for us by virtue of our color. Although I was later to be told that it was because of their fear of Africans, resulting from the five hundred years of war on African people. I am not so sure, however, that the Valdosta whites knew anything about five hundred years of domination. They knew about the whites' place and the blacks' place.

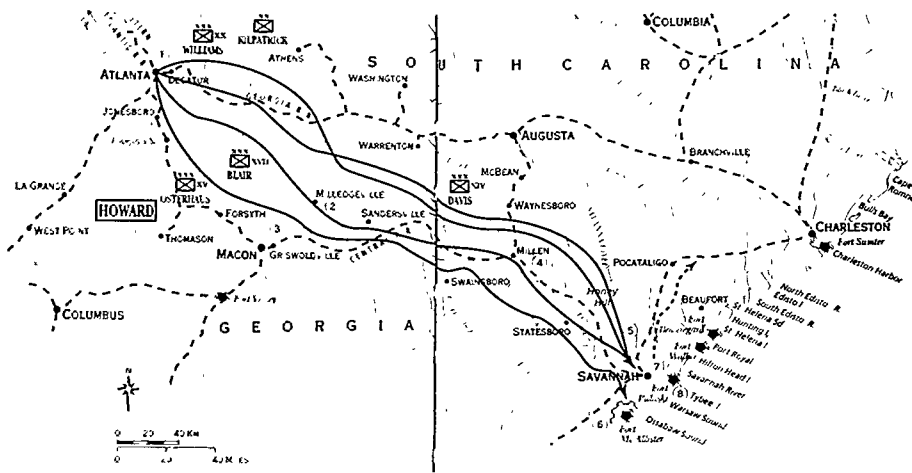
It was all about location, and in their minds God had decreed these "places."

Molefi Kete Asante, *Racism, Consciousness, and Afrocentricity*, in Gerald Early, ed., *Lure and Loathing: Essays on Race Identity, and the Ambivalence of Assimilation* 131 (Penguin, 1993).

99. Burke is the largest county included in the Eleventh District of Georgia with a land area of 831 square miles. U.S. Dept. of Commerce, Bureau of the Census, *County and City Data Book: 1994* ("Data Book"). Burke County's system of at-large elections was successfully challenged as an unconstitutional system maintained for the invidious purpose of diluting the voting strength of its black population in *Rogers v. Lodge*, 458 U.S. 613, 622 (1982). To see the contours of Burke County, see figure accompanying note 124.

of Georgia, with four undulating lines moving from Atlanta to the Atlantic. "The story starts in 1864. Actually it starts way back before then, when plantations crested in a wave rising high from Savannah near the Atlantic ocean, moving all through this rural corridor and crashing into Atlanta itself.¹⁰⁰ But 1864 was the moment for change because in that year the wave receded from Atlanta back to the sea, dragging with it the plantations and all that accumulated wealth that the labor of enslaved people, my people, my great-grandparents, had generated. It was General William Tecumseh Sherman who brought the tide that marched from Atlanta back toward the sea.

"During the march, Sherman ordered his men to 'forage liberally on the country.' And they did. The Union troops left what some historians have described as a 'sixty-mile wide swath of devastation.'¹⁰¹



100. See Michael Barone and Grant Ujifusa, *The Almanac of American Politics* 356 (Dutton, 1994).

101. The map in Figure 2 is a reproduction originally published in James M. McPherson, ed., *The Atlas of the Civil War* 198 (Macmillan, 1994).

Crispus Allan's long fingers moved across the first map, showing the path that the Union troops took. "You know, how history's told has a lot to do with who's doin' the tellin', because the ultimate effect for the people who went overnight from slaves to free men, women, and children was anything but devastating.¹⁰² It was a blessing. As Sherman's 62,000 men rode through this area in four columns, they hit every plantation they could, and as they did, sometimes even before they did, black men, women, and children became Union soldiers, refugees, followers of the Union troops, or squatters on the outlying land of those who had considered them slaves.¹⁰³

102. The impact of Sherman's march on individual slaves was not uniformly positive. Some of the Union troops carried their racial prejudices with them into battle and reacted violently to destroy all Confederate property, including what they perceived to be their human chattel. However, many other Union soldiers specifically went to war as abolitionists and so joined the freedmen and women in rejoicing at the demise of slavery. Still others who began the war with prejudices lost them when they witnessed the dedication and assistance of those who worked both clandestinely and openly within the Union Army's ranks to gain their own freedom. As one officer wrote, "[T]he more we become acquainted with the negro character, both as men and Christians, the more we are compelled to respect them." Joseph T. Glatthaar, *The March to the Sea and Beyond: Sherman's Troops in the Savannah Campaigns* 52-65 (N.Y.U., 1985).

103. Historian Eric Foner has marshaled freedmen's accounts, Union soldiers' descriptions in letters home, and Sherman's diaries to synthesize this description of Sherman's March to the Sea from the black perspective:

To Georgia's slaves the arrival of this avenging host seemed, as one federal officer put it, "the fulfillment of the millennial prophecies." By the thousands, men, women and children abandoned the plantations to follow the Union army. They cheered the destruction of their owners' estates and refused to obey when the troops, following Sherman's orders, attempted to drive them away. "They flock to me, old and young," wrote Sherman from Savannah, "they pray and shout and mix up my name with Moses, and Simon. . . as well as 'Abram Linkom', the Great Messiah of 'Dis Jubilee'."

Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* at 70 (Harper & Roe, 1988). Glatthaar includes a photograph of black Georgian refugees camped out alongside of the road and recounts the stories of other departing slaves, some who left even the "kindest of masters" imploring them to stay on; one couple declined the invitation and told their former slave owner, "We must go, freedom is as sweet to us as it is to you." Glatthaar, *March to the Sea and Beyond* at 61 (cited in note 102). One staff officer's diary bore witness to the readiness with which the newly free men were anxious to join the Union troops: "The negroes all tell the General . . . that they would serve the Union cause in any and all ways that they could, as soldiers, as drivers or pioneers. Indeed, the faith, earnestness, and heroism of the black men is one of the grandest developments of this war." George Ward Nichols, *The Story of the Great March: From the Diary of a Staff Officer* 101 (Corner House, 1865). The same officer also described how free women saw the travels of Sherman's army as an opportunity to reunite with lost family:

Thousands of negro women join the column, some carrying household goods, and many of them carrying children in their arms, while older boys and girls plod by their side. All these women and children are ordered back, heartrending though it may be to refuse them liberty. One begs that she may go to see her husband and children at Savannah. Long years ago she was forced from them and sold. Another has heard that her boy was in Macon, and she is 'done gone with grief goin' on four years.

“By the time Sherman reached Savannah, about 10,000 former slaves had joined his march.¹⁰⁴ Now columns don’t always march in pretty lines and refugees don’t always scatter in nice, neat patterns,” Crispus pointed to the military map again, “but today in Georgia, you will still find the descendants of those brave folks¹⁰⁵ who marched with Sherman or cheered his passing all up and down this corridor. After the Civil War, most folks stayed put until the 1940s. Then they moved to Atlanta, and after that those who prospered in Atlanta moved into the black suburbs of Dekalb County. This district tracks the history of African-Americans who were once slaves and who lived to be free.¹⁰⁶

“But the quest for freedom is still not over. With the exception of those living in Dekalb County, the people living in this district are poor.¹⁰⁷ This district’s march to the sea is largely rural.¹⁰⁸ The people within and outside the cities have their roots in these rural places. The Court slings about the word *community* but it doesn’t tell us how to define what community means.¹⁰⁹ Community is not something

Id. at 71. In an ironic twist of fate, the old, infirm, and disabled, unable to travel as refugees or to fight, remained as free persons on the lands of their runaway masters fleeing the wrath of Sherman’s troops. Id. at 68-69.

104. Glatthaar, *March to the Sea and Beyond* at 54 (cited in note 102).

105. The African-Americans wearing Union uniforms were brave, indeed. The treatment of black prisoners of war was a major source of contention between the North and South. The South insisted that black soldiers captured from the Union army would either be returned to slavery or worse. Often, the black soldiers who surrendered to the Confederates were murdered immediately. See McPherson, ed., *Atlas of the Civil War* at 201 (cited in note 101).

106. Barone and Ujifusa, *Almanac of American Politics* at 356 (cited in note 100).

107. A little over 39.2% of households residing in the fourteen counties that are not split by the boundaries of Georgia’s Eleventh District earn less than \$15,000 per year. *Data Book* at 92, 106, 120 (cited in note 99). Nearly 24% of all people residing in these fourteen counties are living below the poverty level. Id. at 93, 107, 121 (both sets of averages were tabulated by the Author using individual county percentages found at the pages listed; the figures averaged both the white and black populations).

108. The core of the Eleventh District has been described as “the plantation country in the center of the state, lightly populated, but heavily black.” Barone and Ujifusa, *Almanac of American Politics* at 356 (cited in note 100).

109. Whether and how African-American communities can be recognized and empowered is at the center of the controversy that the Court ignited with *Shaw*. The district court in *Johnson* rejected the arguments made by the intervenors in support of the Eleventh District’s African-American community of interest with these words: “the Defendants and Intervenors spent much time outlining the racial community of interest shared by black citizens in Georgia. The problem with this tack is that, while partially convincing, such a community of interest is barred from constitutional recognition.” 864 F. Supp. at 1376.

The Supreme Court on review was not quite so harsh on the issue of African-American community when it said that a “State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests.” *Johnson*, 115 S. Ct. at 2490. While the Court pulled away from the district court’s

that springs up overnight. A new subdivision clustered together in tight cul-de-sacs, all compact, but half-moved-into is not near the community that history's sprawling embrace creates. We're talking about people here with a common history, heritage, and ways of being.

"How did these folks get to be so consistently poor? How could a people responsible for creating so much wealth wind up with so little? We all know the answer to that rhetorical question. It was slavery, an institution that defines its players by the color of their skin.

"When slavery was abolished, the owners of slaves were offered compensation for their 'lost property,' meaning slaves, if they would remain in the Union. Even with these generous offers, there were few takers.¹¹⁰ But what of the lost property of the slaves themselves? What of the lives spent in labor without the right to own as much as a wage or your own parenthood? What of the plantations built, the seeds sown, the harvests reaped without compensation to our families? Forty acres and a mule was the broken promise made to the freedmen and women.¹¹¹

"Nor were our people slow to demand compensation. When Sherman found himself in Savannah with these many thousand travelers, he was at a loss to know what to do. So he called a meeting with Secretary of War Stanton. The black ministers who were the community leaders then—and who today continue in that role¹¹²—met

prohibitive language, this statement does suggest that some other interest besides race must be found to unite those who are joined together by community.

110. Foner, *Reconstruction* at 5-7 (cited in note 103).

111. Couto, *Nobody Turn Me Round* at 166-174 (cited in note 43).

112. It is no accident that the photograph on the front page of the *Georgian Guardian* for the week of July 29th-August 4th, 1994, showed "Evangelist Hazel Scott, pastor of Scott Temple Pentecostal Church, exhort[ing] the crowd to show support for the Eleventh District during a Wright Square rally July 21, the day [district court] hearings began in Savannah." See Jennifer Rust, *11th District Court Challenge: A Tale of Lines and Numbers*, *Georgian Guardian* 1 (July 29-August 4, 1994). The African-American church has played a major role in virtually every political movement within the African-American community.

Scholarship is replete with studies of the history of the African-American church, its importance to the black community, and its roots in the West African experience. For an exploration of the West African roots in the African-American church, see Mechal Sobel, *Trabelin' On: The Slave Journey to an Afro-Baptist Faith* (Greenwood, 1979). See also Albert J. Raboteau, *Slave Religion: The Invisible Institution in the Antebellum South* (Oxford U., 1978).

Professor Bell frequently draws upon the transformative power modeled by African slaves who took a Christianity forced upon them by white masters and created from it a vehicle for political and spiritual empowerment. See Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* 215-238 (Basic Books, 1987). See also Forrest G. Wood, *The Arrogance of Faith: Christianity and Race in America from the Colonial Era to the Twentieth Century* (Knopf, 1990) (providing a detailed history of the ways in which Christianity was employed by proponents of slavery as both a justification for slavery and a tool of subjugation).

with Sherman and Stanton.¹¹³ Stanton asked the clergymen where all of these people proposed to live. One brother stated his strong preference for lands of our own so that we might have farms to 'till and reap by our own labor.' The community felt strongly that having places of our own was critical because, as one brother said, 'there is a prejudice against us in the South that will take years to get over.'¹¹⁴

"After that meeting, Stanton entered an order setting aside some four hundred thousand acres of land for the freedmen, and at least one thousand people immediately headed off to the Sea Islands to begin their lives as landowners.¹¹⁵

"Why then aren't these people wealthy landowners? They should at least be the owners of coastal and island resorts right now, you say. Why? Because the promise was broken when Andrew Johnson became president. Amnesty was granted the Confederates. The land was seized and returned to the former plantation owners.¹¹⁶ People fought, sometimes with guns, to hold onto what was theirs. In

Today, black churches continue to serve multiple functions within the black community, as places of spiritual sustenance, community service, relational love, and political activity. See Mark Chaves and Lynn M. Higgins, *Comparing the Community Involvement of Black and White Congregations*, 31 *J. Sci. Study of Religion* 425, 438-39 (Dec. 1992) (supporting the theory that black congregations continue to perform nonreligious functions within their communities and are more active than white churches in serving underprivileged segments of the immediately surrounding community, without regard to relative congregational size, resources, urban/rural setting, or southern/nonsouthern location); Cheryl A. Weber and Christopher N. Hunte, *An Assessment of the Black Church's Role in Rural Development* (Southern Assoc. of Agr. Sci., 1985) (assessing the role of the black church in rural development and finding that the majority of black church leaders were involved in political issues while at the same time emphasizing the spiritual and moral role of the church).

113. Major Nichols, who claimed to be present during a portion of the meeting between the clergymen, Stanton, and Sherman, described it as follows:

Mr. Stanton sat at a table, asking questions and making notes of the replies; now and then putting down his pen and adjusting his spectacles in a surprised way, as if he could not comprehend how these men came to possess such a clear consciousness of the merits of the questions involved in the war. Their replies were so shrewd, so wise, so comprehensive, that, as Mr. Stanton afterward observed, "they understood and could state the principles of this question as well as any member of the Cabinet."

Nichols, *Story of the Great March* at 102 (cited in note 103).

114. Foner, *Reconstruction* at 70 (cited in note 103).

115. "[T]he freedmen hastened to take advantage of the Order. Baptist minister Ulysses Houston, one of the group that had met with Sherman, led 1,000 blacks to Skiddaway Island, Georgia, where they established a self-governing community with Houston as 'the black governor.' By June [1865], in the region that had spawned one of the wealthiest segments of the planter class, some 40,000 freedmen had been settled on 400,000 acres of 'Sherman land.' Here in Coastal South Carolina and Georgia, the prospect beckoned of a transformation of Southern society more radical even than the end of slavery."

Id. at 71.

116. Id. at 247-48. See also Couto, *Nobody Turn Me Round* at 166-74 (cited in note 43).

some few cases the resistance won, but in the end the former plantation owners came to own the land again, and black farmers wound up sharecropping, an institution that mimicked the economic control of slavery.¹¹⁷

“With the reinstatement of white economic control came white political control. In 1877 Georgia enacted poll taxes. In 1890, white primaries. In 1908, literacy tests. All targeted directly at black political power. Only fourteen years ago, the Georgia House Reapportionment Committee’s chairman spoke these racist words of recalcitrance: ‘I don’t want to draw no nigger districts.’¹¹⁸ It seems that the brotlier who prophesied to Secretary Stanton was right; more than one hundred years later and the prejudice against us has yet to be spent.”

The voices in the room rose again to affirmation, witnessing and testifying that Crispus’s words were right on the mark. “Burke County, where I came up, was described by the Supreme Court only twelve years ago. It was so bad that the same Court that had required direct proof of discriminatory intent¹¹⁹ was convinced of the reality of racism. That racism only served to forge my community’s bonds even stronger just to resist it. We were and still are a majority of the population in Burke County,¹²⁰ but we were excluded from all of the decision making. The Court described the effect that being left out of the political process has on black communities: no representation on boards, roads left unpaved, public donations of our tax dollars going to private white schools to buy them uniforms while our children remained uneducated or in inferior schools, lots more blacks than whites below the poverty level. All of these things the Court recognized as the evil that existed in Burke County. That’s the same place that the Court has returned, through *Johnson*, to powerlessness.¹²¹

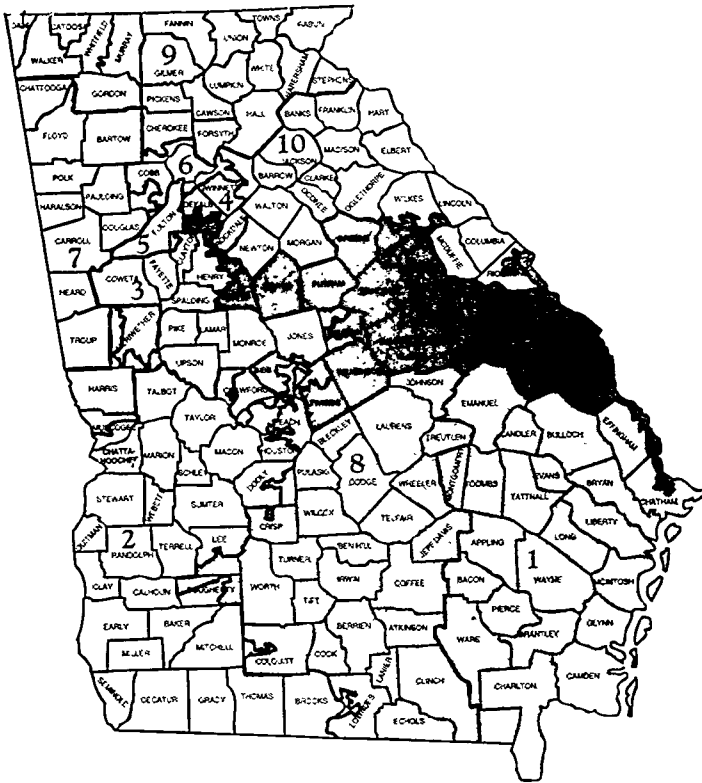
117. Couto, *Nobody Turn Me Round* at 174-78 (cited in note 43).

118. *Johnson*, 115 S. Ct. at 2502 (Ginsburg, J., dissenting) (citation omitted).

119. See *Bolden*, 446 U.S. at 55 (holding that the plaintiffs in vote dilution cases brought under the Fourteenth Amendment must prove that the challenged system had been enacted or maintained for the purpose of depriving African-Americans of political power).

120. The Supreme Court, in 1982, acknowledged that Burke County was a majority-black county. *Rogers*, 458 U.S. at 623. Today, the county’s population is 51% African-American. *Data Book* at 88 (cited in note 99).

121. See *Rogers*, 458 U.S. at 626.

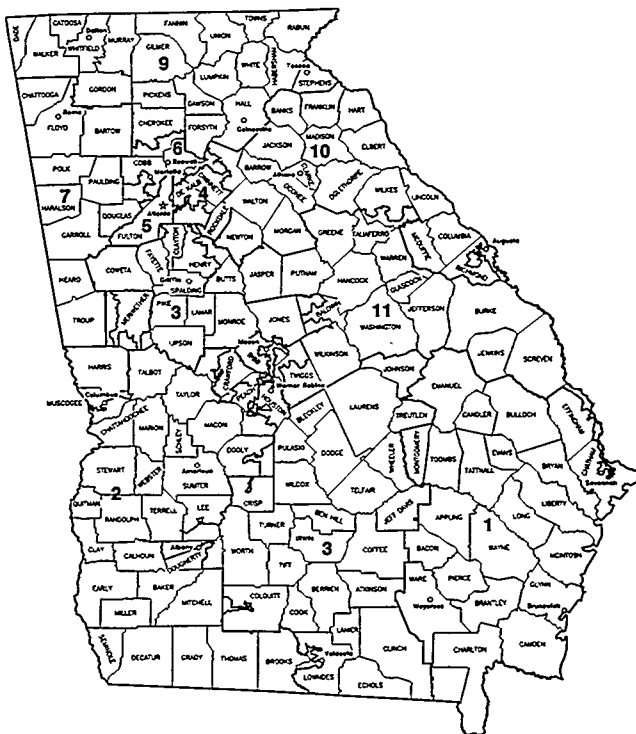


“This is the map of Georgia’s Eleventh District.” Crispus pointed next to a map of the whole state with a shaded district that also moved from Atlanta to the sea. “You can see the way that it tracks the historical paths that African-Americans followed as they scattered after slavery. The Court in *Johnson* again did its best to describe the shape of this district in terms designed to make it appear grotesque. They talked about the fact that it was big, that it linked the black neighborhoods of Savannah and Augusta to the district by narrow corridors. The Court said that these ‘metropolitan’ neighborhoods had little in common with this rural core in the middle.¹²²

“Well, let’s examine those conclusions for a minute. Georgia’s Eleventh travels about 260 miles from Dekalb County to Savannah. Does that sound like a lot to you? Maybe in your head, you’re saying, ‘Yes, Crispus it does, it’s a mighty long way.’ Well, let me show you

122. *Johnson*, 115 S. Ct. at 2484. The map in Figure 3 is a reproduction originally published in Jennifer Rust, *11th District Court Challenge: A Tale of Lines and Numbers*, *Georgia Guardian* 1A (July 29-Aug. 4, 1994).

something else then." Crispus pulled out another map and put it at the end of the ledge, right next to Georgia's Eleventh. "This, ladies and gentlemen, was the congressional districting plan in effect *before* the Eleventh was created. I want you to pay attention to District Eight. Just look at it. It starts just south of Atlanta, but instead of marching to Savannah, it marches all the way down here to the Florida border. It is practically 300 miles long,¹²³ forty miles longer than the challenged Eleventh.



"Well, the district's size isn't the only thing the Court worried over, you say. It also was concerned that metropolitan areas were

123. The former Georgia Eighth District is described as follows:

The oddly-shaped 8th twists nearly 300 miles from the black-majority counties just south of Athens to the Okefenokee Swamp on the Florida border. Covering 30 counties, it is one of the state's poorest areas; blacks are more than one-third of the population.

Most of this is rural territory, given over to tobacco and corn in the south, dairy farming and cotton farther north. The one large city is Macon, which together with surrounding Bibb County casts about one-third of the district's vote.

Philip D. Duncan, ed., *Politics in America: the 101st Congress* 378 (Cong. Quarterly, 1990).

The map in Figure 4 is a reproduction originally published in Philip P. Duncan and Christine C. Lawrence, eds., *Politics in America: The 104th Congress* 336 (C.Q., 1995).

"In the Eighth you have several rural counties, many of the same that the Eleventh has. In both of them, you have Hancock County with a population density of only . . ."—Crispus stopped to check his figures on the desk in front of him—"only nineteen people per square mile, and Glascock, only sixteen.¹²⁵ You have Taliaferro with only nine people per square mile.¹²⁶ But in the Eighth you have the city of Macon, in Bibb County, with a county-wide population density of 608 people per square mile.¹²⁷ But the population density in Richmond County, where those parts of Augusta are scooped up and included in the Eleventh, is 625 people per square mile!¹²⁸ And Chatham County, where the black population of Savannah is located, has 504 people per square mile!¹²⁹ The Eighth and the Eleventh have a very similar mix of metropolitan and rural areas. Is Macon less of a city than Savannah or Augusta? Does Taliaferro County with its nine people per square mile magically become more metropolitan by virtue of its inclusion in the Eighth as opposed to the Eleventh? Or is it that these differences only become important when they exist in a majority-black district like the Eleventh, instead of a majority-white district like the old Eighth?¹³⁰

"Finally you get down to the argument that what the Court is saying here is that it is repugnant to carve out the black population of Savannah and Augusta to lump them together with people that have nothing in common with them 'but the color of their skin.'"¹³¹

Crispus looked at his papers and armed himself with the chalk again. "The Supreme Court talks about race as though it were as minor a thing as deciding what color shirt to put on in the morning before you head off to work. They assume that the African-Americans of Augusta have more in common with the whites who live in Augusta than with the people who live in my home county of Burke. Let's check and see if they're right by looking at a few facts that most people care quite a bit about: poverty and unemployment.

125. *Data Book* at 102 (cited in note 99).

126. *Id.* at 116.

127. *Id.* at 88.

128. *Id.* at 116.

129. *Id.* at 88.

130. Georgia's former Eighth District was 64% white, 35% black. J. Roy Rowland, a white male, had been elected from this district from 1982 until the district's demise in 1994. Duncan, *Politics in America* at 378 (cited in note 123). The challenged Eleventh District represented a racial population virtually the inverse of the former Eighth: 34% white, 64% black. Barone and Ujifusa, *Almanac of American Politics* at 357 (cited in note 100).

131. See *Shaw*, 113 S. Ct. at 2827.

"In Augusta, 42.1 percent of all of the African-Americans live below the poverty line.¹³² Compare that to the percentage of whites in Augusta living below the poverty level: only 8.7 percent.¹³³ Now, in Burke County, 30.3 percent of the entire county population is below the poverty line.¹³⁴ It would seem that on this measure African-Americans in Augusta have more in common with the folks in Burke County.

"Let's look at the unemployment rates. In Augusta, the black unemployment rate is 14.3 percent,¹³⁵ compared to the white unemployment rate of 4.6 percent.¹³⁶ In Burke County, the overall unemployment rate is 11.1 percent.¹³⁷ Who do you think the African-Americans of Augusta have more in common with, the whites of Augusta or the total population of Burke County? The figures stack up the same way when Burke County is compared to the African-American community in Savannah, too.¹³⁸

"The Court likes these pre-existing boundaries that capture populations with divergent interests more than the Eleventh's boundaries that actually capture people with common problems.¹³⁹ In other words, even though the Court doesn't want to admit it, race does still matter. It matters big-time. The majority-black population of the Eleventh District had a history of common interests that exists largely because of governmental actions: slavery, Reconstruction, broken governmental promises, and anti-suffrage laws and practices. These actions were taken against them because of the color of their skin.

132. U.S. Dept. of Commerce, Bureau of the Census, *1990 Census of Population and Housing: Population and Housing Characteristics for Census Tracts and Block Numbering Areas, Augusta, Ga. CMSA 215* (1993) ("Augusta Census Data").

133. *Id.* at 189.

134. *Data Book* at 93 (cited in note 99).

135. *Augusta Census Data* at 202 (cited in note 132).

136. *Id.* at 176.

137. See *Data Book* at 95 (cited in note 99).

138. The black poverty rate in the portion of Savannah included in the Eleventh District places 33.1% of African-Americans below the poverty level. U.S. Dept. of Commerce, Bureau of the Census, *1990 Census of Population and Housing: Population and Housing Characteristics for Census Tracts and Block Numbering Areas, Savannah, Ga. CMSA 142* (1993) ("Savannah Census Data"). By contrast, the white poverty rate is only 9.6%. *Id.* at 129. The black unemployment rate is 12.1%, compared to the white unemployment rate of 4.7%. *Id.* at 124, 134.

139. For a careful analysis of the way that pre-existing geographical boundaries are assumed to be valid while serving to entrench racial power imbalances, see Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *Harv. L. Rev.* 1843 (1994).

"In *Johnson*, the Supreme Court put all majority-black districts at risk because it said that bizarrely shaped districts aren't alone in being subject to strict scrutiny; *all* majority-black districts in which race was a predominant motivating factor must face strict scrutiny.¹⁴⁰ Even those (one might say *especially* those) districts drawn at the insistence of the Justice Department under Section Five are subject to strict scrutiny.¹⁴¹

"Georgia's District Eleven did not survive that scrutiny. The Court held that the entire districting process was subordinated to racial concerns and that the state's interest in satisfying the demands of the Justice Department, at least in this case, didn't constitute a compelling state interest."¹⁴²

Ozell Franklin, a young lawyer who had brought a few voting rights cases under Section Two against local school boards and city councils, stood up. He himself lived in an upper-middle-class black community, a black island in an otherwise white suburban sea.¹⁴³ He had spent little time actually mulling over the irony that he lived outside of most of the black subdistricts that had grown out of his litigation. At this moment, he was more concerned about preserving those seats, which he nevertheless thought represented his life's work. "I'm trying to get a hold of the scope of the problem here. Can these decisions be used to challenge the wins we've had under Section Two of the Voting Rights Act? In other words, could somebody come in and try to destroy Judge Johnson's district? A district that was created by order of the court to fix a violation of the Voting Rights Act? Wouldn't Judge Johnson's district be safe?"

McLane and Allan looked at one another for the answer. McLane shrugged and nodded at the same time, his palms facing the

140. 115 S. Ct. at 2489. The Court noted that, compared to other districts within the Georgia redistricting plan, the Eleventh was not bizarre. *Id.*

141. The Court held that the Justice Department's actions with regard to Section Five preclearance do not deserve judicial deference in the constitutional review of majority-black districts. *Id.* at 2491. If the Justice Department exceeds its authority as narrowly construed by the Court in *Johnson*, the state may not use Section Five as a compelling state interest to engage in race-conscious redistricting. *Id.* at 2491-94. The effect that *Johnson* undoubtedly will have upon the demands that the Justice Department places upon the states and the states' ability to act to satisfy the preclearance process without going forward with administrative or court appeals is beyond the scope of this Article. In short, it is likely that the Justice Department will be encouraged by *Johnson* to demand little more than that the state not treat its minority populations any worse than under previous plans. States who want to be sure that their districting will not be subject to later constitutional challenge may be forced to consider administrative or court action to declare whether their proposed plans were proper under Section Five of the Voting Rights Act.

142. *Id.* at 2490-91.

143. See note 33 for a discussion of racial isolation and African-American suburbanites.

ceiling in a gesture of futility. McLane then attempted an explanation, "What you are quite rightly pointing out is that we should narrow the threat that *Shaw* and *Johnson* present by keeping our eye on the ball. The *Shaw* challenge was to the state's action that North Carolina's legislature took to redraw districts because of the changes in population accounted for in the 1990 Census. Both *Shaw* and *Johnson* involved the Justice Department's preclearance procedures under Section Five. The districts were not drawn because of a court order in a voting rights case. You're right. That is certainly one distinguishing argument to make.

"But *Shaw* has turned up in many different types of cases; most typically, it comes up in the congressional redistricting cases. And indirectly it will have an effect on how Section Two cases are litigated and the degree of success we will have in the future. You can find *Shaw* cited in recent Section Two cases.¹⁴⁴ Sometimes, a court on its own will raise *Shaw* to reinforce the importance of the compactness requirement under *Gingles*.¹⁴⁵ Courts are now more likely to ask whether a proposed remedy is constitutional under *Shaw*. In some cases *Shaw* has been used to defeat the plaintiff's claim entirely by saying that the remedy wouldn't be constitutional.¹⁴⁶ Even in deciding whether to approve settlements, courts have looked to *Shaw*,¹⁴⁷

144. See *Cane v. Worcester Cty., Md.*, 35 F.3d 921, 926-27 n.6 (4th Cir. 1994) (recounting the defendant's citation of *Shaw* against the plaintiff's geographic compactness evidence); *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 277-78 (2d Cir. 1994) (attempting unsuccessfully to use *Shaw* to support the argument that plaintiffs' plan would run afoul of *Shaw* while its existing plan did not), cert. granted and judgment vacated on other grounds 115 S. Ct. 35 (1994); *Clark v. Calhoun Cty., Miss.*, 881 F. Supp. 252, 254 (N.D. Miss. 1995) (citing *Shaw* to reject plaintiff's super-majority district offered at trial); *Sanchez v. Colorado*, 861 F. Supp. 1516, 1522-23 (D. Colo. 1994) (relying on *Shaw* in finding a failure to prove geographic compactness in a Section Two challenge by finding that "redistricting must comply with the overriding demands of the Equal Protection Clause"); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1052-1053 (D. Md. 1994) (citing *Shaw* for two guiding principles: first, courts should be reluctant to order the creation of districts of "bizarre" or "dramatically irregular" shape; second, although a state can place great weight on race in redistricting, it may not do so to the exclusion of all traditional, nonracial districting principles); *Houston v. Lafayette Cty., Miss.*, 56 F.3d 606, 611 (5th Cir. 1995) (citing *Shaw* to support its holding that plaintiffs had proven geographic compactness); *Jeffers v. Tucker*, 847 F. Supp. 655, 662 (E.D. Ark. 1994) (holding that the plaintiffs had failed to meet the compactness requirement and invoking *Shaw*).

145. *Gingles*, 478 U.S. at 30, requires, among other things, that a plaintiff in a Section Two minority vote dilution claim challenging at-large election systems prove as a part of her prima facie case that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50-51.

146. See *Jeffers*, 847 F. Supp. at 661-62; *Sanchez*, 861 F. Supp. at 1522-23.

147. See *Brooks v. State Bd. of Elections*, 848 F. Supp. 1548, 1570 (S.D. Ga. 1994) (rejecting a settlement in a voting rights case challenging the system used in Georgia to elect state trial

and in one case, a court denied approval of a settlement because it believed the districting plan would be unconstitutional."¹⁴⁸

Paul McLane crossed his fingers in a show of wariness. "As of now, no majority-black districts ordered by a court, those districts like Judge Johnson's, have fallen to *Shaw*.¹⁴⁹ But *Shaw* has been relied upon in one employment case in which white employees were challenging a court-ordered affirmative action plan.¹⁵⁰ So the possibility of white intervenors or subsequent white challengers making 'reverse discrimination' claims is not out of the question.

"So you see, there's no absolute answer to these questions yet. The dust hasn't settled. Even though the North Carolina district court upheld the districts in *Shaw* on remand, that district court said, as a kind of aside, that Section Two district plans would be easy targets for strict scrutiny because it's obvious that they were drawn with race in mind.¹⁵¹ That kind of broad language sounds pretty scary. The only saving grace is that, even though the district court in North

court judges and relying upon *Shaw* to invoke strict scrutiny of race-conscious remedies), appeal dismd. and remanded 59 F.3d 1114, 1122 (11th Cir. 1995) (dismissing the appeal as moot because the deadlines imposed in the agreement under review had passed); *White v. Alabama*, 867 F. Supp. 1519, 1547-48 (M.D. Ala. 1994) (approving a settlement in a voting rights case challenging Alabama's system of electing appellate court judges and considering whether the proposed settlement would violate the Equal Protection Clause under *Shaw* as racial gerrymandering).

148. See *Brooks*, 848 F. Supp. at 1577.

149. This Author is aware of at least one challenge interposed to a consent decree entered in a Section Two case since the issuance of *Johnson*. This recently filed matter has yet to be heard. See *Hunt v. Arkansas*, No. PB-C-89-406, Motion to Intervene and to Vacate Consent Decree (July 21, 1995) (copy of pleadings on file with the Author), filed in the United States District Court, Eastern District of Arkansas, Pine Bluff Division.

150. See *Aiken v. City of Memphis*, 37 F.3d 1155, 1161 (6th Cir. 1994) (citing *Shaw* and applying strict scrutiny to race-based promotion goals); *Sims v. Montgomery County Commn.*, 873 F. Supp. 585, 597 (M.D. Ala. 1994) (citing *Shaw* and rejecting the argument that "an attempt to favor blacks may exist without the intent to harm whites").

151. The court explained:

As a practical matter, there will probably be only two types of redistricting cases in which plaintiffs will consistently be able to prove the intent necessary to trigger strict scrutiny: (i) those in which a redistricting plan creates more majority-minority districts than did the prior plan, and there is direct evidence that this has been done in response to either a private suit under the Voting Rights Act or a Section Five objection from the Justice Department; and (ii) those in which a plan creates one or more districts in which citizens of a particular racial group are concentrated in numbers disproportionate to their representation in the state's population as a whole, whose shapes are so highly irregular as to give rise to an inference that the concentration was something that the legislature affirmatively set out to achieve as opposed to being merely an accidental side-effect of a redistricting process in which racial considerations played no role.

Shaw, 861 F. Supp. at 433 n.20. However, the district court also found that potential Section Two liability likely provides the state with a compelling state interest to engage in race-based redistricting. *Id.* at 437-40. The question would remain, however, whether the state's districting actions were narrowly tailored to achieve that purpose. The Supreme Court may choose to comment on the lower court's speculations during its deliberations this term.

Carolina applied strict scrutiny, the court let the districting plan survive. North Carolina proved that the challenged district served a compelling state interest and that it was narrowly tailored to serve that interest.¹⁵² The Supreme Court has accepted the appeal from this decision to review this term. And so we await the next installment in the *Shaw* saga.

“You would hope that enacting a court-ordered Section Two plan would be a compelling state interest and that any resulting district would be narrowly tailored to achieve that purpose. Particularly after a full trial on the merits.”

Exasperation rained down on Ozell Franklin’s face, and those who were not lawyers had long ago lost interest in the lawyer-talk. Franklin demanded, “Bottom line, Paul, *is* there a bottom line?”

“Bottom line is that the outer limits of these decisions haven’t been defined. Guessing at what the bottom line might be, I would say that court-ordered Section Two districts should be among the safest. But keep in mind that new Section Two cases may be harder to win. Courts will get the signal from the Supreme Court that the pendulum has swung, and that they can be stingy with their power to order new majority-black districts. To be on the safe side, anyone bringing new Section Two cases should have in mind districts that are as compact as possible and consistent with other traditional districting principles. Because now that *Johnson* has broadened the inquiry beyond the shape of proposed districts, courts may be even more reluctant to impose subdistricting remedies. This means making sure districts are contiguous and that, despite the resulting unfairness that Crispus pointed out, they don’t split up other political units like counties and towns.”

Sheryl had been listening and watching. She saw Judge Johnson, his questions still dangling in the air; she saw Ozell Franklin, his eyebrows wrinkling toward the center of his forehead; she saw Mary Pogue’s growing anger; she heard the murmurs of confusion. All pointed to the question of *why* such resistance to fair empowerment had been visited upon them, and she interjected, “As Floyd pointed out before we started, we could talk all day about the *why* of this decision. Personally, I’m beginning to think that maybe this decision just shows that racism is destined to be a permanent fixture here. That’s what a law professor who used to do civil rights

152. *Id.* at 474-75.

work has said.¹⁵³ He made some people mighty mad when he said it,¹⁵⁴ but it does seem that so often our victories in the courts are used to the advantage of whites who apply 'color-blindness' or some other argument to take back what little progress we make."¹⁵⁵

Sheryl took a deep breath and continued, "But we can't afford having our collective energies spent singing those blues now. We need to take Judge Johnson's palpable anger, and the anger of each and every one of you here today, and turn it into a plan so that we can deal with these cases if Judge Johnson's district is challenged. I might add that Judge Johnson's district was patterned on the same district that has elected others to the state house and that some of its contours also surface in the congressional district.¹⁵⁶ These are districts that were created by the state and approved by the Justice Department under Section Five. So, while it may not be certain that Judge Johnson's district is threatened, it is likely that our legislative districts could be. We also need to figure out how to deal with this

153. See Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (Basic Books, 1992); Derrick Bell, *Racial Realism*, 24 Conn. L. Rev. 363 (1992).

154. Professor Bell himself has recounted the reactions that his thesis has garnered among African-Americans. He begins the preface to the paperback edition of *Faces at the Bottom of the Well* with the following quote:

"Professor Bell, you have achieved much despite racial discrimination. How dare you now deny our children the hope that they may enjoy a success like yours?" The challenge from a well-dressed, articulate black woman followed a reading from this book in a downtown Washington, D.C., bookstore. I responded that it was the society and not me that burdened her children's hopes and opportunities. I simply chronicled what society had done and was likely to do. The answer did not satisfy her, and she seemed in no mood to suspend judgment until she had read my book.

Bell, *Faces at the Bottom of the Well* at ix (cited in note 153). Professor Bell's pronouncement resulted in similar responses in legal scholarship as well as in more grassroots forums. See S.M. Miller, *Is Racism Permanent? A Symposium (Part 2)*, 3 Poverty & Race Research Action Council 1 (Jan./Feb. 1994) ("The durability of racism is inescapable. The charge of its permanence is too scary; I don't like acting—and living—with such little hope"); R. Jay Allain, *Is Racism Permanent? A Symposium (Part 2)*, 3 Poverty & Race Research Action Council 3 (Jan./Feb. 1994) ("In our case, while the dominant (white) culture has obviously thought too little about the costs of racism, the question about its permanence is somewhat absurd. . . . A more useful question is, 'What must be done to make racism less virulent?'"); John A. Powell, *Racial Realism or Racial Despair?*, 24 Conn. L. Rev. 533 (1992); Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 Yale L. J. 1880 (1981) (reviewing an earlier Bell work as perceptive but despairing and having the effect of chilling public interest fervor).

155. See Bell, *And We Are Not Saved* (cited in note 112); Bell, *Faces at the Bottom of the Well* (cited in note 153).

156. Districts within a state often have parallel contours for different functions. For example, the congressional districting plan that was challenged in *Hays* actually was first created to elect Louisiana's Board of Elementary and Secondary Education. See *Hays*, 115 S. Ct. at 2433.

issue in new Section Two challenges. There are still some cases that we had planned to bring.”¹⁵⁷

“That’s right,” Paul said. “The good news, as I said before, is that on remand in North Carolina, the district court let the North Carolina districts stand. It was a long opinion that struggled to apply the Supreme Court’s standard.¹⁵⁸ In it, the court raised questions aplenty about what kind of harm these white voters had suffered¹⁵⁹ and about whether it made sense to apply a ‘reverse discrimination’ kind of analysis to districting where all people are free to vote and no racial group’s vote is diluted.¹⁶⁰ I had hoped that, when this case was considered again by the Supreme Court, it would review the whole record as it was seen by the district court; I had hoped that the Court would find that District Twelve would survive specifically because the state did not draw the district where the Justice Department told it to.¹⁶¹ The fact that the state chose a different area would seem to be clear evidence that the district’s lines and location were motivated by party politics and not predominantly race. But, I have to tell you, I attended the most recent oral arguments in *Shaw* before the Supreme Court, and I would not bet on this happy outcome. Some members of the Court took the exact opposite position: that the fact that the state located the district where it did instead of where a more compact one could have been drawn means that the creation of this district was not narrowly tailored to the state’s compelling interest in meeting the requirements of the Voting Rights Act.¹⁶² The problem with the Court’s analysis is that it ties the state’s hands in the redistricting process. Paradoxically, such a rule would require the state to privilege race above all other political considerations in striving to meet the requirements of Section Two.

“The only morsel of good news coming from the Court is that standing can be questioned in these cases now because of the

157. In 1992, while African-Americans constituted 11% of the national population, they filled fewer than 1.5% of the elected offices in the United States. Douglas J. Amy, *Real Choices, New Voices: The Case For Proportional Representation Elections in the United States* 6 (Colum. U., 1993). While the racial identity of the representative does not necessarily equate with the degree of electoral success experienced by a particular racial group, this statistic would support the assertion that the work of the Voting Rights Act is not yet complete.

158. See *Shaw*, 861 F. Supp. at 408.

159. *Id.* at 423-27.

160. *Id.* at 427-28.

161. For a discussion of the Court’s seemingly broader standard in *Johnson*, 115 S. Ct. at 2475, see text accompanying notes 20-21.

162. See *Shaw*, 1995 WL 729891 (Dec. 5, 1995) (transcript of the oral argument).

Supreme Court's decision in *Hays*, but this really only weakens standing as to those plaintiffs who live outside the majority-black district. If the Supreme Court's handling of standing in *Johnson* is any indication, those challengers who reside within the district won't have to do more than assert their residency. They won't have to explain how they have suffered any representational harms.¹⁶³

"The bad news is that congressional districts have been struck down in Georgia and Texas. Only California is completely safe because the Supreme Court in a two-liner affirmed the district court's opinion.¹⁶⁴ Of course, we're taking the Texas case up to the Supreme Court and should hear something this year on that."¹⁶⁵

"Hold up, now, hold up, son." Evangeline Waters was waiving her arms and speaking from her place near the front. Ms. Waters had been around, some might say, as long as sin, and if she had something to say, why, she just said it. "Back up here just a minute. I want to go back to what my sister-girl Sheryl just said. What this professor has to say. That racism is as common as water and that the courts have plenty to drink . . . sounds like he's talkin' sense to me. Are we headed back up to those same folks who dealt us these two bad hands? Are we asking them to play us another round? Are we going to take our new cases to courts that now have a special license to deny us?"

"Now, I *know* we've had our history of troubles, and Lord knows, I know we're strong, but like they say, 'Fool me once, shame on you; fool me twice, shame on me.' It's been twice't already. My daddy didn't raise no fool. I sure hope you lawyers brought your own deck this time with some new cards ain't nobody can trump. Maybe this here professor's right. Maybe the courts aren't where we should be, and you *know* that's not easy comin' out of *my* mouth."

163. In *Johnson*, the Court disposed of the standing issue in one simple sentence: "As residents of the challenged Eleventh District, all appellees had standing." 115 S. Ct. at 2485.

164. The Supreme Court's little noticed decision in *DeWitt*, 115 S. Ct. at 2637, reads in its entirety: "With respect to questions 1 through 4 presented by the statement as to jurisdiction, the judgment is affirmed. With respect to questions 5 and 6, the appeal is dismissed." Questions one through four of the jurisdictional statement went to the *Shaw* claims; questions five and six dealt with the term limits and first amendment questions raised by the plaintiffs. The issues on appeal in *DeWitt* did not address the lower court's finding that the districting plan did not involve bizarrely shaped districts. Instead, the questions raised dealt with the deviations in population size and voting strength in the districts involved. See *DeWitt v. Wilson*, 63 U.S.L.W. 3917 (June 27, 1994) (statement of jurisdiction). Given the brevity of the opinion, it would be folly to speculate what message the Court intended to convey by allowing California's districting to stand.

165. See *Vera*, 861 F. Supp. at 1304.

Ms. Waters let her chuckle rumble awhile, as she shook her head. Those of us who knew her—just about everybody there—laughed too and answered, “*You know that’s right.*” Ms. Waters had been in just about every federal courthouse in this state, just a-banging on those doors of justice. Some of those judges had even learned to like her a bit, just so they could have a pleasant day for a change. Ms. Waters continued, “But seriously, I’m not saying that we should give up completely and forever on going to court. I do enjoy worrying those people.¹⁶⁶ But we also need to be wise here, use our God-given mother wit. Maybe if we see ourselves running into a problem with these districts, we need to zig-zag our way out, make some other way out of this here no-way.”

“Like how? Evangeline, either we’re able to elect some people or we’re not. Isn’t that the way it works? If we don’t go to the court, then where *do* we go? You think we can go to the legislators themselves and say, ‘Excuse me, Mister, please get up and let me have your seat?’ Shoot, even Rosa Parks had an empty white seat to sit in when she hopped up into that bus. Don’t seem to me like we have a peck of choices here.” It was Ms. Waters’s old friend, Evelyn Jenkins.

But Evangeline would not be deterred. “Well, if we are going back into the courts with these cases, we need to work outside the courts too. We need to come up with our own bumper stickers about what these *Shaw* and *Johnson* cases are doing not just to us, but to that democracy everybody all the time act so proud of. If *appearances* do matter so dog-gone much, then what about the appearance of an all-white Congress?

“It’s not that I have anything special against white folks. I could elect me a Mr. McLane, if he would run. I think Mr. McLane

166. Ms. Waters is an incarnation of a real person who, this Author is convinced, lives in many places in the South. I have met her while practicing in Arkansas. Derrick Bell has also described her living in Mississippi in the person of Mrs. Biona McDonald:

A final remembrance may help make my point. The year was 1964. It was a quiet, beat-hushed evening in Harmony, a small, black community near the Mississippi Delta. Some Harmony residents, in the face of increasing white hostility, were organizing to ensure implementation of a court order mandating desegregation of their schools next September. Walking with Mrs. Biona McDonald, one of the organizers, up a dusty, unpaved road toward her modest home, I asked where she found the courage to continue working for civil rights in the face of intimidation that included her son losing his job in town, the local bank trying to foreclose on her mortgage, and shots fired through her living room window. “Derrick,” she said slowly, seriously, “I am an old woman. I lives to harass white folks.”

Bell, 24 Conn. L. Rev. at 378 (cited in note 153).

here could represent me pretty well.¹⁶⁷ He already has in many cases." Miss Waters answered parenthetically, sensitive as she was to both speaking her truth and not offending her allies. She went on, "But the white folks that the white folks elect don't be looking out for me and mines.¹⁶⁸ I don't think the majority voters in my county would elect Mr. McLane, no matter how white his skin be. Do you? We ain't talkin' about no exceptions, here; we're talkin' about the rule, the majority rule. So I ask you, what about the appearance of an angry people whose votes never count? We all know what Langston Hughes said about a dream deferred,¹⁶⁹ don't we? What kind of democracy is it that sends our people packing when the first stiff wind blows?"

"We need to organize and get loud. If there is one thing I've learned from going to court all these years, it's that those judges are human underneath those black robes. I don't care whether you be talking about the justice of the peace or the justice of the Supreme Court. They do respond to pressures. We need to be pressing."

167. The meaning of authentic representation is hotly debated within the minority community. The argument often centers on whether "authentic representation" means (1) merely racially consistent representation, (2) representation which is committed to the needs of the minority community without regard to the representative's race, or (3) representation which is both consistent and committed to the needs of the racial community. Recent campaigning in Los Angeles for the Hispanic-majority District Five position on the School Board has given life to this argument again. In this election, David Tokofsky, a white school teacher residing in the district, is running against a Hispanic opponent. The race has resulted in debates within the community and in the press over the importance of representatives as role models and the meaning of authentic representation. See Seth Mydans, *In Los Angeles, Quandary for Hispanic Voters*, N.Y. Times A7 (June 2, 1995).

168. In a study of the roll-call voting patterns of legislators in Louisiana, Georgia, and Alabama, researchers found that the measure of black voting strength in the constituency has a positive and usually significant impact on the level of support that the legislator has on issues of importance to the African-American community. When black legislators are removed from the analysis, however, the black voting strength variable loses its explanatory power but generally remains positive. See Mary Herring, *Legislative Responsiveness to Black Constituents in Three Deep South States*, 52 J. Politics 740 (1990).

169. What happens to a dream deferred?
Does it dry up
like a raisin in the sun?
Or fester like a sore—
And then run?
Does it stink like rotten meat?
Or crust and sugar over—
like a syrupy sweet?

Maybe it just sags
like a heavy load.

Or does it explode?

Langston Hughes, *Harlem*, in Diedre Mullane, ed., *Crossing the Danger Water: Three Hundred Years of African-American Writing* 508 (Anchor, 1993).

"Yes, ma'am," Sheryl said, "We sure do. We need to come up with our own little sound bites just as catchy as 'political apartheid.' We need to stop talking about majority-minority districts, a lingo that often just serves to confuse, and start talking about 'integration empowerment districts' because that's what they are. We need to think broadly and creatively like you say, and that's the reason we're all here today. And while we're on the subject of alternatives to districts, let me just say that there is another way of looking at this. We could take a second look at at-large voting."

"No, no, no, girl, I didn't mean to go *that* far. Miss Evelyn would be pleased to know I haven't lost *all* my sense," Ms. Waters said. "At-large elections mean defeat, consistent, complete defeat. Winner-take-all defeat, and we never be the winners."¹⁷⁰

"I don't mean the same kind of at-large elections that you're talking about, Ms. Waters. We all know the problem with majority-vote, at-large elections. Racial bloc voting means that we never are able to elect the candidates of our choice. It's the very evil that the Voting Rights Act was amended to counteract.¹⁷¹ But what about alternative at-large electoral systems like cumulative voting?"

Faces looked out at Sheryl like she was speaking some foreign language. Racial bloc voting, *that* we understood. We'd seen racial bloc voting at work every time we supported a candidate, particularly a black candidate. Black voters voted for the black candidate, and

170. Professor Lani Guinier's extensive body of work has focused on the problem of the "permanent minority." See generally Guinier, *Tyranny of the Majority* (cited in note 7). The Supreme Court also succinctly stated the effect of racially polarized voting in creating the permanent minority in *Rogers*: "Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race." 458 U.S. at 623.

171. In *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), the Supreme Court first articulated a right to be free of systematic dilution of the constitutional right to suffrage. In *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969), the Court applied *Reynolds* to hold that the dilution of minority voting strength is actionable under the Voting Rights Act. Four years later, in *White v. Regester*, 412 U.S. 755, 766-70 (1973), the Court set forth the elements necessary to establish a prima facie case of minority vote dilution which set forth a discriminatory effects test. In *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion), however, the Supreme Court retreated from its former position in *White* and held that in order to establish a violation of either Section Two of the Voting Rights Act or of the Fourteenth or Fifteenth Amendments to the Constitution, the plaintiff in a vote dilution claim had to prove that the challenged mechanism was intentionally adopted or maintained for a discriminatory purpose. The requirement to prove discriminatory intent in a Section Two claim was a departure from the usual impact analysis applied by courts prior to *Bolden*. In response to this departure, Congress amended Section Two "to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test,' applied by this Court in *White v. Regester*." *Gingles*, 478 U.S. at 35.

white voters voted for the white candidate. There was minimal cross-over going both ways, but for the most part African-American voters became the permanent minority, their votes consistently diluted by the permanent white majority.¹⁷² But "cumulative voting," this was something new.

Sheryl explained, "Under cumulative voting each voter gets as many votes as there are seats to fill. The voter can accumulate as many of his or her votes on a particular candidate as she or he wants. If you have five seats, you have five votes. You can vote for the same candidate five times or you can vote for two candidates twice and a third candidate once. You can vote according to how strongly you feel about the field of candidates. A simple formula is used to figure out the threshold percentage of the vote required to fill all seats, and the seats are filled with those candidates who received enough of the votes."¹⁷³

"It doesn't matter where you live. District lines are no longer a concern. The shape of a district is not scrutinized. Every little ripple is not asked to be explained by something other than race. The beauty of it is that cumulative voting not only allows minorities to elect candidates of their choice but the rules of the game are completely race-neutral."

Sheryl went to the old black board behind the desk, removed the Georgia maps, erased Crispus's numbers, and explained the system again, this time drawing pictures to contrast the three different election systems: (1) subdistricts, (2) traditional at-large systems, and (3) at-large systems with cumulative voting. The different schemes floated above a cloud of chalky erasures.

She described the advantages of cumulative voting. "Not only is cumulative voting safer from constitutional challenge under the Equal Protection Clause, but it also solves the problem of the frustrated minority, whoever and wherever they may be. Those white voters who are now disgruntled members of black-majority districts would have nothing to complain about under a cumulative voting system because they would be able to vote effectively for their favored

172. "For purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates." *Gingles*, 478 U.S. at 62. Under *Gingles*, proof of racially polarized voting is necessary to make out a prima facie Section Two vote dilution claim. *Id.* at 50-51.

173. The simple formula used to determine the threshold for electoral success is $1/1+$ [number of seats]. Edward Still, *Alternatives to Single-Member Districts*, in Davidson, ed., *Minority Vote Dilution* at 256 (cited in note 44).

candidate. The black minorities in the many remaining minority-black districts could cumulate their votes with African-Americans in other parts of town. It offers attractions to other stifled minority groups, including partisan minorities: Republicans in majority-Democrat areas and Democrats in majority-Republican areas. And, inter-racial coalitions would be facilitated. It is an active program to work against the racial balkanization that the Supreme Court contended has occurred as a result of subdistricts. African-Americans, or any other significant minority, would have more influence under cumulative voting because their political power would not be isolated in one or two seats carved out of clear geographical territory."¹⁷⁴

Jozetta Freeman, who lived in the Northwest corner of the state, listened intently. She had almost given up on meetings like these because every time districts were drawn, even in response to litigation, her community was always drawn into a majority-white district. She was just too widely separated from other black populations to make it in to a majority-black district. It wasn't that she lived in a white neighborhood, either. She just lived in a small black enclave of a larger white area.¹⁷⁵ Most of the time, in her district, it wasn't that her candidate lost; it was that her candidate never even ran. There was no point in wasting the money, time, and soul on losing.

Many others in Jozetta's community didn't even vote, but she tried to spur them on with arguments about becoming an influential voting constituency, maybe the margin between winning and losing

174. For an extended discussion of the advantages of cumulative voting both to elect representatives and to be used by representatives when they are voting on issues in the legislative body, see Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 Va. L. Rev. 1413 (1991); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 Mich. L. Rev. 1077 (1991).

175. Small, widely scattered southern towns with black populations have evolved as the result of early black desire for independence from their former white masters and the historical forces that created new segregations and reinforced old ones. For a historical case study of the black small town phenomenon in the rural South, see David Lee, *Black Districts in Southeastern Florida*, 82 Geographical Rev. 375, 375-87 (1992).

Because of the rural history of the South, the data reflecting higher rates of African-American "suburbanization" in the South than in the North can be deceiving. The South differs from the North historically in that African-Americans have traditionally lived outside of central cities. As urbanization moved into the South in the twentieth century, many rural blacks became categorized as "suburbanites" without having moved anywhere. However, "black isolation is generally greater in the suburban areas of the south, owing to the larger representation of blacks within southern suburbs." Massey and Denton, *American Apartheid* at 69, 73 (cited in note 33).

for some candidate who might remember you after election day.¹⁷⁶ But who might not.¹⁷⁷ Half the time, she felt the words ring hollow in her own ears as she spoke them.

176. Subdistricting remedies seek to gain certain minority representation in a limited number of seats by giving up the influence that the minority might have had on the governing body as a whole under a traditional majority-vote at-large system. See *Rural W. Tenn. African-American Affairs Council, Inc. v. McWhorter*, 836 F. Supp. 453, 465 (W.D. Tenn. 1993). However, given racially polarized voting and its consequential permanent racial minority whose interests can always be forfeited when they conflict with those of the permanent majority, those in power often make the strategic decision to disregard the influence of the permanent minority. Of course, this dynamic continues to operate at the governing body level where there is racially polarized voting and an African-American minority. See Guinier, 77 Va. L. Rev. at 1482-84 (cited in note 174).

How to determine at what level a politically cohesive minority becomes pivotal in its influence is no easy task. Anecdotal evidence shows that influence districts represent the interests of both African-Americans and lower income whites through bi-racial coalitions. See Carol M. Swain, *Black Faces, Black Interests: The Representation of African-Americans in Congress* 145-67 (Harvard U., 1993) (describing Robin Tallon's representation of the Sixth District of South Carolina, which was nearly 40% black, the remainder being split between working-class whites and wealthy beachfront home owners and merchants, and describing Tim Valentine's representation of North Carolina's Second District, which during his term also was 40% black). The Supreme Court has thus far refused to decide whether influence dilution claims, under which a minority-group argues that a districting plan has deprived them of an "influence district" in which it would have constituted an influential minority, are cognizable under Section Two. See *Holder*, 114 S. Ct. at 2596; *Voinovich v. Quilter*, 507 U.S. 146 (1993). However, the Supreme Court summarily affirmed a district court opinion that held that the existence of minority influence districts should be considered under the "totality of circumstances" for purposes of a Section Two challenge to a state senate reapportionment plan that the plaintiffs contended had too few majority-black districts. *Rural West Tennessee African-American Affairs Council, Inc. v. McWhorter*, 877 F. Supp. 1096 (W.D. Tenn. 1995), *affd. sub. nom. Rural West Tennessee African-American v. Sundquist*, 116 S. Ct. 42 (1995). Certainly, Justice Scalia has been a proponent of the superiority of influence districts, in which minority candidates may lose due to racially polarized voting, under the theory that spreading influence in as many districts in a state as possible results in more accountable legislation. See *Shaw*, 1995 WL 729891 (Dec. 5, 1995) (transcript of the oral argument).

177. Determining the degree of responsiveness to African-American political interests first requires identification of African-American interests. This identification of interests tied to racial identity is no easy task and is fraught with the peril of overly broad generalizations. However, social science research does support the existence of a transcendent community of similar political goals based upon race.

The National Black Election Study ("NBES") is one of the most recent and extensive studies of black attitudes toward racial identity and public policy issues. Katherine Tate, *From Protest to Politics: The New Black Voters in American Elections* 19 (Harvard U., 1993). The NBES revealed that when asked whether what happens to African-Americans as a group affects them personally, 75% of the respondents to the NBES said yes. *Id.* at 25. When asked how close they felt in "ideas and feelings about things to Blacks," 56% responded that they felt very close, 38% felt fairly close, and only 7% felt "not too close" or "not close at all." *Id.* at 24-25.

Political racial identity arises, in part, from the perception that institutionalized, if not individual, racism persists. This perception evolves into a different set of political values and interests among African-Americans when compared to whites. A 1991 survey revealed that 85% of the black respondents disagreed with the statement: "Discrimination against Blacks is no longer a problem in the United States." Of that 85%, 65% "strongly disagreed." By contrast, the majority of whites surveyed during similar periods have come to believe that substantial progress has been made in race relations and that race no longer plays a role in determining whether African-Americans advance. *Id.* at 22. Not surprisingly, given the differing

At one of these meetings, Jozetta heard one person claim—as if to soothe her for her sacrifice to the struggle—that she would really be represented in the state house by some fellow over in the southeast corner of the state because he was elected from a majority-black district. They called it virtual representation, she recalled.¹⁷⁸ She remembered thinking, “He’s virtually my representative. What’s that mean, ‘virtually’ as in *almost*?” She was happy for the gentleman’s success, but, *really*, didn’t that poor man have enough to do without worrying about someone who couldn’t even vote for him?¹⁷⁹ Sheryl’s

perceptions of blacks and whites on progress in the area of race relations, surveys also yield data demonstrating different levels of commitment to what some social and political scientists have termed “the civil rights agenda.”

African-Americans are disproportionately negatively impacted by social and economic problems that affect all groups of people to some degree. African-Americans suffer disproportionately from unemployment, resulting poverty, inferior educational opportunities, poor health care, resulting infant mortality and higher adult morbidity rates, drug addiction, criminal incarceration, and victimization. The gap between black and white in these areas has widened during the past decade. Swain, *Black Faces, Black Interests* at 7-10 (cited in note 176). Naturally, these disproportionately experienced problems lead to different political needs and values among blacks and whites concerning the urgency to expend governmental resources on solving them. Tate, *From Protest to Politics* at 36-37.

Even in the area of foreign affairs, blacks and whites often hold significantly different opinions. For example, during the Persian Gulf War the disproportionately black infantry of the United States Army voiced different feelings about whether President Bush should have given sanctions more time to work against Iraq. Thirty percent of the Army’s troops in Operation Desert Storm were black even though African-Americans make up just 14% of the population between the ages of 18 and 24. This disproportionate representation of blacks among those most endangered by warfare is likely responsible for the fact that twice as many African-Americans as whites thought that Bush should have given sanctions more time to work. Higginbotham, Clarick, and David, 62 *Fordham L. Rev.* at 1638-39 (cited in note 37).

Elected representatives must make the political decisions that directly impact their constituencies. The political goals of African-Americans are more likely to be submerged by the conflicting goals of whites in those situations where a pattern of minority vote dilution exists, such as in those cases where there is racially polarized voting and political cohesion of racial groups. Unless bi-racial coalitions can be built in those situations in which African-Americans are a substantial minority, responsiveness to black political goals will not likely be effective under our majoritarian system. See Swain, *Black Faces, Black Interests* at 145-69 (cited in note 176).

178. The term “virtual representation” refers to the principle that the interests of a minority in one district may be represented by a more like-minded representative in another district elected by a majority constituency with political interests similar to that otherwise unrepresented minority. See Guinier, 77 *Va. L. Rev.* at 1427 n.49, 1432-52 (cited in note 174).

179. Virtual representation may have more value to the non-constituent in certain contexts than in others. For example, a non-constituent may benefit when the virtual representative votes favorably on a policy matter that affects all constituents of the legislative body. The role of the representative, however, goes beyond those issues reflected in the results of a roll-call vote. In addition to voting on important issues as they arise in the legislative body, elected legislative representatives also spend a great deal of their time on issues directly affecting their particular constituency. Some of this constituency service involves more individualized attention than others. Representatives seek money for improvements to their local communities, thus affecting larger groups of their constituents. Representatives also serve

idea of actually being able to cast a meaningful vote appealed to Jozetta.

"Can we do that in this country? Are you allowed to vote more than once for the same person?" Jozetta asked.

"Well, it is being done in places in this country right now. It was done for one hundred years in the Illinois state legislature. Cumulative voting has been adopted as a remedy in Alamogordo, New Mexico, as part of a settlement in a voting rights case, and in Sisseton, South Dakota, in a voting rights case involving at-large school board elections.¹⁸⁰

"Cumulative voting has also been adopted as part of a settlement in Alabama in a case called *Dillard v. Crenshaw County*.¹⁸¹ People are beginning to study the results of these types of elections more closely. In Alabama, for instance, those places that have used cumulative voting for local elections have found that boards and councils previously made up of white male Democrats actually do diversify and become more representative of the wide range of views, needs, and life experiences reflected in the community. These elections have resulted in truly integrated bodies made up of women, men, whites, blacks, Republicans, and Democrats."¹⁸²

individual constituents by assisting them in their dealings with governmental bureaucracies. Ordinarily, these constituency services are provided only to those individuals who live within the representative's district.

Despite Ms. Freeman's cynicism, a few African-American members of Congress do actually serve people residing outside of their district. These non-constituents frequently call because of the representative's high profile identification with the minority community. In a telephone interview with Gary Cox, Executive Assistant to Congresswoman Cynthia McKinney of the challenged Eleventh Congressional District in Georgia, Mr. Cox stated that the Congresswoman's office had a constituency service caseload of 1,012 as of April 30, 1995. A full 30% of all Ms. McKinney's constituency calls received come from people calling from outside of Ms. McKinney's district for assistance. Approximately 80% of these calls are from low-income minority individuals. The reason that the majority of these individuals give for calling Ms. McKinney's office is that she has a reputation for serving the needs of low-income African-Americans. The policy of Congresswoman McKinney's office is to refer these citizens first to their own representative. The caller is also informed, however, that Ms. McKinney is willing to work with them if they are not satisfied with the results of their own representative's efforts. Mr. Cox stated that the Congresswoman receives a large number of return calls from those people referred elsewhere. Telephone Interview with Gary Cox, Exec. Assistant to Congresswoman McKinney (June 1, 1995).

180. Bernard Grofman, Lisa Handley, and Richard Niemi, *Minority Representation and the Quest for Voting Equality* 126 (Cambridge U., 1992).

181. 649 F. Supp. 289 (M.D. Ala. 1986), *affd.* in part and *revd.* in part 831 F.2d 246 (11th Cir. 1987), on remand 679 F. Supp. 1546 (M.D. Ala. 1988).

182. See Richard H. Pildes, *Cumulative Voting in the United States*, 1995 U. Chi. L. Forum 241.

"Yes, but has it ever been ordered as a remedy, outside of the settlement context?" Paul asked, already knowing the answer.¹⁸³

"No, not yet, but given the reservations expressed about drawing district lines based on race in *Shaw* and *Johnson*, maybe if we keep advocating for cumulative voting, everyone might see the advantages."

"Come on, Sheryl. Let's get real," Crispus interrupted. "Isn't it true that courts, and at least two Supreme Court Justices,¹⁸⁴ have recently shown an active dislike for cumulative voting?"

"So far, that's true, but at least they recognized that cumulative voting was a logical remedy, even if it drove them to distraction to consider it.¹⁸⁵ Just remember that Justice Clarence Thomas's disparaging remarks in *Holder v. Hall* were clearly dicta and only Justice Scalia joined his concurrence."¹⁸⁶

183. Cumulative voting has been rejected by courts considering it as a remedy in most cases in which it has been proposed. See *Nipper*, 39 F.3d at 1545 (rejecting cumulative voting as a remedy to a challenge against at-large, state trial court electoral systems because it conflicts with the state policy favoring numbered-post elections); *L.U.L.A.C.*, 999 F.2d at 876 (holding that cumulative voting mechanisms preserve at-large elections, but are not remedies for the particular structural problem that the plaintiffs chose to attack); *McGhee v. Granville County*, 860 F.2d 110, 119-21 (4th Cir. 1988) (reversing the district court's alternative voting remedy proposed by the plaintiffs and holding that subdistricts were the appropriate remedy to a Section Two violation, particularly when the defendant proposed subdistricts as the appropriate remedy).

In one aberrational Section Two challenge, the district court appeared to be the only proponent of a cumulative voting plan for elections to a Maryland county commission. The parties could not agree on a remedy, and indeed the county would not even produce one. The district court attempted twice to impose some form of cumulative voting on the parties. The Fourth Circuit continually reversed, however, and finally ordered that the plaintiff's subdistricting remedy be implemented. See *Cane*, 59 F.3d at 165.

184. See *Holder*, 114 S. Ct. at 2601 (Thomas and Scalia, J.J., concurring) (lamenting that the reach of Section Two has extended beyond challenges to obstacles to the ballot box and warning that "radical departures from the electoral systems with which we are most familiar," to make way for cumulative voting and the single transferable vote, are the next logical step on the way to the undesirable end of proportional representation).

185. In a similarly off-hand way, earlier courts have recognized that cumulative voting is one way to provide minority representation in an at-large multimember system. See *Whitcomb v. Chavis*, 403 U.S. 124, 156-57 (1971) ("Indeed, it would be difficult for a great many, if not most, multi-member districts to survive analysis under the District Court's view unless combined with some voting arrangement such as proportional representation or cumulative voting aimed at providing representation for minority parties or interests"); *Bolden*, 446 U.S. at 79 (citing *Whitcomb* and quoting the language referenced above).

186. See 114 S. Ct. at 2601 (Thomas and Scalia, J.J., concurring). The irony of having the Supreme Court's only sitting African-American Justice reject any protection of minority voters that extends beyond access to the ballot box is not lost on this Author. The sense of irony is deepened, given the origins of *Johnson*. Justice Thomas not only was born in Georgia, but he was born in Pin Point, Georgia, within the district lines of the Eleventh. During his confirmation hearings, Justice Thomas frequently referred to this place and the descriptions of his impoverished childhood there. See generally Donald P. Judges, *Confirmation as*

Paul jumped back in, "Justice Scalia and Justice Thomas aren't the only two who don't like these at-large remedies. By federal statute, all congressional representatives must be elected from districts.¹⁸⁷ The remedies you are suggesting would not even be lawful in the congressional cases we've been discussing here."

"Maybe not yet," Sheryl answered, conceding almost nothing. "The federal statute that you're talking about was enacted to protect minorities from the abusive nature of unmodified at-large elections to the United State Congress, but it is an African-American woman, Representative Cynthia McKinney, out of the challenged Eleventh District in Georgia, who is sponsoring a bill to amend that statute to allow modified at-large elections.¹⁸⁸ The bill now has a diverse coalition of sponsors who see that allowing alternative at-large elections has the potential to serve everyone's interests.¹⁸⁹ Admittedly, until this bill passes these remedies are best tried outside of the federal electoral context."

Other lawyers in the room jumped in. "What about the famous Section Two proviso¹⁹⁰ that courts love to cite as a clear statement that Congress didn't mean for Section Two to guarantee proportional representation?¹⁹¹ Isn't this proportional representation?"

Consciousness-Raising: Lessons for the Supreme Court from the Clarence Thomas Confirmation Hearings, 7 St. John's J. L. Comm. 147 (1991).

187. See 2 U.S.C. § 2c (1994 ed.).

188. See Benjamin Sheffner, *New McKinney Bill Allows Multi-Member Districts for Congress*, Roll Call 14, 20 (Oct. 30, 1995).

189. *Id.*

190. The proviso in 42 U.S.C. § 1973(b) reads: "That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

191. The tension between the meaning of the Section Two proviso and the social good of using rough proportionality as a benchmark to determine the existence of unlawful minority vote dilution has been with the courts since *Gingles*. See, for example, *Gingles*, 478 U.S. at 84-85; *Holder*, 114 S. Ct. at 2597, 2609; *Johnson v. DeGrandy*, 114 S. Ct. 2647, 2658 n.11 (1994). Many courts point to the proviso either to deny that vote dilution has occurred in a particular circumstance, see *Magnolia Bar Association, Inc. v. Lee*, 793 F. Supp. 1386, 1398 n.14 (S.D. Miss. 1992) (finding no vote dilution in a challenge to a state's method of electing state supreme court justices even though there was not proportional representation), *affd* 994 F.2d 1143 (5th Cir. 1993), or to deny plaintiffs a remedy that would provide for the most complete relief to a vote dilution claim. See *McGhee*, 860 F.2d at 120 (reversing the district court's adoption of the plaintiff's limited voting remedy and holding that the defendant's plan should not have been rejected, relying upon the proviso as preventing "a court from rejecting a remedial legislative districting plan which provides the maximum opportunity for representation possible by that means for the sole reason that the representation possible does not sufficiently approximate proportionality"); *Houston v. Haley*, 859 F.2d 341, 342 (5th Cir. 1988) (setting forth the court's remedial task as follows: "we must evaluate the use of race-conscious remedies to create a more fluid political process without countenancing any move toward installing a structure of proportional representation not in keeping with our theory of government"); *Gunn v. Chickasaw County, Mississippi*, 705 F. Supp. 315, 324 (N.D. Miss. 1989) (rejecting both remedial plans presented to the court because they "take as their foundation the creation of 'safe' districts of at

“You mean the Dole compromise language?”¹⁹² Sheryl quickly answered, “First of all, cumulative voting does not guarantee that any particular racial group will have people of its own race elected.¹⁹³ As Ms. Waters pointed out, someone like Paul could run and if he had sufficient support coming from enough quarters, he could win. It merely places in all voters’ hands an equal opportunity to elect candidates of their choice. To the extent that cumulative voting helps build multi-racial coalitions, racially predictable outcomes are less likely to occur than our traditional subdistricting methods.

“Second, proportional representation is used by political scientists a little less cavalierly than it is by the courts or Congress. Proportional representation is used not to refer to racial quotas for those elected but to refer to a system that generally maximizes the number of voters who are able to elect a representative to voice their interests and concerns.¹⁹⁴ Some systems of voting have more proportional results than others. Given the many different types of proportional systems that are and have been used in the world, political

least 65 percent black populations. Such a division is contrary to the intent of Congress in enacting Section 2(b)” (citation and quote to proviso omitted).

192. The proviso was drafted and submitted by Senator Robert Dole to assuage the fears of those Senators who viewed the House’s version, H.R. 3112, as an invitation for proportional representation and electoral quotas. Senator Dole explained that the compromise was intended both to embody the belief “that a voting practice or procedure which is discriminatory in result should not be allowed to stand, regardless of whether there exists a discriminatory purpose or intent” and to “defineat[e] what legal standard should apply under the results test and clarify] that it is not a mandate for proportional representation.”

Chisom, 501 U.S. at 398-99 n.26.

193. Justice Souter explained his construction of the various meanings and usages of proportional representation in the Court’s recent opinion in *Johnson v. DeGrandy* as follows:

“Proportionality” as the term is used here links the number of majority-minority voting districts to minority members’ share of the relevant population. The concept is distinct from the subject of the proportional representation clause of § 2, which provides that “nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” This proviso speaks to the success of minority candidates, as distinct from the political or electoral power of minority voters. And the proviso also confirms what is otherwise clear from the text of the statute, namely that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.

DeGrandy, 114 S. Ct. at 2658 n.11 (citations omitted). Justices Thomas and Scalia took issue with Justice Souter’s definition of the meaning of the proviso during the very same term in a concurring opinion. See *Holder*, 114 S. Ct. at 2610 n.26 (Thomas and Scalia, J.J., concurring) (challenging the limited meaning attributed to the proviso by Justice Souter speaking for the Court in *DeGrandy*).

194. Amy, *Real Choices, New Voices* at 24-26 (cited in note 157).

scientists refer to cumulative voting as a 'semi-proportional' system.¹⁹⁵ Cumulative voting is only marginally better at achieving proportional representation than subdistricting. Some democratic European countries have far more proportional systems of voting than we do.¹⁹⁶ But none of these systems guarantee the race of the candidate selected by any group of voters. When and if we go for cumulative voting as a remedy in a case, we will need to spend a lot of time educating the courts about the many ways the words 'proportional representation' are used."

Ozell Franklin asked, "What about the fact that subdistricting seems to be built into the law of Section Two cases? That first requirement in *Gingles* still says plaintiffs must prove that they are able to constitute a majority in a single-member subdistrict?¹⁹⁷ It sounds like from what Paul is saying that *Shaw* is being used by district courts to reinforce the compactness requirement even more than before."

Sheryl, again, was ready with her reply. "There are two ways of looking at the compactness requirement. First, you could say that the Court didn't mean for geographic compactness to be the test in every Section Two voting rights case. It was the right test for that case. Take, for example, the test for proving a prima facie case of employment discrimination under Title VII. That test was first set out in *McDonnell Douglas Corp. v. Green*,¹⁹⁸ a rehire case, and of course that prima facie standard included elements that made sense in a hiring case. You had to prove that you applied for the job but

195. *Id.* at 186-87. Other semi-proportional systems include limited voting and the single nontransferable vote. *Id.* at 232-33.

196. Proportional representation systems vary greatly. The three basic forms are (1) party list, (2) additional member, and (3) single-transferable vote. *Id.* at 227-232. The single-transferable vote has been advocated by some legal scholars in this country as a possible remedy in voting rights cases. See Dana R. Carstarphen, *The Single Transferable Vote: Achieving the Goals of Section 2 Without Sacrificing the Integration Ideal*, 9 *Yale L. & Policy Rev.* 405 (1991). Under the single-transferable vote system, often called preference voting, the voter ranks his or her candidates by preference. A threshold of inclusion based upon the same formula applied in cumulative voting is calculated, and when that threshold is met for a particular candidate the voter's vote is transferred to his or her next preferred candidate. This method of voting insures that virtually no vote is wasted and results in high voter satisfaction. *Id.* Another advantage of preference voting over cumulative voting is the increased likelihood that the voters will elect more than one minority candidate when sufficient support exists for more than one. Some critics of cumulative voting have pointed out that minority populations large enough to elect two candidates under either a single-member subdistricting system or a preference voting system might be able to elect only one under a cumulative voting method, particularly if the field is crowded with candidates and the vote fragmented among them. See Robert Brischetto, *Cumulative Voting as an Alternative to Districting: An Exit Survey in 16 Texas Communities*, 4 *Poverty & Race Research Action Council Researchers Rep.* 5-8 (Sept./Oct. 1995).

197. *Gingles*, 478 U.S. at 50.

198. 411 U.S. 792, 802 (1973).

weren't chosen, right? Those hiring elements don't make sense in a pay discrimination case, do they? In a pay discrimination case, you have to prove something else to win; you have to prove that you were paid less than a similarly situated person of a different race, right?¹⁹⁹

"Well, the argument should work the same way with the prima facie case in *Gingles*. The *Gingles* plaintiffs challenged at-large elections. They targeted the at-large system as the cause of the vote dilution they experienced. The plaintiffs were thinking about subdistricts as the remedy at the time they brought the action, and the Court was thinking about subdistricts as the remedy when it decided the case. Naturally, such a theory of the case would have resulted in a prima facie standard that included references to single-member subdistricts. Subdistricts became the relevant benchmark for that particular at-large challenge. Just as *McDonnell Douglas* was a flexible standard²⁰⁰ that could incorporate new elements, so too should *Gingles* be adapted to reflect what is really being targeted as the wrong. Even the language in *Gingles* suggests this argument.²⁰¹

"Or, if we are somehow stuck with the *Gingles* geographically compact subdistrict test, we can remind the court that geographic compactness is used to determine liability. Liability is one thing, remedy is another.²⁰² We could argue that cumulative voting is the requested remedy. While geographic compactness may be relevant as

199. See *Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333, 338 (7th Cir. 1993) (presenting the elements of a prima facie case for salary discrimination under the Equal Pay Act); *E.E.O.C. v. Reichhold Chemicals, Inc.*, 988 F.2d 1564, 1569-70 (11th Cir. 1993) (same); *Thompson v. West*, 883 F. Supp. 1502, 1509 (M.D. Ala. 1995) (same); *E.E.O.C. v. Grinnel Corp.*, 881 F. Supp. 406, 410 (S.D. Ind. 1995) (same); *Williams v. Krug Lincoln-Mercury*, 848 F. Supp. 763, 769 (E.D. Mich. 1994) (same); *Gibson v. American Library Assn.*, 846 F. Supp. 1330, 1337 (N.D. Ill. 1993) (same).

200. The Court in *McDonnell Douglas* noted that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n.13.

201. The *Gingles* opinion contains a disclaimer similar to the one in *McDonnell Douglas*: "[W]e have no occasion to consider whether the standards we apply to respondents' claim . . . are fully pertinent to other sorts of vote dilution claims." *Gingles*, 478 U.S. at 47 n.12.

202. This second argument, attempting to resolve the geographic compactness test with the need to prove vote dilution outside the context of subdistrict remedies, may not be well-received by the Eleventh Circuit given its recent decision in *Nipper*, 39 F.3d at 1494. In *Nipper*, the Eleventh Circuit held that the liability and remedy phase in a minority vote dilution case are inextricably bound together. If there is no remedy, there can be no liability. "The inquiries into remedy and liability, therefore, cannot be separated: A district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system." *Id.* at 1530-1531.

a standard benchmark to measure whether vote dilution has occurred, it does not dictate remedy.²⁰³

"At the remedy stage, you all know how the state defendants have an opportunity to talk about the state's legitimate interest in the challenged electoral systems?²⁰⁴ You've heard them all before, the reasons why states want to keep at-large electoral systems. However, we can also talk about the many ways that cumulative voting preserves the state's interests in at-large elections."²⁰⁵

The heat and humidity in the room was building as the afternoon sun hit. Floyd Garrison yanked open as many of the old windows as he could. Many were warped shut. But the heat outside was just as still and humid as it was on the inside. Women made fans out of what paper they had. Men began to peel off their suit coats and loosen their ties. An old square floor fan was located and set to whirring in the corner of the room, throwing more noise than breeze.

And all the while, the lawyers kept on arguing about whether cumulative voting was legally feasible. Others in the room were still pondering its possibilities and implications in other terms. Judge Johnson was considering whether it might be the answer to the problem posed by the current statewide elections to the state's five-member supreme court. The black population was too dispersed in the state as a whole to draw a district that would result in the election of even one justice of their choice. Jozetta Freeman was considering whether there were enough black people in her county, most of whom

203. For further development of the arguments in favor of a more expansive reading of the *Gingles* case, see Karlan, 24 Harv. C.R.-C.L. L. Rev. at 202-13 (cited in note 10).

204. At both the liability and remedy stages, the courts in Section Two cases consider the state's interest in maintaining the electoral system as challenged. See *Houston Lawyers Assn.*, 501 U.S. at 426-27 ("A state's justification for its electoral system is a proper factor for the courts to assess in a racial vote dilution inquiry").

205. The state's interest in at-large election systems is articulated differently depending upon whether the election is to a legislative or judicial office. If the challenged electoral system results in the election of a judge, the state's interest is usually stated in terms of the inherent need for the appearance of an impartial judiciary, beholden to everyone and no one. This interest dictates that the judge's jurisdictional and electoral base be identical in order to avoid the appearance or reality of unfairness when a voter squares off against a non-voter in litigation before the court. Subdistricts usually are associated with creating constituencies, and constituencies are incongruent with the judicial role. See *Cousin v. McWhorter*, 46 F.3d 568, 574, 576-77 (6th Cir. 1995); *Nipper*, 39 F.3d at 1547 (Edmonson, J., concurring); *L.U.L.A.C.*, 999 F.2d at 868-69. To the extent that at-large systems are used to elect legislators, the state interest in the electoral structure is expressed as the accountability it generates among all of the legislators for the total geographic community embraced within the larger boundary. See *Williams v. Orange County, Florida*, 783 F. Supp. 1348, 1356 (M.D. Fla. 1992); *Jenkins*, 780 F. Supp. at 238. Whether the state's interest resides in jurisdictional linkages as it does in judicial elections, or in accountability as it does in legislative elections, cumulative voting preserves both because the at-large character of the election remains.

lived in small racially isolated pockets like hers, to elect one person to the county commission.

But it was state representative Ben Walters who stood to ask the next question. "If we were to seriously consider this idea as a real strategy for electoral success, I want you to know that I have some serious reservations and concerns. My concerns go toward something that has nothing to do with high-flung legal arguments or even important-sounding discussions about whether these systems are more or less democratic than the system of government we have now. My concerns go to something a little bit closer to the ground: money. I keep thinking, what would I do if I had to run in a multi-member at-large system instead of a single-member subdistrict? I would have had a whole lot more ground to cover. A couple of different media markets. More areas to organize. More headquarters to rent. More flyers and signs to print. More money. I don't know if our people have that kind of money to get into politics. I think we need to keep that in mind as we look at this. For those of us who entered politics on a shoestring, our shoestrings may not be long enough to lace up that much territory."²⁰⁶

Judge Johnson said, "That's a good point, Ben, and I think that we should definitely keep that in mind as we're thinking about whether to really use this theory. Is it possible to shrink the size of a larger district like the one that Ben is referring to?"

Sheryl answered, "Well, we have to meet the one-person-one-vote requirement,²⁰⁷ which means that the districts have to be equi-populous. And under *Holder v. Hall*,²⁰⁸ we can't really challenge the number of seats to try and create more seats and shrink the districts that way. But we could tinker with the borders of the larger districts within those constraints. Perhaps we could look at the state in terms of scaled-down regions and have multi-member at-large districts that are regionally bounded. For instance, this state has long been talked about in terms of its different regional interests. There's the delta

206. See Tate, *From Protest to Politics* at 75-108 (cited in note 177); Swain, *Black Faces, Black Interests* at 220 (cited in note 176).

207. See *Reynolds*, 377 U.S. at 558. However, the Court held the one-person, one-vote principle inapplicable to judicial elections. *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), affd. 409 U.S. 1095 (1973). Despite the holding in *Wells*, in those Section Two cases in which subdistricting results, the principle of equipopulous districting is usually followed. See *Hunt v. State of Arkansas, Eastern District of Arkansas*, Case No. PB-C-89-406 (unpublished consent decree) (on file with the Author).

208. 114 S. Ct. 2581, 2588 (1994) (holding that the plaintiffs could not bring a challenge to the number of seats allotted in the county commissioner form of government).

farming interests, the central region's industrial interests, and the mineral interests in the northern mountainous regions. Maybe we could use some of those regions to shrink the districts to regional rather than state-wide dimensions."²⁰⁹

"Humph, I don't know. Sounds an awful lot like what we had before to me. We'd have to shrink them down damn good to get them to where I could've afforded running in them," Ben said.

Judge Johnson leaned far back into his folding chair, his eyes lifted and squinting as though he were trying to figure a detailed math problem in his head. "I assume that someone would have to put a pencil to it to see if it would work. But cumulative voting just might be the answer. You know, we've been talking for years about our state's supreme court. Right now, you have to run statewide. Now that's mighty expensive. We've been trying to figure out a way to draw a single-member district that would have a majority-minority voting population. It can't be done given only five seats. I understand Ben's argument about the money and certainly at-large races would not be cheap, but in the case of our state supreme court, it may well be the only viable argument."

Sheryl answered, "Yes, and in many ways, judicial election cases provide the best test cases for the use of alternative remedies because, unlike the legislature where strong allegiances to territory and constituencies is what it's all about, the courts have found electing judges from specific territories troubling to say the least. As judges themselves, federal courts really do want to preserve the ideal of an impartial judiciary."²¹⁰

Paul smiled wryly and quipped, "At the risk of sounding like one of our past presidents in debate, *There you go again*, Sheryl. Isn't it a fact that courts have rejected the use of cumulative voting as a remedy in just the cases that you say provide the best opportunity for it: judicial election cases?"²¹¹

"But, Paul, in neither of those cases was the challenge really geared toward a cumulative voting remedy. In both *L.U.L.A.C.*²¹² and

209. For a feasibility study of just such a regionalized cumulative voting remedy in North Carolina, see Richard Morrill, *Reconciling Geography and the Politics of Race* (unpublished manuscript) (on file with the Author).

210. See *Cousin*, 46 F.3d at 576 (holding as a matter of law that Tennessee had a legitimate interest in preserving the at-large system of electing trial judges); *Nipper*, 39 F.3d at 1543 (indicating that the maintenance of the linkage between a trial court judge's territorial jurisdiction and electoral base serves to preserve judicial accountability); *L.U.L.A.C.*, 999 F.2d at 869-71 (recognizing the historic interest in having judicial members remain accountable to all voters in their district).

211. See *Nipper*, 39 F.3d at 1547; *L.U.L.A.C.*, 999 F.2d at 893-94.

212. 999 F.2d at 875-76.

Nipper,²¹³ cumulative voting was treated as the next best alternative to single-member subdistricts. The plaintiffs had their sights set on single-member subdistricts and so most of the energy was expended on crafting a challenge that would be best resolved by that particular remedy. Given the track record we're developing in judicial cases—I don't remember when we last won one of them²¹⁴—I say we have little to lose by not proceeding with a case that is built from the liability phase all the way to remedy on the idea of cumulative voting, not as an *alternative* remedy but as *the* remedy.”

Yusif Hasan, a short, bearded man, rose to ask a question. His was a relatively new presence in these meetings. He was the Imam of the Masjid in the state's capitol. His congregation was not large but it was attracting growing interest among some of the younger men in the city. Through community organizations that used the Masjid for their meetings, young men were finding alternatives to gang activity and were reaching out in the local community to take a stand against the drug trade. Even though not all were Muslims, many of the older adults in the community were joining in the activities geared toward safer streets and community cleanup.²¹⁵

213. 39 F.3d at 1545-46.

214. The challenge to Tennessee's system of electing state trial court judges was decided in favor of the plaintiffs in the original district court opinion and was among the most recent victories. *Cousin*, 840 F. Supp. at 1220-21. On appeal, however, the Sixth Circuit remanded the case for further consideration in light of its opinion. 46 F.3d at 577.

215. Islam, like Christianity, has many different branches or denominations. The two that have been most popular among African-Americans are Al-Islam and the Nation of Islam. Al-Islam is the traditional Muslim religion whose followers are guided by the Koran and the belief that Muhammad, born in 625 A.D., was the last prophet sent by God. The Nation of Islam is a branch of Islam founded by the Honorable Elijah Mohammed. The Nation of Islam directs its message mainly to African-Americans. Both Al-Islam and the Nation of Islam renounce alcohol and drug abuse. Both are emphatic about self-discipline, self-sufficiency, and hard work. Both have become a presence in many particularly urban African-American communities and among the disproportionately African-American prison populations. See R. LaMont Jones, Jr., *Spirituality Called Key to Urban Peace*, Pittsburgh Post-Gazette B8 (May 14, 1995); John Haman, *Allah Behind Bars: In Growing Numbers, Black Prisoners Find Strength in Islam*, Ark. Times 15, 15-17 (July 7, 1994); Michel Marriott, "Manhood" Classes at Mosque: *Hope, Discipline, and Defiance*, N.Y. Times A1 (March 5, 1994); Don Terry, *Farrakhan: Fiery Separatist in a Sober Suit*, N.Y. Times A1 (March 3, 1994). Like many African-American Muslims, Malcolm X, perhaps the most prominent American Muslim, began his study of Islam in the Nation of Islam and eventually became a practitioner of Al-Islam. See James H. Cone, *Martin & Malcolm & America: A Dream or a Nightmare?* (Orbis, 1991) (detailing the spiritual coming of age and leadership of both Martin Luther King, Jr., and Malcolm X).

The Nation of Islam and the level of its popularity in the black community has garnered far more publicity than the presence of the more inclusive Al-Islam. The greater public awareness of the Nation of Islam is due mainly to its controversial rhetoric concerning whites in general and Jews in particular, which has been denounced as racist and Anti-Semitic from both within the African-American community and without. So controversial are some of the beliefs of the

"May I be heard?" he asked.

"Yes, Imam Hasan. Please speak up," Floyd Garrison answered. The group had gotten louder as they discussed this new voting strategy among themselves.

"Thank you, sir. I take it that there would be no residency requirement with this cumulative voting? The candidates could live anywhere within the city as a whole."

"Yes, that would ordinarily be the case because there are no numbered place positions or subdistricts,"²¹⁶ Sheryl answered.

"Then, I don't think that I support this idea, at least not for elections to city councils and the like. We need people from our communities²¹⁷ to represent us, people who understand the problems that

Nation of Islam that there has been extensive debate about whether to include its leadership at the discussion table of other African-American leaders. See Benjamin Chavis, *The Farrakhan Sideshow*, N.Y. Times A19 (July 12, 1994); A.M. Rosenthal, *On My Mind: Supping with the Bigot*, N.Y. Times A15 (June 14, 1995); Alex Kotlowitz, *A Bridge Too Far? Benjamin Chavis*, N.Y. Times Mag. 41, 41-43 (June 12, 1994); Roger Wilkins, *A Loud Silence on Racism*, N.Y. Times A21 (Jan. 8, 1994).

216. Compare by analogy *Cane v. Worcester County*, 874 F. Supp. 687 (D. Md. 1995), in which the district court was able to fashion a remedy that provided for a subdistricted primary and a cumulative at-large general election to a county commission. African-American voters would be able to elect a candidate in the Democratic primary out of one subdistrict, because of the split in the white vote along party lines. Therefore, even though the voting age African-American population is in the minority of that particular subdistrict, it constitutes a majority among the Democrats. The court, therefore, was able to honor the need for a residency requirement as well as have the final election based upon cumulative voting. The remedy in *Cane* fit the demographics of that particular geographic area's racial and partisan composition. While a creative solution to that particular county's problem, it would only be a possibility in other cases with similar racial and partisan dynamics. It also creates a political dilemma in which Republicans in the minority "safe" district are the new permanent minority.

217. The community that Imam Hasan refers to is one that is racially bounded. African-Americans in urban areas reside in a state of hypersegregation described in note 33.

Many poor, urban African-Americans have no other choice but to live in public housing, if it is available. Governmental choices, from which African-Americans were largely excluded, led to the creation of de facto if not de jure segregated public housing in the 1950s and 1960s:

During the 1950s and 1960s, local elites manipulated housing and urban renewal legislation to carry out widespread slum clearance in growing black neighborhoods that threatened white business districts and elite institutions. Public housing was pressed into service to house black families displaced by the razing of neighborhoods undergoing renewal. Although liberal planners often tried to locate the projects away from ghetto areas, white politicians and citizens mobilized to block the construction of projects within their neighborhoods; white city councils and mayors usually obtained the right of veto over any proposed project site. As a result, projects were typically built on cleared land within or adjacent to existing black neighborhoods. In order to save money, maximize patronage jobs, and house within the ghetto as many blacks as possible, local authorities constructed multiunit projects of extremely high density.

Massey and Denton, *American Apartheid* at 55-56 (cited in note 33). Or, in short, as K. Leroy Ervis, long-time activist in the black community in Pittsburgh, once said reflecting upon the demolition of the black business center in the Hill District to make way for the city's Civic Arena, "Of course, we all knew in those days that 'urban renewal' was just another name for 'Negro removal.'" Q.E.D. Communications, Inc., *Wylie Avenue Days* (1991).

we face because they face them too, not outsiders telling us what is good for us. That's been happening for too long. Inevitably, their solutions don't fit because they don't even know what our problems are. A residency requirement insures that the community will be knowledgeably represented and will be solving its own problems."

"Does it really?" City Councilman Jones rose to answer. "I want to applaud your work, brother Hasan. You're helping to make a big difference in our community. I'm also thankful for the litigation that resulted in making my seat possible. I went on city council with big ideas about finally being able to take care of the problems of our neighborhood. I wanted to funnel more city dollars into our neighborhood for police protection, better drainage, better streets. You know the difference between my district's streets and those in the wealthy neighborhoods of our city: it's dramatic. When it rains hard, some streets in my district have to close down. A whole range of city services are inferior, including garbage pick-up.²¹⁸ I know what the problems are, yes, but can I solve them?"

"I may be on the council, but I am still in the minority, struggling to make my district's problems heard. The problems that we as voters feel as a permanent minority are intensified on that council.²¹⁹ My district needs its fair share of the city budget. But if the west-side's floral island in the middle of the street is more important to the

Atlanta is no stranger to the process of segregation through urban renewal and city planning. In Atlanta, urban policy planners used highway design and construction to regulate black mobility and residential patterns. Even when black expansion has overcome these obstacles, the highway patterns have left a legacy of illogical road design and traffic congestion problems. See generally Ronald H. Bayor, *Roads to Racial Segregation: Atlanta in the Twentieth Century*, 15 *J. of Urban Hist.* 3 (1988).

The Court has made heavy the plaintiff's burden to prove governmental racial intent in the location or refusal to locate public housing in neighborhoods, thereby making change in public housing patterns extremely difficult. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

218. For examples of the disparate allocation of municipal services based upon race, see *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971) (finding that 97% of a town's unpaved streets were in African-American neighborhoods, some of which also had no sewer system and open ditches as a draining system, in violation of the Fourteenth Amendment), *affd. en banc* 461 F.2d 1171 (5th Cir. 1972); *Dowdell v. City of Apopka*, 511 F. Supp. 1375 (M.D. Fla. 1981) (finding that black areas of the city received inferior services in the areas of street paving, water sewer drainage facilities, and water distribution and that such intentionally inferior services were actionable under the Fourteenth Amendment and Title VI), *affd.* 698 F.2d 1181 (11th Cir. 1983); *Johnson v. City of Arcadia*, 450 F. Supp. 1363 (M.D. Fla. 1978) (finding that inequality in services and facilities to black residents of a city, with respect to street paving, parks and recreation, and the water supply system, was the result of systematic racial discrimination in violation of the Fourteenth Amendment and Title VI).

219. The problem of the tyranny of the majority within governing bodies is described and discussed at length in Guinier, 77 *Va. L. Rev.* at 1434-47 (cited in note 174).

majority of the council than the backed-up sewers in my neighborhood, then the flowers get planted and my streets fill with raw sewage. Maybe if these alternative remedies were used, if there were more people competing for brother Hasan's vote, there would be more attention paid to the concerns of that neighborhood come budgeting time.²²⁰

"There are other black neighborhoods outside my district experiencing the same problems, but they have no representation because they are the permanent minority within their district. And we all know that there are a few poor white neighborhoods suffering from some of the same problems. I don't think they like trash in their yards any better than we do. Maybe if we could all concentrate our votes on a few candidates, we'd have more than one person on that council and we could work together to reorder some priorities."²²¹

"As far as whether there's a particular residency requirement or not, who cares? Brother Hasan, you know where I live and it wouldn't be too hard to find out where other candidates live either. If you feel it's important that the person live in the community that you live in, vote for those who do and don't vote for the others."

Imam Hasan answered, "With all due respect, sir, I do still care whether there is a residency requirement. I may make it my business to know where people live and I may pass this information on, but there is no guarantee that most voters will have access to that same information. The people in my neighborhood get information the way most people do, from the radio and television. A city is a big place. We don't know all of our neighbors like country people do. If we have campaigns spread all over town coming from all parts of town, then the candidate who outspends will have the advantage. Chances are that the candidate who is able to outspend will *not* be from my neighborhood. My community is not for sale to outsiders."

Councilman Jones was quick to reply, "I think the point that you and Ben make about money is a good one and should be studied, but consider this: if I know where my constituencies are, I don't have to cover the whole territory just because it's out there. I can take in those parts I can best afford, those who would listen and be interested in what I have to say. I could still reach out to others, those who

220. In those places that have experimented with cumulative voting, the result has been that neutral principles have been applied across the entire at-large jurisdiction to allocate resources and city services more fairly. See Pildes, 1995 U. Chi. L. Forum at 278-81 (cited in note 182).

221. The use of cumulative voting in local governmental elections has resulted in the building of bi-racial coalitions. *Id.* at 281, 289.

might see how much we have in common, where I could afford to, but I would be getting the word out in most of the same areas. Granted, it would require a little more organization and lots more cash at the statewide level, but I think it could be done.”

“I just don’t know,” Ben was shaking his head. “I’m not at all sure that this is a good idea. In judicial elections, I can see it, but in governing bodies, I don’t think so. It seems to me that a lot of the problems we face are problems that arise out of the places where we live. For instance, where are we going to put the next landfill? Well, chances are already darn good that it will be located near or in a black neighborhood.²²² If there’s nobody directly accountable to that neighborhood, don’t the odds become even greater? Isn’t it better to have one voice there who can be counted on to at least speak up?”

“And sometimes you have contests over which area will get some coveted benefit. This state has wrangled for years over questions like which town should be graced with a new state hospital on the one hand and whether to close our historically black state colleges on the other.²²³ Unemployment is so high in some places we even

222. Race is the most significant variable in the national siting of commercial hazardous waste facilities. United Church of Christ, Commission for Racial Justice, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites* (1987). See also Robert D. Bullard, *Race and Environmental Justice in the United States*, 18 *Yale J. Intl. L.* 319 (1993); U.S. Gen. Accounting Office, Pub. No. B-211461, *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities* (1983) (finding that three out of four waste facilities were sited in majority African-American communities in Region IV in 1983). During Cynthia McKinney’s first and perhaps only term in office, she opposed a major landfill to be located in black-majority Hancock County within her district. Barone and Ujifusa, *Almanac of American Politics* at 357 (cited in note 100).

223. In *United States v. Fordice*, 112 S. Ct. 2727 (1992), the Supreme Court held that there was discrimination in Mississippi’s state-funded post-secondary education system. Proof positive of this racial discrimination was the continuing existence of the historically under-funded black university system. Rather than mandate equalized funding of the historically black state universities, however, the Court held that the state had an affirmative duty to dismantle its prior de jure segregated school system in higher education that went beyond establishing facially race-neutral admissions policies at the institutions. Mississippi was ordered to eliminate any remaining policies or practices connected to its prior de jure dual system “that continued to foster segregation.” *Id.* at 2735. Among those “policies and practices” was the practice of maintaining duplicative programs at historically black and white universities and the continued operation of all eight of the state’s universities. *Id.* at 2740-43.

With the focus clearly set upon “duplicative” programs and the need to eliminate facilities that were created to accommodate the separation of individuals based upon race, the practical effect of *Fordice* is to place many publicly funded historically black colleges and universities at serious risk of closure. See Leland Ware, *The Most Visible Vestige: Black Colleges After Fordice*, 35 *B.C. L. Rev.* 633 (1994); Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 *Cal. L. Rev.* 1401 (1993).

battle over who will be fortunate enough to have the new state prison!²²⁴ Cities have the same issues. They have to decide which area will receive the funds to improve or create a park for the children to play in. I want someone in my area arguing for me, don't you? And I want someone knowledgeable to complain to when things aren't running right. There are benefits to districts."

"But, Ben, what good does it do to be just a voice? The predictable dissenter against a majority opinion? I've been a voice all year, and, to tell you the truth, I'm starting to get a bad case of laryngitis in a room full of folks I'm beginning to suspect are hard of hearing. If we were able to get more people on board and interested in our people or the community as a whole maybe we would get someplace for a change." The city councilman remained even more convinced.

The room became divided. The community leaders debated whether ties to place would best serve the minority community interests or whether at-large elections would actually result in broader accountability as well as an increase in the number of minority representatives. The lawyers argued over whether alternative remedies would ever be embraced in the courts and whether they were politically feasible. The room churned with noisy debate.

And then, from the group, a tall thin man with wispy white hair atop the balding crown of his head stood. The Reverend Chester Olloway's arms and legs were so long and thin, his rising was like a heron unfolding for flight. He kept his suitcoat on, despite the heat; some said he wore a suit just to cut his yard. Reverend Olloway carried authority with him wherever he went. He expected respect and usually he got it. This was largely attributable to the fact that for years he had been the principal of a segregated black school not far from Cotton Plant. Eventually he was promoted to superintendent of all the black schools in the county. When the black schools closed, he

Indeed, the continued existence of Louisiana's publicly funded historically black colleges have been placed at risk by the *Fordice* holding. See *U.S. v. Louisiana*, 9 F.3d 1159 (5th Cir. 1993).

224. Since the mid-1980s, prisons have moved from being a LULU ("Locally Unwanted Land Use") to a commodity that particularly rural communities compete to win. The reason is simple: the need for jobs during a time when small farming is failing. Not only does the siting of a prison create permanent recession-proof employment, but the construction of prisons creates a boom in the construction industry for a small rural town. The cost to build a medium to maximum security prison is in excess of \$280 million and will generate more than 900 temporary construction jobs. See Maria L. La Ganga, *New Prisons No Panacea for Ills of Rural California: Corrections: They Bring Jobs, but also More Demand for Government Services. Still, Many Places Want One*, L.A. Times A1 (October 18, 1994) (discussing the impact of prison construction for rural California communities).

was not hired by any of the "integrated" white ones,²²⁵ not even to teach, and so he began his ministry. Even now, at his advanced age, he preached at least one Sunday a month and remained active in the affairs of the community.

He cleared his throat and the room went quiet to hear him speak. "I've been fixin' to go for quite some time now. The day is getting long, and I do get weary. But I just wanted to speak my piece before I took my leave, and then you all can go about the business of deciding what you're going to do.

"You will have to excuse me if I don't get as excited about these discussions as I used to. But this news of losing what we've gained is something that comes as no great shock to a man my age. It seems not so long ago to me that I sat in this very room and listened to a bunch of folks just like you discuss whether to desegregate the schools. Lawyers argued about how there was no way to change it. The weight of the law, history, and society was all in favor of 'separate but equal.'²²⁶ The rest of us argued over whether it was good for our children to send them to hostile, unwelcoming places.²²⁷ But we

225. In June of 1971, testimony was heard before the Select Committee on Equal Education Opportunity of the United States on the effect of school desegregation on black administrators and teachers in the public schools. Dr. Epstein testified that a typical pattern of displacing black principals with white ones took place following desegregation in order to make sure that white students would not be under the authority of a black principal. U.S. Dept. of Health, Education, and Welfare, *Displacement of Black Educators in Desegregating Public Schools* 1 (1972).

The most dramatic impact was felt by black principals in North Carolina. With desegregation, the number of black principals of high schools, totaling 227 in 1963, plummeted to only 8 by 1970, a decrease of more than 96%. But North Carolina was not alone in experiencing this phenomenal loss of African-American leadership. In Arkansas, the numbers decreased from 134 black high school principals to 14 from 1963 to 1971. Louisiana lost 68 black secondary school principals during the same period; Florida, 57; South Carolina, 111; Tennessee 56; Alabama, 200. In Texas, resistance to having black principals supervise white teachers led to the total eradication of the black principal. In Georgia, of the 24 black principals remaining after the start of desegregation, only 2 were assigned to schools with integrated student bodies; the remaining 22 remained in charge of all-black schools. *Id.* at 2-3.

Of course, the loss to the black community of administrator positions was the white community's gain. While the number of black principals decreased by anywhere from 27% to 97%, the number of white principals increased, depending on the state, by as little as 8% to as high as 68%. *Id.* at 1-2.

In response to the question, "what happened to the black principals?," the HEW report answers, "Many were forced into premature retirement. Others were demoted. Still others were just plain fired. A few were given respite: that is, they were reassigned to school-system central offices where they were not actively in charge of integrated schools." *Id.* at 3.

226. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that separate but equal did not violate either the Thirteenth or Fourteenth Amendments).

227. Professor Derrick Bell has chronicled the struggle within the African-American community over the perils that desegregation would bring to children and a community torn

pushed on and eventually supported those lawyers who made the arguments that somehow changed the way the law saw things.²²⁸ We were sure that a miracle was happening. Unspeakable joy rained down and we all joined in to say, *Thank you Lord.*"

The room was a pitter-patter of: "Yes, Lord," "Preach, now, brother," "Amen," and "Thank you, Jesus." For a man as slender as a reed, Reverend Olloway's voice grew surprisingly powerful as it gained momentum.

And knowing just the right moment, when the room was tender with listening and thirsty for the next word, Reverend Olloway continued, "But today, you know what? My great grandchildren still attend mostly black schools.²²⁹ The only difference now is that most of their teachers are white²³⁰ and don't know how to pass down those

away from one of its most important institutions: the local school. The civil rights strategy favoring integration and the black community's hopes and fears for their children were not always in complete harmony. See Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L. J. 470 (1976) (reviewing the development of school desegregation litigation and the unique aspects of the lawyer/client relationship in this area).

Some African-American parents attempted unsuccessfully to have their concerns heard over a desegregation that meant the closing of the local black school and the transportation of the children to an alien, predominantly white school. For example, parents in the Tuscaloosa, Alabama, school desegregation case made the following comments in support of keeping open the all-black Druid High School:

The school represents the hub of the community. When a school in a black community is closed, then several things are shut down. Cultural activities that black children would otherwise not have access to, such as plays and choral groups, are sometimes lost. Question: Was the loss of Druid a significant loss to the community? Answer: Most definitely. Druid High School was not only a "school." It was an institution, a tradition. It was not only a tradition, but an opportunity for black children for leadership roles. Druid High School represented the types of activities that poor children had and that they can no longer find and will no longer find in a school setting with an integrated environment.

Derrick Bell, *The Dialectics of School Desegregation*, 32 Ala. L. Rev. 281, 284 (1981).

228. See *Brown v. Board of Education*, 347 U.S. 483 (1954) ("*Brown I*") (holding that the "separate but equal" doctrine as applied in public school education violates the Fourteenth Amendment).

229. Two-thirds of African-American children attend segregated schools today. Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* 162 (Charles Scribner's Sons, 1992).

230. As a result of the attempt to desegregate schools, white teachers displaced black teachers. HEW found in 1971 that

1. The number of black teachers being hired to fill vacancies or new positions is declining in proportion to the numbers of whites hired. Nonhiring is a form of displacement and is as serious as dismissal and demotion.
2. Displacement of black teachers is more widespread in small Southern towns and rural areas than in metropolitan centers; in sections with a medium-to-heavy concentration of black citizens than in regions with predominantly white populations; and in the Deep South than in the upper South.

secrets for survival, those sweet secrets most needed today. They don't know how to lead them down the paths our teachers did.

"In this voting rights question, the problems are even more complicated. Still, there are things to learn from the struggles of the past. Subdistricts, despite what the Supreme Court says, don't seem to carry that hurtfulness old Jim Crow had tucked up under his wing. Districts just draw lines around what already is: black people living together next to white people living together. We call these districts integrated, and they are integrated in percentages, it is true. But are our lives integrated? Now, I am no lawyer, but it sounds to me like that 'geographic compactness' test itself admits that we still live, even today, in a country no stranger to segregation.

"I attended some of the public hearings that took place during the redistricting that led to our state house and congressional districts. The visible anger of some of those white folks who were being drawn into our majority-black districts reminded me of the rage our children experienced when they first set foot on that white school property. The anger rises up, it roars down like a mighty flood water into the white public mind. It rages through the meetings and the newspapers, breaking up everything in its path. Until it comes to us and the places that belong to us. And once again, the courts, guess what? They back away from the promise. Whatever gains made, get taken back with the receding tide. With the schools, it was that second tentative plea to proceed 'with all deliberate speed.'²³¹ Does 'deliberate' even make sense next to 'speed'? Go slow about hurrying up? Now, we hear that after having gained some forty members in the United States Congress,²³² the Court says 'go slow' once more.

U.S. Dept. of Health, Education, and Welfare, *Displacement of Black Educators* at 3 (cited in note 225). For example, in Arkansas, by 1969, 212 black teachers and principals were fired or persuaded to leave; nearly all of the black teachers were gone. *Id.* at 4.

During the past two decades, the number of African-Americans preparing to enter the teaching profession continued to decline and numbers leave the profession annually. According to a study conducted in southeast Georgia, only 20% of currently employed African-American teachers would enter the profession if they could start over again. See J.A. and F.M. Page, *Gaining Access to Academe—Perceptions and Experiences of African-American Teachers*, 15 *Urban League Rev.* 27-39 (1991).

231. *Brown v. Board of Education*, 349 U.S. 294, 301 (1955) ("*Brown II*").

232. The 103rd Congress boasted a Black Congressional Caucus with a membership of forty. Carl McClendon, *Growing Black Caucus Wields New Power*, *St. Petersburg Times* A1 (Sept. 25, 1994). However, the 104th Republican-controlled Congress has threatened the strength of the congressional Black Caucus by promising to defund the caucus. *The 104th Congress: For the Record; New House Rules*, *N.Y. Times* A1 (Jan. 6, 1995). In addition to the defunding of the caucus by the House, *Shaw* challenges threaten to bring membership in the caucus to an all-time low. As Professor Eric Schnapper, a former NAACP Legal Defeuse and

"You'd think we would learn to predict these things but we don't and maybe we shouldn't. We all need hope and faith. You know what the Bible says, don't you? Paul said, 'faith is the substance of things hoped for, the evidence of things not seen.'²³³ There is aplenty we have not yet seen and much to hope for. We may have glimpsed the things hoped for in faith, and when we strain real hard we find evidence of the things we've yet to see. With faith and hope, we must risk disappointment to make that way out of no way.²³⁴

"Young folks, they be saying, 'Why, brother Olloway? Why should we have faith and hope when this seems like our darkest hour?' For the young, every crisis is the darkest hour, every little problem is the end. They haven't lived long enough yet to know that the darkest hour is the one just before the dawn. They haven't lived long enough to know that a life without hope means the dawn don't ever come, that the morning stays hidden behind that heavy curtain of despair.

"So, I say to you now, I will risk disappointment once again. I will risk a future of disillusionment to admit that this new way of voting ignites hope in me. For this particular problem, this idea could be that way out of no way. And let me tell you why I say so.

"Brother Hasan, you wisely preach the importance of responsibility, and I agree, righteousness begins at home and radiates outwardly from there. We have to own where we are. If it's not ours, we have to make it ours. If it's not right, we have to make it right before we come to that place of ownership. We must bring it forth into something new.²³⁵ In our private lives, in our churches, mosques and com-

Education Fund staff attorney has said, "if the court ruled that race could not be used in redistricting, the Congressional Black Caucus 'will be able to meet in the back of a taxi cab.'" Steven A. Holmes, *Court Hears Challenges to Black Districts*, N.Y. Times A20 (April 20, 1995) (quoting Eric Schnapper).

233. Hebrews 11:1 (King James Version, 1976).

234. The phrase "making a way out of no way" is such a staple of African-American Christian theology that finding its original source is difficult at best. For the Reverend Martin Luther King, Jr., it was the expression of hope and faith that "the contradictions of life are neither final nor ultimate . . . [that] God is able to make a way out of no way, . . . to transform dark yestordays into bright tomorrows." Cone, *Martin & Malcolm & America* at 126 (cited in note 215).

235. The theory behind the *Brown* school desegregation decision was that the exclusion of African-American school children from white public schools visited upon them a stigmatic harm based upon their race. Recent scholars have questioned whether the approach taken to remedy segregation has not reproduced yet another stigmatic harm for today's African-American school children: that schools in which they constitute a majority are *bad* schools and that white schools are inherently good ones and that schools controlled by black educators are inferior. See Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 Cornell L. Rev. 1 (1992) (discussing alternative remedies for de jure segregation). Underlying these arguments is the assertion that black ownership and control of historically

munities, we have to work together to be self-reliant and strong. But in politics, we can go only so far in this country all on our own.

“We may be able to elect our own people but they still have to govern with others. In order to do that, we need to be building bridges, not walls. There are people who will join with us who don’t live in our neighborhoods, some of them are right here, right now, in this room. Some of them are black and just live in little places set apart from the larger community. But their problems are just like ours, right here in Cotton Plant. They are just as unemployed.²³⁶ Their people are just as sick.²³⁷ Their boys are crowding up the state prisons with our boys right now, hacking at the dry dirt with the same set of hoes.²³⁸

“Some others are black and have moved up and out of where they came from, into black suburbs, but we should not condemn them because they’ve fulfilled the hopes and dreams that their parents had for them. There are many places and many ways to be black in this society.²³⁹ They still are a part of us.²⁴⁰ They know the sting and rage of discrimination too.²⁴¹

black institutions, even those that came into existence as a result of state-enforced segregation, has a transformative power of its own.

236. According to census data, the black unemployment rate nationally is 12.9% compared to the white unemployment rate of 6%. Among younger workers, aged 20-24, the rate is closer to three times higher for black workers than white workers: 22% compared to 8.7% respectively. *Statistical Abstract* at 416 (cited in note 38).

237. In 1991, the infant mortality rate for white children was 7.3 per 1,000 live births compared to the black infant mortality rate of 17.6 per 1,000 live births. The maternal mortality rate was 5.8 per 1,000 for white women and 18.3 per 1,000 for black women. *Id.* at 91. In Georgia, the infant mortality rates are approximately twice that of whites. See J.F.C. Sung, et. al., *Maternal Factors, Birth-Weight, and Racial Differences in Infant-Mortality—A Georgia Population-Based Study*, 86 *J. Natl. Med. Assoc.* 437-43 (1994). Low-birth-weight babies compose only 5.8% of all white babies born compared to 13.6% of all black babies. *Statistical Abstract* at 79 (cited in note 38).

Cancer survival rates are consistently higher for white Americans than for African-Americans. *Id.* at 143. Even though African-Americans are only 12.4% of the entire national population, they account for 32% of all of the deaths from AIDS from 1982-1992. *Id.* at 13, 98. African-Americans constitute 34.9% of all newly diagnosed cases of AIDS. *Id.* at 139.

238. In 1991, there were 336,920 African-Americans incarcerated in state prisons. This number represents 47.3% of the total state prison population. Another 195,156 were incarcerated in county or city jails in 1992. *Statistical Abstract* at 215 (cited in note 38). Black males are also over-represented relative to their percentage in the total population in the juvenile justice system. See P. David Kurtz, Martha M. Giddings, and Richard Sutphen, *A Prospective Investigation of Racial Disparity in the Juvenile Justice System*, 44 *Juvenile & Family Ct. J.* 43-59 (1993) (focusing on the effect of race in the Georgia juvenile justice system).

239. Any discussion of racial identity and black/white cultural differences risks walking on the knife’s edge of essentialism. bell hooks’s work explores the nuances between appreciation of racial-cultural heritage and the danger of objectified essentialism:

“And some of those who would vote with us are white, and because of the state of affairs in this country they did not grow up in our neighborhoods. But aren’t they here at this meeting in Cotton Plant today? They have given of themselves too. If they want to cast votes with us, who are we to refuse them? We need to welcome them into our community too. Theirs is the path of true integration, a voluntary integration that recognizes that blacks have much to offer whites and that we all must share equally in bringing our own sustenance to the table of fellowship.”²⁴²

There is a radical difference between a repudiation of the idea that there is a black “essence” and a recognition of the way black identity has been constituted in the experience of exile and struggle.

When black folks critique essentialism, we are empowered to recognize multiple experiences of black identity that are lived conditions which make diverse cultural productions possible. When this diversity is ignored, it is easy to see black folks as falling into two categories: nationalist or assimilationist, black-identified or white-identified. Coming to terms with the impact of post-modernism for black experience, particularly as it changes our sense of identity, means that we must and can rearticulate the basis for collective bonding.

bell hooks, *Yearning: Race, Gender, and Cultural Politics* 29 (South End, 1990).

240. The concept of community described by the Reverend Olloway carries with it the shades of meaning found in African cultures’ definitions of what it means to be human. Bishop Desmond Tutu has translated these ideals as follows:

Africans believe in something that is difficult to render in English. We call it *ubuntu botho*. It means the essence of being human. You know when it is there and when it is absent. It speaks about our humaneness, gentleness, hospitality, putting yourself out on the behalf of others, being vulnerable. It recognizes that my humanity is bound up in yours, for we can only be human together.

Interview with Bishop Desmond Tutu, reprinted in *Sierra Club Calendar 1995*.

241. Racial identity is not defeated by class distinctions. According to a 1983 study, more than 60% of the self-identified middle-class African-Americans surveyed stated that they felt closer to their racial group than to their economic class group. Education also increases race identification among African-Americans. College-educated African-Americans possess “the strongest racial common-fate identities.” Tate, *From Protest to Politics* at 28-29 (cited in note 177). For a chronicle of the anger experienced by middle- and upper-class African-Americans as they experience racism in the spheres in which they travel, see Ellis Cose, *The Rage of a Privileged Class* (Harper Collins, 1993). For more on the social fabric, traditions, and racial identification of the African-American middle class, see Sara Lawrence Lightfoot, *I’ve Known Rivers: Lives of Loss and Liberation* (Addison-Wesley, 1994).

242. Among the scholars who are rethinking the integration ideal expressed in *Brown* is Professor Alex M. Johnson. Professor Johnson criticizes *Brown* as having conflated the process of integration with the ideal of integration. He offers a different model for integration that does not incorporate the stigma of segregation:

Both the 1954 and the 1992 Courts failed to recognize and appreciate the social realities that preclude the attainment of meaningful integration through simple judicial or legislative fiat. Only by acknowledging and accommodating the reality of the unique and separate African-American culture or *nomos* will the process of integration ever move forward to accomplish the ideal state of integration sought by *Brown* and its progeny.

Johnson, 81 Cal. L. Rev. at 1402-03 (cited in note 223) (emphasis omitted). This view of integration favors respect and appreciation of cultural differences and the belief that all parties should come to learn from one another willingly. The voluntary integration ideal can find a mechanism for actualization in cumulative voting. Cumulative voting has the advantage of allowing voluntary coalitions to be formed between groups. Unlike majority-minority

“Another reason I am hopeful is that I know that this system could appeal to all kinds of people who believe their interests are not being represented, not only African-Americans.²⁴³ Nobody votes in this country the way they should.²⁴⁴ If we are going to get anywhere, we need to be pushing recipes to bake a bigger pie instead of coming up with ways to slice us a skinnier and skinnier piece.

“We need to act with moral authority even in these complicated times. Could it be that if the law is opposed to everyone having their say in government that the law is just plain wrong? Can't we begin to ask *that* question?

“As I understand it, you lawyers and community organizers are strategists who, like farmers, prepare the ground so that when the season is right these important questions can bear the fruit of being seen with new eyes by the courts and the public. Can we begin the move away from district line-drawing to the creation of communities without walls? Can't we prepare the soil for the harvest that might someday come? We need always to be working on blessing those people over on the west side of the capital with the eyes to see Yusif's children as their children too.

“Communities aren't built by excluding or including others based upon some perfect political agreement. They are built by people willing to help one another struggle through common problems. I am still here, still sitting in this place; this is—now and ever shall be—my community, even though I expressed doubts about closing our schools years ago, even though I came to feel the sting of ‘Uncle Tom’ flung at those who dared to ask the same questions I did. I still want to be here with you and with all of these people with whom I am in varying states of agreement and disagreement on how to proceed.

subdistricts in which a white minority is forcibly drawn into a black majority district, cross-racial coalitions may be built in cumulative voting systems voluntarily and where voters identify mutual self-interests.

243. Derrick Bell has championed the “interest-convergence” hypothesis in which he contends that whites support black rights only to the extent of their self interest. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980). To the extent that cumulative voting offers other groups, such as Republican minorities in heavily Democratic areas, a better chance for semiproportional results than subdistricts, one would expect that political support for such remedies could be found.

244. While most Western democracies have voter turnout of 70-90% for parliamentary elections, the U.S. has barely half of the eligible electorate voting even in high-interest presidential elections. In off-year elections, as low as 37% of the voters may turn out to cast their ballots. In a comparison of 18 industrialized democracies, only Switzerland ranks below the U.S. in its level of voter turnout for elections. See Amy, *Real Choices, New Voices* at 140-41 (cited in note 157).

"And how do we proceed? We proceed knowing that some ideas will do better in some situations and not in others. Each situation provides new facts and problems. There may be places where subdistricts are truly better and then other places where these new forms of voting will work. We proceed to make these decisions despite the risk that we will be forced to live with their repercussions, some of which have been imagined here today and some of which none of us could have ever imagined.

"Finally, we proceed knowing that if success can only be measured by full and permanent inclusion in American politics, then we are likely setting ourselves up for failure. For I have learned to give voice to that prayer which does not call upon the Lord to remove the struggle in my life. I've been comin' up the rough side of the mountain²⁴⁵ for so long my foot would probably slip on the smooth way. For now I have learned to pray like those who came before me. I have learned to say, 'Lord, don't move my mountain. But give me the strength to climb. And Lord, don't take away my stumbling blocks, but lead me all around.'²⁴⁶

"And I feel sure that we will know our prayers have been answered when, at the end of the journey, and all along the way home, we grow stronger as a community climbing that mountain, wiser from being led around the many stumbling blocks. Then we will have made a journey worth the shoe leather. But it takes faith, church, to step out on nothing and believe that something is there."²⁴⁷

On his way out the door, Reverend Olloway was heard to say, "It's time we start steppin'."

245. Recorded by Reverend F.C. Barnes and Reverend Janice Brown, *Rough Side of the Mountain*, on *Rough Side of the Mountain* (Air, 1983).

246. Recorded by Inez Andrew, *Lord Don't Move that Mountain*, on *Shine on Me* (MCA Records, 1983).

247. See The Williams Brothers, *It Takes Faith*, on *The Greatest Hits, Vol. I* (Malaco Records & Tapes, 1991). The generative faith in "the substance of things hoped for, the evidence of things not seen," is the same force that created rights jurisprudence through the civil rights movement. This paradoxical faith is best described by Professor Patricia Williams:

To say that blacks never fully believed in rights is true. Yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before; we hold onto them, put the hope of them into our wombs, mothered them and not the notion of them. And this was not the dry process of reification, from which life is drained and reality fades as the cement of conceptual determinism hardens round—but its opposite. This was the resurrection of life from ashes four hundred years old. The making of something out of nothing took immense alchemical fire—the fusion of a whole nation and the kindling of several generations.

Patricia J. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* 163 (Harvard U., 1991).

III. CONCLUSION

The story of the Cotton Plant meeting reflects the complexities involved in the search for remedies to minority vote dilution in an era characterized by the persistent, dual realities of residential segregation and a transcendent African-American cultural identity caught in the throws of judicial insistence upon a color-blind ideal. On the one hand, most African-Americans do reside in racially segregated geographic places. These places have interests and needs that demand territorial sensitivity and accountability from their political representatives. Such geographic sensitivities argue in favor of subdistricts. On the other hand, the Cotton Plant meeting itself mirrors the wide-ranging transcendence of the African-American cultural and political community. The community spans not only states but the nation. This transcendent community might be strengthened and served in the voting rights context by alternative remedies such as cumulative voting.

In making the decision to advocate drawing wider political boundaries, we must look beyond political science ideals. These strategies must be considered carefully in light of the economic realities of campaigning in a larger district area. With larger districts come increased costs that would inhibit the participation of racial minorities and others disadvantaged by class. These tensions should be examined carefully in each individual case to determine when the physical boundaries of districts have reached their outer limits. The challenge posed by cumulative voting and other at-large alternative remedies is to develop a sense of propriety about community size that truly does allow, rather than stifle, a flowering of diversity and enhanced accountability.

The choice of remedies is further complicated by the paradox inherent in the Court's effort to move toward a color-blind society, free from racial balkanization, in an area of the law that requires race-conscious remedies because of the continuing reality of racially polarized voting. When the Court fails to acknowledge the paradoxical coexistence of color-blindness and racially polarized voting, inconsistent and incoherent standards naturally result. The Court's mere wish for a color-blind society will not result in its materializing any time soon. Either district line-drawing, which takes race into account, or some other solution must be employed to get us there.

Without a strategy to move toward integrated empowerment, color-blindness becomes a mere code word for African-American

invisibility. Alternative at-large remedies offer a programmatic way to achieve the Court's stated goal of a color-blind community. Cumulative voting meets the demand for inclusiveness by honoring the importance of each individual's right to cast an effective ballot and the need to build communities around coalitions not wed to geo-racial lines. It allows for the development of voluntary coalition-building around perceived communities of interest, whether they be local or transcendent.

To be sure, every system of voting accentuates different state interests and needs. Subdistricts emphasize the importance of territorial accountability. When combined with a residency requirement, subdistricting enhances the representative's insight and knowledge of that particular territory's needs. However, at-large cumulative voting honors the state's interests already in place with at-large multimember districts. In addition to those established state interests in the at-large multimember districting schemes, alternative remedies offer a real opportunity for increased pluralism and voter satisfaction in having elected the representative of one's choice.

Finally, the narrative cannot resist the attempt to make sense of *why* the Supreme Court made its decisions in *Shaw* and *Johnson*. It asks *how* the community should respond to the dashed hopes and disappointment these decisions likely will incur. At this deeper level, the narrative draws heavily upon the work of Derrick Bell and the rich paradox of finding human dignity through the process of struggle against those forces that seek to undermine it. As Professor Bell has articulated in his many writings, the irony of this struggle is that its results often benefit white interests as well as or even more than they do the interests of African-Americans. Because at-large cumulative voting is not a race-conscious remedy, it too would be a vehicle for interests other than minority plaintiffs in vote-dilution cases. Provided that the vehicle is not completely hijacked by the increased costs of campaigning, however, the fact that at-large voting meets a diverse set of needs is certainly not a serious disadvantage. Just as the work of civil rights lawyers humanized the Constitution and brought to life the Fourteenth Amendment, not only for African-Americans but for all Americans, so too can the work of civil rights lawyers and community leaders enliven our political system by claiming, for everyone, the right to vote and vote effectively.

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