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**America Votes! Challenges Facing**

**Modern Election Law & Voting Rights**

**The Role of Race & Partisanship in Redistricting**

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**Introduction**

The Supreme Court has long attempted to reach a consensus on the legitimate role of race and political partisanship in the redistricting process. In a Presidential Election year following the February 13, 2016 death of Justice Antonin Scalia, an ideologically divided Court is confronting this issue.

This presentation focuses on the role of race and partisanship as they relate to the creation of electoral districts. The redistricting process is one in which the Court has taken divergent paths over the six decades since it entered the political thicket.

In a timely effort to educate voters, promote electoral access, mobilize the electorate and encourage a strong voter turnout in this Presidential Election year, the American Bar Association has taken a significant step by launching the publication of *America Votes! Challenges to Modern Election Law and Voting Rights* (3rd ed., 2016). Consisting of 17 chapters by many the nation’s top academic experts and seasoned litigators, *America Votes!* addresses voter suppression, vote dilution, voter ID, language minority protection, citizenship and immigration issues and many hot topics in this field of the law. It is a must-read for anyone interested in the future of our democracy. Among the key issues is redistricting and the role of race and partisanship in that process, chiefly through the lens of racial and political gerrymandering claims.

**Racial Gerrymandering Claims**

The law governing racial gerrymanders has become more clearly established since the Supreme Court’s landmark 1993 decision in *Shaw v. Reno*. Moreover, the federal courts have been vigilant in their efforts to ensure that the districting process remains free from constitutionally prohibited racial discrimination.

Equal Protection jurisprudence in the wake of the analytical framework of *Shaw v. Reno* gave rise to “*Shaw* violations," which can occur when "race is the predominant consideration in drawing the district lines such that the legislature subordinates traditional race-neutral principles to racial considerations." *Shaw v. Hunt*, 517 U.S. 899, 907, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*). Classifying citizens predominately by race without regard to traditional race-neutral redistricting principles triggers strict scrutiny analysis. Moreover, even a facially race-neutral redistricting plan can constitute an unconstitutional racial gerrymander that fails to survive strict scrutiny. *Shaw v. Reno*, 509 U.S. 630, 646-47, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993)(Shaw I).

***Alabama Legislative Black Caucus***

In 2015, the Supreme Court concluded that the Alabama legislature had engaged in racial gerrymandering by packing minority voters into safe majority-minority districts. Minority plaintiffs asserted a justiciable racial gerrymandering claim under the Equal Protection Clause since race was “the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). The Court condemned the “prioritiz[ation] [of] mechanical racial targets above all other districting criteria,” particularly where a state’s “mechanical[] rel[iance] upon numerical percentages” is untethered to any “strong basis in evidence” for sorting voters on the basis of race. Id. at 1267, 1273-74.

Most recently, racial gerrymandering claims have been litigated on behalf of minority plaintiffs challenging congressional and legislative redistricting plans in Virginia and North Carolina as predominately based on race. Such claims were used as a sword by minority plaintiffs to challenge legislatively created redistricting plans as racial gerrymanders, in contrast to litigation two decades before in which similarly situated parties were charged with excessive reliance on race in drawing district boundaries that disregarded traditional districting principles.

**The Virginia Litigation: *Page* and *Bethune-Hill***

After *Alabama Legislative Black Caucus*, the Commonwealth of Virginia’s Congressional District 3 was successfully challenged at impermissibly race-based, even though the district had its origin as a *Shaw v. Reno* remedy.

The *Page* court concluded that race was a predominant consideration in the redistricting of Virginia's Third Congressional District, and invoked *Shaw*’s admonition that “[r]acial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters. . . ." citing *Shaw v. Reno* (*Shaw I*), 509 U.S. 630, 657 (1993). See *Page v. Va. State Bd. of Elections (Page II)*, 2015 WL 3604029 (E.D. Va. June 5, 2015); *Page v. Va. State Bd. of Elections (Page I)*, 58 F. Supp. 3d 533 (E.D. Va. 2014), *vacated sub nom*. *Cantor v. Personhuballah*, 135 s. Ct. 1699 (2015).

Similar to how the Alabama legislature had allegedly packed minority voters into safe majority-minority districts, the *Page* court found that the 2012 plan had increased the total number of black voting age residents in the Third Congressional District from a BVAP of 53.1% to a BVAP of 56.3%, even though this district had been a safe majority-minority district for 20 years.

**Confusion over *Alabama Legislative Black Caucus***

 Following the June 2015 decision in *Page* invalidating Virginia's Third Congressional District on grounds of a *Shaw* violation, a differently constituted three-judge court in Virginia issued another decision in *Bethune-Hill v. Virginia State Board of Elections*, 2015 WL 6440332 (E.D. Va. 2015).The court in *Bethune-Hill* rejected a *Shaw* racial gerrymandering claim directed against twelve Virginia House Districts. It found that while race was the predominant factor in the creation of the district under scrutiny, the Virginia General Assembly was pursuing a compelling state interest, actual compliance with federal antidiscrimination law, and used race in a manner narrowly tailored to achieve that interest.

The unsuccessful *Bethune-Hill* plaintiffs, now Appellants, argued that the challenged districts were the product of race-based gerrymandering, since they were drawn to comply with a strict racial quota of at least 55% BVAP. Indeed, the state’s lead map drawer admitted that he steadfastly adhered to that overtly racial rule, other delegates testified that the 55% quota pervaded the redistricting process, and the state general assembly rejected alternative plans and proposed revisions that violated the 55% rule.

Probable jurisdiction was noted on June 6, 2016. <http://www.scotusblog.com/case-files/cases/bethune-hill-v-virginia-state-board-of-elections/?wpmp_switcher=desktop>, and the merits brief of the plaintiffs/Appellants was filed on September 7, 2016, see <http://www.scotusblog.com/wp-content/uploads/2016/09/15-680-merit-brief-appellants.pdf>. Their core argument is that race was the predominant

 purpose of the challenged district, and that it was error for the lower court to conclude that such use of race was narrowly tailored and lawful.

***Dickson v. Rucho* and *Harris v. McCrory*: North Carolina's Experience**

 In neighboring North Carolina, that state’s General Assembly adopted the 2011 Congressional Redistricting Plan, after which two groups of plaintiffs filed suits in state court for unconstitutional racial gerrymandering, and another group of plaintiffs filed suit in federal court.

In the state court litigation, one of the groups filed *N.C. Conference of Branches of the NAACP v. State of North Carolina,* and the other filed *Dickson v. Rucho*, and three-judge panel consolidated the two cases.

 In comparison to *Page*, the state court took a dramatically different approach in *Dickson*. It found that the enacted plans did not contain a greater number of VRA districts than were reasonably necessary to comply with the VRA because the state legislature had a strong basis in evidence for concluding that rough proportionality was reasonably necessary to protect the State from anticipated liability under § 2 of the VRA and ensuring § 5 preclearance.

 The three-judge court in *Dickson* found that the N.C. General Assembly did not unnecessarily "pack" VRA districts with black voters when it endeavored to create all VRA districts with at least fifty percent Total BVAP in order to avoid liability under section 2.

 The final judgment of a majority of the three-judge court in *Dickson v. Rucho* was the subject of a petition for writ of certiorari, which was granted by the U.S. Supreme Court on April 20, 2015, and the lower court’s judgment was vacated and the case was remanded for further consideration in light of *Alabama Legislative Black Caucus v. Alabama*, 575 U. S. \_\_\_ (2015). *Dickson v. Rucho*, 135 S.Ct. 1843, 191 L.Ed. 2d 719, 575 U.S. \_\_\_\_ (April 20, 2015); see SCOTUSBLOG at <http://www.scotusblog.com/case-files/cases/dickson-v-rucho/>

 In *Harris v. McCrory*, Plaintiffs initiated their legal action in federal court, challenging the constitutionality of the North Carolina General Assembly's 2011 Congressional Redistricting Plan. They alleged that North Carolina's Congressional District 1 and Congressional District 12 were racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment. On February 5, 2016, following a three-day bench trial, a three-judge court convened in the Middle District of North Carolina held that the plaintiffs had carried their burden of proving that race predominated in both districts and that defendants had failed to establish that such race-based redistricting satisfied strict scrutiny. *Harris v. McCrory*, 2016 WL 482052 (M.D.N.C. Feb. 5, 2016). New congressional districts were ordered to be drawn forthwith to remedy the unconstitutional districts. Probable jurisdiction was noted June 27, 2016. See 136 S.Ct. 1001 (2016).

 As the litigants in the Virginia and North Carolina racial gerrymandering cases were rushing to the Supreme Court for a resolution, the Court lost one of its most conservative Justices, Antonin Scalia. Both the Virginia and North Carolina cases focused on the same question: To what extent can a state legislature rely upon race in the drawing of districts and invoke as a justification for race-based districting the desire to avoid potential liability under the Section 2 and Section 5 of the Voting Rights Act?

 The issues raised in the Virginia and North Carolina cases concerning the role of race in redistricting go to the heart of our Nation's much-tattered, but still intact, concept that the United States Constitution is colorblind.

**4-4 Division on Pending Cases**

A 4-4 decision in any of these cases would mean affirmance of the lower court’s decision that upheld the challenged districting scheme. In light of Justice Scalia’s untimely death in the midst of these and related appeals, some Court observers have predicted that the Court is likely to remain evenly divided for the foreseeable future. When the Court divides evenly on a case pending before it, the lower court’s order stands and the Supreme Court’s consideration of the case has no precedential value, just as if the justices never agreed to take up the case in the first place. Think Progress, Feb. 13, 2016, at <http://thinkprogress.org/justice/2016/02/13/3749464/the-simply-breathtaking-consequences-of-justice-scalias-death/>

 The Virginia case was the first to be calendared for oral argument, and it proved that this knotty issue was not the kind of legal issue that can be resolved with any degree of certainty by an evenly divided eight-member Court. The Court avoided a decision on the merits by holding that members of Congress – and there were almost a dozen as Plaintiffs in the Virginia case - have no standing to litigate the issue. *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016). Put another way, Congressmen have no right to pick their voters.

**Political Gerrymandering Claims**

Political gerrymandering is a different animal altogether. It has been defined as "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength," Black's Law Dictionary 802, 1346 (10th ed. 2014).

The Supreme Court has recognized that "unlawful political gerrymandering claims may be justiciable in concept" but it has yet to identify a judicially discernable and manageable standard for claims invoking the Equal Protection Clause of the 14th Amendment for adjudicating such claims and in fact has twice indicated that, absent such a standard, political gerrymandering claims must be dismissed. See *League of United Latin American Citizens v. Perry (LULAC)*, 548 U.S. 399 (2006); *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

Justice Kennedy emphasized in his separate opinion in *Vieth* that "First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights," 541 U.S. at 314 (Kennedy, J., concurring in the judgment). His statement has now provided support in a Maryland district court for the proposition that the First Amendment can provide the framework for considering political gerrymandering claims.

**Shift to First Amendment Framework**

 While the Supreme Court has not been able to agree on a standard for adjudicating political gerrymandering claims brought under the Equal Protection Clause, the lower courts have begun cobbling together the separate opinions, concurrences and dissents from *Bandemer*, *Vieth* and *LULAC* to provide a framework for an Article III court to adjudicate a claim that the State's abuse of political considerations in districting has violated any other constitutional provision.

 In *Shapiro v. McManus*, Maryland citizens commenced a political gerrymandering action against the Chair and the Administrator of the State Board of Elections, alleging that Maryland’s 2011 Redistricting Plan violated their rights under the First Amendment and Article I, § 2, of the U.S. Constitution.

 A single district court judge granted the State's motion to dismiss, *Benisek v. Mack*, 11 F. Supp. 3d. 516 (D. Md. 2014), and the Fourth Circuit Court of Appeals summarily affirmed, *Benisek*, 584 F. App'x. 140 (4th Cir. 2014). The Supreme Court reversed, concluding that the plaintiffs' constitutional challenge was not "wholly insubstantial" and it thus had to be decided by a district court composed of three judges, as required by 28 U.S.C. § 2284. See *Shapiro*, 136 S. Ct. at 456. In doing so, the Supreme Court recognized that the theory underlying the plaintiffs' First Amendment claim had originally been suggested by Justice Kennedy and was "uncontradicted by the majority in any of [the Court's] cases." Id.

The three-judge court on remand began its analysis in *Shapiro v. McManus* (D. Md. Aug. 24, 2016) <https://scholar.google.com/scholar_case?case=5152767999033440537&q=political+gerrymandering+partisanship&hl=en&as_sdt=3,25&as_ylo=2016>, by noting that the Supreme Court had now recognized that the plaintiffs' legal theory premised on the First Amendment rather than the Equal Protection Clause was "uncontradicted by the majority in any of [its] cases," *Shapiro*, 136 S. Ct. at 456. It concluded that a political gerrymandering claim based on the First Amendment could survive a Rule 12(b)(6) motion to dismiss, and so held.

 The *Shapiro* court also noted that a basic principle in the political patronage context also applied in the redistricting context, namely, that even though the government may deny a person a valuable governmental benefit for any number of reasons,

 [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

 Assessed against this First Amendment framework, Maryland voters and registered Republicans were held to state a justiciable claim upon which relief could be granted in *Shapiro v. McManus* (D. Md. Aug. 24, 2016) <https://scholar.google.com/scholar_case?case=5152767999033440537&q=political+gerrymandering+partisanship&hl=en&as_sdt=3,25&as_ylo=2016>, and their challenge to the constitutionality of Maryland's 2011 congressional redistricting law under the First Amendment was allowed to proceed, where they alleged (1) that the State drew the lines of Maryland's Sixth Congressional District with the specific intent to punish and retaliate against them and similarly situated voters by reason of how they voted and their political party registration; (2) that the State, in furtherance of this purpose, drew the Sixth District's lines in such a manner as to dilute their vote and burden their political expression; and (3) that the State succeeded in its efforts, inflicting a tangible and concrete adverse effect.

 This latest development of a First Amendment basis for asserting political gerrymandering claims gives some weight to the argument that it may still be possible to challenge redistricting plans when partisan considerations go "too far." See *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) ("In the recent decision in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), all but one of the Justices agreed that [politics] is a traditional criterion, and a constitutional one, so long as it does not go too far."), but who can say what "too far" means, and can the First Amendment provide a clear, manageable framework?

A ninth member joining ranks of the current 4-4 Supreme Court may be the answer to whether the First Amendment framework will be recognized as a workable basis for adjudicating political gerrymandering claims.

**CONCLUSION**

 *Alabama Legislative Black Caucus v. Alabama* breathed new life into the constitutional tort of racial gerrymandering, and *Shapiro v. McManus* may do the same for political gerrymandering claims. The First Amendment may provide a suitable basis for such claims, provided the aggrieved plaintiff can adequately allege and ultimately prove the key elements of intent, injury, and causation and thereby support a plausible claim a given redistricting plan has violated the plaintiff’s rights under the First Amendment

 For racial gerrymandering claims, there are sharply divergent results in the application of the racial predominance standard in Virginia's *Page* and *Bethune-Hill* decisions and in North Carolina's *Dickson* and *Harris* decisions. That sharp divergence illustrates graphically that courts are struggling to find a coherent, uniformly applicable set of constitutional standards for measuring the propriety of racial classifications during the redistricting process, and for determining when race trumps political partisanship in that process. Moving this debate to a politically divided eight-member United States Supreme Court may not provide a solution anytime soon, and for the time being the struggle may continue through a series of politically predictable 4-4 votes until a ninth Justice emerges once the current stalemate between the Executive Branch and the Senate Judiciary Committee’s majority is resolved.

 The courts are still not in accord on the ultimate question of when race impermissibly becomes the predominant factor forming the basis of a redistricting plan. Further, the United States Supreme Court has not provided adequate guidance for those jurisdictions seeking to invoke compliance with Section 2, or prior compliance with Section 5, as a sufficient justification for a race-based redistricting plan. These issues await clarification by the Court.

 For now, we can discern a coherent approach to the racial gerrymandering quandary through the decisions handed down thus far in the Virginia and North Carolina redistricting litigation.

That approach may consist of several factors: (1) a principled analysis of the burden of proof for *Shaw* claims of racial gerrymandering, (2) a consistent application of deference and the presumption of constitutionality of state legislative action in the redistricting arena, (3) a consistent application of existing constitutional precedent with respect to racial classifications, (4) a fact-based assessment of whether the redistricting variables of racial identification and political affiliation are highly correlated or not, and (5) an intensely fact-specific appraisal of the political landscape and litigation history that forms the backdrop for such claims in a particular jurisdiction.

The success or failure of *Shaw* claims should turn in part on whether a legislative body allows race to predominate in the development of a redistricting plan, in subordination of race-neutral traditional districting principles. Another central concern over the viability of such claims will be whether the use of race is narrowly tailored to serve a compelling governmental interest.

While it may be quite some time before the lower courts can fully articulate whether and in what manner the First Amendment can provide a suitable basis for political gerrymandering claims, the law applicable to racial gerrymandering is reaching a critical mass in the context of viable *Shaw* claims. Nonetheless, the fate of *Shaw* claims will hang in a 4-4 balance until the U.S. Supreme Court provides guidance to the lower courts on whether compliance with nonretrogression principles under now-immobilized Section 5 or avoidance of vote dilution liability under Section 2 constitute such a compelling governmental interest. We may be moving toward a resolution of this impasse after November 8, 2016.

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