Many commentators saw the United States Supreme Court’s June decision in Shelby County, Ala., v. Holder, ___ US ___, 133 SCt 2612, eliminating the preclearance requirement of Section 5 of the Voting Rights Act, as a significant setback for African American voters. In at least one area of the law, however, the consequences of Shelby County may turn out different than expected and actually may increase the influence of African American voters. That area is redistricting.

To explain, it’s necessary to start with a brief reminder of redistricting strategy.

**Packing as accepted redistricting strategy** — The two major parties share a common goal in redistricting: you place as many of the other parties’ voters into the fewest districts possible and thus leave more seats for your own party. When Democrats are in charge they will recognize that there are certain areas where Republicans are in the majority and will elect legislators. There is no point in trying to eliminate all Republican districts; it cannot be done. The strategy, therefore, is to pack as many likely Republican voters as possible in a few districts so they have less influence on other seats. For Democrats, a 70 percent Republican district is preferable to a 55 percent district because it removes more Republican voters from neighboring districts and improves the Democratic advantage there.

Republican redistricting strategy follows the same reasoning: concede that there will be Democratic seats but load as many Democrats as possible into those districts, reducing their influence elsewhere. And the most predictable and easily identifiable Democratic voters are African Americans.

**How minority districts help Republicans** — For the reason just discussed, it has long been understood by politicians in both parties, but perhaps not by the general public, that the Republican Party benefits from majority African American districts. African Americans are the most consistent Democratic voters. Putting as many of them as possible into their own districts takes that many Democratic voters away from affecting the results in other districts. Consequently it is generally in the interest of Republicans in redistricting to draw as many majority African American districts as they can. But to what extent does the law allow districting based on race?

**The law of racial redistricting** — The basic legal rule, established by the United States Supreme Court in Shaw v. Hunt, 517 US 899 (1996), a North Carolina case, is that redistricting is subject to the same equal protection analysis as other government actions involving race. That is, the use of race as the predominate factor in drawing election districts is subject to strict scrutiny by the courts and is constitutionally permissible only when needed to serve a compelling governmental interest and only when the consideration of race is narrowly tailored to serve that compelling interest.

A complementary decision to Shaw is Stephenson v. Bartlett, 355 NC 354 (2002), from the North Carolina Supreme Court. There the court held that the state constitution’s “whole county provision” barring the splitting of counties between legislative districts, previously thought to have been superseded by federal law, has to be honored to the extent it can without violating federal law. The effect was to impose a rule of rough geographical compactness on legislative districts, allowing bug splats and other odd configurations only when necessary to satisfy the constitutional requirement of one-person/one-vote or federal voting rights.

Taken together, Shaw and Stephenson establish that legislative districts in North Carolina generally should have some tie to county lines and may meander around to link pockets of black voters into a majority in a district only when there is a compelling reason for doing so.
The only compelling reason recognized by the courts thus far for drawing districts based on the inhabitants’ race is to comply with the Voting Rights Act. In North Carolina that has had two meanings. One is to comply with Section 2 of the Voting Rights Act; the other is to comply with Section 5.

Section 2 of the Voting Rights Act? Section 2 is a nationwide prohibition on discrimination in elections. It was not at issue in the Shelby County decision and remains fully effective. Section 2 is important for redistricting because it was the basis for the US Supreme Court’s 1986 decision in Thornburg v. Gingles, 478 US 30, that first caused North Carolina to start drawing majority black districts. The court held in Gingles that countywide, multi-seat legislative districts in a few parts of North Carolina were unlawful because they submerged concentrated blocks of African Americans in large, majority white districts and kept them from electing candidates of their choice.

The remedy for the Section 2 violation, the Gingles court decided, was to split those large multi-seat districts into single-member districts, some of which would have African American majorities. As a result of Gingles, Wake County, for example, went from electing six members of the state House of Representatives from the county at large to six separate districts, one of which was given a black majority.

Although the Gingles decision is more than a quarter century old, was based on voting patterns that existed in the 1960s and 1970s, was limited to a small number of counties, and did not include an ongoing court order to maintain majority minority districts, each subsequent General Assembly has felt that Gingles compels it to continue to draw majority black districts in some parts of the state. Indeed, those districts have been extended to areas of the state never at issue in Gingles.

Section 5? The other Voting Rights Act justification for using race to draw districts has been Section 5. It is the part of the Voting Rights Act requiring certain jurisdictions with a history of racial discrimination to have any changes in election law or practice approved — “precleared” — by the US Justice Department or the federal court for the District of Columbia before they take effect. Election changes are denied preclearance when they seem likely to make it more difficult for African Americans to vote or elect candidates, i.e., when the changes are considered “retrogressive.”

Entire southern states such as Alabama, Mississippi and Georgia have been subject to this preclearance requirement as have been 40 counties in North Carolina. Statewide election changes in North Carolina also have required preclearance because they affect those 40 counties. One of the most significant election changes subject to preclearance has been the redistricting that occurs after each census. Because district lines have such great effect on who may be elected, those submissions have received particularly close scrutiny and have often prompted revisions to better the prospects of African American voters.

Once North Carolina embarked on drawing districts with African American voting majorities in the late 1980s and early 1990s, Section 5 prevented the General Assembly from ever going back to fewer such districts. And when the Justice Department said the state could do more the legislature usually complied. Each new redistricting plan had to attempt to achieve the same level of African American representation as the previous decade or run the risk of being considered retrogressive and failing preclearance.

Thus for the last three rounds of decennial redistricting? after the 1990, 2000 and 2010 censuses? the General Assembly has had a compelling justification for using race as a predominate factor in drawing legislative and congressional districts: compliance with the Gingles decision under Section 2 of the Voting Rights Act and meeting the preclearance requirements of Section 5. But the Shelby County decision now takes Section 5 out of play.

The Shelby County decision? In Shelby County the Supreme Court held that the formula for deciding who was subject to Section 5 — based in part on the proportion of eligible voters registered or voting in 1964 — was too out of date to still be used.

Theoretically Congress can rewrite the coverage formula and revive Section 5, but for now and the foreseeable future preclearance is dead. No longer does Section 5 require the General Assembly to submit its redistricting plans for preclearance or to draw majority black districts to assure that African American voters keep the same level of representation in the legislature and in the state’s congressional districts.
With one of the principal compelling reasons for North Carolina’s racial gerrymandering removed, where does that leave redistricting? And how might it affect the two major political parties? The current litigation over the most recent round of redistricting may give an idea of what to expect in the future.

The arguments about race in the 2011 redistricting — Two lawsuits were filed over the 2011 redistricting, one by a mixed group of black and white citizens, the other by the NAACP, League of Women Voters, Democracy NC and others. At the heart of both complaints is the claim that the Republican controlled General Assembly drew districts based on race in a way that cannot be constitutionally justified. The argument is that bizarre lines were used to pack African Americans into districts in violation of the US Supreme Court’s admonitions in Shaw against racial gerrymandering and contrary to the NC Supreme Court’s Stephenson ruling on not splitting counties unless necessary to comply with federal law.

Note that in the current litigation it is African American plaintiffs who are complaining that the legislature drew too many districts with African American majorities. They argue that a district does not need a majority black voting age population for African Americans to be able to elect candidates — 40 percent or so would suffice, they say — and that the effect of putting so many black voters together in a district is to reduce their influence elsewhere.

The legislature’s answer to the racial gerrymandering claim? It is, in part, that even if race was the predominate factor in drawing some districts there was a compelling governmental interest in doing so, compliance with the Voting Rights Act. That is, the majority black districts, some quite contorted, are required by Section 2 and Section 5.

A three-judge panel of superior court judges upheld the redistricting plan and the appeal is now before the North Carolina Supreme Court. The issues are more complicated than discussed here, but the justification for drawing districts based on race still is central to the case. The trial court said the Shelby County decision did not need to be considered in the current litigation because Section 5 and preclearance still were in effect in 2011 when the districts were drawn. But Shelby County clearly will affect redistricting after the 2020 census and the arguments made in the present lawsuits may have greater traction.

Race and redistricting after the 2020 census — One way or the other the use of race in drawing congressional and legislative districts after the next census is likely to be less prevalent and more nuanced. And the difference seems likely to work to the advantage of Democrats.

If Democrats win control of the General Assembly and control 2020 redistricting they likely will maintain a strong number of districts that African American voters can control, but with lower percentages than now. If their analysis shows that black voters can elect candidates in a district which is only 40 percent African American, that is what they will draw rather than making it over 50 percent. There will be no need to worry about a lower percentage affecting preclearance. Those other black voters will go into a neighboring district to combine with white Democrats to improve the party’s chances there.

If Republicans retain control over the legislature and are in charge of redistricting in 2020 they too will be more limited in using racial districting. Because of Shelby County they will not be able to say that it is necessary to concentrate so many black Democrats into districts to satisfy the preclearance requirement. And there may also well be less force to the argument that the Gingles decision still obligates the state, 35 years later, to maintain majority black districts, especially in areas that were not even considered in that litigation. The skepticism the Supreme Court expressed in Shelby County about using old data to support race-based remedies may carry over to the thinking about the continued vitality of Gingles. Regardless of that, the loss of the Section 5 justification for drawing districts according to race will by itself result in fewer districts stretched and pulled to get over 50 percent African American voting age population — meaning more African American voters available to help elect Democrats in other districts.

So, one way or the other, it looks like there will be fewer majority African American districts in 2020; African American Democratic voters will have more say in other districts; and districts will be tied somewhat more closely to county geography.