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Daniel D. Polsby
Northwestern University

Robert D. Popper

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UGLY: AN INQUIRY INTO THE PROBLEM OF RACIAL GERRYMANDERING UNDER THE VOTING RIGHTS ACT

*Daniel D. Polsby**
and
*Robert D. Popper***

INTRODUCTION

If you have to ask, you can't afford it. — Attributed to J.P. Morgan[1]

How ugly is too ugly? *Shaw v. Reno*[2] examines that important question in the course of rejecting North Carolina's 1990 effort to comply with the preclearance provisions in section 5 of the Voting Rights Act (VRA).[3] But the problem presented is a general one that is apt to arise perennially in any territory-based system of representative democracy. What has "shape" to do with representation? Quite a lot, as we hope to demonstrate.

In *Shaw,* North Carolina's congressional redistricting map — ugly enough as first proposed[4] — was made uglier to accommodate the creation of a second "safe" district for an African-American representative.[5] In the jargon of electoral districting, an "ugly" map is one filled with irregular, uncompact shapes that do not evidently correspond to established political or natural boundaries. An ugly map implies that a human ambition of some kind, with politically strategic ulterior motives, has been hard at work.

Pared to its simplest form, the question is this: Why does an effort to comply with conditions set by the Attorney General for

* Kirkland & Ellis Professor of Law, Northwestern University. B.A. 1964, Oakland University; J.D. 1971, University of Minnesota. — Ed.

** Member of the New York Bar. B.A. 1981, University of Pennsylvania; J.D. 1989, Northwestern University. — Ed. The authors are grateful to Carl Auerbach, Karen Blinder, Bruce Cain, Robert Cooter, Mayer Freed, David Haddock, Gary Lawson, Bill Marshall, and Austin Ranney for taking time to discuss some of the questions raised by this article. Chris Kline furnished valuable research assistance. The work was subsidized by the Kirkland & Ellis research fund of Northwestern University. Thanks and full absolutions to all.

1. This quotation has been widely attributed to J.P. Morgan, who said "[a]ny man who has to ask about the annual upkeep of a yacht can't afford one." JOHN BARTLETT, FAMILIAR QUOTATIONS 533 (16th ed. 1992) (attributing quotation to J.P. Morgan).

2. 113 S. Ct. 2816 (1993).

3. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973c (1988)).

4. *See Political Pornography,* WALL ST. J., Sept. 9, 1991, at A10; *see also America's "Segremanders,"* WALL ST. J., Apr. 2, 1992, at A14 (maps).

5. 113 S. Ct. at 2819-21.

preclearance under the VRA[6] by consciously creating a district with certain racial demographics — through gerrymandering or otherwise — violate the Constitution? In North Carolina's case, the government created the very ugly Twelfth District to satisfy administrative preclearance procedures established by the VRA. Although the Supreme Court has read the VRA expansively in several cases,[7] the *Shaw* Court — shocked to find racial gerrymandering going on in the back room — remanded for a finding whether this sort of thing is absolutely necessary.[8]

Of course, whether a racial gerrymander is necessary will depend upon a number of variables. Is it right to allow any form of race-based districting? If it is, may the districtmaking authorities attend to other political business first, and only take race into account afterward? The construction of nonugly districts might have been easier if the districtmakers were not trying to do so many things at once. The protection of minority voting interests was a concern to which North Carolina mapmakers turned only after they had other, more important fish fried, including ensuring reelection of incumbent members of Congress[9] — such as Steve Neal of the ugly Fifth District, chairman of the subcommittee that supervises the regulation of financial institutions; and Charlie Rose of the very ugly Seventh District, who chairs the House subcommittee with jurisdiction over tobacco and peanut subsidies and who aspires to be Speaker of the House.[10]

In addition to incumbent protection, mapmakers also have the overall partisan makeup of the delegation to consider.[11] Every decennial census indicates that the Democratic Party's traditional hold on North Carolina's voters is eroding. As recently as 1960, Democratic candidates for Congress in North Carolina outpolled Republicans by a

6. The statute allows a defendant to choose between preclearance by the Justice Department and a declaratory judgment in federal district court. The difference is meant to be procedural, not substantive: "[T]he Attorney General shall make the same determination that would be made by the court in an action for a declaratory judgment under section 5 . . . ." 28 C.F.R. § 51.52(a) (1992).

7. Clark v. Roemer, 111 S. Ct. 2096 (1991); City of Pleasant Grove v. United States, 479 U.S. 462 (1987).

8. 113 S. Ct. at 2832.

9. White v. Weiser, 412 U.S. 783, 791 (1973), indicates that it is permissible for the state to take the protection of incumbents into account in mapmaking. *See also* Burns v. Richardson, 384 U.S. 73, 89 n.16 (1966). However, Rybicki v. State Bd. of Elections, 574 F. Supp. 1082 (N.D. Ill. 1982), citing and relying on those cases, adds an important qualification: although protection of incumbents is an otherwise permissible criterion for districtmakers to consider, it may not be used when it adversely affects the interests of racial minorities. 574 F. Supp. at 1104, 1109-10.

10. *See* Al Kamen, *Jumping the Gun on Speakership,* WASH. POST, July 14, 1993, at A19. Republican incumbents with a taste for safe seats were also complicit. *See* John Hood, *Republican Quota Fiasco,* REASON, Nov. 1993, at 51.

11. Gaffney v. Cummings, 412 U.S. 735 (1973), holds that districters may draw boundaries in such a way that the resulting map probably will reflect the statewide popular strength of the principal political parties. 412 U.S. at 751-54.

wide margin and held eleven of the state's twelve seats in the House of Representatives; in 1970, the Democrats still led by fifty-three to forty-seven percent and held seven of eleven seats.[12] By 1992, Republican vote totals had almost matched those of the Democrats: out of 2.48 million votes cast for congressional candidates, Democratic votes surpassed Republican by only about three percentage points.[13] Yet, in the end, the state's delegation of twelve was Democratic by an eight-to-four margin.[14] This result partly reflects one of the properties of the single-member district with plurality voting rules (SMDPV), as will be discussed below.[15] But one can infer that a certain amount of artifice has entered into the outcome; North Carolina seems to have gerrymandered its districts a little.

In the discussion that follows, we focus on the case of congressional districting rather than on districting in general. Although we proceed in this manner for the sake of clarity, it is also true that no single, all-purpose normative theory of electoral mechanics will cover every case of democratic representation, from county commissions to mosquito control districts to sovereign legislatures. We do not claim that one can generalize our argument to every sort of election to which the VRA might apply. Yet we think our argument does approximate a theory of general application.

The *Shaw* decision is nebulous and fits uncomfortably into the Supreme Court's VRA jurisprudence. It raises new problems rather than working with the ones already in play. Most puzzling is how *Shaw* treats the current constitutional status of "compactness" as a principle of districtmaking. On the one hand, the Court says that compactness is not constitutionally mandated;[16] on the other hand, it says that North Carolina's Twelfth District was simply too ugly to be legal.[17] Why? What did the North Carolina defendants do wrong? If racial gerrymandering is unconstitutional, where does that leave statutes like the VRA, which courts and commentators have always assumed to entail race-conscious districtmaking?

Shaw addresses a fundamental problem of representative democracy — namely, how far a legislature may go in controlling who is elected to it. In some respects, this question is the most fundamental that we can ask in our constitutional system. The compactness of districts is pertinent to this inquiry. We argue that compactness in some

12. *See* Congressional Quarterly's Guide to U.S. Elections 999, 1024-25 (2d ed. 1985).

13. *See* Michael Barone & Grant Ujifusa, The Almanac of American Politics 1994, at 938, 946-70.

14. *See id.* at 946-70.

15. *See infra* note 89 and accompanying text.

16. Shaw v. Reno, 113 S. Ct. 2816, 2827 (1993).

17. *Cf.* 113 S. Ct. at 2819-20.

sense is ordinarily a property of single-member territorial districts. We offer a proof that gerrymandering — whether it is conducted under the auspices of the VRA or is freelance legislative tinkering — can spoil the game for representation by single-member district. In order to avoid that destiny, an antigerrymandering principle must be defined and administered outside normal political channels.

I. THE GENESIS OF *SHAW*

In the beginning, the Voting Rights Act was simple enough. Acts that were prohibited — that is, impediments to the exercise of the franchise such as poll taxes, chicanery by vote registrars, obstructing polling places, and the like — and the reasons Congress prohibited these obstacles were well understood by everyone connected with the election process.[18]

After the Supreme Court decided *Mobile v. Bolden*[19] in 1980, however, matters took an esoteric turn. *Bolden* involved the at-large election of city commissioners. The African-American plaintiffs complained that this procedure deprived them of Fourteenth and Fifteenth Amendment rights because it led to a situation in which a simple majority (fifty percent plus one) could win one hundred percent of the seats. The justiciability of this sort of vote-dilution claim had been recognized in prior Supreme Court cases.[20] Following the rule of *Washington v. Davis*,[21] *Arlington Heights v. Metropolitan Housing Development Corp.*,[22] and *Personnel Administrator v. Feeney*,[23] the Supreme Court held that plaintiffs must show purposeful discrimination to state a cause of action. However, proving the state of mind of wary public officials, even ones who were acting in bad faith, would not be easy. Shortly after *Bolden*, therefore, Congress amended the VRA to give *Bolden*-type plaintiffs relief that the Constitution, as interpreted by the Supreme Court, would not give them. The VRA amendments protected minority voters' "opportunity . . . to participate in the political process and to elect representatives of their choice."[24] A violation exists if the participation-election opportunities of voters in the protected class are less than those of other voters.

18. *See* ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? 11-30 (1987). Moreover, the removal of these impediments sparked a dramatic increase in registration and voting by black citizens. *See* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992).

19. 446 U.S. 55 (1980).

20. The jurisprudence of vote dilution was developed in response to the particular practice of holding at-large, multimember elections. *See, e.g.*, White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971).

21. 426 U.S. 229, 239 (1976).

22. 429 U.S. 252, 265 (1977).

23. 442 U.S. 256, 276 (1979).

24. Whitcomb v. Chavis, 403 U.S. 124, 149 (1971), provided the language used in the statute.

Courts relieve plaintiffs hoping to make such a showing of the obligation to prove intentionally discriminatory acts.

Amended section 2 charted a new course for voting-rights law not only because it established a new cause of action for plaintiffs, but because section 2 constitutes one of the section 5 preclearance criteria that the Attorney General employs in cases like *Shaw.*[25] In order to understand section 5, therefore, it is first necessary to understand section 2, a difficult task. The legislative history of the 1982 amendments is filled, as Professor Issacharoff has noticed,[26] with obviously strategic talk and rejoinder designed to influence the spin that courts would put on the legislation. But a problem remains at the heart of the statute that partisan infusions in legislative history can do little to fix. The statute is paradoxical in that it seems to mean two conflicting things at once.

In amending section 2, it seems that Congress proposed to abate *Bolden* and to resurrect the standard in *White v. Regester,*[27] which propounded a "totality of circumstances" methodology for determining when the denial of a section 2 "opportunity to participate and to elect" had occurred.[28] This standard later appeared in the Senate Judiciary Committee's Majority Report.[29] What, then, does section 2 mean by "opportunity to participate and to elect," over and above freely voting and having one's votes honestly counted?

The answer to this question, such as it is, appears in the Supreme

25. 28 C.F.R. §§ 51.55(a), 51.59 (1992).

26. Issacharoff, *supra* note 18, at 1847; *cf.* Thornburg v. Gingles, 478 U.S. 30, 44-46 & n.9 (1986) (discussing the legislative history of § 2); 478 U.S. at 96-97 (O'Connor, J., concurring) (quoting Sen. Dole).

27. 412 U.S. 755 (1973); *see also* Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), *affd. sub nom.* East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976).

28. Depending upon how one counts, the Majority Report put forward seven, eight, or nine factors: (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; (2) the extent to which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, antisingle-shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process; (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) whether political campaigns have been characterized by overt or subtle racial appeals; (7) the extent to which members of the minority group have been elected to public office in the jurisdiction; (8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and (9) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. S. REP. NO. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07 [hereinafter SENATE REPORT].

29. SENATE REPORT, *supra* note 28, at 28-29.

Court's decision in *Thornburg v. Gingles.*[30] The "opportunity to participate and to elect"[31] means not to have one's vote "diluted."[32] But *dilution* is neither a statutory nor intuitive term. When does dilution take place? Dilution occurs when an electoral structure "submerges" a protected minority.[33] What does the term *submergence* mean?[34] *Gingles* sets forth a three-prong test for determining when a statutory violation has occurred:

> First, 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 . . . usually to defeat the minority's preferred candidate.[35]

The right to be un-"submerged" is the vindication that the statute promises. And therein lies the paradox, for the amendments also note that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."[36] But unsubmergence that entails a minority's right to an electoral structure that will deliver its "preferred candidate" is semantically equivalent to a right to be represented separately and distinctly "in numbers equal to their proportion in the population." This is an extraordinary convolution.[37] How did it occur?

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30. 478 U.S. 30 (1986).

31. 478 U.S. at 34.

32. 478 U.S. at 46-51.

33. *See* 478 U.S. at 46.

34. The following passage in *Gingles* illustrates the idea: "Appellees contend that the legislative decision to employ multimember, rather than single-member, districts in the contested jurisdictions dilutes their votes by submerging them in a white majority, thus impairing their ability to elect representatives of their choice." 478 U.S. at 46 (footnotes omitted).

35. 478 U.S. at 50-51.

36. 42 U.S.C. § 1973(a) (1988).

37. It is also, we think, an unnecessary one. Although it is beside the present point, we think there is a relatively obvious escape from the paradox. We are persuaded by Abigail Thernstrom's argument that some sort of intent standard surely survives in § 2, even if it is not the sort of specific intent that the Constitution normally requires. *See* THERNSTROM, *supra* note 18, at 195; *see also* Personnel Admr. v. Feeney, 442 U.S. 256, 279 (1979) (noting that, for Fourteenth Amendment purposes, " '[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"). The totality-of-the-circumstances test is adaptable to limiting remedies to occasions when it appears that racially discriminatory acts have probably occurred. It is a tool for recognizing the existence of discriminatory intent. Thus the factors that the Senate Report found relevant to a violation look to "any history of official discrimination"; whether the state has "used unusually large election districts . . . or other voting practices or procedures that may enhance the opportunity for discrimination"; whether "the members of [a] minority group have been denied access" to a candidate slating process; the extent to which minorities "bear the effects of discrimination" in other areas of life; whether "campaigns have been characterized by overt or subtle racial appeals"; and whether the policy underlying the use of a particular electoral practice "is tenuous." *See* SENATE REPORT, *supra* note 28.

A finding that a policy underlying an electoral practice "is tenuous" implies that the policy is

This paradox arose because those members of Congress who wanted proportional representation for racial minorities did not have the votes to make the change in the law they preferred, while those who were satisfied with the outcome in *Bolden* did not have the votes to protect the status quo they preferred.[38] The result is an amended section 2 whose parts seem to conflict.

The plurality in *Gingles* effectively resolved this tension by deciding that the VRA established a limited right on behalf of minorities to some measure of proportional representation. The Justices did not come right out and say this, but, tracking through their analysis of how racially polarized voting is supposed to be proved, it is hard to avoid the inference that this is what they meant. The *Gingles* plaintiffs had proffered evidence that showed a relationship between the race of the voters and the candidates for whom they voted. The plaintiffs relied on this so-called bivariate correlation to support the inference of racial bloc voting. The statistical axiom that a bivariate correlation does not show that those variables are dependent on one another[39] was not taken to matter. The North Carolina defendants thus argued that the plaintiffs' bivariate analysis was inadequate as a matter of law because it did not establish that race was the cause of bloc voting. The defendants suggested that a plaintiff's proof required a more sophisticated and complex analysis involving multiple variables. Only this kind of analysis could yield a sound inferential basis for establishing whether racial bloc voting was the result of racial prejudice. The plurality rejected this approach because, as it stressed, Congress's purpose in amending section 2 was to do away with the need to show discriminatory intent. Thus, with respect to a violation under section 2, "the legal concept of racially polarized voting incorporates neither causation nor intent."[40]

> It is the *difference* between the choices made by blacks and whites — not the reasons for that difference — that results in blacks having less opportunity than whites to elect their preferred representatives. Consequently, we conclude that under the "results test" of § 2, only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters.[41]

By this reasoning, a violation might exist when there is racial di-

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pretext. The use of an "unusually large" district that "enhances the opportunity to discriminate" implicates intent. To deny someone access to a slating process is an intentional act. All these matters notice the parochialism and prejudice of state or community actors — in short, they tell us when it is reasonable to infer that intentional discrimination may have decisively influenced an election.

38. SENATE REPORT, *supra* note 28, at 194; THERNSTROM, *supra* note 18, at 134-36.

39. For example, if one detects a statistical correlation between diagnoses of heart disease and of cataracts, this correlation would not warrant the inference that cataracts cause heart disease or vice versa.

40. Thornburg v. Gingles, 478 U.S. 30, 62 (1986).

41. 478 U.S. at 63.

vergence in voting patterns, whether this divergence is attributable to racial prejudice, to accident, or to noninvidious differences in political perspective that may sometimes sort along racial lines. The plurality recognized that such divergence may be attributable to the differing *political* agendas favored by a white majority and a black minority but argued that, under section 2, this should make no difference to whether there was a violation.[42] As a consequence, "racial bloc voting that dilutes minority votes" can be found whenever majority voters reject a candidate preferred by minority voters, even though that rejection may have more to do with that candidate's views on health care or tax policy or defense research than with his race.

The *Gingles* plurality infuses the VRA with a bias toward proportional representation because state legislatures that wish to follow the precept of the plurality can realistically conclude that they have a duty to alter any electoral system in which racial bloc voting has *prevented* proportional racial representation. A cause of action appears to exist whenever a plaintiff can argue that proportional representation could have been achieved, but was not.

The possibility of proportional racial representation, in other words, establishes the *necessity* of proportional racial representation. As Judge Phillips recently noted,

> [a] unique, critical feature of contemporary group vote-dilution jurisprudence [is that a] violation can only be determined by identifying electoral districts which would not violate the group's voting rights because in those districts they would constitute effective voting majorities. A state's failure so to have districted thus constitutes the violation, and the appropriate remedy is a requirement that it now do so. In this somewhat unusual decisional process, the availability of remedy thus effectively determines the existence of right — and its violation.[43]

The final judicial event on the road to *Shaw v. Reno* was the application of *Gingles* to single-member districts, a step taken by the Supreme Court in *Growe v. Emison.*[44] There is some irony here; in the early VRA cases, single-member districts were regarded as the preferred remedy for successful claims of vote dilution in at-large, multimember districts. It now appears that single-member districts that "submerge" minorities — in other words, in which the minority is a minority — are similarly subject to vote-dilution claims, with the preferred remedy being the substitution of a different single-member district in which the minorities are "unsubmerged" — which is to say, in the majority.[45]

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42. 478 U.S. at 64-65.

43. Republican Party v. Hunt, 991 F.2d 1202, 1206-07 (4th Cir. 1993) (Phillips, J., dissenting from denial of rehearing en banc).

44. 113 S. Ct. 1075 (1993).

45. The application of *Gingles* to single-member districts is an especially perplexing development given the nature of such districts. Single-member districts can be gerrymandered, with one

The *Gingles* court reserved the question of how to apply the VRA to single-member districts,[46] but it seems unlikely that the complexities of doing so were fully appreciated at that time. In the context of single-member districts, *Gingles'* first prong — the requirement of a geographically compact minority — proved to be something of a time bomb, which went off in *Shaw.* The question is how one tells when a protected minority is "sufficiently . . . geographically compact to constitute a majority in a single-member district."[47] The Court did not suggest a particular criterion of compactness in *Gingles,* and, as the mapmakers in North Carolina knew, *any* group of voters — no matter where they live in a state — can be fit into the same contiguous district. As we have explained elsewhere,

> for *any* spatial arrangement of voters, a scheme of contiguous districts can be constructed such that each district contains only those voters that have been specified in advance, regardless of where they live.
>
> If every name in the Manhattan phone book is randomly associated with one of ten districts, a map can be constructed that will place every voter in a literally contiguous district no matter which combination of names and districts are chosen. The resulting district map would certainly look odd — in places, districts might be stretched thin as telephone wires — but it can be done, regardless of where the voters live.[48]

Unless one assumes some concept of compactness, the requirement that there exist a territorial district in which a racial minority group could constitute an electoral majority boils down to a question of minority group numbers alone. A VRA violation would occur if there are a district's worth of minority citizens scattered anywhere in the state, provided white and black voters consistently demonstrated divergent voting patterns. As a matter of congressional intent and practical public administration, this condition seems rather a rarefied basis upon which to found a statutory violation. The problem emerged in *Shaw v. Reno,*[49] in which the appellees redrew the congressional district map to satisfy the preclearance procedures of section 5. The Department of Justice had discerned the existence of enough black voters sufficiently geographically compact to constitute a majority in a single-member district. The resulting district, the Twelfth, proves the

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of two potentially objectionable results: either minority voters can be overconcentrated as part of a gerrymander designed to minimize the total number of minority representatives, or minorities can be overly divided in a manner that contravenes the requirements of the VRA. *See generally* Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act,* 63 N.Y.U. L. REV. 449, 464-71 (1988).

46. *Gingles,* 478 U.S. at 46 n.12.

47. 478 U.S. at 50.

48. Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering,* 9 YALE L. & POLY. REV. 301, 331 (1991) (footnote omitted).

49. 113 S. Ct. 2816 (1993).

Attorney General's point. But it is very, very ugly.[50]

The plaintiffs made no representation concerning their race and did not press a claim based upon the dilution of white voting strength. Rather, they alleged "that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a 'color-blind' electoral process."[51] The court rejected the notion that the Constitution guarantees any such right and recast plaintiff's allegations: "What appellants object to is redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate races for the purpose of voting . . . ."[52] Thus reframed, said the Court, this allegation states an equal protection claim because the North Carolina plan was manifestly intended as a race-based classification of voters. Accordingly, the plan must survive strict scrutiny — that is, it must be "narrowly tailored to serve a compelling state interest." The Court remanded to give the district court an opportunity to find what compelling state interest the plan was narrowly tailored to achieve.

The majority's assignment of the burden of proof may at first seem puzzling. As the dissenters pointed out, Fourteenth Amendment cases addressing group voting rights had always required "a showing that 'the political processes . . . were not equally open to participation by the group in question — that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.' "[53] The majority's approach apparently releases plaintiffs from this burdensome requirement and places an equally burdensome requirement on the state to prove that its actions are justified by a compelling interest. The critical move in the *Shaw* majority's opinion is the assertion that the districting statute was an *overt* racial classification, and, as such, subject to strict scrutiny. To be sure, no "racial classification appears on the face of the statute."[54] Yet the *Shaw* court protested that the North Carolina districting plan was one of a class of admittedly " 'rare' statutes that, although race-neutral, are on their face, 'unexplainable on

50. For a map of the Twelfth District, see Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 492 (1993). As measured under the standard of compactness discussed in Polsby & Popper, *supra* note 48, at 348-51, the Twelfth District of North Carolina scores 1.4 points when 100 is the maximum. *Pace* Justice Souter's assertion to the contrary in his dissent in *Shaw,* 113 S. Ct. at 2848, several congressional districts drawn to comply with the VRA have even worse scores. Florida's Third District is much worse — it scores 1.03. To give an idea of the compactness characteristics of the Twelfth District, it is as uncompact as the silhouette of a strand of rope one inch thick and eight feet long.

51. 113 S. Ct. at 2824.

52. 113 S. Ct. at 2824.

53. 113 S. Ct. at 2835 (quoting White v. Regester, 412 U.S. 755, 766 (1972)).

54. 113 S. Ct. at 2824.

grounds other than race' "[55] — linguistically neutral, that is, but unmistakably race based nonetheless. There can be little justification for exempting manifestly race-based classifications from the usual justifying protocols when, as the *Shaw* court appreciated, "a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than" an explicit racial classification.[56]

The justification that the Court gives for its decision in *Shaw* implies that an insecure foundation upholds the entire structure of the vote-dilution jurisprudence that has developed around the Voting Rights Act, at least as applied to single-member districts. North Carolina drew its district map in order to comply with the requirements of section 5 of the VRA. One would ordinarily think it a "compelling" interest for the state, which was a member of the Confederacy and has a long and notorious history of de jure segregation by race, to attempt in good faith to conform with U.S. Department of Justice directives issued pursuant to a constitutionally valid civil rights law. But to this proposition, the *Shaw* court demurred: "States certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid . . . . But in the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits, and what it requires."[57] Compliance with the VRA, the Court suggests, did not require the creation of North Carolina's ugly Twelfth District.

This explanation is unconvincing. If the VRA requires the creation of a second black district, then in creating that district the State of North Carolina must engage in an act of racial classification. This is true whether the resulting district is ugly or compactly drawn. If the constitutional infirmity of North Carolina's district map was the act of racial classification, and if North Carolina has no choice but to engage in such an act under a federal mandate, then something has to give. That something, one is bound to suspect, is the federal mandate, which must be constitutionally infirm, at least as applied. The *Shaw* court eluded this hard-to-doubt result, temporarily, by remanding, and this is the riddle that the undoubtedly bemused district judge must resolve. Sooner or later there will be a case with an irremediably ugly district map — that is, where no less-ugly map will bring about the desired racial result — whose only justification is compliance with the VRA. Then what? If the courts stay with the reasoning in *Shaw,* they will strike down that map. Much VRA jurisprudence will go down with it.

55. 113 S. Ct. at 2825 (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

56. 113 S. Ct. at 2826.

57. 113 S. Ct. at 2830.

In the meantime, it seems that the one principle that a district court can take to the bank is that extraordinarily uncompact district maps are not to be tolerated, though professedly drawn in order to comply with the VRA. As the Court stated in *Shaw,* "we believe that reapportionment is one area in which appearances do matter."[58] Yet the Court's concern was not with appearances per se. What the court was rejecting was the interpretation, as embodied by the Twelfth District, of *Gingles'* ugly idea of geographical compactness.

Compactness, this interpretation insinuates, is territorial contiguity with the addition of the rather vague and, one is bound to suspect, meaningless criterion of "community of interest." What that chain of reasoning ultimately produces is the map in *Shaw.* As we show below,[59] one can manufacture dramatically uglier maps utilizing the same procedure. So far, there has been little or no constitutional law on the question of how far a state may indulge a political mapmaker's panache. "Ugliness," it seems, is the provisional name given to the problem. It is an impulse in search of a theory. The theory follows.

II. Representation: The Madisonian Wager

We leave it to others either to admonish the Supreme Court for ignoring the proportional representation proviso of amended section 2 or to offer the acrobatic proof that, despite appearances, *Gingles* does not endorse a form of proportional representation.[60] Our burden in this Part is simply to persuade that proportional representation and representation by single-member districts are incompatible: choosing one system means rejecting the other.

Both proportional representation and representation by single-member districts have many possible variants, some more familiar than others, and all have both philosophical and practical advantages and disadvantages. We assume without discussion that the main varieties of either form are agreeable, or can be massaged into agreement, with Article I, Section 2 of the Constitution — "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States"[61] — and that therefore the choices among systems will be driven primarily by arguments of prudence and policy and only secondarily by those of constitutional law.

Single-member districts and proportional representation aim at

58. 113 S. Ct. at 2827.

59. *See infra* Part III.

60. Any such argument will be wasted on us, however. We agree with what Justice O'Connor said in *Thornburg v. Gingles:* "[E]lectoral success has now emerged, under the Court's standard, as the linchpin of vote dilution claims, and . . . create[s] an entitlement to roughly proportional representation . . . ." 478 U.S. 30, 93 (1986). Lani Guinier has made the same point. *See* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success,* 89 MICH. L. REV. 1077, 1093 (1991).

61. U.S. CONST. art. I, § 2.

mutually inconsistent objectives and present candidates for office with different, indeed essentially opposite, electoral incentives. Single-member district systems favor candidates whose political "pitch" is near the center of the electorate's values.[62] The incentive of a candidate in a single-member district system is to cultivate a base of support that is broad rather than deep because a vote is a vote; intensity does not matter. In any multimember district, and especially under proportional representation, the dominant strategy for a candidate is to be the first preference of an electoral fraction large enough to be entitled to a legislative seat.

The most familiar form to Americans is single-member districts with plurality voting. The chief liability of this system is not its well-advertised tendency to shortchange persons and interests on the margins of political life. Arguably, this tendency is as much a strength of the method as it is a weakness. The worst problem of the single-member district system is that, without proper safeguards, it can be subverted by partisan gerrymandering[63] — the most-studied genus of "vote dilution."

Until the past twenty or thirty years, the problem of partisan gerrymandering had been more serious in theory than in reality. Drawing a partisan gerrymander freehand is difficult to do successfully, and there are many examples of botched jobs that not only have not had their intended effect, but have backfired.[64] In the twenty-first century, when the next redistricting will take place, things will be different. New computers, better market research, and more widely available databases will change the playing field. The American political system is at a fork in the road, and it will have to choose between explicitly recognizing some kind of antigerrymandering principle or moving away from the single-member district system as its dominant representational form.

Perhaps we should simply jettison the single-member system. A number of scholars are skeptical as to whether single-member districts adequately "represent" their constituents.[65] The Supreme Court has

62. Eli Noam used the term *pitch* to describe how different kinds of television programming address their audience. Eli M. Noam, *A Public and Private-Choice Model of Broadcasting*, 55 PUB. CHOICE 163, 165 (1987). Pitch defines all of the matters a candidate puts forth, intentionally or unintentionally, that will affect electoral success. For example, issues, character, personal competence, party identification, personal history, and likability are all important ingredients of a candidate's political pitch.

63. *See* REIN TAAGEPERA & MATTHEW S. SHUGART, SEATS AND VOTES 233 (1989).

64. *See* Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1341-45 (1987); *cf.* Bruce E. Cain, *Simple vs. Complex Criteria for Partisan Gerrymandering: A Comment on Niemi and Grofman*, 33 UCLA L. REV. 213, 225-26 (1985).

65. For that matter, maybe representative democracy itself has outlived its usefulness. The "technological infeasibility" objection to direct democracy is gone, and a brave new world awaits. *See* Brian Beedham, *A Better Way To Vote*, ECONOMIST, Sept. 11-17, 1993, at 5.

recently acknowledged the applicability of the VRA to single-member districts[66] and may, at some point, see fit to herald a new democratic paradigm. Short of a paradigm shift, however, the terms of the argument leave a familiar choice: single-member districts, at-large elections, or some form of proportional representation. The skirmishing among these options is a very old and polemical pastime, which has been well described by Rein Taagepera, Matthew Shugart, and many others.[67]

The chief advantage of proportional representation systems is that they allow voters a chance to elect representatives whose pitch is in the voters' own strike zone. Proportional representation voters less often endure the distasteful business of going through life pulling levers for lesser evils. Every pitch with appreciable electoral support is entitled to its share of the legislative bully pulpit. Proponents of this system — many of whom, one suspects, never do find a candidate for an important office whose pitch they really like — see many advantages in it: proportional representation emphasizes political differences and hence may serve to sharpen legislative debate and clarify what eventually is decided.[68] Many points of view get a seat at the table to engage in dialogic republicanism in order to hammer out the stuff of which our public life in common will be made.[69] Best of all, the system enhances regime legitimacy because interests that have been marginalized or excluded for discreditable reasons, such as racial prejudice, are at last given sanction to speak.[70]

On the other hand, proportional representation makes it more likely that deputies from the one-issue outskirts of political life will fill the legislatures. It may be quite a challenge for those dissentient representatives to create and implement a common agenda of governance. The risks are greater than with a single-member system that the legislative program will disintegrate into a cafeteria-style hodgepodge of concessions to the various factions that make up the governing coalition, any of which measures might prove obnoxious to the great ma-

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66. *See* Growe v. Emison, 113 S. Ct. 1075 (1993).

67. *See* TAAGEPERA & SHUGART, *supra* note 63, at 47-57. An excellent discussion also appears in Mary A. Inman, Comment, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System,* 141 U. PA. L. REV. 1991 (1993). *See also* ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS (1968); Maurice Duverger, *Which Is the Best Electoral System?, in* CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES 31, 34 (Arend Lijphart & Bernard Grofman eds., 1984); John R. Low-Beer, Note, *The Constitutional Imperative of Proportional Representation,* 94 YALE L.J. 163 (1984).

68. See generally the discussion in Duverger, *supra* note 67, and in Ferdinand A. Hermens, *Representation and Proportional Representation, in* CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES, *supra* note 67.

69. *See generally* Cass R. Sunstein, *Interest Groups in American Public Law,* 38 STAN. L. REV. 29 (1985).

70. *See* Guinier, *supra* note 60, at 1134-53.

jority of voters. For that matter, as in the case of the Fourth French Republic, proportional representation systems might not be able to find a common thread and so would regress to institutional incompetence. Legislative paralysis is an altogether defensible result in the absence of adequate representational consensus. In any case, this experience is more of a risk in a proportional representation world.[71]

Single-member district systems move the republican dialogue out of the legislative chamber and into the streets of the district. The single-member district candidate's incentive to pitch to the largest faction of probable voters ordinarily translates into an exercise in electoral coalition building within the district. Single-member district systems are comprised of members whose incentives are to build election and reelection coalitions for themselves,[72] and who had better not be too closely connected to controversy. Coalition building in the streets among factions in the community is probably easier than coalition building in the legislature among deputies of different parties. Voters will take much more for granted about what a candidate is likely to do, will tend to extract fewer specific promises, and will leave a candidate more wiggle room in comparison with the deputy's legislative colleagues. Hence single-member districts tend to a politics of mushiness in contrast to the hard, gemlike flame of legislatures comprised of members with sharply differentiated pitches.

Which system is preferable on democratic principles? Of course there is no unique answer; everything depends upon what one is trying to do. Proportional representation is attractive to those who attach primary importance to what Professor Hanna Pitkin calls "descriptive representation."[73] John Adams thought legislatures should be "an exact portrait, in miniature, of the people at large."[74] On this theory, the purpose of democracy is to be democratic, and representational forms are allowed as a concession to the practical reality that direct democracy is too unwieldy to function. Proportional representation preserves and translates the pluralism of the electorate into the legislative chamber. Advocates of fringe positions — Libertarians or Socialists or religious parties — might also prefer proportional representation[75] if they seek to have members of their own faction in the legislature rather than some degree of influence under the big tent of one of two grand coalition parties.

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71. *See generally* LEON D. EPSTEIN, POLITICAL PARTIES IN WESTERN DEMOCRACIES 315-40 (1967).

72. *See generally* RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS (1978).

73. HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION 60-91 (1967).

74. Letter from John Adams to John Penn (Jan. 1776), *in* IV WORKS OF JOHN ADAMS 203, 205 (Boston, Charles C. Little & James Brown 1851).

75. *Cf.* Akhil R. Amar, Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283 (1984).

A single-member district system is generally defended on practical grounds[76] because it tends to produce stronger, more decisive governments.[77] We think that this defense of the single-member district system is unnecessarily apologetic for two reasons. First, the ability of proportional representation to deliver sharply defined issues can easily be overstated. It is true that candidates for office will have an incentive to differentiate their products, but, corresponding to the information one gains about the sympathies and intellectual commitments of candidates, one loses information in a proportional representation system about the relationship between voting on the one hand, and what sort of government one can expect eventually to emerge from the electoral process on the other. As Professor Douglas Rae suggested, "[t]he election itself comes to a very partial arbitration of the question 'Who governs?' "[78] Because the SMDPV form tends to lead to a two-party equilibrium no matter how many issue dimensions are in play,[79] elections in this system have a governance transparency advantage over proportional representation. For example, American voters know that, by tendency, there is a difference between Republican and Democratic candidates in terms of what interest groups support them and what laws of social cause and effect they will bring to bear on the issues of the day. These differences should in turn lead predictably to differences, if not necessarily large ones, in agendas, priorities, and behavior in office. A voter is thus in a position to register a conviction on these matters by deciding which lever to pull. In proportional representation systems, however, as Rae has noticed, the ultimate makeup of the governing coalition "is a choice *bounded* but left undecided by the election outcome . . . . [T]his surely raises important difficulties for theories of electoral representation, for it is impossible to see how the citizen could draw useful associations between his voting decision and the eventual choice of a government."[80] There seems to be a sort of Heisenbergian principle at work; while the views of the candidates in a proportional representation system are likely to be sharper — and the more proportional the system the more sharply differentiated their views are apt to become — the identity of the coalition that will eventually come to power is correspondingly harder to foresee and becomes progressively harder as proportionality

76. Bruce E. Cain, *Voting Rights and Democratic Theory: Toward a Color-Blind Society?, in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 261, 263 (Bernard Grofman & Chandler Davidson eds., 1992); Schuck, *supra* note 64, at 1359-61.

77. *See* Schuck, *supra* note 64, at 1361.

78. DOUGLAS W. RAE, THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS 173 (rev. ed. 1971).

79. *See* TAAGEPERA & SHUGART, *supra* note 63, at 39-41 (illustrating the tendency of an SMDPV system to produce a two-party system by analyzing the history of political parties in New Zealand); *cf. id.* at 112-16 (number of seats per district is an important factor in determining the number of effective political parties).

80. RAE, *supra* note 78, at 173.

increases.[81]

A second argument for SMDPV taps a more fundamental political norm. The dominant strain of American constitutional thought rejects the premise that the purpose of democracy is to be democratic. Democracy, and government itself, are mere vehicles for more important matters. Governments are not instituted in order to represent people, but rather to secure rights.[82] Democracy's special claim is that it furthers this objective better than other forms of government, at least if its constitution can contain and incapacitate the destructive influence of factions. Madison's scheme for accomplishing this objective, usually called the Republican Principle, was put forth in *The Federalist Nos.* 10 and 51.[83] Robert A. Dahl characterized the point thus:

> If a faction consists of less than a majority, it can be controlled by the operation of "the republican principle" of voting in the legislative body, i.e., the majority can vote down the minority.
>
> . . . The development of majority faction can be limited if the electorate is numerous, extended, and diverse in interests.[84]

Disabling factions, not empowering them, lay at the heart of Madison's constitutional idea. The single-member district scheme carries this project forward by forcing ideological compromise on those who hope to be influential within the system. The single-member district system accepts what might be called the Madisonian Wager — that the compromise policies that emerge from a system that rewards "center" candidates and ignores the fringes will in the long run be more respectful of the rights and liberties of the people than will those compromises that emerge from a system in which faction is allowed its full, vigorous, and in some ways satisfying play. The Madisonian Wager is, in effect, a form of poker in which each player must discard his strongest cards — his one-issue preferences — before starting to bet.

The psychological assumption that lies at the heart of the Madisonian Wager is that many people hold unusual views about something of potential electoral moment. Although the world is composed of people whose sensibilities on average are average, the sensibilities of most average people are not average with respect to *everything.* The most egregious quirks and potential "one-issue" enthusiasms are cultivated, proverbially so, by people who appear in other respects to be quite ordinary. The avowed mission of proportional representation is electoral disaggregation — getting people to think of themselves in

81. *See* EPSTEIN, *supra* note 71, at 315-40. *See generally* RAE, *supra* note 78, at 87-103.

82. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). *See generally* Wilson C. McWilliams, *The Anti-Federalists, Representation and Party,* 84 NW. U. L. REV. 12 (1989).

83. *See* Hermens, *supra* note 68, at 16-17.

84. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 27 (1956); *see also* McWilliams, *supra* note 82.

terms of their differences instead of their commonalities. Proportional representation thus encourages electoral disaggregation by making it more valuable in the political marketplace.

The incentive to go for broad, shallow support is not the only characteristic of the single-member district system that rankles minority interests. As is well known, the single-member district system awards an electoral bonus to a party that polls a majority of voters across a state in excess of that party's actual strength among voters. This tendency is sometimes called the "cube law," a reference to the exponent in a formula relating vote totals and electoral outcomes.[85] By this theory, majority dominance of the legislative chamber in a single-member district system increases with the cube of its vote totals. Hence, a narrow electoral majority for one party usually results in its comfortably controlling the legislature, and a clear electoral victory translates into a landslide in the legislative chamber.

Scholars have challenged the theoretical details of the cube law; they have proposed other formulae that better reflect the inflationary effect of single-member district schemes.[86] That there is such an inflationary effect is beyond dispute as an empirical matter. Furthermore, the likely cause of this bonus seems apparent.[87] The ratios of minority to majority votes in the districts that make up a given state will vary from that same ratio for the entire state. In some districts the ratio will be closer, and in others greater, than in the state as a whole. Assuming that the district-to-district variance is random, in any particular district the majority can fall below its statewide performance and still obtain the simple majority it needs to win. The minority, on the other hand, will only carry those districts where its support is greater than its statewide average by enough to give it a simple majority there. Because this is statistically less likely to occur, the majority wins seats in somewhat greater proportion than its votes even in a scrupulously fair election, and, the greater the majority, the greater the bonus.

Professors Rein Taagepera and Matthew Shugart convincingly demonstrate that vote inflation is a real-world attribute of *all* electoral systems, including proportional systems.[88] Almost invariably, the losers are the smallest parties, and the winners are the largest parties; proportionality is determined chiefly by the number of representatives

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85. *See, e.g.*, Bernard Grofman, *For Single-Member Districts Random Is Not Equal*, *in* REPRESENTATION AND REDISTRICTING ISSUES IN THE 1980S, at 55 (Bernard Grofman et al. eds., 1982).

86. *See* TAAGEPERA & SHUGART, *supra* note 63, at 184-98; Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 AM. POL. SCI. REV. 540 (1973).

87. *Cf.* Tufte, *supra* note 86, at 545 (disputing "that there actually is a theory behind the cube law") (emphasis omitted).

88. *See generally* TAAGEPERA & SHUGART, *supra* note 63. The foundational discussion of this proposition is found in RAE, *supra* note 78, at 69.

that are to be elected in each district.[89] Beyond these attributes, however, proportional representation systems differ widely in how proportionally they represent.

Regardless of the relative merits or disadvantages of the single-member district system, the Madisonian Wager and the concomitant bonus for whatever party is in the majority has indelibly marked the practice of American politics. Our political parties hover around an ideological center, and observers who hail from countries with sharply defined political parties may well wonder whether there is any real difference between them. Candidates for Congress shy away from strong measures on ideologically charged issues if they can, and they often find ways to move "hot button" matters to courts, base-closing commissions, or other agencies for whose decisions they cannot be blamed. If these system flaccidities are exasperating, they have a compensating attribute. Extremism is notably absent.

The important point to grasp is that the decision between single-member district and proportional representation systems is genuinely a choice. The two are philosophically and practically different. As Taagepera and Shugart note, "you cannot have your cake and eat it too: sociopolitical gerrymander in single-seat districts is not a feasible way to increase proportional representation of whatever group."[90] Proportional representation ultimately requires multiseat districts, which will eventually tend to produce a multiparty system.[91] Attempting to create a system of proportional representation in the context of a two-party, single-member system is not realistic. It is also unrealistic to take away a considerable fraction of the whole and try to represent that part proportionally, without expecting the political character of the minuend to change as well.

The system created under the VRA is neither fish nor fowl. It is not SMDPV; a "fix" has been added that increases the probability that racial minorities, if they are large enough, will be proportionately represented. Nor is it a system of proportional representation. One of the characteristics of proportional representation systems, and arguably that with the greatest normative appeal, is that the proliferation of parties is unregulated. Any contender is free to define itself in terms of

89. RAE, *supra* note 78, at 69, 112.

90. TAAGEPERA & SHUGART, *supra* note 63, at 233. They also write:

> It is hard enough to delineate single-seat districts which are politically neutral, but the United States lately has engaged in attempts at "constructive gerrymander" to make some districts ethnically non-random so that minorities could gain some representation. What this means is that some sort of PR is sought within the framework of single-seat districts, and this is a contradiction in terms. Multi-seat districts are unavoidable, if one desires some resemblance to proportionality. . . . [I]f one [desires] some sort of sociopolitical PR, one should give up the hope of achieving it within the scope of single-seat districts, short of a segregational busing of voters to proper ethnic districts. PR requires multi-seat districts.

Id.

91. This might be called Duverger's Law. See the discussion in *id.* at 233.

its own choosing. It may follow along some conventional sociopolitical category — Christian democrat, socialist, labor — or it may find some cross-cutting theme — the environment, immigration, "change." The combinations and marketing opportunities are theoretically boundless; the limiting factor is simply whether the public finds the combination of positions attractive enough to vote for it. The voters themselves choose the issue dimensions that will eventually get to be represented.[92]

When the government preselects the operative issue dimensions, it creates a defective hybrid. It preserves the single-member district form, but with an extra chromosome, so to speak. Specially created districts are designed to lack an element that conventional single-member districts ordinarily possess. The crux of the difference is that conventional single-member districts have the Madisonian "centering" property: single-member districts with preselected issue dimensions are meant not to have this property. If the preselected issue dimension is race, incentives to "move toward the center" with respect to that dimension are lost.

In this respect, the VRA creates an entitlement that may be said to benefit a certain kind of political agenda — one that is freed from the moderating pressures that the system normally bolsters. As a result, the most strongly ideologically committed members of the privileged faction become its most influential, inframarginal core instead of being moved toward the margin, as the Madisonian Wager would ordain. No other interest groups are thus privileged, and the political game turns into one between those with incentives to accommodation and those with opposite incentives.

In practice, this sort of system adapts itself to bringing forth authentic representatives of the minority community only by the verbal trick of defining authenticity as counter-Madisonian racial politics. As the Supreme Court noted, a preselected racial issue dimension "reinforces the perception that members of the same racial group — regardless of their age, education, economic status, or the community in which they live — think alike, share the same political interests, and will prefer the same candidates at the polls."[93] The single-member district system, then, has a great deal to be said for it, but it does have an Achilles' heel. We will expound upon this theme in Part III.

III. Representation: The Case of East Garden

The Constitution provides few constraints upon how we elect members of the House of Representatives. For all the Constitution provides, any state might organize the election of its House delega-

92. The most authoritative recent discussion of issue dimensions is found in *id.* at 92-103.

93. Shaw v. Reno, 113 S. Ct. 2816, 2827 (1993).

tions according to a mix of regional interests, occupational matters, or some sort of proportional representation by religion, race, gender, or ethnicity — or, for that matter, some combination of the forgoing.

The principle of one person, one vote must be taken to have narrowed the set of constitutional possibilities down to three: representation at large — for example, each elector may cast one vote in each of five distinct contests, and the five top vote getters will win; proportional representation in multimember districts — for example, each elector may vote only once, and the top five vote getters win;[94] or a version of representation by single-member district.

A variant of the latter system is one in which contiguous tracts of real estate make up "districts." But one easily can conceive of nonterritorial principles of organization which might be termed *printout districts.*[95] A printout district is comprised of a list of voters regardless of where they reside in the state. The lists can be compiled according to any number of principles or by no principle — that is, randomly. Printout districts could represent people by ideology, by age cohorts, by occupations, by expressed affinity for hobbies, or by ways of life; people might be grouped by ascribed characteristics such as race, religion, or sex. The possibilities are endless.

We now offer the example of the imaginary state of East Garden to establish that printout districts, if they no more than obey the principle of one person, one vote, will not do. We apologize in advance for the involved arithmetic that is necessary to demonstrate how to steal an election, but it seems to us a worthwhile exercise to go through if only to see how poorly the principle of one person, one vote serves as a bulwark against antidemocratic electoral practice.[96]

East Garden has a population of 5,000,000 divided into ten congressional districts. As in most of the larger American states, the two major parties have roughly equal statewide strength. In East Garden, the two major parties are the Standard Old Party and the Flat Earth-Vegetarian.[97] Assume that in average elections the turnout of voters is fifty percent of those eligible, and that these will divide equally for

94. A version of this system — cumulative voting for members of the state House of Representatives — was practiced in Illinois for 100 years until 1970, when the state's present constitution was adopted. For description and discussion, see GEORGE S. BLAIR, CUMULATIVE VOTING (1975); AUSTIN RANNEY, ILLINOIS POLITICS 20-22 (1960). Blair emphasizes that cumulative voting as a means of enhancing minority representation requires comparatively well-organized political parties. BLAIR, *supra*, at 63-86. An important general discussion of proportional representation appears in Guinier, *supra* note 60, at 1136-53.

95. For purposes of discussion, we conflate all of these variants into one.

96. Professor Schuck has argued that hypotheticals of the sort that follows in the text lay out a pretty implausible scenario. *See* Schuck, *supra* note 64, at 1358. We consider Schuck's refutation unpersuasive, *see* Polsby & Popper, *supra* note 48, at 325-26, but urge the reader to consider the argument carefully.

97. We borrow these designations from Paul E. Meehl, *The Selfish Voter Paradox and the Thrown-Away Vote Argument*, 71 AM. POL. SCI. REV. 11 (1977).

S.O.P. and FE-V. If East Garden is like the United States as a whole, 25.6% of its citizens — 1,280,000 persons — are under the age of eighteen[98] and therefore cannot vote. Distribute these young citizens evenly in three districts — which, to simplify arithmetic in the next few paragraphs, we can treat as a single triple-sized district. In order to get up to the required number of persons in the districts (500,000 in each, multiplied by 3, equals 1,500,000), we must fill out the rolls with 220,000 adults. If we choose eligible voters randomly, one should expect 110,000 of those 220,000 to vote — that is the assumption of fifty percent election turnout — of whom 55,000 would favor the S.O.P. and 55,000 the FE-V. In other words, if we chose the 220,000 randomly, those three districts would be "toss-up" seats.

Arranging toss-ups, however, is no way to steal an election — which is, remember, what we are trying to do; we can assume we are doing it for the S.O.P. So we will not select our additional 220,000 constituents randomly. We will first choose 60,000 highly motivated S.O.P. voters whom we can find easily with some commercially available databases and a Basic search program. Suppose certain kinds of consumption patterns indicate both a high probability of voting and strong S.O.P. identification; we could look for members of certain country clubs or subscribers to *Blood Sport Digest.* But why be cute? We can probably get most of our 60,000 from the S.O.P.'s own membership roster.

We now need another 160,000 adults. If we acquire these by random draw — it does not matter, of course, where in the state they live — we would expect to find 77,600 voters — that is our fifty percent turnout assumption again, but with an appropriate deduction for having removed 60,000 highly probable voters, three percent of the statewide total, from the mix when we began. We should expect this 77,600 to favor FE-V by a margin of 41,128 to 36,474. This result follows because the 60,000 S.O.P. stalwarts we chose at the outset represent three percent of the expected voters and six percent of the expected S.O.P. voters, so a random draw of the voters who are left should have three percent fewer S.O.P. supporters and three percent more FE-V supporters. The 60,000 planted S.O.P. loyalists, added to the 36,474 we expect to get from the random draw of the 160,000, allows the S.O.P. a margin of 96,474 to 41,128 in the three districts, a greater than two-to-one electoral margin in each district. Sixty thousand, in other words, yields a quite handsome cushion for error; as a practical matter, one could comfortably dominate elections with 40,000 or even 30,000 S.O.P. supporters.

Seven districts remain to be composed with 3,500,000 persons, all of them eligible to vote. Recall that these 3,500,000 are now a some-

98. THE UNIVERSAL ALMANAC 1993, at 285 (citing the STATISTICAL ABSTRACT OF THE UNITED STATES (1989)).

what biased sample of the electorate because we have already identified and subtracted from the original statewide voter rolls 60,000 people whom we believe will vote for the S.O.P. We should therefore expect these 3,500,000 persons to cast 1,800,000 votes, which is half less 60,000 of the original statewide voter rolls. Furthermore, we should expect these 1,800,000 votes to divide 930,000 for the FE-V and 870,000 for the S.O.P. because we have taken 60,000 from the 930,000 statewide S.O.P. votes that we postulated at the outset. Our next step is to find 500,000 people who satisfy both of two conditions: highly likely to vote and highly likely to support FE-V candidates.

Easily done. All college and university professors except Engineering and Business School faculty; all members of any affiliate of the American Federation of State, County and Municipal Employees (AFSCME), the National Education Association or the American Association of Social Workers; all subscribers to *Tikkun;* all members of the Alan Alda fan club . . . and so on. These individuals we now designate as a district — an effectively unanimous FE-V district.

We now have six districts, and 3,000,000 persons, all of voting age, left to represent. Here is how the cards lie. We have densely packed one of the districts with 500,000 highly motivated FE-V loyalists, and three other districts with 60,000 high-probability S.O.P. loyalists, and consequently we should expect the remaining, so-far unrepresented electorate to cast 1,300,000 votes — that is the fifty percent turnout assumption again — which yields 1,300,000 probable voters (1,860,000 probable voters out of 3,720,0000 eligible voters, minus 60,000, minus 500,000). These 1,300,000 voters should favor the S.O.P. over the FE-V by 870,000 to 430,000, better than two to one. Distribute these persons randomly, or, better, with a little insouciant artistry, and the S.O.P. will effortlessly sweep all six remaining districts. The net result: nine S.O.P. representatives are elected, versus one FE-V representative elected practically unanimously, despite identical vote totals for the two parties statewide.

The one point that remains to be added is this: the forgoing demonstration is not an argument for why printout districts are bad and territorial districts are better. Indeed, our argument is quite the opposite. Territorial districts are *not* better if the only rule they are obliged to respect is that of one person, one vote. By the use of noncompact and therefore functionally noncontiguous districts, it is a simple project to produce a set of territorial districts that are politically isomorphic to the case of East Garden. We have described the procedure elsewhere,[99] and the technique is no secret — certainly not in North Carolina.

99. *See* Polsby & Popper, *supra* note 48, at 327-32.

IV. Cheating

What is wrong with the forgoing picture? Why should we say that the East Garden system of representation flunks Civics 101? "Dilution" of votes is certainly present — but what is "dilution"? After all, politics is politics. We may have our compunctions about it, but over the years partisan politics has been a remarkably serviceable element in sustaining American public life. Why should we think it is cheating to gerrymander given that people can vote unhindered, governments honestly count their votes, and no one interferes with their underlying preferences?

The term *self-dealing* captures the two related considerations that seem to make up the intuition that this is cheating. First, the people who are drawing the lines and the people who are standing for election are in an agency relationship with one another. In effect, the people who are in the legislature get an important, and sometimes decisive, share of the decision about who will be in the legislature. Second, a legislature that constitutes itself tampers with its own legitimacy, which comes from without, not from within. The legislature's power is not a reflexive ipse dixit — any assembly can call itself a legislature. Whether it actually is one depends on extramural issues, such as whether a constitution and an electorate have authorized it to exercise power.

The problem, however, is not merely that of *self*-dealing. Any dealing, whether self or not, would seem obnoxious. As an illustration, consider the imaginary game of Dealer's Choice, which is played as follows: Five or more people stand in a circle and give a dollar to the dealer. The dealer then gives the entire pot to one of the players, on any basis that she chooses.

Why are people reluctant to play this game? After all, it has a much higher expected payout-to-ante ratio than a typical lottery. Moreover, it is very like roulette, and there are queues of people waiting to play roulette. But the games are different. In a lottery or in roulette, outcomes are random but predictable by a probabilistic rule. In Dealer's Choice, the players do not know the basis upon which the dealer will award the pot. If they knew, with hypothetical certainty of 1.0, that the dealer would behave just like a lottery or a roulette wheel, probably they would play Dealer's Choice interchangeably with those games. But people never "know" such things about other people. Furthermore, the things they *do* know about other people should make them hesitate to play Dealer's Choice.

First, people know about human nature — that people are sometimes corrupt and that sometimes they make side deals. Second, they know their own information about the dealer is imperfect. The dealer may be a straight-ahead person, but there is some chance that her discretion will not perfectly replicate the "discretion" of a roulette wheel.

Surely she is corruptible; maybe she is already corrupt. Maybe, in fact, she has a shill among the players. People, on the whole, are more content to have their lives and fortunes spoiled by chance than ruined by the will of an arbitrary master.[100]

The hypothetical draws nearer to political mapmaking if, instead of the dealer awarding the kitty arbitrarily, she openly solicits bids, in the form of kickbacks, from the players. In this version she decides who will win on the basis of whoever is willing to give her the best deal. Not only is the game governed by the will of a human actor, that actor — the dealer — is herself a player of the game who makes up the rules as she goes along. No one other than the dealer's kith and kin would willingly play such a game.

This second version of Dealer's Choice is a cameo of what is wrong with *any* kind of gerrymandering, whether of the partisan *Davis v. Bandemer*[101] variety or of the *Shaw v. Reno*[102] racial variety. It corresponds to no defensible notion of democratic process, whether or not it satisfies the constitutional tests that have hitherto satisfactorily disposed of the cases that have arisen. Nor should we necessarily criticize the doctrine, as it has developed to this point necessarily, for failure to worry much about partisan gerrymanders. As Bruce Cain and others have pointed out, a wholesale hijacking of the electoral process such as the one we have described has simply been infeasible.[103] One requires better information about voters — who is likely to vote, how likely, and for whom — than has been readily available. Until recently, that is, the dealer did not know how to behave as anything other than a roulette wheel. Now thanks to new survey research data and new computers, she is rapidly learning. It remains, however, to demonstrate the existence of a judicially manageable criterion for resolving a gerrymandering complaint.

V. The Antigerrymandering Principle

Gerrymandering — whether racial or partisan — and the sort of cheating described in Part IV are cut from the same cloth. What makes them objectionable is the notion that the legislature has strayed from its proper domain and played too large a role in constituting itself. The VRA as applied against at-large, multimember districts seems to have viewed legislative self-constitution skeptically and sought to limit the practices that too shamelessly pointed in this direction. It is neither incoherent nor imprudent to think of the Depart-

100. John Locke, An Essay Concerning the True Original, Extent and End of Civil Government (J.W. Gough ed., Basil Blackwell 3d ed. 1966) (Oxford 1690).

101. 478 U.S. 109 (1986).

102. 113 S. Ct. 2816 (1993).

103. Bruce E. Cain, The Reapportionment Puzzle 146 (1984); Schuck, *supra* note 64, at 1341-47.

ment of Justice or the federal courts as extrapolitical actors to keep legislative self-dealing within decent bounds. But there are decided limits on how constructive such extrasystem interventions can be unless they are structured by principles that describe how to limit legislative discretion. In *Shaw*, for example, the Attorney General rejected the legislature's original plan and returned the matter to the state assembly where the VRA ironically authorized or required, rather than limited, legislative self-constitution.[104]

The antigerrymandering principle we have in mind is easily spliced to the existing system of territorial districting that is constrained by the principle of one person, one vote. The principle simply requires that territorial districts be contiguous and as compact as possible. By themselves, those intuitive and traditional attributes of territorial districts are capable of taking the profit out of gerrymandering in most cases.

The antigerrymandering principle as we have described it requires adherence to three criteria in drawing SMDPV districts. Districts must be (1) of equal population; (2) contiguous; and (3) compact. There is some room, admittedly, for a certain amount of pedantic finagling with respect to these terms, but realistic and workable definitions are available.[105] The intuition behind the antigerrymandering principle is that the three criteria are functionally interdependent. If any *one* criterion is ignored, though the others were scrupulously obeyed, a partisan mapmaker is free to create a world that is indistinguishable from the unsavory world of printout districts.[106] All three rules are necessary to check electoral manipulation.

In the American political tradition, the criterion that has been ignored is that of compactness, and those who would tamper with the electoral system have thus created uncompact gerrymanders — for reasons of partisan advantage as well as to comply with the VRA. A compactness criterion would end most partisan gerrymandering and prevent the ugly districts that the *Shaw* court found objectionable.[107] Moreover, this procedure, which is already embodied in the Attorney General's regulations governing section 5 preclearance,[108] effectively

104. 113 S. Ct. at 2819-20.

105. *See* Polsby & Popper, *supra* note 48, at 323 n.113 (definitions of equal population), 330 (contiguity), 339-51 (compactness).

106. For an extended discussion of this interdependence, see *id.* at 327-32.

107. Some commentators have doubted the efficacy of compactness as a check on gerrymandering, and it cannot be denied that the antigerrymandering principle does not make it impossible to gerrymander. It always makes it more difficult, however, and in many cases so difficult that it might as well be abandoned as a cost-effective approach to garnering political power. For a discussion, see *id.* at 332-34. In any case, it is a weak criticism of a proposed reform that it does not completely cure the problem. *See generally* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969) (arguing that criticisms of the free market must be compared to available alternatives instead of ideal solutions).

108. 28 C.F.R. § 51.59(f) (1992).

can limit — not eradicate, but keep reasonably decorous — the problem of legislative self-constitution. The Department of Justice currently says that, in judging whether a practice abridges the right to vote on account of race and so forth, it will consider certain factors, including: "the extent to which the plan departs from . . . relevant factors such as compactness and contiguity." The *Shaw* map astonishingly cleared this hurdle, which means, we suppose, that to consider everything is to consider nothing.

Requiring that elections be held within fair territorial districts implies some notion of contiguity and compactness, for these attributes are inherent in what is ordinarily understood by a "territorial" district. Territorial districts are distinguished from printout districts by the property of location. A "district" scattered around like the spots on a Dalmatian does not answer this description; location carries at least a rough implication of contiguity. But, as the *Shaw* map rather tamely illustrates, contiguity is an entity easily mocked. Contiguity is meaningless as an element of locality unless it implies some ingredient of compactness.

Printout districts do not have the property of location. In principle they are capable of reflecting whatever values a decisionmaker wishes to have represented in the electoral process. As the case of East Garden shows, printout districts are the easiest system to gerrymander if districtmakers have discretion over whom to assign to which district — even if that discretion is always subject to the requirement of one person, one vote. But printout districts can as easily be rendered gerrymanderproof if constituted as completely random affairs, with citizens assigned to districts by a tamper-proof computer program. Every member of an East Garden family of ten could conceivably be sorted into a different printout district. Such a system can be made quite safe from a self-dealing legislature or its agent, but it seems to possess little normative appeal.

A preference for territorial districts, single-member or otherwise, emerges independently from an antigerrymandering principle. People's lives are organized and lived in places. Where one lives, works, shops, where one's children go to school, the means of access from place to place, the people one encounters in all of these venues, the rules of engagement in all the resulting relationships, the patterns of political and social influence, "the webs of affiliation" that give individuality to social human beings[109] — all possess a definite territorial element.

Formal political structures are especially important for patterning the interactions and relationships of strangers — not only people whose interests we know conflict with our own, but also those whose

109. *See generally* Georg Simmel, *The Web of Group-Affiliations, in* CONFLICT AND THE WEB OF GROUP-AFFILIATIONS 125 (Reinhard Bendix & Kurt H. Wolff trans., 1955).

interests are unknown. Cooperative social behavior is natural for very small communities — families, neighborhoods, and so on — but difficult to sustain among strangers — or, in jargon, nonrepeat players.[110] The strangers whose lives most touch and affect us, whose primary behavior most intersects with ours, live near at hand rather than far away.

This perception would seem inducement enough to prefer territorial to printout districts — if territorial districts could be made tamper proof. It is reasonable to fear that, if the people who operate the legislative process have unlimited authority to constitute it as they will, sooner or later — and no doubt by insensible degrees and without the necessity of any mapmaker possessing the mens rea for larceny — they will begin to confound the general interest and their own. It is reasonable, in other words, to fear that East Garden is a sketch of the future of democratic politics, whose arrival awaits only the acquisition of better tools for identifying and categorizing voters.

We cannot make territorial districts tamper proof to the same extent as printout districts. Even if one accepts our antigerrymandering technique of contiguous and maximally compact districts, mapmakers retain significant discretion to cant territorial districts toward the satisfaction of partisan objectives. It is still possible for them to merge the districts of popular opposite-party representatives; it is still possible for them to protect their own favored incumbents. It is still possible, in other words, for the mapmakers to play normal politics with politically constitutive rules. But the rule of contiguous and compact territory makes the game many times harder for them to play successfully and reduces to insignificance the fear that partisan operators will steal elections.[111]

As a practical matter, the antigerrymandering principle could be administered rather simply in federal district court. Let the official mapmakers have the first move. If some complainant comes forward with a redistricting plan that beats the official plan for contiguous-compactness, let that constitute a prima facie case of unconstitutional gerrymandering. Such a system gives mapmakers virtuous incentives in the starting gate. Maps like the one in *Shaw* would never be seen again.

Who would be entitled to proffer such an alternate map? Such a question fairly raises one of the nagging aspects of the whole of voting-rights jurisprudence — namely, it does not fit well within the categories of legal or constitutional rights used in most litigation. When the government counts everyone's vote, when the government obeys the one-person-one-vote principle, when everyone's vote is equal, then finding an "individual" right for one person amounts to imposing a

110. *See generally* Robert Axelrod, The Evolution of Cooperation (1984).

111. *See* Polsby & Popper, *supra* note 48, at 332-34.

duty on another to refrain from voting for his own self-interest or conception of the general good. Such personalized formulations, whether one calls them deprivations of equal protection or of an opportunity to participate and elect, completely fail to capture the pith of the problem. The problem is that somebody has stolen the election. In other words, the claim resembles the grievance in *Massachusetts v. Mellon.*[112] Ordinarily, complaints of this kind do not state a cause of action in federal court. A successful plaintiff must have a *particularized* claim of an injury that flows from the assertedly unlawful assumption of executive or legislative power.[113] No one in East Garden has such a particularized claim. The *Shaw* plaintiffs tried to go forward with a *Mellon*-like claim,[114] but the Supreme Court proceeded on a different theory.

There seems to be little justification for sidestepping the issue just because all one has is Professor Jaffe's non-Hohfeldian plaintiff[115] who has received no injury that is concrete and particular to himself and who can allege no violation of his own "rights," as they are conventionally understood. *Flast v. Cohen*[116] is the model exception to the general rule of standing; it would allow "citizens" in a gerrymandered state, if they had a better plan in hand, to complain without the pretense that they have received a rights injury in the ordinary sense.

The case for allowing this exception is stronger than that presented in *Flast,* which allowed plaintiffs without a personal or particularized stake to complain of federal money being spent to finance religious instruction in religious schools. Everyone understands that the true justification for the *Flast* exception to the rule of *Mellon* is that government should not be allowed to subsidize religion unconstitutionally only because no one with a uniquely concrete and particularized injury

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112. 262 U.S. 447 (1923). In *Mellon,* an individual taxpayer alleged the injury of a heavier tax burden in her attempt to enjoin a federal statute. The Court held that the suit could not be maintained on such an injury, for the causal relation of the statute to the plaintiff's taxes was "uncertain" and, in any event, was a burden "shared with millions of others." 262 U.S. at 486-88.

113. *See* 262 U.S. at 488 (holding plaintiff must show a "direct injury" and "not merely that he suffers in some indefinite way in common with people generally").

114.

> [Plaintiffs] did not claim that the General Assembly's reapportionment plan unconstitutionally "diluted" white voting strength. They did not even claim to be white. Rather, appellants' complaint alleged that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a "color-blind" electoral process.

Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993).

115. *See* LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 483 (1965). Jaffe is discussed in Justice Harlan's dissenting opinion in Flast v. Cohen, 392 U.S. 83, 120 n.7 (1968). The reference in the text is to Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,* 23 YALE L.J. 16 (1913).

116. 392 U.S. 83 (1968).

can be found to protest.[117] But rent seeking by religious groups is similar to rent seeking by many a nonreligious group, albeit with an especially sinister and politically reactive history. This history may well be considered terrible enough to justify a special provision in the Bill of Rights and special standing rules to eliminate the problem. But, at the end of the day, other forms of legislative self-seeking by factions pose a challenge to democracy that is more or less continuous with self-seeking of the religious kind. It is normal politics; in other words, it is the usual stuff of legislative practice.

But the constitution of the legislature, "the first and fundamental Act of Society,"[118] is altogether different. Although the details of organization are left in the hands of the legislature itself,[119] there must be a limit to its power to control the rules of its self-constitution which, being "constitutional," are prior to and outside of normal politics. One implication is that the constitutional rule for legislatures must originate extramurally and must ultimately be administered extramurally and not by the legislature itself. The case of East Garden proves that proposition by indicating what can follow if one assumes the contrary.

CONCLUSION

The antigerrymandering principle that we have in mind does not assume to take the politics altogether out of politics, but only to recognize and control skewed incentives at the heart of democratic practice. It has an additional, practical advantage. Any territorially compact minority will tend to gain — in the sense of "electoral success," the VRA's basic criterion of "opportunity" — from an antigerrymandering principle. So, we strongly suspect, would the black population of North Carolina, geographically dispersed though it is, if the partisan makeup of the congressional delegation and the safety of its most powerful incumbents had not been taken by the mapmakers as lexically prior concerns.

"Districting," as Justice Souter said, "inevitably is the expression of interest group politics."[120] Justice White notes elsewhere: "it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another."[121] Again, "[p]olitics and political considerations are inseparable from

117. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 490 (1982) (Brennan, J., dissenting).

118. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 425 (Peter Laslett ed., 1960) (Cambridge 1690).

119. U.S. CONST. art. I, § 5.

120. Shaw v. Reno, 113 S. Ct. 2816, 2836 (1993) (Souter, J., dissenting).

121. Gaffney v. Cummings, 412 U.S. 735, 753 (1973).

districting and apportionment."[122] Justice White's observations are fair enough; practical people should not get carried away by utopian idealizations of the political system and overestimate the comparative wisdom of judges. The institutional costs of intercepting every last bit of systemic self-dealing may often be too great to justify judicial action.[123]

Nevertheless, there is a crucial distinction between normal politics and constitutive politics. Those who deny this distinction or refuse to make it deserve honorary life citizenship in East Garden. If we do not aim to extirpate the politically strategic behavior of mapmakers, we should try to stop them from stealing elections — from self-dealing and from constituting the legislature by partisan rules. We can insist on being governed by the territorial principle and let the chips fall where they may.

The notion of "letting the chips fall where they may" imbues this subject with an intriguing subtext. Many scholars of electoral systems believe that an antigerrymandering principle of the kind we suggest would, as a generalization, tend to favor Republicans.[124] *Shaw* seems to have recognized that the Constitution cannot allow any version of this objection whatsoever. When the legislature of North Carolina generates districts as ugly as the Twelfth, it is in effect claiming, albeit by means of a heavily camouflaged circumlocution, that it has a right to make sure that blacks' electoral gains come largely at the expense of Republicans rather than fellow Democrats. If one were looking for a first principle upon which to found a jurisprudence of the ugly, one could find no better place to start.

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122. 412 U.S. at 753.

123. Of course one tolerates allocative inefficiencies when the costs of remedying them are too great. *Cf.* George Stigler, *Law or Economics?*, 35 J.L. & ECON. 455 (1992).

124. Only Daniel Lowenstein and Jonathan Steinberg, however, seem to have had the existential courage to acknowledge that this is the real objection to the antigerrymandering principle. Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive of Illusory*, 33 UCLA L. REV. 1, 23-27 (1985).