SUPREME COURT OF THE UNITED STATES

No. 92–357

RUTH O. SHAW, ET AL., APPELLANTS *v.* JANET RENO, ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[June 28, 1993]

JUSTICE SOUTER, dissenting.

Today, the Court recognizes a new cause of action under which a State's electoral redistricting plan that includes a configuration "so bizarre," *ante*, at 12, that it "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race [without] sufficient justification," *ante*, at 17, will be subjected to strict scrutiny. In my view there is no justification for the Court's determination to depart from our prior decisions by carving out this narrow group of cases for strict scrutiny in place of the review customarily applied in cases dealing with discrimination in electoral districting on the basis of race.

Until today, the Court has analyzed equal protection claims involving race in electoral districting differently from equal protection claims involving other forms of governmental conduct, and before turning to the different regimes of analysis it will be useful to set out the relevant respects in which such districting differs from the characteristic circumstances in which a State might otherwise consciously consider race. Unlike other contexts in which we have addressed the State's conscious use of race, see, *e.g., Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989) (city contracting); *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267 (1986) (teacher layoffs), electoral districting calls for decisions that nearly always require some consideration of race for legitimate

reasons where there is a racially mixed population. As long as members of racial groups have the commonality of interest implicit in our ability to talk about concepts like "minority voting strength," and "dilution of minority votes," cf. *Thornburg* v. *Gingles*, 478 U. S. 30, 46–51 (1986), and as long as racial bloc voting takes place,[1] legislators will have to take race into account in order to avoid dilution of minority voting strength in the districting plans they adopt.[2] One need look no further than the Voting Rights Act to understand that this may be required, and we have held that race may constitutionally be taken into account in order to comply with that Act. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144, 161–162 (1977) *(UJO)* (plurality opinion of WHITE, J., joined by Brennan, BLACKMUN, and STEVENS, JJ.); *id.*, at 180, and n. (Stewart, J., joined by Powell, J., concurring in judgment).[3]

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[1]"Bloc racial voting is an unfortunate phenomenon, but we are repeatedly faced with the findings of knowledgeable district courts that it is a fact of life. Where it exists, most often the result is that neither white nor black can be elected from a district in which his race is in the minority." *Beer* v. *United States*, 425 U. S. 130, 144 (1976) (WHITE, J., dissenting).

[2]Recognition of actual commonality of interest and racially-polarized bloc voting cannot be equated with the "`invocation of race stereotypes' " described by the Court, *ante*, at 16 (quoting *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. ___, ____ (1991)), and forbidden by our case law.

[3]Section 5 of the Voting Rights Act requires a covered jurisdiction to demonstrate either to the Attorney General or to the District Court that each new districting plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race[,] color, or [membership in a language minority.]" 42 U. S. C. §1973c; see also 42 U. S. C. §1973b(f)(2). Section 2 of the Voting Rights Act forbids districting plans that will have a

A second distinction between districting and most other governmental decisions in which race has figured is that those other decisions using racial criteria characteristically occur in circumstances in which the use of race to the advantage of one person is necessarily at the obvious expense of a member of a different race. Thus, for example, awarding government contracts on a racial basis excludes certain firms from competition on racial grounds. See *Richmond* v. *J. A. Croson Co.*, *supra,* at 493; see also *Fullilove* v. *Klutznick*, 448 U. S. 448, 484 (1980) (opinion of Burger, C. J.). And when race is used to supplant seniority in layoffs, someone is laid off who would not be otherwise. *Wygant* v. *Jackson Bd. of Ed., supra*, at 282–283 (plurality opinion of Powell, J.). The same principle pertains in nondistricting aspects of voting law, where race-based discrimination places the disfavored voters at the disadvantage of exclusion from the franchise without any alternative benefit. See, *e.g., Gomillion* v. *Lightfoot*, 364 U. S. 339, 341 (1960) (voters alleged to have been excluded from voting in the municipality).

In districting, by contrast, the mere placement of an individual in one district instead of another denies no one a right or benefit provided to others.[4] All citizens

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discriminatory effect on minority groups. 42 U. S. C. §1973.

[4]The majority's use of "segregation" to describe the effect of districting here may suggest that it carries effects comparable to school segregation making it subject to like scrutiny. But a principal consequence of school segregation was inequality in educational opportunity provided, whereas use of race (or any other group characteristic) in districting does not without more deny equality of political participation. *Brown* v. *Board of Education*, 347 U. S. 483, 495 (1954). And while *Bolling* v. *Sharpe,* 347 U. S. 497, 500 (1954), held that requiring segregation in public

may register, vote, and be represented. In whatever district, the individual voter has a right to vote in each election, and the election will result in the voter's representation. As we have held, one's constitutional rights are not violated merely because the candidate one supports loses the election or because a group (including a racial group) to which one belongs winds up with a representative from outside that group. See *Whitcomb* v. *Chavis*, 403 U. S. 124, 153–155 (1971). It is true, of course, that one's vote may be more or less effective depending on the interests of the other individuals who are in one's district, and our cases recognize the reality that members of the same race often have shared interests. "Dilution" thus refers to the effects of districting decisions not on an individual's political power viewed in isolation, but on the political power of a group. See *UJO, supra,* at 165 (plurality opinion). This is the reason that the placement of given voters in a given district, even on the basis of race, does not, without more, diminish the effectiveness of the individual as a voter.

Our different approaches to equal protection in electoral districting and nondistricting cases reflect these differences. There is a characteristic coincidence of disadvantageous effect and illegitimate purpose associated with the State's use of race in those situations in which it has immediately triggered at-least heightened scrutiny (which every Member of the Court to address the issue has agreed must be applied even to race-based classifications designed to serve some permissible state interest).[5]

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education served no legitimate public purpose, consideration of race may be constitutionally appropriate in electoral districting decisions in racially mixed political units. See *supra*, at 2.

[5]See *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493–

Presumably because the legitimate consideration of race in a districting decision is usually inevitable under the Voting Rights Act when communities are racially mixed, however, and because, without more, it does not result in diminished political effectiveness for anyone, we have not taken the approach of applying the usual standard of such heightened "scrutiny" to race-based districting decisions. To be sure, as the Court says, it would be logically possible to apply strict scrutiny to these cases (and to uphold those uses of race that are permissible), see *ante*, at 22–25. But just because there frequently will be a

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495 (1989) (plurality opinion of O'CONNOR, J., joined by REHNQUIST, C. J., and WHITE and KENNEDY, JJ.) (referring variously to "strict scrutiny," "the standard of review employed in *Wygant*," and "heightened scrutiny"); *id.*, at 520 (SCALIA, J., concurring in judgment) ("strict scrutiny"); *id.*, at 535 (Marshall, J., dissenting) (classifications "`must serve important governmental objectives and must be substantially related to achievement of those objectives'") (quoting *University of California Regents* v. *Bakke*, 438 U. S. 265, 359 (1978) (joint opinion of Brennan, WHITE, Marshall, and BLACKMUN, JJ.)); *id.*, at 514–516 (STEVENS, J., concurring in part and concurring in judgment) (undertaking close examination of the characteristics of the advantaged and disadvantaged racial groups said to justify the disparate treatment although declining to articulate different standards of review); see also *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267, 279–280 (1986) (plurality opinion of Powell, J.) (equating various articulations of standards of review ``more stringent'' than ```reasonableness''' with ``strict scrutiny''). Of course the Court has not held that the disadvantaging effect of these uses of race can never be justified by a sufficiently close relationship to a sufficiently strong state interest. See, *e.g., Croson, supra*, at 509 (plurality opinion).

constitutionally permissible use of race in electoral districting, as exemplified by the consideration of race to comply with the Voting Rights Act (quite apart from the consideration of race to remedy a violation of the Act or the Constitution), it has seemed more appropriate for the Court to identify impermissible uses by describing particular effects sufficiently serious to justify recognition under the Fourteenth Amendment. Under our cases there is in general a requirement that in order to obtain relief under the Fourteenth Amendment, the purpose and effect of the districting must be to devalue the effectiveness of a voter compared to what, as a group member, he would otherwise be able to enjoy. See *UJO,* 430 U. S., at 165–166 (1977) (plurality opinion of WHITE, J., joined by STEVENS and REHNQUIST, JJ.); *id.*, at 179–180 (Stewart, J., joined by Powell, JJ., concurring in judgment). JUSTICE WHITE describes the formulations we have used and the common categories of dilutive practice in his dissenting opinion. See *ante*, at 4–6 (WHITE, J., dissenting); *ante*, at 13.[6]

A consequence of this categorical approach is the absence of any need for further searching "scrutiny" once it has been shown that a given districting decision has a purpose and effect falling within one of those categories. If a cognizable harm like dilution or the abridgment of the right to participate in the electoral process is shown, the districting plan violates the Fourteenth Amendment. If not, it does not. Under this approach, in the absence of an allegation of such cognizable harm, there is no need for further scrutiny because a gerrymandering claim

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[6]In this regard, I agree with JUSTICE WHITE's assessment of the difficulty the white plaintiffs would have here in showing that their opportunity to participate equally in North Carolina's electoral process has been unconstitutionally diminished. See *ante*, at 9–10, and n. 6 (WHITE, J., dissenting).

cannot be proven without the element of harm. Nor if dilution is proven is there any need for further constitutional scrutiny; there has never been a suggestion that such use of race could be justified under any type of scrutiny, since the dilution of the right to vote can not be said to serve any legitimate governmental purpose.

There is thus no theoretical inconsistency in having two distinct approaches to equal protection analysis, one for cases of electoral districting and one for most other types of state governmental decisions. Nor, because of the distinctions between the two categories, is there any risk that Fourteenth Amendment districting law as such will be taken to imply anything for purposes of general Fourteenth Amendment scrutiny about "benign" racial discrimination, or about group entitlement as distinct from individual protection, or about the appropriateness of strict or other heightened scrutiny.[7]

The Court appears to accept this, and it does not purport to disturb the law of vote dilution in any way. See *ante*, at 21 (acknowledging that "*UJO* set forth a standard under which white voters can establish unconstitutional vote dilution"). Instead, the Court creates a new "analytically distinct," *ibid.*, cause of action, the principal element of which is that a

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[7]The Court accuses me of treating the use of race in electoral redistricting as a "benign" form of discrimination. *Ante*, at 22. What I am saying is that in electoral districting there frequently are permissible uses of race, such as its use to comply with the Voting Rights Act, as well as impermissible ones. In determining whether a use of race is permissible in cases in which there is a bizarrely-shaped district, we can readily look to its effects, just as we would in evaluating any other electoral districting scheme.

districting plan be "so bizarre on its face," *ante*, at 12, or "irrational on its face," *ante*, at 21, or "extremely irregular on its face," *ante*, at 10, that it "rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification." *Ante*, at 21. Pleading such an element, the Court holds, suffices without a further allegation of harm, to state a claim upon which relief can be granted under the Fourteenth Amendment. See *ante*, at 17.

It may be that the terms for pleading this cause of action will be met so rarely that this case will wind up an aberration. The shape of the district at issue in this case is indeed so bizarre that few other examples are ever likely to carry the unequivocal implication of impermissible use of race that the Court finds here. It may therefore be that few electoral districting cases are ever likely to employ the strict scrutiny the Court holds to be applicable on remand if appellants' allegations are "not contradicted." *Ante*, at 22; see also *ante*, at 26.[8]

Nonetheless, in those cases where this cause of action is sufficiently pleaded, the State will have to justify its decision to consider race as being required by a compelling state interest, and its use of race as narrowly tailored to that interest. Meanwhile, in other districting cases, specific consequential harm will still need to be pleaded and proven, in the absence of

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[8]While the Court "express[es] no view as to whether `the intentional creation of majority-minority districts without more' always gives rise to an equal protection claim," *ante*, at 17 (citing *ante*, at 11 (WHITE, J., dissenting)), it repeatedly emphasizes that there is some reason to believe that a configuration devised with reference to traditional districting principles would present a case falling outside the cause of action recognized today. See *ante*, at 10, 17, 21, 26.

which the use of race may be invalidated only if it is shown to serve no legitimate state purpose. Cf. *Bolling* v. *Sharpe*, 347 U. S. 497, 500 (1954).

The Court offers no adequate justification for treating the narrow category of bizarrely shaped district claims differently from other districting claims.[9] The only justification I can imagine would be the preservation of "sound districting principles," *UJO, supra*, at 168, such as compactness and contiguity. But as JUSTICE WHITE points out, see *ante*, at 15 (WHITE, J., dissenting), and as the Court acknowledges, see *ante*, at 15 (opinion of the Court), we have held that such principles are not constitutionally required, with the consequence that their absence cannot justify the distinct constitutional

[9]The Court says its new cause of action is justified by what I understand to be some ingredients of stigmatic harm, see *ante*, at 15–16, and by a "threa[t] . . . to our system of representative democracy," *ante*, at 18, both caused by the mere adoption of a districting plan with the elements I have described in the text, *supra*, at 7. To begin with, the complaint nowhere alleges any type of stigmatic harm. See App. to Pet. for Cert. 68a-100a (Complaint and Motion for Preliminary Injunction and For Temporary Restraining Order). Putting that to one side, it seems utterly implausible to me to presume, as the Court does, that North Carolina's creation of this strangely-shaped majority-minority district "generates" within the white plaintiffs here anything comparable to "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown* v. *Board of Education*, 347 U. S. 483, 494 (1954). As for representative democracy, I have difficulty seeing how it is threatened (indeed why it is not, rather, enhanced) by districts that are not even alleged to dilute anyone's vote.

regime put in place by the Court today. Since there is no justification for the departure here from the principles that continue to govern electoral districting cases generally in accordance with our prior decisions, I would not respond to the seeming egregiousness of the redistricting now before us by untethering the concept of racial gerrymander in such a case from the concept of harm exemplified by dilution. In the absence of an allegation of such harm, I would affirm the judgment of the District Court. I respectfully dissent.