NOTE

LAWYER v. DEPARTMENT OF JUSTICE: FLORIDA'S DANCE WITH THE DISTRICTING DEMON

William Jack Dempsey*

INTRODUCTION

Florida officials again face the risky task of redrawing State legislative districts in the year 2000.[1] With each decennial census, the fifty states must reapportion their districts to reflect changes in the voting population.[2] Such redistricting plans have recently faced a rash of constitutional challenges grounded in the Fourteenth Amendment.[3] Most recently, Florida's Senate District 21 faced judicial scrutiny in the Florida Supreme Court, the United States District Court for the Middle District of Florida, and, finally, the United

---

* B.A., University of South Florida, *cum laude,* 1993; J.D., Stetson University College of Law, expected May 1998; Notes and Comments Editor, *Stetson Law Review,* 1997–98.

This Note is dedicated to my wonderful parents, without whom my legal education would have been a pipe dream. I would like to thank *La Societa Guerzoni,* the entire Barucchi family, John and Cathy Greer, Beth Curnow, and the many *Stetson Law Review* associates and editors who worked on this Note. I am particularly grateful to Robyn Severs for her editorial help and to Professors Mark Brown and J.J. Brown for their advice, guidance, and encouragement.

1. The Florida Constitution requires that the Legislature reapportion and redraw State voting districts within two years of each decennial census. *See* FLA. CONST. art. III, § 16(a).

2. *See id.*; David O. Barrett, *The Remedial Use of Race-Based Redistricting After* Shaw v. Reno, 70 IND. L.J. 255, 256 n.20 (1994).

3. *See* Jeffrey L. Fisher, *The Unwelcome Judicial Obligation to Respect Politics in Racial Gerrymandering Remedies*, 95 MICH. L. REV. 1404, 1404–06 (1997).

States Supreme Court.[4] With the approach of the next decennial census, *Lawyer* and its predecessors should serve as guidance for the drawing of constitutionally valid district lines. However, in *Lawyer*, the United States Supreme Court did little to clarify the vagaries of previous districting decisions, although it may have provided an incentive for states to settle districting disputes at the district court level.

Generally, redistricting litigation results from state efforts to comply with the directives of the Voting Rights Act of 1965 (the Act),[5] and "banish the blight of racial discrimination in voting, which has infected the electoral process."[6] The Act utilizes two measures to prevent the loss of voting power among historically disadvantaged groups. First, section 2 contains a broad prohibition on voting procedures that "den[y] or abridg[e] . . . the right of any citizen . . . to vote on account of race or color."[7] Any state practice is invalid if, "based on the totality of circumstances," it causes the "members of a class of citizens [to] . . . have less opportunity than other members of the electorate to participate in the political process."[8] Second, section 5 specifically requires that changes in certain suspect jurisdictions be precleared to avoid "retrogression in the position of racial minorities" electoral rights.[9]

---

4. *See* Scott v. Department of Justice, 920 F. Supp. 1248 (M.D. Fla. 1996), *aff'd sub nom*. Lawyer v. Department of Justice, 117 S. Ct. 2186 (1997).

5. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971–1974e (1994)).

6. South Carolina v. Katzenbach, 383 U.S. 301, 308 (1986) (upholding the Act as constitutionally valid). African-Americans were initially granted the right to vote via the post-Civil War "reconstruction amendments." *See* U.S. CONST. amend. XV, § 1 (stating that the right to vote "shall not be denied or abridged . . . on account of race, color, or previous condition of servitude"). For an analysis of "old south" voting practices, including "Jim Crow" laws and the "Poll Tax," see Carroll Rhodes, *Changing the Constitutional Guarantee of Voting Rights from Color-Conscious to Color-Blind: Judicial Activism by the Rehnquist Court*, 16 MISS. C. L. REV. 309, 318–30 (1996); Jaren D. Wilcoxson, Miller v. Johnson: *An Improper Emphasis of Form over Substance*, 76 B.U. L. REV. 771, 772–75 (1996).

7. 42 U.S.C. § 1973(a). This section applies to "any State or political subdivision" and protects "language minority group[s]" by incorporating 42 U.S.C. § 1973b(f)(2). *See id.* §§ 1973(a), 1973b(f)(2).

8. *Id.* § 1973(b). In considering the totality of circumstances, the examining court may consider the number of members from the protected class to be elected to office in the state or political subdivision. *See id.* The statute explicitly states, however, that the protected class *does not* have the right to a number of elected representatives in proportion to the class's population. *See id.*

9. Miller v. Johnson, 515 U.S. 900, 926 (1995) (quoting Beer v. United States, 425

Under section 5 of the Act, several jurisdictions across the United States[10] are monitored by the Attorney General.[11] These jurisdictions were designated because the voting-age population in each registered less than fifty percent of its members, or because less than fifty percent of the jurisdiction's registered voters actually voted, in either the 1968 or 1972 presidential elections.[12] Florida's Collier, Hardee, Hendry, Hillsborough, and Monroe Counties became section 5 districts in 1975 and 1976.[13] Any state-imposed change affecting voting in these jurisdictions must be precleared by the United States Attorney General.[14] A proposed change that "has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group" should be denied preclearance.[15] In effect, section 5 states must seek a declaratory judgment that a proposed change in voting practices does not have a discriminatory purpose or effect and will not result in "retrogression."[16] The Act specifically includes redistricting in its definition of changes affecting voting, and the state has the burden of obtaining federal approval.[17]

Additionally, the Act provides for an expedited appeal to the

---

U.S. 130, 141 (1976)); *see also* 42 U.S.C. § 1973b.

10. Over 70 counties across the United States are either partially or entirely covered by the Act. *See* 28 C.F.R. app. § 51 (1997). Additionally, the states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia are covered in their entirety. *See id.* Interestingly, a two-tiered system covers the entire State of Arizona, with several counties also monitored individually. *See id.*

11. *See generally* 42 U.S.C. § 1973c.

12. *See id.* § 1973b(b).

13. *See* 28 C.F.R. app. § 51 (1997). Hillsborough, Hardee, and Monroe Counties were declared to have had "less than 50 percentum of the citizens of voting age . . . registered . . . or . . . less than 50 percentum of such persons vot[ing] in the Presidential Election of . . . 1972." 40 Fed. Reg. 43,746 (1975). Further, these counties had provided English-only ballots in areas heavily populated with "single language minorit[ies]." *Id.* On a broader scale, Congress included in the Act a finding that "voting discrimination against citizens of language minorities is pervasive and national in scope." 42 U.S.C. § 1973b(f)(1).

14. *See id.* § 1973b(a)(1) (defining state action as a "test or device" that may abridge the right of a citizen or a "political subdivision" to vote); *id*. § 1973b(a)(1)(E) (allowing the Attorney General to object to state action that affects voting).

15. 28 C.F.R. § 51.52 (1997). If the Attorney General is unsure that the change is non-discriminatory, "[a]n objection shall be interposed." *Id.*

16. *See* 42 U.S.C. § 1973b(a). The Act provides for federal judicial review of proposed changes in the form of three-judge district court panels. *See id.* § 1973b(a)(5).

17. *See* 28 C.F.R. §§ 51.10, 51.13(e).

United States Supreme Court[18] and the right for aggrieved parties to intervene in districting disputes.[19] A state's plan may be invalidated if, among other things, the Attorney General denies approval or an aggrieved party intervenes and successfully challenges the change.[20] Given the expedited appeals process, redistricting plans often find their way to the United States Supreme Court.

The Court has found itself torn between the voting equality demanded by the Act and the Court's self-imposed ban on race-based decisionmaking. Recently, the claim of "racial gerrymandering" was recognized by the Court in *Shaw v. Reno*.[21] Since then, the Justices have been divided on the issue of race-based redistricting, resulting in consistent plurality decisions and five-Justice majorities.[22] Additionally, the Court's analysis has gone from "bizarre," to an application of strict scrutiny that is very subjective and malleable. It is particularly notable that this problematic series of cases arose out of nationwide redistricting following the last decennial census in 1990.

Lawyer v. Department of Justice[23] presented the Court with the opportunity to resolve an issue that has long divided the Justices: To what degree may race be considered in a redistricting plan?[24] Rather than clarify the issue, the Court, in a very short opinion, affirmed a state-brokered settlement plan as approved by the district court.[25] This decision is significant because it leaves states to ponder the unclear and subjective holdings of the Court in the voting-rights cases preceding *Lawyer*. Two issues in particular remain unresolved: 1) the effect of shape — particularly if odd or unconventional — on the

---

18. *See* 42 U.S.C. § 1973b(a)(5) (providing a two-tiered system with the United States Supreme Court having sole jurisdiction to review the judgment of the district courts); *id.* § 1973c.

19. *See id.* § 1973b(a)(4) (stating that "any aggrieved party may as of right intervene at any stage in such action"). *But see* United States v. Hays, 515 U.S. 737, 744 (1995) (limiting standing to residents of suspect districts).

20. *See* 42 U.S.C. § 1973a(b) (forcing states to suspend voting practices that have been successfully challenged "in a proceeding instituted by the Attorney General or an aggrieved person); *id.* § 1973b(a)(3) (forcing states to demonstrate that any prior "violations were trivial, were promptly corrected, and were not repeated").

21. 509 U.S. 630 (1993).

22. *See, e.g.,* Shaw v. Hunt, 116 S. Ct. 1894 (1996) (five-Justice majority) [hereinafter *Shaw II*]; Bush v. Vera, 116 S. Ct. 1941 (1996) (plurality opinion); Miller v. Johnson, 515 U.S. 900 (1995) (five-Justice majority); Shaw v. Reno, 509 U.S. 630 (1993) (five-Justice majority).

23. 117 S. Ct. 2186 (1997).

24. *See id*. at 2194–95.

25. *See id.* at 2191, 2195.

Court's review, and 2) whether *any* state interest is sufficiently "compelling" to justify racially gerrymandering a district. Further, the timing of the *Lawyer* decision is significant because only three years remain before many states, including Florida, will be forced to redistrict based on the results of the next decennial census.

This Note will first detail the relevant facts leading up to *Lawyer*. The Note will then examine the recent Court decisions preceding *Lawyer*, including dissenting opinions, and Justice Souter's opinion in *Lawyer*. Next, this Note will critically analyze the *Lawyer* decision, the Justices' inability to unite on the issue of voting districts, and the possible solution presented by *Lawyer* — early settlement with heavy state involvement. Finally, this Note will conclude with suggestions for the Florida Legislature in light of the current state of the Equal Protection Clause as applied to voting districts.

THE FACTS IN LAWYER

Florida Senate District 21, encompassing much of Hillsborough and Pinellas Counties, was redrawn by the State Legislature following the 1990 decennial census.[26] The Florida Supreme Court approved the newly drawn district in 1992, as required by the Florida Constitution.[27] Because the new district included Hillsborough County, the Florida Attorney General submitted the plan for preclearance under section 5 of the Voting Rights Act.[28] The Justice Department denied preclearance, finding that the plan separated "politically cohesive minority populations" rather than creating another majority-minority district.[29] When the Legislature failed to take remedial action, the Florida Supreme Court acted *sua sponte* and redrew District 21.[30]

---

26. *See generally In re* Constitutionality of SJR 2G, 597 So. 2d 276 (Fla. 1992), *modified*, 601 So. 2d 543 (Fla. 1992).

27. *See id*. at 285. The court noted that the timing requirements of the Florida Constitution prevented a full examination of the district as provided by the Voting Rights Act. *See id.*

28. *See* Lawyer v. Department of Justice, 117 S. Ct. 2186, 2189 (1997). Preclearance was required because the district included parts of Hillsborough County, an area covered by section 5 of the Voting Rights Act. *See supra* notes 13–17 and accompanying text.

29. *In re Constitutionality*, 601 So. 2d at 547 (Shaw, C.J., specially concurring) (quoting a letter from Assistant United States Attorney General John Dunne to Florida's Attorney General Robert A. Butterworth).

30. *See id*. at 545. The Florida high court had issued an order encouraging the

The reapportioned District 21, Plan 330,[31] was termed by some the "bug-splat" district.[32] It encompassed portions of downtown Tampa, leap-frogged Tampa Bay to include downtown Saint Petersburg, extended narrow corridors both north into Clearwater and east into Polk County, and covered "the eastern shore of Tampa Bay running south to Bradenton in Manatee County."[33] The voting-age population therein was 45.8% African-American and 9.4% Hispanic.[34] In effect, Plan 330 "combine[d] minority populations in Hillsborough and Pinellas Counties" to create a majority-minority district in compliance with the Justice Department's directions.[35]

On April 4, 1994, a group of plaintiffs sued in the United States District Court for the Middle District of Florida, Tampa Division, alleging that District 21 under Plan 330 "was drawn specifically to encompass members of minority groups . . . residing in several different communities."[36] The court allowed several interested parties to intervene, including the Florida Senate, Florida Secretary of State Sandra B. Mortham, District 21 Senator James T. Hargrett, Jr., and several residents of the district.[37]

Legislature to accommodate the Justice Department's objections and redraw the District. *See id*. at 544. The court then allowed interested parties to submit alternative plans, received six, and chose the one that contemplated a majority-minority district. *See id*. at 545–47.

Justice Barkett, however, authored a *dubitante* opinion, stating that she was "loath to agree to any of the convoluted plans submitted under these hurried circumstances." *Id.* at 549.

31. *See Lawyer*, 117 S. Ct. at 2190.

32. *See* Larry Dougherty, *District Fight Reaches High Court*, ST. PETERSBURG TIMES, Oct. 16, 1996, at 1B.

33. *Lawyer*, 117 S. Ct. at 2190. The dissent in the Florida Supreme Court opinion noted that Plan 330 effectively stripped four counties of their African-American voters. *See In re Constitutionality*, 601 So. 2d at 548 (Overton, J., dissenting). For example, the three remaining Pinellas County senate districts were left with an average white population of 96.5%. *See id.* at 548–49 (Overton, J., dissenting).

34. *See Lawyer*, 117 S. Ct. at 2190; *In re Constitutionality*, 601 So. 2d at 546.

35. *In re Constitutionality*, 601 So. 2d at 545. The Florida high court also noted that "the Justice Department seems to interpret the . . . Act as favoring the creation of more districts in which minorities [can] elect minority candidates rather than the creation of more districts in which minorities have greater influence." *Id.* at 546.

36. Scott v. Department of Justice, 920 F. Supp. 1248, 1250 (M.D. Fla. 1996) (quoting plaintiffs' complaint), *aff'd sub nom.* Lawyer v. Department of Justice, 117 S. Ct. 2186 (1997).

37. *See id.* All intervening residents were either African-American or Hispanic. *See id.* Interestingly, the Florida House of Representatives sought intervenor status, but was unwilling to align itself with either side. *See id.*

The case was initially delayed[38] pending the United States Supreme Court's decision in *Miller v. Johnson*,[39] another redistricting case. During the delay and after much political wrangling, the Florida Senate in July 1995 entered into mediation with the plaintiffs and intervenors to avoid "the uncomfortable intervention inherent in federal judicial resolution of [state government] issues."[40] By November 1995, all parties, except for plaintiff Martin Lawyer, had agreed to a proposed resolution of the District's configuration.[41] The settlement, Plan 386, included sections of three counties around Tampa Bay, was somewhat smaller, did not extend east or north into Clearwater, and reduced the African-American voting-age population in the District to 36.2%.[42] Judge Steven D. Merryday, writing for the district court, noted that Plan 386 still included communities in three counties that were separated by Tampa Bay from the body of the District.[43] The panel, however, approved the settlement agreement, declining to require "the best possible district," and deferring to the State Legislature's judgment.[44] Martin Lawyer, a legal-aid attorney and "self-described `aging liberal'"[45] practicing in District 21, appealed, arguing that the district was racially gerrymandered under recent Supreme Court precedent.[46] HELD: Settlement Plan 386 was constitutional because the State had an adequate opportunity to fashion its own district and was

---

38. *See id.*

39. 515 U.S. 900 (1995). For an analysis of *Miller*, see *infra* notes 73–95 and accompanying text.

40. *Scott*, 920 F. Supp. at 1250. The Florida House of Representatives remained strangely aloof during the proceedings, refusing to firmly align itself with either side. *See id.* The House initially appeared as an amicus, but without clearly expressing its opinion of the district. *See id.* The court finally joined the House as a defendant, noting the House's "largely opaque answer to the complaint." *Id.* Ultimately, this joinder facilitated the process of negotiating a settlement to District 21. *See id.* at 1251 & n.1.

41. *See id.* at 1251.

42. *See Lawyer*, 117 S. Ct. at 2191.

43. *See Scott*, 920 F. Supp. at 1254.

44. *Id.* at 1255. The court considered several factors in deciding to defer to the State's judgment, including the State Legislature's consenting to Plan 386, the concurrence of the State's Attorney General and Secretary of State, and the United States Department of Justice's preclearance of the plan. *See id.*

45. *See* Dougherty, *supra* note 32, at 1B.

46. *See Lawyer*, 117 S. Ct. at 2191; Dougherty, *supra* note 32, at 1B. Lawyer continued the appeal with his own funds, taking the position that "race should not matter in representative politics." Dougherty, *supra* note 32, at 1B.

properly represented at settlement negotiations.[47]

HISTORICAL ANALYSIS

A. A "Bizarre" Beginning

The Supreme Court's current stand on racially gerrymandered districts developed from the 1993 decision *Shaw v. Reno*.[48] *Shaw* concerned the constitutionality of a North Carolina redistricting plan created after the 1990 census.[49] The North Carolina State Legislature was required to preclear the redistricting plan because it affected several section 5 counties.[50] As in *Lawyer*, the State's initial plan was rejected because it failed to create a second majority-minority district.[51] The State revised its plan to include a second such district, connecting African-American populations in ten counties with a narrow, 160 mile corridor.[52] When the Attorney General cleared the revised plan, five State residents sued, alleging that the plan was an invalid race-based decision under the Fourteenth Amendment.[53] A three-judge district court panel dismissed the suit, holding that it lacked jurisdiction over the subject matter and that there was no constitutional violation in favoring minority voters.[54] The State residents appealed to the United States Supreme Court.[55]

The Supreme Court in *Shaw* was forced to decide whether racial gerrymandering in favor of minority voters was a cognizable claim.[56] Justice O'Connor, writing for the five-Justice majority, began by

---

47. *See Lawyer*, 117 S. Ct. at 2193.

48. 509 U.S. 630 (1993).

49. *See id.* at 633–34. North Carolina was entitled to a twelfth United States Representative according to the census results. *See id.* at 633.

50. *See id.* at 634; 28 C.F.R. app. § 51 (listing 40 North Carolina counties that require preclearance).

51. *See Shaw*, 509 U.S. at 635.

52. *See id.* The corridor followed the route of highway I-85 and was no wider than the interstate in some places. *See id.* The *Wall Street Journal* described the district's shape as a "bug splattered on a windshield." *Id.* (citations omitted).

53. *See* Shaw v. Barr, 808 F. Supp. 461, 462 (E.D.N.C. 1992), *rev'd sub nom.* Shaw v. Reno, 509 U.S. 630 (1993).

54. *See id*. at 473. In a vigorous dissent, Chief Justice Voorhees described one of the majority-minority districts as a "Rorschach ink-blot test," and the other as an effort to "gobble in . . . enclaves of black neighborhoods." *Id.* at 476 (Voorhees, C.J., dissenting).

55. *See Shaw*, 509 U.S. at 636–37.

56. *See id.* at 634.

noting that the appellants were alleging racial gerrymandering rather than political gerrymandering or vote dilution.[57] In an earlier districting case, *United Jewish Organizations of Williamsburgh, Inc. v. Carey* (*UJO*),[58] the Court held that political gerrymandering was valid if it did not cause a minority group's voting strength to be diluted.[59] Justice O'Connor distinguished *UJO*, stating that "[t]he plaintiffs in *UJO* . . . did not allege that the plan, on its face, was so highly irregular."[60] Citing *Gomillion v. Lightfoot*,[61] the Court reasoned that bizarrely-shaped districts may serve as convincing evidence of race-based decisionmaking.[62] Justice O'Connor concluded that an extremely bizarre district triggers strict scrutiny if it was obviously constructed with racial considerations.[63] However, the Court declined to apply this threshold test to the North Carolina districts, and instead remanded *Shaw*, allowing the State to challenge the racial gerrymandering allegation.[64] If the State failed, the district court would be required to apply strict scrutiny to determine whether the districting plan was "narrowly tailored to further a compelling governmental interest."[65]

The *Shaw* dissent argued that the majority had ignored Court precedent in reaching its decision.[66] Justice White cited *UJO* for the proposition that the white plaintiffs in *Shaw* could not legitimately

---

57. *See id.* at 636, 641. The Court made it clear that the appellants had made a wise concession by not alleging a total constitutional ban on race-based reapportionment. *See id.* at 641–42.

58. 430 U.S. 144 (1977).

59. *See id*. at 167. *UJO* concerned New York districts that "deliberately increased the nonwhite majorities . . . to enhance the opportunity for election of nonwhite representatives from those districts." *Id.* at 165. This was accomplished by splitting the members of a discrete Hasidic community between two voting districts. *See id.* at 152.

60. *Shaw*, 509 U.S. at 651.

61. 364 U.S. 339 (1960). The Court in *Gomillion* invalidated an Alabama plan to draw African-American voters *out of* the Tuskegee city limits. *See id.* at 341–48. The plan removed all but four or five of the African-American voters by creating a "strangely irregular twenty-eight-sided figure." *Id.* at 341.

62. *See Shaw*, 509 U.S. at 646–47.

63. *See id.* at 646.

64. *See id.* at 657–58. The Court made it clear that the holding was limited to the finding that "appellants have stated a claim under the Equal Protection clause by alleging that the . . . reapportionment scheme [was] so irrational on its face that it can be understood only as an effort to segregate voters [by] . . . race, and that *the separation lacks sufficient justification.*" *Id.* at 658 (emphasis added).

65. *Id.*

66. *See id.* at 659 (White, J., dissenting).

prevail under the Equal Protection Clause.[67] He contended that, given the inherently political nature of legislative redistricting, the Court's intervention should be limited to plans that granted different groups of voters unequal access to the political process.[68] Justice White also stated that the perceived violation of the appellants' right to equal protection was "both a fiction and a departure from settled equal protection principles."[69] In sum, Justice White considered the bizarreness of a district's shape immaterial unless coupled with an injury, such as loss of voting power.[70]

Shaw is significant because it created a claim for racial gerrymandering, although the notion of a threshold test based on bizarreness was later disavowed by the Court.[71] The shape of voting districts, however, remained important to the majority Justices in *Shaw*[72] as circumstantial evidence of racial gerrymandering and, ultimately, as evidence in the "narrowly tailored" prong of strict scrutiny.[73] Although it had created an understandable test for detecting impermissible gerrymandering, the Court would later be forced to revisit *Shaw* and the issue of strict scrutiny.

B. *Miller* Time

In 1995, the Court faced the next round of challenges to post-census redistricting schemes. In *Miller v. Johnson*,[74] the Court withdrew somewhat from *Shaw*'s bizarreness threshold test in favor of a predominant factor test.[75] Like *Shaw*, *Miller* concerned the validity of majority-minority voting districts that the legislature had created

---

67. *See Shaw*, 509 U.S. at 659 (White, J., dissenting) (citing *UJO*, 430 U.S. at 165–68).

68. *See id.* at 661–63 (White, J., dissenting).

69. *Id.* at 659 (White, J., dissenting). Justice White found significance in the fact that North Carolina had elected its first African-American congressmembers under the plan. *See id.*

70. *See id.* at 671–72 (White, J., dissenting).

71. *See infra* notes 74–75 and accompanying text.

72. Chief Justice Rehnquist, along with Justices Scalia, Kennedy, and Thomas, joined Justice O'Connor to form the shape-conscious majority. *See Shaw*, 509 U.S. at 632.

73. *See, e.g., infra* notes 175–79 and accompanying text.

74. 515 U.S. 900 (1995).

75. *See id.* at 916. Justice Kennedy stated that "[o]ur observation in *Shaw* was not meant to suggest that a district must be bizarre on its face before there is a constitutional violation." *Id.* at 912.

to gain preclearance under section 5 of the Voting Rights Act.[76] Georgia gained an added seat in the United States Congress after the 1990 census and formulated a redistricting plan to incorporate the addition.[77] The Justice Department refused to preclear the plan, citing Georgia's failure to incorporate other minorities into the two majority African-American districts.[78] The second plan retained the two majority-minority districts while strengthening minority populations in three others.[79] However, the Justice Department refused preclearance again and prodded the State to create a third majority African-American district.[80] Georgia finally gained preclearance by connecting the minority populations of Atlanta and the coastal areas to create the desired third majority-minority district.[81] Nearly two years later, five white residents of the newly-created Eleventh Congressional District sued in federal district court, alleging that the legislature had racially gerrymandered the district in violation of the Equal Protection Clause.[82] Citing *Shaw*, the district court applied strict scrutiny and held that the Eleventh District was not narrowly tailored to further the State's compelling interest of complying with the Voting Rights Act.[83] Several intervenors immediately appealed to the Supreme Court.[84]

The Court began by noting that the parties had practically stipulated that the Eleventh District was the product of race-based planning.[85] Justice Kennedy, joined by the majority Justices from *Shaw*,[86] considered the appellants' allegation that a district was

---

76. *See id*. at 906.

77. *See id.* The census revealed that African-Americans made up 27% of Georgia's population. *See id.*

78. *See Miller*, 515 U.S. at 906–07. Prior to the redistricting plan, only one of the 10 congressional districts was majority African-American. *See id.* at 906.

79. *See id.* at 907.

80. *See id.* The Department favored the so-called "max-black" plan proposed by the ACLU. *See id.* This plan would maximize African-American populations in two districts by transferring voters in what was termed the "Macon/Savannah trade." *See id.*

81. *See Miller*, 515 U.S. at 908. The third district spanned 260 miles of swampland and eight counties to connect the African-American populations. *See id.*

82. *See id.* at 909. In the intervening elections, all three majority-minority districts elected African-American congressmen. *See id.*

83. *See id.* at 910. The district court assumed, without deciding, that Georgia had a compelling interest in complying with the Voting Rights Act. *See id.*

84. *See Miller*, 515 U.S. at 910.

85. *See id.*

86. *See id*. at 902; *Shaw*, 509 U.S. at 632.

valid unless the challenger demonstrated a "bizarre[ness] that . . . is unexplainable other than on the basis of race."[87] The Court refined, and perhaps expanded, the scope of *Shaw* by stating that a district need not be "bizarre on its face" to violate the Equal Protection Clause.[88] Rather, the Court considered bizarre features "persuasive circumstantial evidence" that race was the primary factor in shaping the district.[89]

The Court also recognized that district line-drawing is an inherently political act and necessarily involves consideration of racial demographics.[90] However, Justice Kennedy stated that strict scrutiny would apply when "race was the *predominant* [motivating] factor" and "the legislature subordinated traditional race-neutral districting principles, . . . [such as] compactness, contiguity, [and] respect for political subdivisions, . . . to racial considerations."[91] The Court proceeded to strictly scrutinize the Georgia redistricting plan, noting the State's admission that it had engineered the third majority-minority district to satisfy the Department of Justice.[92]

The Court determined that Georgia's plan was not narrowly tailored to fulfill a compelling state interest.[93] Justice Kennedy stated that Georgia's use of the "black max" plan was beyond the requirements of the Voting Rights Act[94] and "so discriminate[d] on the basis of race . . . as to violate the Constitution."[95] Justice Kennedy did not answer whether the Voting Rights Act alone provides a

---

87. *Miller*, 515 U.S. at 905.

88. *Id.* at 912 (citing Shaw v. Reno, 509 U.S. 630, 643 (1993)). Rather than require bizarreness, the Court concluded that a challenger must show that voters were separated into different districts based on race. *See id.* at 913.

89. *Id.*

90. *See Miller*, 515 U.S. at 915.

91. *Id.* at 916 (emphasis added). The Court also stated, without giving an example, that a state could conceivably defeat a gerrymandering claim. *See id.* (citing *Shaw*, 509 U.S. at 647).

92. *See id.* at 918. The Court refuted the appellants' argument that the oddly shaped Eleventh District served to unite "communities of interest." *Id.* at 919. Notably, the Court stated that "[a] State is free to recognize communities that have a . . . common thread of relevant interests." *Id.* However, the Court did not perceive any such common interests in the Eleventh District population. *See id.*

93. *See Miller*, 515 U.S. at 920.

94. *See id.* at 921.

95. *Id.* at 924 (quoting Beer v. United States, 425 U.S. 130, 141 (1976)). Justice Kennedy apparently believed that Georgia's first two proposals would have passed constitutional scrutiny as "ameliorative" plans to prevent loss of minority voting power (as required by section 5 of the Voting Rights Act). *See id.*

compelling state interest.[96] Rather, the Court simply invalidated the Georgia plan as "extraordinary" rather than narrowly tailored.[97]

C. Beating Around the *Bush* and *Shaw* Revisited

In 1996, the Court faced another pair of post-census gerrymandering cases. Having developed an understandable threshold test for gerrymandered districts in *Miller*, the Court in *Bush v. Vera*[98] and *Shaw v. Hunt* (*Shaw II*)[99] turned its attention to the requirements of strict scrutiny: That a state's race-based actions be narrowly tailored to further a compelling governmental interest.[100]

1. Bush v. Vera

Bush is notable for the sudden split of the *Shaw* and *Miller* majorities into a plurality. This divisive case involved an equal protection challenge to the post-census Texas redistricting plan that created three new majority-minority districts.[101] Although the Justice Department granted preclearance, the district court invalidated the plan, holding that the three challenged districts were unconstitutional.[102] The Supreme Court affirmed in a plurality opinion, but the Justices suddenly disagreed on the minimum requirement for triggering strict scrutiny.[103] Justices O'Connor, Kennedy, and Chief Justice Rehnquist agreed that, under *Shaw* and *Miller*, strict scrutiny applied when race was the *predominant factor* in the districting plan.[104] Justices Thomas and Scalia, concurring in judgment only, argued that "[s]trict scrutiny applies to *all* governmental classifications based on race."[105]

---

96. *See id.* at 921. Justice Kennedy stated that a "strong basis in evidence of the harm being remedied" must be shown by the state claiming a compelling interest. *Id.* at 922.

97. *See Miller*, 515 U.S. at 926. The Court stated that "[t]here is no indication [that] Congress intended such a far-reaching application of § 5." *Id.*

98. 116 S. Ct. 1941 (1996).

99. 116 S. Ct. 1894 (1996).

100. *See Bush*, 116 S. Ct. at 1951; *Shaw II*, 116 S. Ct. at 1899.

101. *See Bush*, 116 S. Ct. at 1950–51. The results of the 1990 census granted Texas three additional seats in the United States Congress. *See id.*

102. *See id.* at 1951.

103. *See id.* at 1950–52

104. *See id.* at 1951–52 (quoting *Miller*, 515 U.S. at 916).

105. *Bush*, 116 S. Ct. at 1972–74 (Thomas & Scalia, JJ., concurring) (emphasis

In applying the predominant factor test, Justice O'Connor rejected the State's argument that it had primarily considered legitimate districting principles, such as assuring the reelection of "functional incumbents" and uniting "communities of interest."[106] Rather, the Court held that Texas had used race as a proxy for legitimate districting principles by utilizing a computer program that provided up-to-the-minute racial and economic statistics for each districting change.[107] Based on the State's reliance on the REDAPPL computer program and the use of other racial considerations, the Court concluded that race was the predominant motivating factor.[108] The Court then applied strict scrutiny to the Texas plan.[109]

Once again, the Court declined to rule on whether compliance with the Voting Rights Act provides a State with a compelling interest.[110] Rather, Justice O'Connor held that the bizarre shaping of the districts precluded a finding that they were narrowly tailored to further a legitimate state interest.[111] Further, Justice O'Connor stated that *any* plan seeking to comply with section 5 by preventing retrogression would be invalidated if it "went beyond what was reasonably necessary to avoid retrogression."[112] The Court concluded by defending *Shaw*'s tenuous guidelines, stating that "the complexity of the districting process [is] such that bright-line rules are

---

added). Justice Thomas stated that the Court had "vigorously asserted that *all* governmental racial classifications must be strictly scrutinized." *Id.* at 1972 (Thomas & Scalia, JJ., concurring) (emphasis added) (citing Adarand Constructors, Inc. v. Pena, 505 U.S. 200, 225–27 (1995)).

106. *Bush*, 116 S. Ct. at 1952–55. The State argued that it had drawn district lines primarily to protect the seats of elected officials who had demonstrated an ability to govern effectively. *See id.*

107. *See id.* at 1953, 1958–60.

108. *See id.* at 1953–58. The REDAPPL program superimposed this data on a map of existing Texas districts and provided updated information for each proposed districting change. *See id.* at 1953. Interestingly, Justice O'Connor suggested that the use of race-neutral data to achieve an identical districting plan would constitute valid political gerrymandering. *See id.* at 1956.

109. *See Bush*, 116 S. Ct. at 1960.

110. *See id.*

111. *Id.* at 1961–62. Justice O'Connor went on to indicate that a state's compelling interest is satisfied when it remedies past discrimination and is demonstrated by a "strong basis in evidence." *Id.* at 1962–63 (quoting *Shaw II*, 116 S. Ct. at 1902–03).

112. *Id.* at 1963 (quoting *Shaw*, 509 U.S. at 655). The State argued that the nonretrogression rule applied here because the sole majority African-American district in Georgia had succeeded in electing African-American representatives for the past twenty years. *See id.*

not available."[113] Rather than abandon or modify *Shaw*, however, the Court was compelled to "adhere to stare decisis."[114]

Importantly, though, Justice O'Connor stated in a separate concurring opinion that "the States have a compelling interest in complying with the [Act]."[115] Justice O'Connor noted that the prior districting opinions had "assumed without deciding that compliance with the results test of VRA § 2(b) is a compelling state interest."[116] Justice O'Connor, however, believed that the states undoubtedly had a compelling interest in complying with the mandates of the Act because of the potential liability involved with running afoul of section 2.[117]

2. Shaw v. Hunt *(Shaw II)*

In 1996, the Court was forced to revisit *Shaw* to determine the proper application of strict scrutiny, an issue that the Court deferred in its original decision.[118] On remand, the district court upheld the plan examined in *Shaw*, holding that it was narrowly tailored to further the State's interest in complying with the Voting Rights Act.[119] For the second time, however, the North Carolina districts came before the Supreme Court on appeal.[120]

Justice Rehnquist, joined by the majority Justices from *Shaw* and *Miller*,[121] began by stating that racially gerrymandered districts are subject to strict scrutiny "whether or not the reason for the racial classification is benign or the purpose remedial."[122] As in *Bush* and *Miller*, the Court held that the redistricting plan was not nar-

---

113. *Bush*, 116 S. Ct. at 1964.

114. *Id.*

115. *Id.* at 1968 (O'Connor, J., concurring).

116. *Id.*; *see also infra* notes 164–67 and accompanying text.

117. *See Bush*, 116 S. Ct. at 1968–69. Justice O'Connor believed that the states were required to "respect . . . the authority of Congress under the Reconstruction Amendments" and ensure that the results of each electoral contest did not indicate discriminatory voting practices. *Id.* at 1969.

118. *See* Shaw v. Hunt, 116 S. Ct. 1894, 1899 (1996) *(Shaw II)*; Shaw v. Reno, 509 U.S. 630, 658 (1993).

119. *See Shaw II*, 116 S. Ct. at 1899.

120. *See id.*

121. Justices O'Connor, Scalia, Kennedy, Thomas, and Chief Justice Rehnquist comprised the majority in each decision. *See id.* at 1898; Miller v. Johnson, 515 U.S. 900, 902 (1995); Shaw v. Reno, 509 U.S. 630, 632 (1993).

122. *Shaw II*, 116 S. Ct. at 1900 (citing *Shaw*, 509 U.S. at 642–43, 653–54).

rowly tailored.[123] The Court also declined once again to decide whether the State had a compelling interest in creating the districts.[124] Justice Rehnquist discounted North Carolina's claimed interest in avoiding retrogression and section 5 liability, stating that a "State's policy of adhering to other districting principles instead of [maximizing] . . . majority-minority districts" could not validly result in such liability.[125] Further, the Court echoed *Miller* by basing its decision largely on the unwieldy appearance of the challenged districts.[126] The Court stated that "[a] map portrays the districts' deviance far better than words," and that the district lines were "unconventional" under any standards.[127] Chief Justice Rehnquist concluded that the challenged districts were "not required under a correct reading of § 5 [of the Voting Rights Act] and that District 12, as drawn, is not . . . narrowly tailored to the State's professed interest in avoiding § 2 liability."[128]

D. From *Shaw* to *Shaw II* — The Dissents

As noted, the Court has decided the above cases by the barest of majorities.[129] Consequently, the retirement of a single Justice might change the Court's standing on this issue entirely.[130] The dissenting Justices in *Shaw* through *Shaw II*[131] may one day form a majority and, therefore, it is important to examine their opinions.[132] Justices Ginsburg, Breyer, Souter, and Stevens have dissented in every post-*Shaw* districting case, with the latter two authoring most of the

---

123. *See id.* at 1903.

124. *See id.* The Court noted that North Carolina's plan was certainly ameliorative because it "created the first majority-black district in recent history." *Id.* at 1904.

125. *Id.* (quoting *Miller*, 515 U.S. at 924).

126. *See id.* at 1900–01.

127. *Shaw II*, 116 S. Ct. at 1899.

128. *Id.* at 1903.

129. *See supra* note 22 and accompanying text.

130. For an excellent analysis of Court dynamics, see Lynn A. Baker, Comment, *Interdisciplinary Due Diligence: The Case for Common Sense in the Search for the Swing Justice*, 70 S. CAL. L. REV. 187 (1996).

131. Justices White, Blackmun, Stevens, and Souter dissented in *Shaw*. *See* Shaw v. Reno, 509 U.S. 630, 632 (1993). Justices White and Blackmun were replaced by Justices Ginsburg and Breyer. *See* cases cited *infra* note 133 and accompanying text.

132. At least one legal scholar has argued that the Court's current conservative stance on civil rights resulted simply from President Reagan's court-packing plan. *See* Rhodes, *supra* note 6, at 335–36.

opinions.[133] As will be shown, both lines of dissent have consistently made similar arguments.

1. No Harm, No Constitutional Foul

Justice Souter authored dissenting opinions in *Shaw*, *Bush*, and *Shaw II*.[134] His argument consistently focused on the Court's pre-*Shaw* requirement of "evidence of substantial harm to an identifiable group of voters" in Fourteenth Amendment challenges to voting districts.[135] Justice Souter relied heavily on the decisions preceding *Shaw*, most notably *UJO*, for the proposition that no cause of action lies unless the "purpose and effect of the districting [is] to devalue the effectiveness of a voter" based on group membership.[136]

In *Bush*, Souter argued that *Shaw*'s use of the bizarre standard resulted in the Court's regrettable reliance on shape as a criterion.[137] He concluded that such reliance is flawed because race is inevitably a consideration in traditional districting principles and often results in unshapely districts.[138] Justice Souter closed the *Bush* dissent by proposing two solutions to his perceived defects in the *Shaw* cases: "[T]o confine the cause of action by adopting [an understandable] shape test or to eliminate the cause of action entirely."[139]

2. Race as a Permissible Consideration

Justice Stevens has been the most active dissenting Justice, authoring opinions in each *Shaw* case.[140] These opinions focused on

---

133. *See* Shaw v. Hunt, 116 S. Ct. 1894, 1907 (1996) (Stevens, Ginsburg, & Breyer, JJ., dissenting); Bush v. Vera, 116 S. Ct. 1941, 1974 (1996) (Stevens, Ginsburg, & Breyer, JJ., dissenting); Miller v. Johnson, 515 U.S. 900, 934 (1995) (Ginsburg, Stevens, Breyer, & Souter, JJ., dissenting); Shaw v. Reno, 509 U.S. 630, 658 (1993) (White, Blackmun, Stevens, & Souter, JJ., dissenting).

134. *See Shaw II*, 116 S. Ct. at 1923 (adopting the dissenting opinion in *Bush*); *Bush*, 116 S. Ct. at 1997; *Shaw*, 509 U.S. at 679.

135. *Bush*, 116 S. Ct. at 2000 (Souter, J., dissenting); *Shaw*, 509 U.S. at 684 (Souter, J., dissenting).

136. *Shaw*, 509 U.S. at 684 (Souter, J., dissenting). See also *supra* notes 66–70 and accompanying text for a similar argument as set forth by Justice White's *Shaw* dissent.

137. *See Bush*, 116 S. Ct. at 2003–04 (Souter, J., dissenting).

138. *See id.* at 2005.

139. *Id.* at 2011.

140. *See Shaw II*, 116 S. Ct. at 1907 (Stevens, J., dissenting); *Bush*, 116 S. Ct. at 1974 (Stevens, J., dissenting); *Miller*, 515 U.S. at 929 (Stevens, J., dissenting); *Shaw*, 509 U.S. at 676 (Stevens, J., dissenting).

race-based decisionmaking and concluded that defining boundaries according to race is permissible to advance the interests of an underrepresented minority group.[141] Justice Stevens echoed the "no harm, no foul" proposition, asking: "[H]ow can the increased probability that black candidates will win cause white voters, such as respondents, cognizable harm?"[142] In sum, Justice Stevens consistently argued that the Court's intervention should be limited to instances when "[t]he duty to govern impartially is abused [by the] group with power."[143]

Justice Stevens' dissents generally address shape as a non-issue. He stated in *Shaw* that "[t]here is no independent constitutional requirement of compactness or contiguity,"[144] and in *Shaw II* that "residents of hook-shaped Massachusetts receive [no] less effective representation than their counterparts in perfectly rectangular Wyoming."[145] Like Justice Souter, Stevens consistently argued that ameliorative racial gerrymandering is permissible, and thus the challenged district's shape is irrelevant.[146]

COURT'S ANALYSIS IN LAWYER

In a very brief opinion, the Court in *Lawyer* approved the admittedly odd-shaped district resulting from the state-brokered settlement. Chief Justice Rehnquist joined the dissenters from *Shaw II*, *Bush*, and *Miller* to form the five-Justice majority in a significant

---

141. *See Shaw II*, 116 S. Ct. at 1918 (Stevens, J., dissenting); *Bush*, 116 S. Ct. at 1974–75 (Stevens, J., dissenting); *Miller*, 515 U.S. at 930 (Stevens, J., dissenting); *Shaw*, 509 U.S. at 678–79 (Stevens, J., dissenting).

142. *Miller*, 515 U.S. at 931 (Stevens, J., dissenting); *see also Shaw II*, 116 S. Ct. at 1910–11 (Stevens, J., dissenting); *Bush*, 116 S. Ct. at 1977–78 (Stevens, J., dissenting); *Shaw*, 509 U.S. at 684 (Stevens, J., dissenting).

143. *Shaw*, 509 U.S. at 677–78 (Stevens, J., dissenting); *see also Shaw II*, 116 S. Ct. at 1910 (Stevens, J., dissenting) (stating that there is "no basis for recognizing the right to color-blind districting"); *Miller*, 515 U.S. at 932 (Ginsburg, Stevens, Breyer, & Souter, JJ., dissenting) (stating that "districting plans violate the Equal Protection Clause when they `serve no purpose other than to favor one segment — whether racial, ethnic, religious, economic, or political — [occupying] a position of strength'" (citations omitted)).

144. *Shaw*, 509 U.S. at 677 (Stevens, J., dissenting). In fact, Justice Stevens openly accepted that the North Carolina district was "so bizarre that it must have been drawn for the purpose of either advantaging or disadvantaging a cognizable group of voters." *Id.* at 676 (Stevens, J., dissenting).

145. *Shaw II*, 116 S. Ct. at 1916 n.13 (Stevens, Ginsburg, & Breyer, JJ., dissenting).

146. *See id*. at 1916 (Stevens, Ginsburg, & Breyer, JJ., dissenting); *Shaw*, 509 U.S. at 677 (Stevens, J, dissenting).

departure from the earlier *Shaw* cases.[147] *Lawyer*, however, is analytically distinct from the *Shaw* decisions because the Court limited the scope of its review to the district court's rulings: 1) that the settlement agreement was valid and constitutional; and 2) that a judgment invalidating Plan 330 was not a necessary prerequisite to the validation of Plan 386.[148] Consequently, the Court once again avoided a direct application of *Miller*'s predominant factor test to the challenged district's shape.[149]

Justice Souter, writing for the majority, first addressed the appellants' allegation that the district court erred by not invalidating the presettlement district.[150] The appellants argued that the district court had improperly bypassed the State Legislature's districting function by failing to invalidate Plan 330 and sending it back to Tallahassee.[151] The Court held that the district court was not required to issue a "formal adjudication of unconstitutionality" on the presettlement districts because the State had participated in and consented to the settlement after the "continuing refusal of the legislature to address the issue in formal session."[152] Further, the Court did not consider the appellant prejudiced by the lack of a formal finding of invalidity because "he [was] in the same position he would have enjoyed if he had had such a decree."[153]

The Court then reviewed the district court's approval of the settlement under a clearly erroneous standard.[154] In a very curt analysis, Justice Souter affirmed the lower court's conclusion that

---

147. *See* Lawyer v. Department of Justice, 117 S. Ct. 2186, 2189 (1997); *supra* notes 72, 130 and accompanying text.

148. *See Lawyer*, 117 S. Ct. at 2192–95.

149. *See* Miller v. Johnson, 515 U.S. 900, 934 (1995) (Ginsburg, Stevens, Breyer, & Souter, JJ., dissenting); *see also* Jeanmarie K. Grubert, *The Rehnquist Court's Changed Reading of the Equal Protection Clause in the Context of Voting Rights*, 65 FORDHAM L. REV. 1819, 1852–54 (1997) (outlining the differing arguments of the *Miller* majority and dissenting Justices).

150. *See Lawyer*, 117 S. Ct. at 2192.

151. *See id.*

152. *Id.* at 2193. Justice Souter concluded that the Florida Attorney General had the power to consent to the settlement on behalf of the State. *See id.* at 2193 & n.4. The Court noted that the State had the right to demand a judgment, but had waived this right by participating in settlement negotiations. *See id.* at 2194.

153. *Lawyer*, 117 S. Ct. at 2194. The Court also noted that the appellant's "views on the merits of the proposed plan were heard, and his right to attack it in this appeal is entirely unimpaired." *Id.*

154. *See id.* at 2194–95 (citing Miller v. Johnson, 515 U.S. 900, 917 (1995), for the standard of review).

Plan 386 did not subordinate "traditional districting principles" to race.[155] The Court noted that the Plan's shape, although spanning Tampa Bay and including three counties, "[did] not stand out as different from numerous other Florida House and Senate districts."[156] Importantly, the Court also recognized District 21's community interest as represented by the "urban, low-income population, . . . whose white and black members alike share a similarly depressed economic condition."[157] Generally, though, the Court spent little time analyzing District 21 under the *Shaw* and *Miller* standards.[158]

The dissenting opinion, authored by Justice Scalia, argued that the district court had intruded on the State's sovereignty by approving Plan 386.[159] Justice Scalia concluded that the Florida Constitution assigned districting responsibility to Florida's Legislature and Supreme Court.[160] By not invalidating Plan 330 and sending the issue back to the Legislature, Scalia reasoned that the district court had "fail[ed] to give Florida a reasonable opportunity to craft its own solution."[161] The dissent also cited *Miller* for the proposition that "federal interference with state districting `represents a serious intrusion on the most vital of local functions.'"[162] In effect, the *Lawyer* dissent reflects more on states rights than the issue of valid districting.

CRITICAL ANALYSIS OF LAWYER

Lawyer was infected with the same condition as its *Shaw* brethren: A divided Court that danced around the opportunity to establish a clear rule of law. While *Miller* established an under-

---

155. *Lawyer*, 117 S. Ct. at 2195.

156. *Id.* The Court also pointed out the Florida Supreme Court's holding that a district's contiguity, under state constitutional principles, is not destroyed by the presence of an intervening body of water. *See id.* at n.9 (citing *In re* Constitutionality of SJR 2G, 597 So. 2d 276, 280 (Fla. 1992)). Further, 31 of Florida's 40 Senate districts are multi-county districts. *See id*.

157. *Id.* at 2195.

158. *See id.*

159. *See Lawyer*, 117 S. Ct. at 2196–99 (Scalia, J., dissenting). Justices O'Connor, Kennedy, and Thomas joined in the dissent. *See id.* at 2196.

160. *See id.* at 2197 & n.2 (citing FLA. CONST. art. III, § 16).

161. *Id.* at 2198.

162. *Id.* at 2197 (quoting *Miller*, 515 U.S. at 915).

standable threshold test,[163] the districting cases that followed, including *Lawyer*, have consistently avoided the complete application of strict scrutiny. The Court has yet to define: 1) the boundaries of permissible state interests or 2) the role of shape in narrowly tailoring districting plans.

This uncertainty will result in a second wave of post-census redistricting cases as states guess at how narrowly tailored each district must be. In making this guess, state officials must now consider the shape of each district and avoid bizarre boundaries. The *Shaw* decision's shape reliance seems to have opened a "Pandora's Box," as demonstrated by the latest post-census litigation, and the Court will deal with its effects well into the next millennium. On a positive note, *Lawyer*'s holding provides states, interested parties, and federal district courts great incentive to reach settlements early, without necessarily litigating the merits of a challenged districting plan. Hopefully, this avenue will divert some litigation that is sure to arise after the next census.

A. Strict Scrutiny After *Lawyer*

1. Compelling State Interests

The *Shaw* decisions were openly hesitant to broach the issue of strict scrutiny. Rather than apply the entire test, the Court has found in each post-*Shaw* case that the state actions were not narrowly tailored without directly addressing the issue of "compelling state interests." *Miller* did not answer "[w]hether or not in some cases compliance with the Voting Rights Act . . . can provide a compelling interest;"[164] the Court in *Bush* "assume[d] without deciding that compliance with results test . . . can be a compelling state interest;"[165] in *Shaw II*, the Court "once again [did] not reach that question;"[166] and finally, *Lawyer* never allowed the Court to apply strict scrutiny because the predominant factor threshold test was not met.[167]

---

163. *See Miller*, 515 U.S. at 912.

164. *Id.* at 920–23. Justice Kennedy reasoned that the Georgia districts were not reasonably necessary under the Act. *See id.* at 921.

165. Bush v. Vera, 116 S. Ct. 1941, 1960 (1996) (citations omitted).

166. Shaw v. Hunt, 116 S. Ct. 1894, 1903 (1996).

167. *See* Lawyer v. Department of Justice, 117 S. Ct. 2186, 2195 (1997).

The Court has struggled with this issue and seems reluctant to take a stand either way. Justices Souter, Stevens, Ginsburg, and Breyer have stated in dissenting opinions that a state has a compelling interest in complying with the Act.[168] Interestingly, Justice O'Connor's concurring opinion in *Bush* also stated that "compliance with the results test . . . is a compelling state interest."[169] These opinions suggest that a majority of the Justices would find a compelling interest in a state plan that seeks to avoid liability under the Act.[170] This is particularly important for section 5 designated states like Florida, which face the specter of triggering the Act's nonretrogression clause in every election.[171] By arguing that they have a fear of liability under the Act, these states now have a better chance of finding five of the Justices receptive to the claim of a compelling state interest in race-based line-drawing.

Additionally, *Lawyer*'s recognition that Plan 386 considered community interests opens the possibility that states might have a compelling interest in uniting groups based on socioeconomic similarities other than race.[172] Justice Souter emphasized that District 21 was "the poorest of the nine districts in the Tampa Bay region and among the poorest districts in the State."[173] While the *Lawyer* decision never reached the issue of strict scrutiny, the community interest argument may become important to the issue of compelling interests in the Court's future consideration of districting plans. The district court relied heavily on District 21's community and concluded that such interests should be considered in districting plans.[174] Unfortunately, Justice Souter did not expand on the community interests theory, an opportunity that the district court's analysis clearly provided.

2. Narrow by Design

---

168. *See supra* notes 129–46 and accompanying text.

169. *Bush*, 116 S. Ct. at 1968 (O'Connor, J., concurring).

170. *See* Erwin Chemerinsky, *Minority Voting Rights and the Supreme Court*, TRIAL Nov. 1996, at 20.

171. *See supra* notes 9–17 and accompanying text.

172. *See Lawyer*, 117 S. Ct. at 2195.

173. *Id.*

174. *See* Scott v. Department of Justice, 920 F. Supp. 1248, 1254 (M.D. Fla. 1996), *aff'd sub nom.* Lawyer v. Department of Justice, 117 S. Ct. 2186 (1997). The district court defined a community as "individuals who sense among themselves a cohesiveness that they regard as prevailing over their cohesiveness with others." *Id.*

Even if a state has a compelling interest, it still has the problem of creating a districting plan that the Court considers narrowly tailored.[175] While this has primarily been an issue of aesthetics for the *Shaw* majority, the *Lawyer* opinion provided little guidance because strict scrutiny was never triggered.

In *Shaw*, the Court began its unfortunate dependence on appearance by measuring the challenged districts' shape against the majority's own idea of bizarreness.[176] The term is prevalent in each of the majority and plurality opinions following *Miller*, although the Court in *Miller* withdrew from the idea of bizarreness as a threshold test.[177] In fact, the word "bizarre" is used by the *Bush* plurality more than twenty times.[178] Further, the predominant factors test, with its compactness and contiguity elements, amounts to nothing more than a test of the challenged district's bizarreness.

It is no surprise, then, that the shape of a district is crucial to the narrowly tailored issue. As the plurality understated in *Bush*, "district shape is not irrelevant to the narrow tailoring inquiry."[179] State officials seeking to narrowly tailor future districts must consider the *Shaw* majority's clear preference for linear, compact, and *normal* shapes.[180] Fortunately, the *Lawyer* opinion provided some guidance on the role of shape in narrowly tailoring districts by referring to legitimate districting principles.[181] In judging the benign shape of District 21 under Plan 386, Justice Souter used other Florida districts for comparison and considered the State's unique geography and historic districting principles.[182] He concluded that

---

175. One legal scholar has stated that "the precise extent to which election districts can be designed to take race or ethnicity into account remains shrouded in a doctrinal framework that provides scant practical guidance." Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2505–06 (1997).

176. *See* Shaw v. Reno, 509 U.S. 630, 644–45 (1993).

177. *See Miller*, 515 U.S. at 913.

178. *See Bush*, 116 S. Ct. at 1948–49, 1952, 1954–58, 1961–62.

179. *Id.* at 1962. Justice O'Connor also hinted that there was some allowable degree of bizarreness by rejecting "the District Court's view . . . that a district must have the least possible amount of irregularity in shape." *Id*. at 1960 (quotations omitted).

180. *See* Sally Dworak-Fisher, *Drawing the Line on Incumbency Protection*, 2 MICH. J. RACE & L. 131, 168 (1996) (stating that "legislators . . . will be more cautious in their use of racial data and less likely to create majority-minority districts, particularly if such districts would be irregular").

181. *See Lawyer*, 117 S. Ct. at 2194–95.

182. *See id.* The district court, on the other hand, approved of the settlement plan even though its boundaries were markedly uneven. *See Scott*, 920 F. Supp. at 1253.

strangely shaped districts were not unusual in Florida.[183] In his prior dissenting opinions, shape has not been an issue because Justice Souter considers racial distinctions valid in ameliorative situations.[184] This suggests two lines of thought on shape: 1) the *Shaw* majority's clear distaste for unconventional line-drawing; and 2) the remaining Justices' willingness to consider elements other than compactness, contiguity, and shape. Unfortunately, *Lawyer* failed to go beyond a few scant comments in clarifying the importance of shape in redistricting. Given Justice Souter's clear dislike of *Shaw*'s shape dependence,[185] his evasion of the issue is not surprising.

B. The Effects of an Imprecise *Lawyer*

State officials and district court judges should carefully use the meager guidance provided by *Lawyer* and its predecessors to craft constitutional redistricting plans in the next millennium. Unfortunately, this guidance will inevitably prove inadequate for some, and the Court will surely be forced to revisit the issue of racial gerrymandering. Aside from the obvious inconvenience for the Court, these imprecise rulings will have several collateral effects on the state-level electoral process. First and foremost, state officials will be forced to curb their formerly broad discretion in drawing district lines.

The Court has recognized the inherently political nature of districting and the inevitable consideration of racial demographics in reapportionment plans.[186] In fact, the Voting Rights Act was intended to encourage the proper use of race in a state decision affecting voting dynamics. The Justice Department has prodded section 5 states, with a history of questionable voting practices (including Florida), to ameliorate the electoral standing of disadvantaged

---

183. *See Lawyer*, 117 S. Ct. at 2194–95. Similarly, the district court had concluded that District 21's boundaries were "markedly uneven and, in some respects, extraordinary," and that the "racial composition of District 21 is somewhat dissimilar from . . . the larger, encompassing geographical area." *Scott*, 920 F. Supp. at 1253.

184. *See supra* notes 134–39 and accompanying text.

185. *See supra* notes 56–73 and accompanying text.

186. *See supra* note 82 and accompanying text; Ken Gormley, *Reapportioning Election Districts: An Exercise in Political Self-Preservation*, USA TODAY (magazine) Jan. 1997, at 22–25 (outlining the political nature of redistricting and the considerations involved).

groups.[187] As Justices Souter and Stevens contend,[188] using race distinctions to accomplish such a goal is very different from the discriminatory practices that the Court so vigorously opposed in *Brown v. Board of Education*,[189] *Arlington Heights v. Metropolitan Housing Development Corp.*,[190] and other landmark civil rights cases.[191] By creating the racial gerrymandering cause of action in *Shaw*,[192] the Court gave notice that there were limits to acceptable ameliorative state actions that are based on racial distinctions. However, by failing to define these limits in *Lawyer* and the intervening decisions, the Court has forced states to take the most conservative approach possible in considering race as a relevant factor while crafting conventional-looking districts.[193]

Rather than openly considering racial demographics, as exemplified in Texas's use of the REDAPPL computer program, independent-minded states may be forced to deal behind closed doors to avoid the *Bush* accusation of using "race as a proxy."[194] Additionally, some state officials will necessarily apply a conservative aesthetics and shape standard to any district with distinguishing racial demographics to avoid invalidation. States may be forced to cloak racial considerations in the guise of some permissible redistricting principle, most likely *Bush's* incumbency protection or community interest theories.[195]

As one legal scholar noted, "A dubious aspect of this line

---

187. *See, e.g.*, *supra* notes 29, 78, 80 and accompanying text.

188. *See supra* notes 134–46 and accompanying text.

189. 349 U.S. 294, 301 (1955) (holding that racial discrimination in public educational institutions was unconstitutional and ordering the states to integrate "with all deliberate speed").

190. 429 U.S. 252, 265–71 (1977) (stating that discriminatory intent cannot be the motivating factor in a zoning board's refusal to rezone a tract of land to permit integrated housing).

191. *But see* Katharine Inglis Butler, *Affirmative Racial Gerrymandering: Rhetoric and Reality*, 26 CUMB. L. REV. 313, 342–45 (1996) (arguing that redistricting should be race-neutral).

192. *See supra* notes 71–73 and accompanying text.

193. *See* M. Elaine Hammond, *Toward a More Colorblind Society?: Congressional Redistricting After* Shaw v. Hunt *and* Bush v. Vera, 75 N.C. L. REV. 2151, 2211–12 (1997) (describing states' implementation of alternative redistricting solutions). For an insider's view of the redistricting process, see Gormley, *supra* note 186.

194. *See supra* notes 106–08 and accompanying text.

195. *See supra* note 106 and accompanying text. *See generally* Dworak-Fisher, *supra* note 180 (outlining the evils of allowing politicians the opportunity to protect their own interests as incumbents).

drawing is that it remains under the control of incumbents . . . who are disproportionately White."[196] The result is terribly ironic: While *Bush* inferred that states may properly redistrict to protect the incumbency of individual elected officials,[197] they may not, under *Shaw* and its progeny, consider race to protect or improve the electoral muscle of historically disadvantaged citizens.[198] One state official has noted that "[p]reservation of jobs is the most powerful driving force behind reapportionment" and "[t]he appetites of incumbents, when given a chance to draw their own maps, are boundless."[199] The absurd result is that many politicians may reapportion to serve their own individual and collective political needs, but may not substantially consider race in ameliorative reapportionment without triggering strict scrutiny.[200] A possible consequence of this ridiculous dynamic is that "future redistrictings will be driven entirely by the self interests of legislators."[201] Presumably, such petty political jockeying will be allowed to continue, so long as any accompanying racial considerations serve a compelling state interest and are narrowly tailored (i.e., visually appealing). Unfortunately, *Lawyer* was unable to shed more light on the matter, and the Justices' divergent views foretell a long struggle before these issues are resolved. Without a clear directive from the Court, states must now redistrict in a very conservative fashion, while considering both the Voting Rights Act and the Court's shaky standing on redistricting.

C. A Possible Solution

---

196. Dworak-Fisher, *supra* note 180, at 131.

197. *See Bush*, 116 S. Ct. at 1955. Justice O'Connor characterized incumbency protection as "political gerrymandering," which does not trigger strict scrutiny. *See id.* at 1956.

198. *See* Dworak-Fisher, *supra* note 180, at 167–68 (noting that white politicians may not properly fight to keep minority voters and minority voters may not retain a favorable representative if the result is an irregularly shaped district).

199. Gormley, *supra* note 186, at 23.

200. One Pennsylvania state legislator, for example, "fought violently" to have his district redrawn to include Punxsutawney and its famous resident groundhog. *See* Gormley, *supra* note 186, at 23. "Punxsutawney Phil" leads the town's annual Groundhog Day celebration and has been the subject of media coverage and movies. *See id.*

201. Butler, *supra* note 191, at 348 (arguing that incumbency protection is not a permissible redistricting goal).

Unfortunately, *Shaw*'s shape-based threshold test, together with the Voting Rights Act, forced the Court to examine far too many districting plans following the 1990 census. The *Lawyer* decision should provide great incentive for states and their citizens to settle districting disputes early, without having to litigate in federal court. With *Lawyer*, it seems that Justice Rehnquist, a noted affirmative action opponent,[202] will join the *Miller* dissenters in upholding a challenged district if its shape and racial demographics are the result of negotiated settlement.[203]

After *Shaw* and *Miller*, redistricting without considering race as a predominant factor was essentially guesswork for state officials who were race-conscious by necessity when faced with section 5 of the Voting Rights Act. Thus, many states became "politically paralyzed" and decided to leave the issue to the federal courts rather than redistrict at all.[204] After *Miller*, *Bush*, and *Shaw*, the state legislatures in Georgia, Texas, and North Carolina decided to abandon the districting decisions at the steps of the district courts.[205] Likewise, the Florida House of Representatives in *Scott v. Department of Justice* effectively deferred to the judgment of Judge Merryday by "keeping its view of District 21 largely to itself" and "fil[ing] a largely opaque answer to the complaint."[206] The result is a paradox: *Federal* courts are increasingly involved in drawing *state* district lines even though the Court has stated that it is a *state* function.[207] Additionally, race-based decisionmaking is not always invalid.[208] It is more than coincidental that this paradox arose after *Shaw* and *Miller* clouded the districting issue by considering shape as a relevant constitutional factor.

Finally, in *Lawyer*, the Court mustered five Justices to uphold the well-reasoned settlement agreement, as approved by the district court, despite the district's somewhat bizarre shape.[209] Further, the

---

202. *See generally* Rhodes, *supra* note 6, at 335–36 (outlining the "Rehnquist Court" and its "dismantling [of the] special protections guaranteed to minority voters").

203. *See* Lawyer v. Department of Justice, 117 S. Ct. 2186, 2189 (1997); Miller v. Johnson, 515 U.S. 900, 904 (1995).

204. Pildes, *supra* note 175, at 2508 & n.11.

205. *See id.*

206. Scott v. Department of Justice, 920 F. Supp. 1248, 1250 (M.D. Fla. 1996).

207. *See* Miller v. Johnson, 515 U.S. 900, 915 (1995).

208. *See* Shaw v. Reno, 509 U.S. 630, 642 (1993) (stating that "[t]his Court never has held that race-conscious state decisionmaking is impermissible in all circumstances").

209. *See Lawyer*, 117 S. Ct. at 2189.

Court accepted the proposed settlement even though it was the product of multiparty negotiations and not the Florida Legislature (as required by the Florida Constitution).[210] Justice Souter carefully pointed out that Florida had participated in the settlement and, consequently, that the Florida Constitution was not violated.[211] The Court noted that "there is no reason to suppose that the . . . attorney general lacked authority to propose [Plan 386 and] . . . represent the State in this litigation."[212] Importantly, the Court stated that when a state enters into such settlements, "the discretion of the federal court is limited except to the extent that the plan itself runs afoul of federal law."[213]

This holding may serve to grant broad settlement powers to state officials so long as the "proponents of the plan include[] counsel authorized to represent the State itself."[214] In *Lawyer*, the Court may have recognized the difficulty of maintaining the *Shaw* reasoning and decided to leave the issue for resolution at the state and district court level. Consequently, it may now be possible for states to avoid expensive, time-consuming litigation by reaching a settlement early. It is important in such settlements that the proper state officials be involved and that due recognition be given to the reapportionment processes as set forth in each state's constitution. Any district court supervising such settlements should note that, in *Lawyer*, the district court received assurances that the State officials involved were authorized to represent their respective governmental bodies.[215] If the parties to a districting suit can carefully and reasonably arrive at a settlement, *Lawyer* seems to indicate that the Supreme Court will take a more reserved approach in reviewing the result.[216] While this does little to dispel the difficulty of deciphering

---

210. *See id.* at 2193 & n.4.

211. *See id.* at 2193. Justice Souter pointed out that "the District Court sought and received specific assurances from lawyers for the President of the Senate and the Speaker of the House that they were authorized to represent their respective government bodies . . . and enter into the settlement proposed." *Id.* at 2191.

212. *Id.* at 2192. The Attorney General's position as the "chief law officer of the state" was presumed "absent express legislative restriction to the contrary." *Id.* at 2193 n.4.

213. *Id.* at 2193.

214. *Lawyer*, 117 S. Ct. at 2193. The dissent, on the other hand, accepted Mr. Lawyer's argument that the State Legislature had sole power to reapportion under the Florida Constitution. *See id.* at 2197 & n.2 (Scalia, J., dissenting).

215. *See supra* note 211 and accompanying text.

216. *See supra* notes 209–13 and accompanying text.

a rule of law from *Shaw* and its progeny, it does allow the parties in districting disputes to resolve the problem with a reduced threat of judicial invalidation.

CONCLUSION

As the Florida Legislature prepares to redraw district lines after the 2000 census, it should consider several factors. First, the current Supreme Court seems to loathe oddly-shaped districts that result from race-based criteria.[217] Accordingly, Florida officials must not become too adventurous when drawing district lines in 2000, even if intending to ameliorate past discrimination. Second, five Supreme Court Justices believe that compliance with the Voting Rights Act is a compelling interest.[218] Consequently, the Florida Legislature should craft a well-reasoned policy that explains the need for race-based line-drawing and provides factual support for a compelling state interest argument.[219] Third, a solid four-Justice contingency may be willing to allow the broad application of racial demographics in districting schemes, regardless of shape.[220] State officials should take note of any change in the Court's makeup and direct their efforts accordingly. Finally, the *Lawyer* opinion suggests that this Court may be willing to leave the resolution of districting disputes to the parties by allowing the district courts broad discretion in approving settlements.[221] However, settlements should be constructed with an awareness of the Court's standing on shape and race-based decisionmaking. In sum, the 2000 census will force Florida and other states to cross a constitutional minefield in constructing valid districts, but early settlement may help avoid a fatal districting misstep.

---

217. *See supra* notes 176–80 and accompanying text.

218. *See supra* notes 168–71 and accompanying text.

219. *See generally* Hammond, *supra* note 193 (outlining strategies for post-*Shaw* redistricting plans). For an analysis of possible tactics for defending challenged districts, see Benjamin E. Griffith, *Defense Strategies in Voting Rights Litigation After* Shaw *and* Miller, 28 URB. LAW. 715, 722–32 (1996).

220. *See supra* notes 129–46 and accompanying text.

221. *See supra* notes 211–16 and accompanying text.

APPENDIX