Tinsley E. Yarbrough

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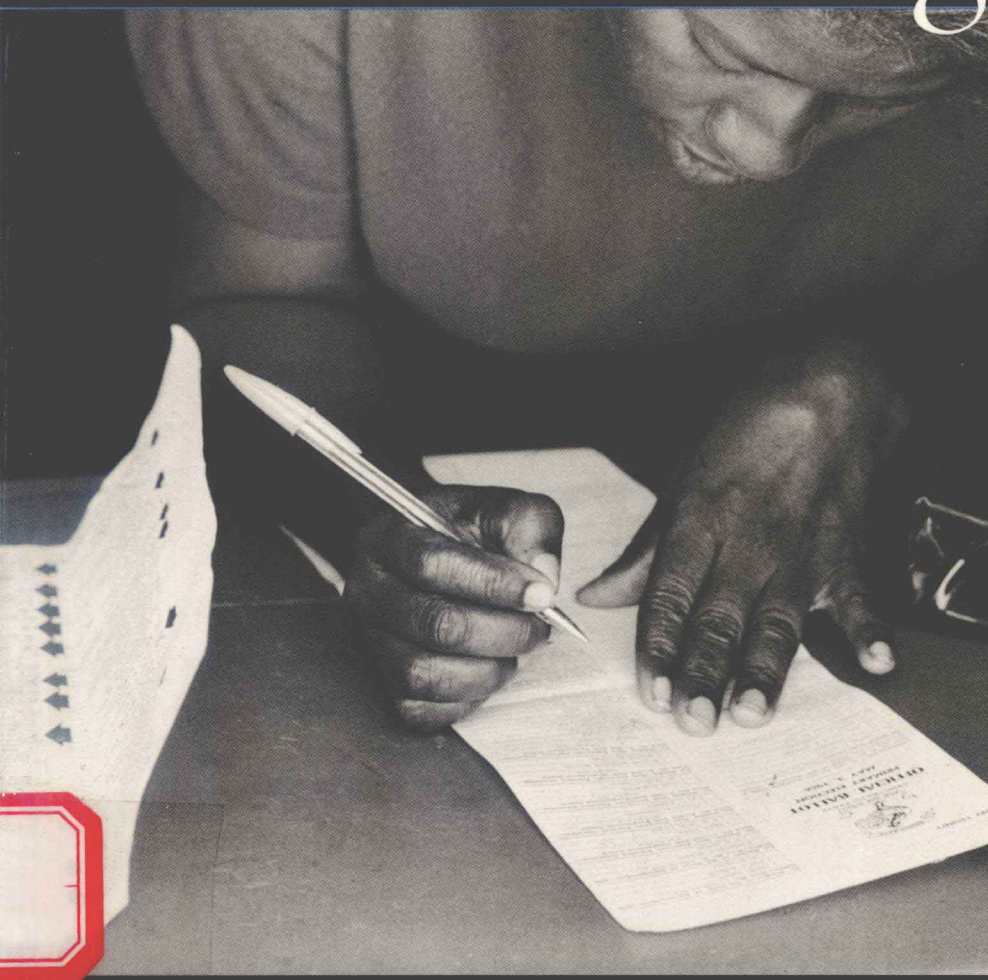

The *Shaw-Cromartie* Cases

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To Ben

The series of cases that opponents of North Carolina's Twelfth Congressional District brought over the course of the 1990s makes a wonderfully complex and immensely intriguing tale. In one sense, the story begins with the Voting Rights Act of 1965. In another, it goes back to Reconstruction and the progressive, debilitating denial of political rights to African American citizens of North Carolina. Lambasted as the "I-85" district by its critics (for its tortuous boundaries along the interstate highway), defended as the only way that African American voters could select one of their own to represent them in Congress, the Twelfth District and its story bring together a remarkable cast of characters. By the time the suits reached the U.S. Supreme Court for the third time, local politicians, civil rights advocates, historians, political scientists, the Democratic and Republican National Committees, a phalanx of federal judges, and eleven members of the Supreme Court's bench had spoken. Even a spectator in court got the chance to register an opinion by a nod of the head. One might say that history played its part, for the changing demographic composition of the state, the success of the civil rights movement in its precincts, and the rise of the African American bar also spoke in the *Shaw-Cromartie* cases.

There were good folks on both sides — people who hated prejudice and worked for equal protection of the law for all races. But was the creation of one or two majority-minority districts the appropriate way to ensure that people with a long-standing lack of political power could finally exercise such power? Was taking race explicitly into consideration an illegitimate step for the legislature? Or were the legislators simply engaging in the time-honored (and legally acceptable) practice of partisan gerrymandering of districts, ensuring that the balance between Democrats and Republicans in the state's congressional delegation would not be disturbed by the additional seat the 1990 census had given the state? These were critical constitutional questions, but when they were heard in court they took on a partisan tinge.

The federal district courts, whose three-judge panels heard the various suits three times, seemed to divide on partisan grounds. That is, the Democratic appointees to the bench favored the two majority-minority districts, while the Republicans opposed them. So, too, when

the case went to the High Court, race and partisanship crisscrossed each other. The Court divided five to four twice, then flipped its ruling in a final five-to-four division. Nevertheless, throughout the oral presentations, the key question remained whether the legislature could arrange electoral boundaries to ensure that a preponderance of voters of one race resided within the district. At the same time, the snakelike shape of the Twelfth District played a role in its fate, as considerations of compactness and contiguity, though not mentioned in the Voting Rights Act and the Constitution, influenced the voting of more than one judge.

Fortunately, the complexities of the cases have met their match in the author of this book. Tinsley Yarbrough is one of the country's foremost students of the courts and brings to this study not only a mastery of the details but also a personal familiarity with many of the participants. His great respect for all of them shines through this balanced and authoritative essay. He makes the most difficult legal arguments and factual disputes compelling and clear.

But the story, as the author reminds us, is not really over, for in the 2000 census, North Carolina gained another congressional seat. And in other states the federal requirement that redistricting not deny to any racial group its right to participate fully in the political process will surely lead to more oddly shaped districts and more cases challenging them, as it did in Georgia and Louisiana. All these factors make this book must reading for students of our politics, past and future.

ACKNOWLEDGMENTS

The assistance of a number of individuals and institutions was critical to the completion of this project. I am tremendously appreciative to Judge Robinson O. Everett for making pertinent files available to me, and to his associate Seth Neyhart and secretary Francesca Burns for graciously assisting me in collecting and copying briefs, oral arguments, trial transcripts, and related documents. Frances Carraway of the North Carolina attorney general's office was similarly helpful in providing materials relevant to my research. For giving so freely of their time and experiences in recorded interviews, I am grateful not only to Judge Everett and Seth Neyhart but also to Dan T. Blue, Thomas Farr, W. Edwin McMahan, Ruth O. Shaw, Melvin Shimm, Tiare Smiley, Eddie Speas, and Adam Stein. Sincere thanks are also extended to the staffs of the Southern Historical Collection at the University of North Carolina at Chapel Hill and East Carolina University's Joyner Library, to Cynthia Manning Smith for flawless clerical assistance, and to Michael Briggs and his superb staff at the University Press of Kansas. Finally, as always, I cherish the love and encouragement of my family, especially our latest addition, grandson Benjamin Cole Ratner, to whom "Gramps" affectionately dedicates this book.

CONTENTS

PROLOGUE

In 1992, the North Carolina General Assembly, under pressure from the U.S. Department of Justice, created two majority-black congressional districts, greatly improving chances for the election of African Americans to the state's delegation in the U.S. House of Representatives for the first time since the beginning of the century. At first glance, Robinson Oscar Everett seemed an unlikely prospect to challenge North Carolina's "majority-minority" districts. The Duke law professor, Durham attorney, and former chief judge of the Court of Military Appeals was, after all, a specialist in military law, not voting rights disputes. He had never argued any case before the U.S. Supreme Court, much less a civil rights suit of potentially far-reaching significance. In fact, he had devoted much of his attention over the years to his family's extensive real estate holdings and broadcasting interests. Like his parents, both of whom had also been prominent members of the North Carolina bar, Everett had long been active in the civic, political, and cultural life of Durham and his native state. Like them, too, he was at least a moderately liberal Democrat who for years had enjoyed close relations with the leaders of Durham's African American community.

The chances for victory in a suit challenging majority-minority districting as an unconstitutional racial gerrymander also appeared doubtful. Despite the obvious distaste of certain Supreme Court justices for race-conscious policies of virtually any sort, the Court's response to affirmative action programs and related practices had been mixed, with a number surviving challenge. Moreover, when the Court held in *Mobile v. Bolden* (1980) that the federal Voting Rights Act of 1965 prohibited only election procedures with a racially discriminatory *intent*, even though their *effect* was to exclude all African Americans from elective office, Congress moved to amend the law in 1982. The Voting Rights Act's revised Section 2 made it clear that nothing in the law entitled racial minorities to proportional representation. Under the new provision, however, a voting rights violation was established "if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election [were] not equally open to participation by members of a [protected] class of citizens in that its members have less opportunity than other members

of the electorate to participate in the political process and to elect representatives of their choice." The extent to which a racial minority had been elected to office was one factor in determining whether Section 2 had been violated.

Even before Section 2's modification, the Supreme Court had upheld a New York state legislative districting plan based on racial criteria as a constitutional means of securing Justice Department approval for redistricting covered by the Voting Rights Act. Speaking for a plurality in *United Jewish Organizations [UJO] v. Carey* (1977), Justice Byron R. White emphasized that the plan did not underrepresent white voters relative to their share of the population, but instead was an appropriate means of "seeking to alleviate the consequences of racial voting at the polls and to achieve a fair allocation of political power between white and nonwhite voters."

The Supreme Court's membership had changed considerably, however, since *UJO* was decided, and at least three justices — Chief Justice William H. Rehnquist and Associate Justices Antonin Scalia and Clarence Thomas — seemed opposed to nearly all race-conscious laws. Speaking for the *UJO* plurality, moreover, Justice White himself had stipulated that legislatures drawing majority-minority districts must employ "sound districting principles such as compactness and population equality." North Carolina's new majority-minority Twelfth District, which snaked along the state's Interstate 85 corridor for 165 miles from Durham to Gastonia, was hardly a model of geographic compactness. Indeed, it was one of the least compact legislative districts ever drafted.

Most important perhaps, Robinson Everett's courtly southern demeanor masked an exceptionally tenacious personality. An old-style liberal who believed that discrimination against African Americans was abhorrent, he found race-conscious policies that were beneficial to blacks, including candidates for elective office, equally objectionable. Acting as chief counsel as well as plaintiff, and enlisting a longtime Duke law school colleague, one of his sons, an old friend, and a secretary in his firm to act as co-plaintiffs, Everett not only filed his suit but also went on to win two impressive Supreme Court victories in *Shaw v. Reno* (1993) and *Shaw v. Hunt* (1996). When further redistricting prompted by *Shaw I* and *II* removed him and the other original plaintiffs from North Carolina's disputed districts but failed to satisfy his

notion of a "color-blind" Constitution, Everett was hardly dissuaded. Instead, he rounded up new plaintiffs; filed another suit, *Cromartie v. Hunt;* and continued the battle, albeit with less successful results. Drawing primarily on interviews, court transcripts, other documents, and newspaper files, this book chronicles the politics of majority-minority districting in North Carolina, *Shaw-Cromartie*'s protracted journey through the courts, the cases' significant impact on election law, and the fascinating interplay of law, politics, and human conflict the dispute has generated.

CHAPTER 1

Preclearance Politics

The Fifteenth Amendment, adopted in 1870 in the aftermath of the Civil War, proclaims, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The amendment also confers on Congress the power to enforce its provisions through "appropriate legislation." Nearly a century later, however, various states and counties, especially in the South, were still resorting to stratagems designed to defeat the amendment's purpose. Indeed, in a number of counties of the Old Confederacy, not a single voting-age African American was registered to vote, while more than 100 percent of their white counterparts — living and dead — remained on the voter rolls.

Over the years, the Supreme Court had abolished some of the more egregious discriminatory election devices. After indulging for a time the fiction that party primaries held to nominate candidates for elective office were private affairs beyond the Constitution's reach, a majority in *Smith v. Allwright* (1944) struck down the Texas Democratic Party's all-white primary. In *Allwright* and later cases, the justices declared that primaries were elections in the constitutional sense if they were regulated by the state — as was the case with Democratic primaries throughout the post–Civil War South — or effectively controlled the election choice.

In *Gomillion v. Lightfoot* (1960), the Court intervened further in state election practices, invalidating a state law that had redrawn the boundary lines of predominantly black Tuskegee, Alabama, thereby excluding all but ten of its African American voters from the town and further participation in its elections. Prior to the law's adoption, Tuskegee had been essentially square in shape; afterward, it had twenty-eight sides, roughly resembling a stylized seahorse. The justices unanimously branded the scheme a transparently unconstitutional racial gerrymander.

Judicial decisions had little impact, however, on devices used to restrict black voter registration. Discriminatory application of literacy and education tests, disqualification of applicants for spelling and other technical errors on registration forms, strict application of voucher requirements for would-be African American registrants, and severe limitations on the number of days registration offices were open each month were but a few of the stratagems to which voting officials resorted. In certain areas, blacks with the temerity to visit a registration office faced intimidation and violence.

Finally, Congress moved slowly and cautiously to action. The 1957 Civil Rights Act authorized Justice Department attorneys to seek injunctions against voter registrars. When many registrars resigned in a ploy to frustrate such suits, Congress in 1960 amended the statute so that states could be made defendants in voter discrimination cases. Although directed primarily at discrimination in public accommodations, employment, and federally funded programs, the omnibus Civil Rights Act of 1964 also contained a number of voting provisions, including a ban on the disqualification of voter applicants for irrelevant errors on registration forms. The next year, however, Congress passed the most formidable voting rights safeguards ever enacted.

The Voting Rights Act of 1965 suspended literacy and related tests in all states and counties in which less than 50 percent of the voting-age population was registered in November 1964 or actually voted in that year's presidential election. The law also authorized the attorney general to dispatch federal examiners to covered areas with the authority to register voters where necessary to protect against continued discrimination or intimidation by local officials. Under the "preclearance" requirements of Section 5, the Voting Rights Act's most controversial provision, state and local jurisdictions subject to the voter test ban were required to secure the approval of the attorney general or the U.S. District Court in the District of Columbia before enforcing any new election or voting law. The law's "bailout" provision exempted state and local governments from coverage only if they could convince the district court that their officials had not engaged in discriminatory voting practices for the past five years.

Based on its triggering formula, the Voting Rights Act initially applied to Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, portions of North Carolina, and Alaska. Alaska was eventually

permitted to take advantage of the bailout provision. Given their long histories of voter discrimination, the southern states covered by the law were hardly in a similar position. Instead, South Carolina invoked the Supreme Court's original jurisdiction in a suit contending that the Voting Rights Act exceeded Congress's constitutional authority. Speaking for the Court in *South Carolina v. Katzenbach* (1966), however, Chief Justice Earl Warren rejected each of the state's claims, upholding every provision of the statute and emphasizing the broad scope of congressional power to enforce the Fifteenth Amendment's prohibition on racial discrimination at the polls.

While concurring in the Court's judgment with respect to other parts of the law, Justice Hugo L. Black vigorously objected to the preclearance provisions, charging that they violated state reserved powers under the Tenth Amendment. But the Alabama native dissented alone. So long as a federal statute's provisions were rationally related to the elimination of racial discrimination in the suffrage, the Court held, they fell within Congress's power to enforce the Fifteenth Amendment, and outside the states' reserved powers.

In subsequent years, Congress extended the Voting Rights Act's life and made its ban on voter tests nationwide. Supreme Court decisions also made it clear that Section 5's preclearance provisions covered electoral boundary lines as well as voting requirements. Section 5 stipulated that new election laws must "not have the purpose . . . [or] the effect of denying or abridging the right to vote on account of race or color." And in *Rome v. United States* (1980), the Court upheld the Justice Department's refusal to grant preclearance to electoral changes and annexations in a Georgia community, even though the attorney general had found no discriminatory purpose but only that Rome had failed to prove that the annexations would not have the effect of diluting the African American vote. Under Section 5's "plain language," Justice Thurgood Marshall concluded for the Court, new election laws must have neither a discriminatory purpose nor a discriminatory effect to withstand a preclearance challenge.

The *Rome* case involved an application of Section 5. *Mobile v. Bolden*, decided the same day, raised issues under Section 2 of the Voting Rights Act, which forbade any "voting qualification or prerequisite to voting, or standard, practice, or procedure . . . imposed or applied by any state or political subdivision to deny or abridge the

right of any citizen of the United States to vote on account of race or color." The *Bolden* majority upheld at-large elections for members of Mobile, Alabama's county commission, even though no African American had been elected to the commission since its creation in 1911. Finding no racially discriminatory intent behind the scheme, the Court concluded that neither Section 2 nor the Constitution prohibited election procedures with a merely racially disparate impact.

The *Bolden* decision became a major focus of debate when Congress considered further extension of the Voting Rights Act in 1982. Over the opposition of the Reagan administration, the law was extended for twenty-five years. In addition, a covered state or political subdivision was required to show that it had not been guilty of voting discrimination for the past ten years and had made efforts to improve the rate of minority voting. Most significantly, Congress replaced the *Bolden* Court's interpretation of Section 2 with a results standard. Section 2(a) prohibited voting regulations that "result[ed]" in denying or abridging the right to vote on account of race, and Section 2(b) provided that a Section 2(a) violation was established when the "totality of the circumstances" revealed that election processes were not equally open to all races, and minorities had less opportunity than other voters to participate and elect representatives "of their choice."

A Senate Judiciary Committee report on the 1982 amendments to the Voting Rights Act listed "typical factors" that might warrant a finding of a Section 2 violation. Among them were an area's history of racial discrimination in voting; the degree of racially polarized voting there; the extent to which unusually large districts or other arrangements enhanced the opportunities for discrimination against minorities; the degree to which minorities were denied access to candidate slating processes; the effects of discrimination in education, employment, and other fields on minority participation in the political process; the presence of racist appeals in political campaigns; and the degree to which minority candidates had been elected to public office in the area in question.

In *Thornburg v. Gingles* (1986), a North Carolina case that gave the Supreme Court its first opportunity to construe the revised Section 2, the Court drew on such considerations in announcing conditions necessary to establish a Section 2 vote dilution claim. The same year that Section 2 was revised, North Carolina's General Assembly had

adopted a redistricting plan for state house and senate seats. In *Gingles*, African American voters contended that one single-member district and six multimember districts in the plan impaired their ability to elect representatives of their choice, in violation of Section 2. Applying Section 2's "totality of the circumstances" test, a three-judge federal district court held that the plan resulted in the dilution of minority votes in each of the disputed districts.

Speaking through Justice William J. Brennan, the Supreme Court concurred in the lower court's judgment with respect to all but one of the districts at issue. The *Gingles* Court also established three conditions that must be met for a Section 2 vote dilution violation to prevail in a challenge to multimember districts. "First," declared Brennan, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances, such as the minority candidate running unopposed . . . — usually to defeat the minority's preferred candidate."

Against this background, North Carolina and other states began the redistricting process necessary to comply with the results of the 1990 census. Under the Constitution, the national government must conduct a census of the population every decade. Based on those census results, the 435 seats in the U.S. House of Representatives are reapportioned among the states, with certain state delegations gaining seats, some losing representation, and others retaining their previous allocation of House seats. Next, states are obliged to redraw the districts from which House members, state legislators, and most other officials elected by district are chosen. In the process, they must comply with the Supreme Court's "one-person, one-vote" rulings requiring districts of substantially equal population, as well as with other Court decisions and the Voting Rights Act.

States derive their responsibility for congressional districting primarily from Article I, Section 4, of the Constitution, which provides that "the times, places, and manner of holding elections for Senators

and Representatives, shall be prescribed in each state by the legislature thereof." But that provision also stipulates that "the Congress may at any time by law make or alter such regulations." In 1842, Congress required each state with more than one House member to elect its representatives by single-member districts "composed of contiguous territory," rather than at large. In an effort to limit gerrymandering — the drawing of districts to favor the electoral chances of one political party or group over others — Congress in 1901 and 1911 also required that congressional districts be "compact." A major apportionment act adopted in 1929, however, omitted any requirement for contiguous, compact, or equally populated districts. From that point until the Supreme Court's reapportionment rulings of the 1960s and passage of voting rights legislation, the state congressional redistricting process was subject to virtually no federal oversight.

In North Carolina, as in most other states, the legislature assumes responsibility for redistricting rather than placing that task in the hands of a commission or some other agency. Always a complicated, politically sensitive process, congressional redistricting in North Carolina following the 1990 census was especially problematic. First, the state's population growth entitled it to an additional U.S. House member; its eleven districts had to be redrawn not only to reflect population shifts since the last census but also to accommodate a new Twelfth District. Second, interests both internal and external to the state pressed for the creation of one or more districts in which African Americans would constitute a voting majority. Finally, since a portion of North Carolina was subject to Section 5 of the Voting Rights Act, the state's congressional redistricting plan was subject to Justice Department preclearance.

External pressure for the creation of majority-minority districts came primarily from the Justice Department's Civil Rights Division. Some suggested that staff attorneys with no partisan political interests simply believed that the 1982 amendments to Section 2 of the Voting Rights Act, as well as the *Gingles* ruling, required such districting to guard against minority vote dilution. Democratic officeholders in North Carolina and elsewhere in the South, however, charged that the campaign for majority-minority districts was part of a Bush administration "Max-Black" campaign, largely orchestrated by Republican National Committee counsel Ben Ginsberg. The plan was to pack African American voters — by far the most reliable members of the