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# Gerry-Built Voting Rights: The District Shape Test

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# GERRY-BUILT VOTING RIGHTS: THE DISTRICT SHAPE TEST

## INTRODUCTION

Although voting is the essence of democracy,[1] minority voters have found that casting ballots is no guarantee of political participation.[2] The combination of polarized voting, majority rule, and manipulable electoral mechanisms, particularly the drawing of districts, can slant an election decisively in the majority's favor. Under unchecked majority rule, a permanent majority bloc can routinely silence the votes of the minority. This effect, called "vote dilution," reflects the diminution or cancellation of the minority vote.[3]

The Fifteenth Amendment[4] and its well-known progeny, the Voting Rights Act of 1965 ("Act"),[5] prohibit denial or dilution of the right to vote on account of race. However, preventing such dilution is more easily said than done. Vote dilution remedies that take race into account are controversial. Advocates of a "colorblind" Constitution charge that race-conscious

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[1] As Chief Justice Warren wrote, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Reynolds v. Sims, 377 U.S. 533, 555 (1964). The Court framed the right to vote as a super-fundamental right, "preservative of all rights." *Id.* at 562 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

[2] The term "minority" here denotes "discrete and insular" groups sharing a common characteristic such as race. The courts have a special obligation to provide such groups protection against the oppression or indifference of the majority. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). *See also* JOHN HART ELY, DEMOCRACY AND DISTRUST 75-104 (1980) (describing the broader "representation-reinforcing" theory that courts should protect the rights of politically disfavored minorities against majority abuses).

[3] As the Court explained, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Reynolds v. Sims, 377 U.S. 533, 562 (1964).

[4] The Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

[5] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)). *See* discussion *infra* parts II.B.2, III.C.1.

measures, particularly "safe districting,"[6] represent impermissible affirmative action, or reverse discrimination, beyond the Congressionally intended or constitutionally permitted scope of the Act.

In a sharply divided decision, the Supreme Court recently joined the attack on safe districting. Splitting 5-4 in *Shaw v. Reno*,[7] the Court created a new cause of action that permits plaintiffs to challenge irregularly-shaped safe districts as violations of the constitutional guarantee of equal protection.[8] The Court held that some districting plans may be sufficiently "bizarre" as to be "unexplainable on grounds other than race."[9] If a plaintiff makes a showing of irregularity, "racial gerrymandering"[10] is presumed; if the state cannot rebut that presumption, it bears the burden of defending the districting under strict scrutiny, the Court's most exacting standard of review.[11]

The *Shaw* decision stands ominously at the intersection of voting rights and race-conscious remedial legislation. Although the Court expressly did not decide whether all race-conscious districting might be unconstitutional, it vigorously denounced the potential harms of race-consciousness used for any purpose, including remedies.[12] Such language has become a characteristic refrain of the increasingly conservative Court, and *Shaw* must therefore be taken for what it is: a preliminary attack on the inherent race consciousness of the Voting Rights Act.

This Note argues that the *Shaw* Court misinterpreted the facts of the case, misconstrued the substance of voting rights,

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[6] A safe district is a district that sends a single representative to a legislative body and that is drawn race-consciously to create a districtwide majority of a statewide minority. In a safe district, the majoritarian tables are turned: the "majority-minority" can vote and win at majority rule. Safe districts are currently the most common judicial remedy for dilution of minority voting rights. *See* discussion *infra* part I.C.4.

[7] 113 S. Ct. 2816 (1993).

[8] The Equal Protection Clause of the Fourteenth Amendment states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[9] *Shaw*, 113 S. Ct. at 2825 (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

[10] "Gerrymandering" is the self-interested manipulation of district lines to benefit a group in power, and commonly, though inaccurately, connotes using strange-shape districts to do so. *See* discussion *infra* part I.B.

[11] *Shaw*, 113 S. Ct. at 2832.

[12] *See* discussion *infra* part III.A.2.

and created a regressive cause of action. The shape-based claim,[13] evidently turning on aesthetic and formal considerations, mysteriously divorces the concept of gerrymandering from proof of harm to anyone. The result is a major setback for voting rights that should be judicially or legislatively derailed.

Part I clarifies the foundations of *Shaw*, including the issues underlying minority voting rights, the significance of districting, and the inherent problems of judicial oversight of the political process. Establishing appropriate standards of review has proved to be one of the judiciary's most difficult tasks, and the Court, to the detriment of minorities, has not articulated a coherent theory of political fairness to support it. This Part notes the case law on which the *Shaw* shape test relies and discusses the lessons of thirty years of judicial experience with the familiar but limited rule of one person, one vote.

Part II summarizes the *Shaw* facts and opinions. Part III examines the flawed premises of the shape test and its failure to articulate the harm it is meant to remedy. This Note concludes that the Court made a serious departure from precedent with this new extension of formal race analysis and that the shape test must be discarded if voting rights reform is to survive. In the event the Court instead ratifies or broadens its reasoning in *Shaw*, this Note briefly discusses ways to limit the doctrine's impact and to protect the Voting Rights Act, including alternatives to safe districting that may allay equal protection concerns, moot *Shaw*, and salvage some of the vigor of voting rights reform.

## I. FOUNDATIONS

### A. THE RIGHT OF POLITICAL PARTICIPATION

Voting rights begin with the individual vote. However, in our representative, as opposed to direct, democracy, there are three stages through which one must pass to realize meaningful political participation: first, the ability to cast a vote; second,

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[13] Technically, the *Shaw* test applies to any "bizarre" districting plan and not to strange-shape districts per se. However, the Court's discussion of relevant factors to consider in evaluating a plan, such as district compactness, contiguity and preservation of political subdivisions, are essentially shape considerations, and it is apparent that the "bizarre" districting the Court had in mind were the strange-shape districts of the classic gerrymander and the case before it. *See* discussion *infra* part III.A.2.

the ability to elect a candidate of one's choice; and third, the ability to influence legislative decisions.[14] Early voting rights reform focused on the first stage by increasing voter registration and ensuring access to the ballot: striking down poll taxes, literacy tests, and other discriminatory practices. More recently, safe districting has been used to surmount the second stage by creating pockets of sufficiently concentrated minority political power to elect minority-chosen candidates.[15]

1. *The Vulnerability of Minority Political Rights*

Before ratification of the Constitution, James Madison cautioned in *The Federalist Papers* that minority rights are inadequately protected by pure majority rule: "If a majority be united by a common interest, the rights of the minority will be insecure."[16] He reasoned that it was equally important for "a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."[17]

For this simple reason, majority rule is sometimes subject to abuse. Under "winner-take-all" majority rule, fifty percent-plus-one of the voters can be mathematically certain to control 100% of the power, regardless of the votes of the minority.[18] If

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[14] *See* Richard C. Reuben, *Challenges to Race-Based Districts Could Shatter Minority Electoral Gains*, CAL. LAW., Nov. 1993, at 39 (reporting remarks of Professor Guinier).

[15] The third tier of meaningful participation, legislative decisionmaking by minority representatives, is no less important than the first and second tiers. *See generally* Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991) (discussing problems of legislative empowerment). However, this author leaves its discussion for another day.

[16] THE FEDERALIST No. 51, at 323 (James Madison) (Willmoore Kendall & George W. Carey eds., 1966). However, majority rule is not the only possible rule for democracy; it is merely a convenient compromise between achieving consensus and efficiency. One could imagine, for example, a legislature run on a rule of unanimity. Although this also constitutes "democratic" rule, it would give veto power to even the smallest and most self-interested groups and thus would be incompatible with the goal of effective government.

[17] *Id.*

[18] According to public choice theory, even small "interest groups" with, for example, significant economic clout can exert considerable control over legislative processes, even overriding the will of the majority. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) (arguing that

the majority establishes a stable voting bloc or faction,[19] it has no need to negotiate with the minority for votes. Such a bloc majority owes nothing in political capital to the minority, yet it gains inflated political power in the legislature because it is apportioned power as if it spoke for both the majority and the minority.

Once a majority faction obtains legislative power, it can enlarge and entrench that power by influencing voting mechanisms and practices. For example, majority-controlled drafting of electoral district boundaries can guarantee the seats of majority incumbents and expand majority political control over additional districts. Although this appears to be ordinary politics, in which factionalization is a permanent feature of the political landscape,[20] such politics preserve undemocratic majority domination in a way that was precisely Madison's concern.[21] Because of deeply racially polarized voting, African-American voters have felt these effects for many years.[22]

Madison argued that the tendency of the majority to self-deal was immutable and that the political system had to be

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statutes should be interpreted narrowly to diminish the power of private interest groups). This again shows that unmodified majority rule does not guarantee fairness.

[19] "Faction" is used here as Madison defined it: "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interests, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." THE FEDERALIST No. 10, at 78 (James Madison) (Willmoore Kendall & George W. Carey eds., 1966).

[20] There are constitutional limits to *extremely* discriminatory politics; the Supreme Court held that a justiciable question is presented where "purely political" gerrymandering is so extreme as to violate the most basic guarantees of the Equal Protection Clause. Davis v. Bandemer, 478 U.S. 109, 118-27 (1986).

[21] *See* Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 315 (1972) ("Race prejudice divides groups that have much in common (blacks and poor whites) and unites groups (whites, rich and poor) that have little else in common than their antagonism for the racial minority. Race prejudice, in short, provides the 'majority of the whole' with that 'common motive to invade the rights of other citizens' that Madison believed improbable in a pluralistic society.").

[22] The continuing political, economic and social disadvantages of people of color have been well documented. *See, e.g.*, DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992); T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 355-64 (1992).

designed to control it: "[T]he *causes* of faction cannot be removed and . . . relief is only to be sought in the means of controlling its *effects*."[23] For the then-nascent federal government, he urged that such countermajoritarian means could be built into the structure of federalist democracy.[24]

Racially polarized voting provides contemporary evidence of the persistence and power of factionalism.[25] After the enactment of the Fifteenth Amendment in 1870, racism continued to effectively suppress African-American votes. The courts provided little recourse; voting rights suits were difficult to bring and harder to win, requiring as many as 6,000 hours of reviewing registration records to prepare for trial.[26] Voting qualification tests were administered discriminatorily, all-white primaries existed for many years, and vague "good morals" tests granted voting officials broad discretion to disenfranchise.[27] As of the mid-1960s, African-American registration in Alabama reached only 19.4%; in Louisiana, 31.8%; and in Mississippi, 6.4%. Yet white registration ran fifty percent or more ahead.[28] In North Carolina, African-Americans scored lower on literacy tests because they received inferior educations in segregated schools,[29] and public restaurants and accommodations were inaccessible,[30] let alone the ballot box.

As the civil rights movement expanded the right of African-Americans to vote, the majority's tactics shifted from obstruction to dilution of the minority vote. In 1986 a key voting rights case, *Thornburg v. Gingles*,[31] provided a snapshot of the effects of discrimination in North Carolina. The *Gingles* Court relied on the district court's findings that from 1900 to 1970 "North Carolina had officially discriminated against its black citizens with respect to their exercise of the voting franchise," using poll

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[23] THE FEDERALIST No. 10, *supra* note 19, at 80.

[24] *Id.* at 80-84.

[25] *See* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1860-61 (1992) (evaluating Madison's concerns in light of modern problems of polarized voting and minority vote dilution).

[26] South Carolina v. Katzenbach, 383 U.S. 301, 314 (1966).

[27] *Id.* at 310-13.

[28] *Id.* at 313.

[29] *See* Gaston County v. United States, 395 U.S. 285, 293-95 (1969).

[30] *See* Blow v. North Carolina, 379 U.S. 684 (1965).

[31] 478 U.S. 30 (1986).

taxes, literacy tests, and other methods.[32] After these direct restraints were eliminated, North Carolina persisted with state-sanctioned discrimination to depress African-American voter registration.[33] Meanwhile, "historic discrimination in education, housing, employment, and health services" lowered African-American socioeconomic status and political power, and "white candidates in North Carolina . . . encouraged voting along color lines by appealing to racial prejudice."[34]

Although over one-fifth of North Carolina's population is African-American, discriminatory electoral practices and "severe and persistent racially polarized voting"[35] have kept most African-Americans out of office.[36] Not one African-American was elected to the United States Congress from North Carolina for nearly one hundred years. Yet in 1992, North Carolina sent two African-Americans to the House of Representatives, primarily with African-American support and as a direct result of redistricting under the auspices of the Voting Rights Act.[37] This redistricting was also the focus of the challenge brought in *Shaw v. Reno*.[38]

2. *Voting Rights Reform*

The Voting Rights Act, enacted "to banish the blight of racial discrimination in voting,"[39] enabled minority groups to

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[32] *Id.* at 38 (citing findings of trial court).

[33] *Id.*

[34] *Id.* at 39-41.

[35] *Id.* at 41.

[36] The general inability of African-American candidates to win office stems from two discriminatory factors: the refusal of white voters to vote for someone who is African-American, and their refusal to vote for someone predominately supported by African-Americans. The paucity of African-American representatives in Congress is thus related to, but is not the same as, the problem of minority disenfranchisement. *See infra* parts I.C.4 and III.B.2 (discussing voting discrimination remedies).

[37] Eva M. Clayton and Melvin L. Watt were the first African-American North Carolinians elected to Congress since 1898. BRUCE A. RAGSDALE & JOEL D. TREESE, BLACK AMERICANS IN CONGRESS, 1870-1989 (1990); *The 1992 Elections: State by State: South*, N.Y. TIMES, Nov. 4, 1992, at B18.

[38] 113 S. Ct. 2816 (1993).

[39] South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (upholding constitutionality of Voting Rights Act).

exercise some of their political rights for the first time.[40] The Act benefits victims of discrimination in two ways. First, it provides minority plaintiffs with statutory grounds on which to challenge electoral schemes as dilutive, and second, it requires the most racially polarized states to obtain permission from the federal government before making electoral changes that might be discriminatory.[41] These protections are contained in two key sections of the Act, Sections 2 and 5.[42]

Section 2 is remedial and establishes a cause of action to enjoin electoral practices where the "totality of the circumstances" indicates invidious interference with minority political opportunity.[43] Although a court may consider the extent to which minority members have or have not been elected to office, Section 2 expressly does not create a right to proportional representation.[44]

Section 5 is narrower and prophylactic; it only applies to "covered jurisdictions," counties with a history of discriminatory practices.[45] This section requires these jurisdictions to receive federal approval before making even subtle electoral changes.[46] A change will not be approved if it limits the accessibility of the political process to a protected class or if it violates the "nonretrogression" principle, which requires that changes not place the electoral strength of a protected minority in worse standing than it was before the changes.[47] Approval is ob-

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[40] *See, e.g.*, 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 (Bernard Grofman & Chandler Davidson eds., 1992).

[41] *See* McCain v. Lybrand, 465 U.S. 236, 243-44 (1984).

[42] 42 U.S.C. § 1973 (1988) (Section 2); 42 U.S.C. § 1973c (1988) (Section 5).

[43] 42 U.S.C. § 1973 (1988).

[44] 42 U.S.C. § 1973(b) (1988) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

[45] The Act defines a "covered jurisdiction" as a state or political subdivision that, as of November 1964, 1968 or 1972, imposed a literary test, poll tax, requirement of "good moral character" or similar restriction on voter registration, and in which fewer than 50% of eligible voters were registered or had voted in the Presidential election of the respective year. 42 U.S.C. § 1973b(b) (1988); *see also* 28 C.F.R. Part 51, app. (1994) (list of covered jurisdictions as determined by the Attorney General, including 40 counties in North Carolina).

[46] *See* 42 U.S.C. § 1973c (1988).

[47] Beer v. United States, 425 U.S. 130, 141 (1976).

tained either by declaratory judgment or, more commonly, by seeking the Attorney General's preclearance.[48]

The Act provides an important deterrent effect on legislative decisionmaking. It is a "brooding omnipresence"[49] that gives minority voting rights primary importance in district planning, particularly in covered jurisdictions subject to both Section 5 preclearance and Section 2 vote dilution suits.[50] The Act has been so important in this mission, and some of the states so recalcitrant, that in 1982 Congress strengthened and renewed the Act through the year 2007.[51]

The effectiveness of the Act depends heavily on the judiciary's construction of its language and mandate. For instance, in *Presley v. Etowah County Commission*,[52] the Supreme Court construed the statute narrowly. In that case, the Justice Department imposed electoral changes pursuant to the Act on the system of electing commissioners to two commissions in Alabama.[53] These changes resulted in the election of three African-Americans to the county commission for the first time in recent history.[54] However, the incumbent white commissioners, still in the majority, voted to all but eliminate the power allocated to the newcomers.[55]

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[48] *Id.* The option to seek preclearance from the Attorney General was added to the Act to provide covered jurisdictions expedited review of electoral changes. *See* McCain v. Lybrand, 465 U.S. 236, 246 (1984). Regardless of whether the covered jurisdiction opts for a declaratory judgment (in the District Court for the District of Columbia) or preclearance, it carries the burden of proving that the proposed plan imposes no discriminatory or retrogressive effect. *Id.* at 247. Because preclearance is more convenient and less expensive, it is the overwhelmingly preferred route. The judiciary also accords substantial deference to the Attorney General's interpretations of the Act. NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 178-79 (1985).

[49] *See* Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 CARDOZO L. REV. 1237, 1263-65 (1993) (describing Act as "brooding omnipresence").

[50] *Id.* at 1239 ("Section 5 preclearance provisions will have a strong deterrent effect on plans that give even the appearance of being dilutive, since the jurisdiction must bear the costs of contesting a preclearance denial.").

[51] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 1 (1982).

[52] 112 S. Ct. 820 (1992).

[53] *Id.* at 825-27.

[54] *Id.* at 832.

[55] *Id.* at 825-26.

Despite the discriminatory effect of these actions, the Court refused to intervene, construing the Act as limited to "changes 'with respect to voting,'" and not "changes 'with respect to governance.'"[56] The Court explained that "the Voting Rights Act is not an all-purpose antidiscrimination statute [and does not] apply to other forms of pernicious discrimination."[57] Regardless of the accuracy or inaccuracy of this interpretation, *Presley* shows that the formal right to vote is no guarantee of political participation.[58] The substance of voting, that is, the prospect of exercising influence over an actual outcome of the political process, is the principle the white Alabama commissioners easily defeated. Majority rule, standing alone, is not enough to ensure legitimate rule.

### B. THE ROLE OF DISTRICTING

Districting is the mechanical process of dividing territories into districts, and most elections are conducted under some districting scheme. In its simplest form, an election may be at-large, with all voters in an undivided political unit voting to fill all of the representative seats available. For example, the vote for United States senators occurs in an at-large election with respect to state boundaries. More commonly, territories are divided into districts. Voters in a "single-member" district vote exclusively to fill one seat, whereas voters in a "multimember" district vote for several, but not all, of the seats in a single legislative body.

The method of districting can have, and is usually intended to have, significant political effects.[59] Truly "neutral"

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[56] *Id.* at 832. *See also* Robert B. Carter, Note, *Mere Voting:* Presley v. Etowah County Commission *and the Voting Rights Act of 1965*, 71 N.C. L. REV. 569 (1993) (discussing weakening effects of *Presley* on § 5 jurisprudence).

[57] *Presley*, 112 S. Ct. at 832.

[58] *See also* Holder v. Hall, 114 S. Ct. 2581 (1994) (finding § 2 inapplicable to number of seats in commission governing body).

[59] In *Davis v. Bandemer*, Justice White explained:

> The very essence of districting is to produce a different — a more 'politically fair' — result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment. . . . The reality is that districting inevitably has and is intended to have substantial political consequences.

districting is unattainable because it is undefinable. Any line-drawing will have political effects of some kind, and the combination of effects that strikes a neutral balance depends on the perspective and politics of the observer.[60] For example, in *Shaw v. Reno*,[61] the Justice Department imposed its view that the inclusion of two safe districts restored fairness and neutrality, while the plaintiffs preferred a plan resulting from ordinary political processes.

Gerrymandering is the deliberate manipulation of districting to benefit a particular interest. It is often used by the political party that controls the state legislature and enacts the districting plan to dilute the votes of its opposition, sometimes on the basis of race.[62] Discriminatory districting may be accomplished by "splitting" opposition voters among as many districts as possible or by "packing" them in as few as possible.[63] The split group will be outvoted in all the districts and the packed group will "waste" its votes in the districts where it is excessively concentrated, losing control or influence it could have had over other districts.[64] Districts drawn with or without regard to the constituencies of incumbents may, for example, determine who gets reelected.

Shape is a district's most readily apparent characteristic, and strange shape inheres in the popular conception of gerry-

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478 U.S. 109, 128-29 (1986). On the positive side, single-member districting can serve important and legitimate state goals, such as ensuring better local representation, balancing urban and rural interests, and remedying minority exclusion via safe districting. Federal law mandates single-member districts for Congressional representatives. 2 U.S.C. § 2c (1988).

[60] As the Court noted twenty years ago, "[d]istrict lines are rarely neutral phenomena." Gaffney v. Cummings, 412 U.S. 735, 753 (1973). Professor Dixon argued that "every line drawn wittingly or unwittingly will have an apportionment political effect different from another line which is equally 'equal' and equally available." ROBERT G. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 380 (1968).

[61] 113 S. Ct. 2816 (1993).

[62] As the Court recently noted, "[i]n the context of single-member districts, the usual device for diluting minority voting power is the manipulation of district lines." Voinovich v. Quilter, 113 S. Ct. 1149, 1155 (1993).

[63] *Shaw*, 113 S. Ct. at 2840.

[64] The principle of wasting opponent votes is not confined to the single-member district. An at-large voting scheme, with no districts at all, may be the optimal weapon of discrimination in certain circumstances, permitting a united majority to assume control of the entire political unit. The multimember district shares characteristics of both methods.

mandering. Indeed, the term was coined in 1812 to ridicule the reptilian shape of Massachusetts Governor Elbridge Gerry's "salamander" district.[65] Modern dictionary definitions of gerrymandering also typically emphasize strange shape, tending to equate it with discrimination.[66] Pundits frequently depict contorted districts as silent indictments of the lack of integrity of the political process.[67]

However, strange district shape is not a reliable test of illegitimate motives. The late Professor Dixon objected to the popular emphasis on shape as "highly unfortunate" because "[i]t immediately casts attention in the wrong direction — towards superficialities of shape and size, rather than towards the political realities of district composition."[68] He argued that "[g]errymandering is simply discriminatory districting which operates unfairly to inflate the political strength of one group and deflate that of another."[69]

The shape connotation of gerrymandering misleads where, for example, a voting bloc is geographically concentrated and can be easily isolated by an ordinary-looking district. A square district drawn around an inner city might capture virtually all the voters in a particular group, removing their influence from all other districts. Because the political effect of drawing districts depends intimately on the geographical distribution of voters of various alignments, manipulation takes many geometric forms, regular or irregular, in accordance with demographics

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[65] *See* DIXON, *supra* note 58 at 459.

[66] One authoritative definition of gerrymander is "to divide a territorial unit into election districts in an unnatural and unfair way with the purpose of giving one political party an electoral majority in a large number of districts while concentrating the voting strength of the opposition in as few districts as possible." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 952 (1986). A legal dictionary defines gerrymandering in stronger terms as districting with an "ulterior or unlawful purpose" of partisan results differing from districting achieved "according to obvious natural lines." BLACK'S LAW DICTIONARY 618 (5th ed. 1979). Note each dictionary's emphasis on "unnatural or unfair" and "obvious natural lines," terms whose definitions are themselves subjective.

[67] *See, e.g.*, GEORGE F. WILL, RESTORATION: CONGRESS, TERM LIMITS, AND THE RECOVERY OF DELIBERATIVE DEMOCRACY 43-46 (1992) (using maps to depict supposed districting abuses, including part of the plan challenged in *Shaw*).

[68] DIXON, *supra* note 58, at 459.

[69] ROBERT G. DIXON, THE COURT, THE PEOPLE, AND "ONE MAN, ONE VOTE" *in* REAPPORTIONMENT IN THE 1970S 29 (Nelson W. Polsby ed., 1971).

that are accidents of history or, more commonly, characteristics of particular groups.

Given the difficulty of identifying districting abuses, some commentators have suggested abolishing districting altogether. However, where voting is racially polarized, this approach would only place political control squarely in the hands of the majority. In the resulting at-large election, the minority would have no way to counter majority discrimination because it would be unable to elect even a single legislator.[70] Abolishing districting would spread majority domination in individual districts to the state as a whole because it would merely transform the state into one large district.[71]

### C. JUDICIAL REVIEW OF DISTRICTING

The judiciary maintains a central role in voting rights reform because it interprets and enforces the requirements of the Constitution and the Voting Rights Act. As judicial intervention in electoral processes has increased, the courts have wrestled with defining this role. Political apportionment, classically characterized by Justice Frankfurter as a perilous

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[70] *See* Barbara L. Berry & Thomas R. Dye, *The Discriminatory Effects of At-Large Elections*, 7 FLA. ST. U. L. REV. 85, 87 (1979) (in discriminatory at-large elections, "[t]he minority's loss is absolute"). The rise in popularity of initiatives, referenda and other forms of "direct democracy" that not only dispense with districting, but also the moderating deliberation of elected representatives, raises even more troubling concerns of unchecked majority rule and the submergence of the voice of minority groups. *See* Cain, *supra* note 40, at 273-75 (describing the potentially deleterious effect on minorities of trend towards "new populism"); *see also* Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 17-18 (1978) ("Direct legislation, the creation of progressives of another era, today poses more danger to social progress than the problems of governmental unresponsiveness it was intended to cure.").

[71] Nor would arbitrary, random districting be fair, because it would not upset the majority's natural advantage. A district with a majority of a geographically diffuse minority would be unlikely to result from happenstance. Random lines would also disserve the secondary districting goals emphasized by *Shaw* of compactness, contiguity and preservation of political subdivisions. *See* discussion *infra* part I.C.3.

"political thicket,"[72] provides few clear standards of review or self-evident remedies.

1. *Entering the "Political Thicket"*

*Shaw* represents the most recent attempt in the Court's thirty-year effort to define the judiciary's role in the political thicket. The search began with the Court's milestone 1962 decision *Baker v. Carr*,[73] which addressed a challenge of the Tennessee apportionment of state legislative districts. From 1901 to 1961, the Tennessee urban population grew dramatically, yet the Tennessee legislature, dominated by thinly-populated rural interests, refused to disturb the 1901 apportionment. The plaintiffs charged that the apportionment was "arbitrary and capricious," irrationally favoring some counties over others.[74] For the first time, the Court held that such a claim presented a justiciable equal protection claim and that the federal courts properly had subject matter jurisdiction.[75]

Justice Frankfurter dissented energetically, stating that "[a] hypothetical claim resting on abstract assumptions is now for the first time made the basis for affording illusory relief for a particular evil even though it foreshadows deeper and more pervasive difficulties in consequence."[76] He protested at length the Court's foray into the political realm, arguing that it would undermine the integrity of the judiciary by immersing the courts in a quintessential political question.[77] Justice Frankfurter warned that establishing judicial standards would burden the courts with the insurmountable "task of accommodating the

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[72] Colegrove v. Green, 328 U.S. 549, 556 (1946). Justice Frankfurter strongly resisted judicial intervention in the districting process, arguing that the "remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress." *Id.* "The Constitution," he wrote, "has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." *Id.*

[73] 369 U.S. 186 (1962).

[74] *Id.* at 207.

[75] *Id.* at 204.

[76] *Id.* at 267 (Frankfurter, J., dissenting).

[77] *Id.* at 280-97.

incommensurable factors of policy that underlie these mathematical puzzles."[78]

Justice Frankfurter correctly surmised that *Baker* would be difficult to apply. Although *Baker* opened the door to judicial review, it was conspicuously silent as to the standards and remedies to be used.[79] In 1964 the Court turned to the simple and restrained rule of "one person, one vote," reasoning that "as nearly as is practicable one man's vote . . . is to be worth as much as another's."[80] The one person, one vote rule promised mathematical application and limited judicial involvement in the details of the political process, apparently avoiding the "incommensurable factors of policy" that concerned Justice Frankfurter.[81] But the following year, the Voting Rights Act thrust the federal judiciary firmly into the political thicket by outlawing a variety of directly and indirectly discriminatory electoral practices, including discriminatory districting.

The Warren Court initially construed the Act broadly.[82] However, the Burger Court later sought to limit its scope in accordance with a more conservative view of civil rights remedies and the propriety of judicial intervention. In 1980 the Voting Rights Act reached a crossroads with the Court's decision in *City of Mobile v. Bolden*.[83] In *Bolden*, the Court upheld an at-large voting scheme against a Section 2 charge of vote dilution. The plurality opinion first read Section 2 as legislative surplusage that added nothing to the protections of the Fif-

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[78] *Id.* at 268.

[79] As Chief Justice Warren later described *Baker*: "We intimated no view as to the proper constitutional standards for evaluating the validity of a state legislative apportionment scheme. Nor did we give any consideration to the question of appropriate remedies." Reynolds v. Sims, 377 U.S. 533, 556 (1964). *See also* Robert B. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 649 (1963) (discussing *Baker*'s deliberate ambiguities shortly after its decision).

[80] Wesberry v. Sanders, 376 U.S. 1, 8 (1964). *See* discussion *infra* part I.C.2 (discussing one person, one vote rule). Although the Court initially wrote "one man, one vote," it later remembered the Nineteenth Amendment and switched to "one person, one vote."

[81] *But see infra* part I.C.2 (arguing that one person, one vote's neutrality is illusory).

[82] *See* South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966) (upholding constitutionality of Voting Rights Act).

[83] 446 U.S. 55 (1980).

teenth Amendment.[84] The Court then reasoned that because "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation," the *Bolden* plaintiffs could show no injury — they had proven only discriminatory effect, not intent, in the city's maintenance of an at-large system.[85] The Court found that the ability of African-American voters to "register and vote without hindrance" was enough to satisfy the Constitution.[86]

The Court's choice of an intent-based formal standard reflects the process orientation of its conservative members and highlights a doctrinal viewpoint that later informed *Shaw*.[87] To focus on the intent of the districting officials is to assume that a districting plan created without proven racial intent, regardless of its effect, is nondiscriminatory, at least for constitutional purposes. Thus, so long as minority voters are able to execute their formal right to vote, it is irrelevant that their substantive constitutional right to participate means nothing unless it is shown that someone *intends* for their right to mean nothing.[88]

The Court's rigidly formal *Bolden* analysis departed from the Voting Rights Act's substantive purpose of ensuring equal opportunity to participate in the political process. As a practical matter, requiring proof of racial animus imposed a heavy burden on plaintiffs; the viability of Section 2 litigation appeared to be on the verge of collapse.[89] In 1982 Congress rebuffed the

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[84] *Id.* at 60-61 ("[T]he sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself.").

[85] *Id.* at 62. The requirement of racially discriminatory intent extended to voting rights the philosophy behind the Court's rulings in several contemporaneous discrimination cases in other areas of the law. *See* Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 272 (1979); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265, 266 (1977); Washington v. Davis, 426 U.S. 229, 240 (1976).

[86] *Bolden*, 446 U.S. at 65 (internal quotation marks omitted).

[87] *See* Issacharoff, *supra* note 25, at 1865-71 (discussing the interaction of process theory and voting rights).

[88] Professor Ely anticipated this trend in the Court's thinking: "It would be a tragedy of the first order were the Court to expand its burgeoning awareness of the relevance of motivation into the thoroughly mistaken notion that a denial of a constitutional right does not count as such unless it was intentional." John Hart Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1160-1161 (1978).

[89] *See* Laughlin McDonald, *The 1982 Amendments to Section 2 and*

*Bolden* intent test by adding a "results test" to Section 2 that explicitly established a violation upon a showing of discriminatory effect alone.[90] Three principal reasons motivated repudiating the intent test: First, demonstrating intent was "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities;" second, it placed an "inordinately difficult" burden of proof on plaintiffs; and third, it asked "the wrong question" by focusing on intent rather than the Act's goal of equal electoral opportunity — that is, it looked for perpetrators rather than victims.[91] In short, the intent test was both functionally and analytically inappropriate.

Shortly after the 1982 amendments, the Court softened its intent stance. While still requiring intent to show a violation of the Fourteenth and Fifteenth Amendments, the Court held that an electoral plan's discriminatory intent could be proved *indirectly*, by inference from its discriminatory effect.[92] This reasoning returned the focus of the inquiry to effect while only technically retaining the intent requirement, blurring the line between the definitions of intent and effect and highlighting the analytical weakness of the Court's theory of formal process neutrality.[93] The *Shaw* shape test now amplifies this confusion by adding another level of abstraction, purporting to be an intent standard while using strange district shape to presume both discriminatory intent and effect — without any proof of either.[94]

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*Minority Representation, in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE, *supra* note 40, at 66, 67.

[90] *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 1 (1982) (codified at 42 U.S.C. § 1973(b) (1982)). *See also* Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 458-60 (1988) (discussing legislative history and intent animating § 2's amended definition of violation); Howard M. Shapiro, Note, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 YALE L.J. 189 (1984) (discussing the implications of § 2 amendments).

[91] Thornburg v. Gingles, 478 U.S. 30, 43-44 (1986) (quoting from and relying upon Senate Report accompanying 1982 amendments to § 2).

[92] Rogers v. Lodge, 458 U.S. 613, 618 (1982) ("[D]iscriminatory intent need not be proved by direct evidence.").

[93] *See* Shapiro, *supra* note 90, at 190-95 (discussing the inherent limitations of a pure intent standard).

[94] *See* discussion *infra* part III.A.2.

### 2. *Standard of Review: One Person, One Vote*

As Justice Frankfurter predicted in *Baker*, judicial review of districting has proved a challenging task, often requiring convoluted rules and complex factual inquiries.[95] This difficulty has tempted the judiciary to reach for bright-line measures, preferably methods with familiarity, neutrality and apparent objectivity.[96] One person, one vote is one such measure; it attempts to ensure process neutrality by requiring every district to have the same number of voters. Its apparent objectivity, however, disguises the problems of arbitrariness encountered in its application — difficulties that will be amplified by the more subjective shape test.

The Court formally adopted the one person, one vote rule in its 1964 decision in *Reynolds v. Sims*.[97] The *Reynolds* facts were shocking: in Alabama, the state legislative districts were so malapportioned that population variations from district to district were as great as forty-one to one.[98] A voter in an underpopulated rural district could cast a vote that, for the purposes of influence in the state legislature, was forty-one times as significant as the vote of a voter in an overpopulated urban district. Thus, one-fourth of the state population controlled the majority of seats in both the state Senate and House of Representatives.[99]

The Court turned to one person, one vote for guidance.[100]

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[95] *See, e.g.*, Bernard Grofman, *Expert Witness Testimony and the Evolution of Voting Rights Case Law, in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE, *supra* note 40, at 197, 197 (describing extensive use of social scientist testimony in voting rights litigation). However, such searching inquiries are also constitutionally required because the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination." Gomillion v. Lightfoot, 364 U.S. 339, 342 (1960) (Frankfurter, J.) (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).

[96] Professor Karlan describes this as the judiciary's "deep-felt yearning for easy-to-apply mathematical rules." Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 179 (1989).

[97] 377 U.S. 533 (1964).

[98] *Id.* at 545.

[99] *Id.*

[100] The one person, one vote rule first gained currency in Gray v. Sanders, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fif-

It derived the rule from Article I, Section 2 and the Equal Protection Clause of the Constitution.[101] The rule eases the administrative burdens of judicial oversight by relying on readily available and relatively unassailable census data, and it conveniently spares the judiciary the "institutional discomfort" of weighing the more substantive merits of competing theories of fairness in the political process.[102] Indeed, the rule's adoption is likely rooted more in ease of administration than constitutional compulsion.[103] The rule's limited purpose should not be exaggerated. In contrast to the Voting Rights Act, one person, one vote focuses not on the protection of minority voting rights, but merely on protecting majority rule for the majority.

In theory, reasonable district population variations should be permissible; as the Court stated at the rule's inception, "[m]athematical exactness or precision is hardly a workable constitutional requirement."[104] Acceptable justifications for deviation from equal division, the Court has suggested, include the districting goals of district compactness, contiguity, and preservation of political subdivisions.[105] Preserving incumben-

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teenth, Seventeenth, and Nineteenth Amendments can mean only one thing — one person, one vote."). It was soon applied to congressional apportionment in Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964) (construing Art. I, § 2, of the Constitution as supporting the premise that "one man's vote in a congressional election is to be worth as much as another's") and to state legislative apportionment in Reynolds v. Sims, 377 U.S. 533 (1964) (invalidating malapportioned state districting plan on equal protection grounds).

[101] The Court founded its equipopulous requirement for *federal* redistricting on the Census Clause (Art. 1, § 2, cl. 3) and for *state* redistricting on the Equal Protection Clause, providing a subtle analytical distinction that permits it to relax the one person, one vote requirement for state legislatures. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.36(c) (4th ed. 1991).

[102] *See* Kathryn Abrams, *Relationships of Representation in Voting Rights Act Jurisprudence*, 71 TEX. L. REV. 1409, 1414 (1993).

[103] *See* ELY, *supra* note 2, at 120-25 (concluding that one person, one vote was not constitutionally compelled, but was adopted primarily for reasons of judicial administrability).

[104] Reynolds v. Sims, 377 U.S. 533, 577 (1964). Stated simply, "[w]e must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Id.* at 577 n.57.

[105] *Id.* at 578-79. Significantly, the Court accepted these justifications for regular shape in part for their prophylactic effect: "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." *Id.*

cies and preventing contests between incumbents may also be legitimate state goals.[106]

Regardless, the Court has seized upon the rule and required congressional districts to be all but perfectly equipopulous,[107] even at the cost of the legitimate political goal of enhancing representation.[108] Professor Dixon argued that the wooden application of rules such as one person, one vote discourages intelligent districting solutions and exacerbates abusive gerrymandering.[109] Ironically, creative solutions are straitjacketed by a rule meant to curb abuses, while abuses evade detection by

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[106] *See* Karcher v. Daggett, 462 U.S. 725, 740 (1983) (suggesting that avoiding contests between incumbents may justify some population deviation), *aff'd*, 467 U.S. 1222 (1984); Mississippi v. United States, 490 F. Supp. 569, 583 (D.D.C. 1979) (protecting incumbencies is not improper motive). Of course, in jurisdictions in which minorities have been excluded from the political process, it may be difficult to differentiate preservation of white incumbencies from perpetuation of racial discrimination. *See, e.g.*, Rybicki v. State Bd. of Elections, 574 F. Supp. 1082, 1109 (N.D. Ill. 1982).

[107] *See, e.g.*, Karcher v. Daggett, 462 U.S. 725, 728, 740-42 (1983) (rejecting congressional district population variance of 0.6984% from average as excessive), *aff'd*, 467 U.S. 1222 (1984); *see also* Jon M. Anderson, Comment, *Politics and Purpose: Hide and Seek in the Gerrymandering Thicket After* Davis v. Bandemer, 136 U. PA. L. REV. 183, 198-202 (1987) (summarizing criticism of Court's zealous application of equipopulous standard); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-6, at 1074 (2d ed. 1988) (concluding that "as far as congressional apportionment in concerned, the possibility of justifying deviations from exact equality is more theoretical than real").

For state legislatures, a more liberal rule has been applied. Recent decisions suggest that the maximum population deviation for state legislatures that may go unquestioned is roughly 10%, with greater deviations allowable with sufficient state justification. *See, e.g.*, Voinovich v. Quilter, 113 S. Ct. 1149, 1159 (1993) (affirming acceptability of 10% population deviations in state legislature districts to preserve political subdivisions); Brown v. Thomson, 462 U.S. 835 (1983) (permitting 10% deviation in state legislature districts without requiring justification, and allowing 89% deviation where justified by state goal of maintaining political subdivisions). However, permitting a fixed deviation is as much a bright-line rule as a test that allows for none; it merely sets the line in a different place. *See* ELY, *supra* note 2, at 124 n.61.

[108] *See* Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105, 154-56 (1992) (arguing that overzealous application of one person, one vote has resulted in arbitrary fragmentation and submergence of political subdivisions at the expense of minorities).

[109] *See* Robert G. Dixon, *The Warren Court Crusade for the Holy Grail of "One Man-One Vote"*, 1969 SUP. CT. REV. 219 (criticizing Court's elevation of "absolutism" over "political reality").

adherence to the letter but not the spirit of the rule.[110] Additionally, districting methodology has become much more sophisticated through the use of computers to massage demographic data into countless outcomes.[111] Thus, a legislature bent on a discriminatory plan can draw perfectly equipopulous districts, the precise political impact of which is obscured from the "objective" standpoint of the districting map.

Finally, the census numbers themselves have come under increasing attack because of their inaccuracy and systematic undercounting of minorities.[112] In short, rigid standards serve judicial economy, manageability, and the appearance of neutrality, but not necessarily voting rights. While an "objective" rule is certainly appealing, such a rule may only whitewash unfairness.

### 3. *The Significance of District Shape*

Until recently, strange district shape was given little weight in judicial review of districting plans,[113] and compactness did not become a rule of the same stature as one person, one vote. When strange shape was at issue, the courts generally used it as collateral evidence of discrimination and not as proof of a harm in itself. Although shape is an obvious and sometimes disturbing characteristic, it can also be misleading. A gerry-

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[110] *See* Davis v. Bandemer, 478 U.S. 109, 168 (1986) (Powell, J., concurring in part and dissenting in part) (arguing that "exclusive or primary reliance on 'one person, one vote' can betray the constitutional promise of fair and effective representation by enabling a legislature to engage intentionally in clearly discriminatory gerrymandering"); *see also* Alexander D. Rosati, *One Person, One Vote: Is It Time for a New Constitutional Principle?*, 8 N.Y.L. SCH. J. HUM. RTS. 523 (1991) (arguing that one person, one vote harms minorities).

[111] The influence of computers is so great that the national political committees of major parties now provide centralized computer districting services for use in districting battles. *See* Grofman, *supra* note 49, at 1249-50.

[112] *See* City of New York v. United States Dep't of Commerce, 34 F.3d 1114 (2d Cir. 1994) (requiring Secretary of Commerce to justify decision not to apply statistical corrections to Census counts); Stephen A. Holmes, *Sampling Uncounted is Urged for Census*, N.Y. TIMES, Nov. 18, 1994, at A22.

[113] *See* Richard G. Niemi & John Wilkerson, *Compactness and the 1980s Districts in the Indiana State House: Evidence of Political Gerrymandering, in* POLITICAL GERRYMANDERING AND THE COURTS 255, 255-57 (Bernard Grofman ed., 1990).

mander is a political creature that can only be proven by looking at its political effects.[114]

Historically, there were practical reasons for respecting compactness and contiguity, such as ensuring that a representative could obtain adequate transportation to visit and communicate with the district's constituents;[115] yet such physical difficulties are attenuated in modern times.[116] For example, the entire state of Montana is one district and is extremely noncompact, but not unmanageable. Similarly, one of the districts challenged in *Shaw* was not compact, but its geographically elongated constituency was quite accessible because it was arranged along an interstate.[117]

There are also political reasons for imposing compactness requirements. The sensitivity of districting to the physical distribution of voters may tempt the party that stands to benefit to demand compactness. Some commentators have argued that compactness requirements systematically benefit whites and conservatives because of geographical segregation and urban concentration of particular minorities.[118]

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[114] As one political scientist explained:

> Dragons, bacon strips, dumbbells, and other strained shapes are not always reliable signs that partisan (or racial or ethnic or factional) interests are being served, while the most regularly drawn district may turn out to have been skillfully constructed with an intent to aid one party. The safest and most direct indication of gerrymandering is a state-wide calculation of results.

Robert J. Sickles, *Dragons, Bacon Strips, and Dumbbells — Who's Afraid of Reapportionment?*, 75 YALE L.J. 1300 (1966).

[115] For example, geographically compact districting "to some extent . . . facilitates political organization, electoral campaigning, and constituent representation." Karcher v. Daggett, 462 U.S. 725, 756 (1983) (Stevens, J., concurring), *aff'd*, 467 U.S. 1222 (1984).

[116] *See* Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*, 33 UCLA L. REV. 1, 20-22 (1985).

[117] *See* discussion *infra* part II.A.

[118] Professor Karlan notes that minorities are often residentially segregated as a result of discrimination or socioeconomic status, such that geography may be closely tied to both political interests and racial identity. Karlan, *supra* note 96, at 177. Similarly, Lowenstein and Steinberg contend that compactness requirements uniformly benefit Republicans because many of their opponents live in densely populated urban ghettoes that lend themselves to electoral packing. *See* Lowenstein & Steinberg, *supra* note 116, at 23 ("[T]he adoption of compactness as a criterion for drafting or evaluating districting plans will systematically advance the interests of the Republican Party."). *But*

*Shaw* relied most heavily for support on the Court's 1960 decision in *Gomillion v. Lightfoot*,[119] a case in which shape was a prominent but not decisive factor. In *Gomillion*, African-American voters in Tuskegee, Alabama, challenged the constitutionality of a plan to redraw the Tuskegee city limits into a jagged and convoluted shape. Justice Frankfurter, writing for a unanimous Court, observed that the proposal "alters the shape of Tuskegee from a square to an uncouth twenty-eight-sided figure."[120] He proceeded immediately to discuss the practical effect and discriminatory result of the new boundary:

> The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save four or five of its 400 Negro voters while not removing a single white voter or resident. The result of the [plan] . . . is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia*, the right to vote in municipal elections.[121]

Unconstitutionality was triggered by the racially discriminatory *effect* — segregation of nearly every African-American outside the city limits — and *result* — deprivation of the African-American municipal vote. Justice Frankfurter, an impassioned critic of the Court's forays into the "political thicket," viewed the Tuskegee situation as justiciable because it perpetrated egregious racial disenfranchisement, not because it was physically ugly.[122]

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*see* Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652, 682 (1993) (arguing that avoiding compactness requirements in order to improve African-American electoral success is unfair to Republicans).

[119] 364 U.S. 339 (1960).

[120] *Id.* at 340.

[121] *Id.* at 341.

[122] Distinguishing his own decision in Colegrove v. Green, 328 U.S. 549 (1946) (*see supra* note 72), Justice Frankfurter found that where a legislature "singles out a readily isolated segment of a racial minority for special discriminatory treatment" tantamount to "unequivocal withdrawal of the vote solely from colored citizens," it was sufficient to "lift this controversy out of the so-called 'political' arena and into the conventional sphere of constitutional litigation." *Gomillion*, 364 U.S. at 346-47. He cited with approval Justice

In later decisions, the Court avoided heavy reliance on district shape to identify unfairness. In its 1964 decision in *Reynolds v. Sims*,[123] the Court expressly rejected Tennessee's argument that districts should be drawn in accordance with geographic boundaries of state political subdivisions, declaring: "Legislators represent people, not trees or acres."[124] In 1983 when the Court settled a districting challenge in *Karcher v. Daggett*[125] by rigid application of the one person, one vote rule, Justice Stevens cautioned in concurrence against "judicial preoccupation with the goal of perfect population equality."[126] Justice Stevens suggested that "dramatically irregular shapes may have sufficient probative force to call for an explanation," but he agreed with Professor Dixon's dictum that gerrymandering should not be defined exclusively by shape.[127]

Nevertheless, in recent years the Court has increasingly relied on shape. The Court first imposed shape as a limitation on remedies for Voting Rights Act violations in 1986. In

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Holmes' remark in a related context: "'Of course the petition concerns political action,' but '[t]he objection that the subject matter of the suit is political is little more than a play upon words.'" *Id.* at 347 (quoting Nixon v. Herndon, 273 U.S. 536, 540 (1927)).

Justice Frankfurter attempted to base the Court's intervention on narrow Fifteenth Amendment grounds. However, because the Court soon came to regard voting as a fundamental right, it now treats *Gomillion* as though settled on the more expansive ground of equal protection. *See, e.g.*, Karcher v. Daggett, 462 U.S. 725, 748 (1983); Whitcomb v. Chavis, 403 U.S. 124, 149 (1971). In *Gomillion* itself, Justice Whittaker's concurrence suggested an equal protection analysis. *Gomillion*, 364 U.S. at 349.

[123] 377 U.S. 533 (1964).

[124] *Id.* at 562. The Court's words are worth quoting at length:

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.

*Id.* Note that the emphasis is on "people," not "acres." The Court proceeded to reject the argument that the objective of creating districts roughly equal in land area justified massive deviations from equal population, reiterating that "people, not land or trees or pastures, vote." *Id.* at 580.

[125] 462 U.S. 725 (1983).

[126] *Id.* at 750 (Stevens, J., concurring).

[127] *Id.* at 755. *See also* DIXON, *supra* note 58, at 459.

*Thornburg v. Gingles*,[128] minority plaintiffs challenged a multimember voting scheme that allegedly diluted their votes. The Court held that, as an initial showing,

> 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. If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates.[129]

*Gingles* thus sets up an initial hurdle to surmount before reaching the Section 2 totality of the circumstances inquiry, forcing minority plaintiffs to prove they are sufficiently "politically cohesive [and] geographically insular" to form a compact safe district. The Court narrowly reasoned that if a safe district remedy was impractical, the multimember scheme did not cause any minority vote dilution — even if dilution nonetheless existed.[130] The cognizability of the harm was thus limited by proof of the remedy.[131]

*Gingles* mistakenly gave the shape criterion a hard substantive dimension in the context of Section 2, setting the stage for *Shaw* later to extend it to Section 5. To follow the *Gingles* Court's reasoning, a strange-shape district is not merely an indication of something wrong but instead is a wrong in itself, something that a court should not impose as a remedy, even where minorities are demonstrably shut out of the political system. The Court thereby endeavored to avoid in the future the uncomfortable position of having to admit that it lacks a remedy for the geographically diffuse minority. The Court ignored the hard question of whether to pursue more sophisti-

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[128] 478 U.S. 30 (1986).

[129] *Id.* at 50. Minority plaintiffs further had to show racial polarization — that they were themselves "politically cohesive" (i.e., voted in a bloc) and that the majority also voted as a bloc to defeat their candidates. *Id.*

[130] *Id.* at 50 n.17.

[131] These conclusions were recently reasserted unanimously in Growe v. Emison, 113 S. Ct. 1075, 1084 (1993) ("Unless these [*Gingles*] points are established, there neither has been a wrong nor can be a remedy.") *See also* Karlan, *supra* note 96, at 174, 201 (1989).

cated remedies than safe districting in its attempt to hold fast to "traditional" political principles.

4. *The Safe Districting Remedy*

When a court identifies a violation of antidiscrimination law, it has both the power and the duty to fashion a remedy.[132] Courts have routinely ordered the creation of single-member safe districts as the remedy of choice.[133]

There can be no question that safe districting works, at least in the sense of increasing the number of minority-elected legislators sent to Congress. Unusually aggressive attention to minority interests in redistricting after the 1990 Census resulted in a record number of minority lawmakers.[134] Yet safe districting does seem like a counterintuitive solution for racial discrimination in that it recognizes, and then legislates according to, racial division — in sharp contrast, for example, to the integrationist remedies for school segregation.[135]

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[132] *See* Louisiana v. United States, 380 U.S. 145, 154 (1965) (courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future"); United States v. Paradise, 480 U.S. 149, 183-84 (1987) (extraordinary one-for-one promotion requirement imposed to integrate recalcitrant state trooper department is within court's broad and flexible equitable power).

[133] Although the Supreme Court has stated that multimember districts are not per se unconstitutional, it is clear that the courts prefer single-member districts for non-Congressional districts. *See* City of Mobile v. Bolden, 446 U.S. 55, 65-66 (1980) (citing cases); Chapman v. Meier, 420 U.S. 1, 26-27 (1975) (court-ordered reapportionment of state legislature must use single-member districts with minimal population variance unless there are persuasive and articulated justifications for departure). Meanwhile, federal law mandates single-member Congressional districts. 2 U.S.C. § 2c (1988).

[134] Peter Applebome, *Suits Challenging Redrawn Districts That Help Blacks*, N.Y. TIMES, Feb. 14, 1994, at A1. The number of African-Americans in Congress increased from twenty-six to thirty-nine in 1992. *Id.* It is true that minority-elected representatives are most often members of the group that chose to support them, and that minority candidates have had little success in majority-white districts. Only two of the thirty-nine African-American representatives are from majority-white districts. *See* Allan J. Lichtman, *Quotas Aren't the Issue*, N.Y. TIMES, Dec. 7, 1994, at A23. The thrust of voting rights reform is that minorities ought to have equal opportunity to elect candidates of their choice, regardless of the race of either the voter or the candidate.

[135] *See* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act*

Whether race can be used remedially is a volatile political and constitutional issue. Some charge that to take account of race is just racial discrimination in another guise, contrary to the intent of the Reconstruction Amendments and the Voting Rights Act.[136] There is, however, historical support for the proposition that the Equal Protection Clause should be read as aggressively protecting disenfranchised minorities deprived of political recourse, and not as incorporating a formal colorblindness rule that would prohibit race-conscious remedies.[137] Professor Ely characterized this countermajoritarian function as "representation reinforcing" whereby the judiciary provides virtual representation of minorities when political processes fail them.[138]

As a practical matter, colorblindness would likely prevent the construction of effective remedies.[139] The Court has per-

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*and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1099 (1991).

[136] *See, e.g.*, ABIGAIL THERNSTROM, WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 11 (1987) (arguing that "[t]he Voting Rights Act of 1965 had a simple aim: providing ballots for southern blacks"). Professor Thernstrom's basic thesis is that the Act was meant only to remove direct barriers to African-Americans voters, such as poll taxes and literacy tests, and that expanding the Act to supervise redistricting amounts to unwarranted "special protection" and "affirmative action" for African-Americans. *Id.* at 5-6.

[137] *See* GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 481-83 (2d ed. 1991) (discussing enactment of Reconstruction Amendments). The first Justice Harlan is often cited for his original suggestion that the Constitution is colorblind. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). This was not entirely the enlightened statement it is often made out to be; in the same breath, Justice Harlan asserted that the "white race" was superior, and merely argued that it was not the role of the Constitution to write that difference into law. *Id.*

[138] *See generally* ELY, *supra* note 2 (describing the theory of representation reinforcement).

[139] As Justice Blackmun explained in a key decision permitting some forms of affirmative action in university admissions:

> I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot — we dare not — let the Equal Protection Clause perpetuate racial supremacy.

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., separate opinion).

mitted a number of carefully circumscribed race-conscious remedies. For example, in *Regents of the University of California v. Bakke*,[140] the Court invalidated the use of fixed quotas to set the number of minority admissions to a state medical school, but permitted the use of race as a factor or "plus" in an applicant's file.[141] Although the distinction between a quota that prescribes a certain result and a "plus" of indeterminate weight is subtle, the Court did thereby strike a cautious balance that preserved race-conscious affirmative action.

The Court's imprecise position on the constitutionality of affirmative action generally parallels its treatment of race-conscious safe districting. Before *Shaw*, the primary case addressing the propriety of manipulating district lines to reach a predetermined racial composition was the Court's 1977 decision in *United Jewish Organizations v. Carey* (*UJO*).[142] In *UJO*, the New York legislature drew a safe district with a sixty-five percent African-American majority in an effort to comply with the Attorney General's denial of Section 5 preclearance.[143] White Hasidic Jews in a community split by the district challenged the apportionment under the Fourteenth and Fifteenth Amendments.

The Court found the plan constitutional but issued no majority opinion. Seven of the eight Justices participating in the decision concurred that New York's districting by racial criteria did not unconstitutionally discriminate against the Hasidic appellants,[144] yet the Justices had considerable difficulty agreeing why this was so.[145] Four Justices agreed that

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[140] 438 U.S. 265 (1978).

[141] *Id.* at 317-18. Justice Powell's swing vote was responsible for this narrow distinction. Four Justices would have struck down any sort of race-conscious plan, while the other four would have upheld the quota. Though his opinion was joined by no one, Justice Powell's decisive vote split the difference, agreeing with the first bloc on striking the racial quota, but with the second bloc on approving the use of race as a factor.

[142] 430 U.S. 144 (1977).

[143] *Id.* at 148-52.

[144] *Id.* at 145-47.

[145] For the lone dissenter, Chief Justice Burger, the question was easy. He read *Gomillion* broadly as concerning all districting manipulated for a "racial result," rather than districting causing *harmful* racial results: "If *Gomillion* teaches anything, I had thought it was that drawing of political boundary lines with the sole, explicit objective of reaching a predetermined racial result cannot ordinarily be squared with the Constitution." *Id.* at 181.

the state's obligation to comply with the Voting Rights Act was sufficient justification for race-conscious districting,[146] but two of these Justices, joined by a third, went further and held that the state had inherent constitutional power to do so.[147] Two other Justices struck out on their own and applied a *Gomillion*-type analysis, finding that the Hasidic appellants failed to show the purpose or effect of discrimination on the basis of their race, and therefore there was no need to reach the question of whether the state had power.[148]

Despite the differences of opinion, one rule did emerge from *UJO*, a rule that a slim majority of the Court ratified as recently as 1990 in its decision in *Metro Broadcasting v. FCC*: Race-conscious remedial measures are not per se subject to strict scrutiny.[149] In *Metro Broadcasting*, the 5-4 Court upheld under heightened scrutiny two FCC affirmative action programs that awarded radio and television station licenses preferentially to firms controlled by minorities.[150] Reasoning that such preferences were a rational way to enhance diversity in broadcast programming, the Court observed that in *UJO* it had upheld the constitutionality of race-consciousness to enhance diversity of political participation:

> [A] State subject to § 5 of the Voting Rights Act . . . 'may deliberately creat[e] or preserv[e] black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5. . . . [N]either the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment'.[151]

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[146] *Id.* at 155-65 (White, Brennan, Blackmun, Stevens, JJ.).

[147] *Id.* at 165-68 (White, Stevens, Rehnquist, JJ.).

[148] *Id.* at 179-80 (Stewart, Powell, JJ., concurring in the judgment).

[149] 497 U.S. 547 (1990).

[150] *Id.* at 564-66.

[151] *Id.* at 584 (quoting *UJO*, 430 U.S. at 161). Another important consideration was that the FCC program represented federal, not state, action; the Court held that this justified applying a more relaxed standard of review than strict scrutiny. *Id.* at 563. This point is developed in greater detail in part III.B.1, *infra*.

*Metro Broadcasting* nonetheless augured the Court's rising conservatism that later provided the votes for *Shaw*.[152] In *Metro Broadcasting*, Chief Justice Rehnquist, Justice O'Connor, Justice Scalia and Justice Kennedy dissented, urging a uniform standard of strict scrutiny for all race-conscious programs.[153] Justices Kennedy and Scalia compared the majority's ruling with the Court's infamous "separate but equal" decision in *Plessy v. Ferguson*[154] and analogized the race-consciousness of the FCC program to Nazi racial classification and South African apartheid statutes.[155] Three years later, after Justice Thomas succeeded Justice Marshall, these Justices formed the majority in *Shaw*. A majority of the Court now plainly leans toward imposing strict scrutiny to reject most racial classifications regardless of their purpose or whom they affect.[156] Typical of this approach is the majority opinion in *City of Richmond v. J.A. Croson Co.*,[157] in which the Court invalidated a minority business set-aside program designed to remedy past discrimination. In stark contrast to *Bakke*'s nuanced distinction between race quotas and race-as-a-factor, the *Croson* opinion unwaveringly criticizes the use of race.[158]

Aside from its constitutionality, the political wisdom of race-conscious safe districting is contested for taking reform too far,[159] not far enough,[160] and down the wrong track.[161]

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[152] Indeed, the *Metro Broadcasting* decision now lies in a precarious balance. The four dissenters, joined by newcomer and affirmative action critic Justice Thomas, formed the *Shaw* majority. It is thus questionable whether *Metro Broadcasting* would turn out the same today. The Court is expected to rule soon on a federal set-aside program in Adarand Constructors v. Pena, 16 F.3d 1537 (3d Cir.), *cert. granted* 115 S. Ct. 41 (1994).

[153] *Id.* at 602 (O'Connor, J., dissenting).

[154] 163 U.S. 537 (1896).

[155] *Metro Broadcasting*, 497 U.S. at 631-33, 633 n.1 (Kennedy, J., dissenting).

[156] *See* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 597-98 (1993).

[157] 488 U.S. 469 (1989).

[158] Aleinikoff & Issacharoff, *supra* note 156, at 599-600. The writers describe *Croson* as reflecting "a new model of equal protection that narrowly limits the use of race-conscious measures based on a norm of equal treatment of individuals rather than the raising up of disadvantaged groups — a model that is dedicated to the pursuit of social peace rather than social justice." *Id.*

[159] *See generally* THERNSTROM, *supra* note 136 (arguing that the current

From a political standpoint, bolstering a group presence in one district necessarily means weakening it in others, potentially giving the group a voice in one area but submerging it in another. Non-safe districts become "whiter" and even less likely to elect minority-favored candidates. Safe districting has some of the effects of packing, particularly where a supermajority — a majority created by a large margin — is created; a fine line exists between remediation and discrimination.[162] Some suggest safe districting exacerbates racial divisiveness by "balkanizing" voters into fixed racial factions.[163] Members of a majority-minority bloc may also find their political freedom straitjacketed: because their only route to power lies in voting together, individuals cannot switch parties or vote for candidates other than those chosen by the bloc. Finally, the token success of electing a few minority representatives may erode public support for deeper reform.[164]

Because it is tied to geographic distributions of voters, safe districting becomes more difficult where members of a minority group are geographically dispersed.[165] The creation of a stran-

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interpretation of the Voting Rights Act amounts to impermissible affirmative action for African-Americans); Abigail Thernstrom, *By Any Name, It's A Quota*, N.Y. TIMES, Dec. 7, 1994, at A23. *Cf.* Issacharoff, *supra* note 25 (arguing that remedial districting is not affirmative action, in part because no one loses his or her vote).

[160] *See, e.g.*, Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1 (1991).

[161] *See* Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135 (1993). *See generally* Guinier, *supra* note 135 (arguing remedial trend is towards "tokenism" in black representation). Professor Guinier participated in litigating districting disputes for the Voting Rights Section of the Department of Justice, but argues now that safe districting "'inescapably closed the door' on the real goal of the civil rights movement, which was to alter the material condition of the lives of America's subjugated minorities." *Id.* at 1101.

[162] *See* Abrams, *supra* note 90, at 516 n.346.

[163] Shaw v. Reno, 113 S. Ct. 2816, 2832 (1993).

[164] Professor Guinier terms this "the triumph of tokenism." *See* Guinier, *supra* note 135 (arguing that the current conception of African-American electoral success as election of African-American representatives is an inadequate and deceiving measure of empowerment).

[165] As one commentator observed: "If . . . the black population of a city that is forty percent black were spread evenly throughout the city, it would be impossible to construct contiguous black-majority districts, let alone supermajority districts." Shapiro, *supra* note 90, at 202.

gely-shaped safe district compromises the districting goals of compactness, contiguity, and preservation of political subdivisions. Strange shapes also draw public opprobrium[166] that might stigmatize the minority voters the districting is intended to protect.[167] Meanwhile, members of the district who are not part of the minority bloc are relegated to the politically marginal role of "filler people" or "electoral fodder."[168]

## II. THE SHAPE TEST IN *SHAW V. RENO*

### A. THE *SHAW* FACTS

The 1990 Census indicated that North Carolina was entitled to be apportioned a twelfth seat in the United States House of Representatives, requiring the state legislature to redistrict.[169] The Census also reported North Carolina's voting age population of 5,022,487 was seventy-eight percent white, twenty percent African-American, and one percent Native American.[170] Thus the non-white population accounted for between two and three of the twelve seats apportioned.

The state legislature initially passed a redistricting plan that included only one safe district and, pursuant to the Voting

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[166] A widely-cited newspaper editorial denounced the *Shaw* districting plan as "political pornography." *Political Pornography — II*, WALL ST. J., Feb. 4, 1992, at A14.

[167] *Shaw*, 113 S. Ct. at 2824. The Court offered no empirical evidence for this claim. *See* discussion *infra* part III.A.2.

[168] *See* Aleinikoff & Issacharoff, *supra* note 156, at 628-33 (describing as a side effect of safe districting that "filler people" are treated as "electoral fodder"). The irony, of course, is that this, if true, is the position formerly occupied by minority groups absent remediation.

[169] For most of this century, the number of House representatives has been fixed by statute at 435. *See* 2 U.S.C. § 2 (1988). After each decennial census, this number is automatically reapportioned among the states in accordance with changes in state populations. *See* 2 U.S.C. §§ 2a-2b (1988) (providing statutory method of federal apportionment). Thus a state's relative, not absolute, population determines the number of representatives it receives, and one state's gain of a seat necessarily comes at another's loss.

[170] 1990 Census of Population and Housing, Pub. L. No. 94-171. When nonvoting North Carolinians are included in the count, the percentage of African-American residents is slightly larger, 22%. *Id.* A few courts have relied on total population in resolving voting rights claims; the Court recently declined to decide whether one was required over the other. Growe v. Emison, 113 S. Ct. 1075, 1083 n.4 (1993).

Rights Act,[171] submitted it to the Attorney General for preclearance. The Attorney General objected, observing that "the proposed configuration of the district boundary lines in the south-central to southeastern part of the state appear to minimize minority voting strength given the significant minority population" and contending that for "pretextual reasons" the legislature "chose not to give effect to black and Native American voting strength in this area, even though it seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration."[172] The Attorney General conditioned preclearance on the creation of a second safe district.

The legislature's revised plan complied with the letter, if not the spirit, of the requirement of two safe districts; it included District 1, a holdover from the first plan, and the newly drawn District 12. Both districts contained bare fifty-three percent African-American majorities.[173] Both were also of very irregular shape. District 1 was variously disparaged as a "Rorschach ink-blot test" or a "bug splattered on a windshield."[174] The more infamous District 12 narrowly straddled Interstate 85 for nearly 160 miles, splitting numerous counties with a serpentine thread at times no wider than the road itself. The plan was widely condemned. Its design inspired one observer to quip, "Ask not for whom the line is drawn; it is drawn to avoid thee."[175] A state legislator remarked, "If you drove down the interstate with both car doors open, you'd kill most of

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[171] Section 5 of the Voting Rights Act covers 40 of North Carolina's 100 counties. Shaw v. Barr, 808 F. Supp. 461, 463 (E.D.N.C. 1992); *see also* 28 C.F.R. Part 51, app. (1994) (listing 40 North Carolina jurisdictions covered by § 5).

[172] Attorney General's letter, Appendix to Brief for Federal Appellees at 10a-11a, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357).

[173] Appendix to Brief for State Appellees at 19a-24a, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357) (data derived from 1990 Census of Population and Housing, Pub. L. No. 94-171).

[174] *Shaw*, 113 S. Ct. at 2820.

[175] *Id.* at 2821 (quoting Bernard Grofman, *Would Vince Lombardi Have Been Right If He Said: "When it Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 CARDOZO L. REV. 1237, 1261, n.96 (1993) (internal quotation marks omitted)).

the people in the district."[176] A newspaper editorial excoriated the plan as computer-generated "political pornography."[177]

Forty-two North Carolina voters, including several Democrats, and the Republican Party of North Carolina filed suit, alleging the plan represented a political gerrymander in violation of equal protection.[178] Finding that the plaintiffs' allegations were insufficient to show they were shut out of the political process to the degree necessary to trigger judicial scrutiny, a three-judge district court[179] dismissed their complaint for failure to state a claim. The Supreme Court summarily affirmed.

In a second action, filed shortly after the first, five North Carolina voters claimed the plan violated their alleged Fourteenth Amendment equal protection right to a colorblind apportionment.[180] This suit was likewise dismissed for failure to state a claim.[181] The district court, finding *United Jewish Organizations v. Carey*[182] to control and taking judicial notice that the plaintiffs were white, reasoned that the plan did not violate equal protection because it was drawn with the intention of complying with the Voting Rights Act and because white voters statewide were still more than proportionally represented.[183] In *Shaw v. Reno*,[184] the Supreme Court granted certiorari and reversed.

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[176] *Id.* This joke is said to date from the 1970s, originally describing Phil Gramm's "weirdly shaped" district in Texas. Jeffrey Rosen, *Gerrymandered*, The New Republic, Oct. 25, 1993, at 12, 13 (reporting observation of Samuel Issacharoff).

[177] *Political Pornography — II*, *supra* note 166 (describing North Carolina district map as "political pornography" and a "monstrosity").

[178] Pope v. Blue, 809 F. Supp. 392 (W.D.N.C.), *aff'd mem.*, 113 S. Ct. 30 (1992).

[179] The Voting Rights Act requires actions challenging the constitutionality of electoral changes covered by the Act to be brought before a three-judge district court. Appeal is taken to the Supreme Court. 42 U.S.C. § 1973c (1988).

[180] Because the voters were white, they were not members of a protected class and thus did not have Voting Rights Act remedies available.

[181] Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. 1992), *rev'd and remanded sub. nom.* Shaw v. Reno, 113 S. Ct. 2816 (1993).

[182] 430 U.S. 144 (1977).

[183] *Id.* at 472-73.

[184] The 1993 appointment of a new Attorney General, Janet Reno, resulted in the automatic substitution of her name for Attorney General Barr's.

### B. THE "BIZARRE SHAPE" TEST

Unlike its detailed exposition of the facts, *Shaw* did not explore the shape test's contours in any detail. It instead left much of the new claim's interpretation to the courts below. Because the next section thoroughly discusses the test, only a brief outline appears here.

#### 1. *The Majority*

Justice O'Connor, joined by Chief Justice Rehnquist, Justices Scalia, Kennedy, and Thomas, reasoned that "a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race."[185] The majority held that such districting was presumptively a "racial gerrymander" and that a plaintiff could state a claim under the Equal Protection Clause "by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race."[186] The Court did not decide whether the North Carolina plan was unconstitutional; instead, it remanded the case with instructions that "[i]f the allegation of racial gerrymandering remains uncontradicted, the District Court further must determine whether the North Carolina plan is narrowly tailored to further a compelling governmental interest."[187]

The majority roundly condemned the harms inflicted by racial classifications, making little exception for "benign" uses.[188] Although the Court warned that "[c]lassifications of citizens solely on the basis of race . . . threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility,"[189] it expressly did not decide whether the remedial use of race in creating safe districts was per se

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[185] Shaw v. Reno, 113 S. Ct. 2816, 2826 (1993) (quoting Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960)).

[186] *Id.* at 2828.

[187] *Id.*

[188] *Id.*

[189] *Id.*

suspect.[190] The new cause of action was thus confined to the narrower instance of facially irregular districts.[191]

2. *The Dissents*

Each of the three substantive dissents[192] touched on the shape issue. Justice Souter bluntly attacked the shape test: "The Court offers no adequate justification for treating the narrow category of bizarrely shaped district claims differently from other districting claims."[193] He argued that the Court had normally regarded the use of race in districting differently from its use in other governmental decisions, and could rationally accord such use heightened, rather than strict, scrutiny.[194] Moreover, he criticized the Court's reacting to "the seeming egregiousness of the redistricting now before us by untethering the concept of racial gerrymander in such a case from the concept of harm exemplified by dilution."[195]

Justice Stevens emphasized that there are no constitutional requirements of district compactness or contiguity and that shape is at best mere evidence of wrongdoing.[196] He distinguished between permissible and impermissible districting by reference to whether a cognizable minority group was

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[190] The Court wrote that it "never has held that race-conscious state decisionmaking is impermissible in all circumstances." *Id.* at 2824.

[191] The Court "expresse[d] no view as to whether 'the intentional creation of majority-minority districts without more' always gives rise to an equal protection claim." *Id.* at 2828. The "more" that, in this case, tipped the constitutional balance was the strange shape. The Court refused to comment whether the claim would have been sustained had North Carolina constructed a more compact district in a different part of the state. *Id.* at 2832.

[192] Justice Blackmun's one-paragraph dissent stated his agreement that "the conscious use of race in redistricting does not violate the Equal Protection Clause unless the effect of the redistricting plan is to deny a particular group equal access to the political process or to minimize its voting strength unduly." *Id.* at 2843 (Blackmun, J., dissenting). He saw it as ironic that the Court would break with precedent to create a new cause of action in "a challenge by white voters to the plan under which North Carolina has sent black representatives to Congress for the first time since Reconstruction." *Id.*

[193] *Id.* at 2848 (Souter, J., dissenting).

[194] *Id.* at 2846-47.

[195] *Id.* at 2849.

[196] *Id.* at 2843-44 (Stevens, J., dissenting).

harmed.[197] He argued that under circumstances in which gerrymandering is otherwise permissible, such as for political reasons, and the purpose is remedial, race should not make a categorical difference to the analysis.[198]

Justice White believed that *UJO* controlled, and he attacked the shape distinction as superficial: "The Court today chooses not to overrule, but rather to sidestep, *UJO*. It does so by glossing over the striking similarities, focusing on surface differences, most notably the (admittedly unusual) shape of the newly created district, and imagining an entirely new cause of action."[199] Justice White disputed that strange shape should make a substantive difference if racial classifications were the issue.[200] He argued that "the issue is whether the classification based on race discriminates against anyone by denying equal access to the political process."[201] Concluding that the appellants' votes had been neither denied nor diluted, Justice White indicated that the claim should have been dismissed.

## III. ANALYSIS

### A. CRITIQUE OF THE SHAPE TEST

The shape test presents two immediately disquieting problems. First, to gather support for the shape test, the *Shaw* Court interpreted precedent in a way that significantly distorted established case law. Second, the decision leaves unclear what harm the test is meant to remedy. *Shaw* does not explain who the victims are, or how they are injured.

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[197] *Id.*

[198] *Id.* at 2844-45 ("If it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history in the United States gave birth to the Equal Protection Clause.").

[199] *Id.* at 2834 (White, J., dissenting).

[200] *Id.* at 2841.

[201] *Id.* at 2836.

1. *Shaw's Reliance on Precedent*

The *Shaw* shape test, as the majority conceded, represents a departure from past theory in voting rights. The test establishes a third and "analytically distinct" ground for equal protection challenges of electoral districting, in addition to one person, one vote and vote dilution.[202] As discussed above, prior decisions that explored shape avoided treating it as ultimate proof or disproof of legitimacy, and the courts have frequently employed and held constitutional race-conscious districting remedies.[203]

As Justice White noted, the *Shaw* majority relied on a "curious" and shape-delimited reading of *Gomillion v. Lightfoot*.[204] The *Shaw* majority characterized the Tuskegee city boundary as an "exercise in geometry" and an "example of . . . racial discrimination in voting."[205] Focusing on the geometric aspect of the case, the majority failed to acknowledge that it was not the shape but the discriminatory effect and result that motivated the *Gomillion* Court to declare the boundary change unconstitutional.

The *Shaw* Court misread *Gomillion*. Although the *Gomillion* and *Shaw* facts share the common feature of oddly-shaped political boundaries, the decisions bear little similarity. *Shaw* looked no further than the shape, while *Gomillion* probed for the political and racial meaning behind the lines.[206] The two cases are also factually distinct. In *Gomillion*, the change in city boundaries segregated and destroyed African-American votes; in *Shaw*, the district boundaries concentrated and enabled voting strength.

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[202] *Id.* at 2830.

[203] *See* discussion *supra* parts I.C.3-4.

[204] *Shaw*, 113 S. Ct. at 2839 (White, J., dissenting); *see supra* notes 119-122 and accompanying text.

[205] *Id.* at 2823.

[206] In addition to *Gomillion*, the *Shaw* Court relied on Wright v. Rockefeller, 376 U.S. 52 (1964), a case that further weakens its holding. *Wright* involved not the deprivation of the vote by "fencing out" minorities, but instead the packing of minority voters into a jagged eleven-sided congressional district in New York City. *Wright* did not invalidate the plan it reviewed. The *Shaw* Court mysteriously concluded that "*Wright* illustrates the difficulty of determining from the face of a single-member districting plan that it purposefully distinguishes between voters on the basis of race," *Shaw*, 113 S. Ct. at 2826, yet hastily proceeded to do just that.

Although the *Shaw* Court suggested that *Gomillion* "applied the same reasoning,"[207] it did not in fact appreciate *Gomillion*'s firm commitment to the substantive right to vote. *Gomillion* was not an opinion on district aesthetics or voting rights remedies. Its author, Justice Frankfurter, had deep misgivings about the Court's entry into the political thicket, but was persuaded that the plainly racist effects of the new boundary compelled intervention. The central issue in *Gomillion* was not the theoretical benefits of colorblindness but the concrete issues of whom the plan hurt and how. In *Shaw*, the injured party and the injury itself were not clearly identified.[208]

Similarly, the *UJO* precedent was not handled forthrightly. As Justice White contended, the Court sidestepped it.[209] Assuming that *UJO* is still good law, it can only be distinguished from *Shaw* by the element of strange shape.[210] However, the *Shaw* majority did not expressly rely on shape and conceded that the districting principles of political subdivisions — compactness, contiguity, and preservation — are not constitutional requirements, but are merely potential indicia of "racial gerrymandering."[211] Hence the two cases are substantively identical, both turning on race-conscious districting implemented by a state seeking Section 5 preclearance, yet they come to opposite conclusions.

The Court made a Herculean effort to mold *Shaw* into a decision about shape, perhaps to avoid a decisive confrontation with the underlying race issue. The Court itself brought the issue of shape to the forefront. Neither the appellants' original claim, dismissed by the district court, of a right to a "'colorblind' electoral process,"[212] nor the question the Court directed the parties to brief mentioned shape.[213] The Court observed

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[207] *Shaw*, 113 S. Ct. at 2825.

[208] *See* discussion *infra* part III.A.2.

[209] *Shaw*, 113 S. Ct. at 2834 (White, J., dissenting).

[210] *UJO* did not directly address the district shape issue; the appearance of the disputed district was evidently not unusual. *Id.* at 2829 (discussing *UJO*).

[211] "We emphasize that these criteria are important not because they are constitutionally required — they are not — but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Id.* at 2827 (citation omitted).

[212] *Id.* at 2824.

[213] The question briefed by the parties was:

that it "never has held that race-conscious state decisionmaking is impermissible in all circumstances," and it recast the appellants' claim:

> 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 the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification.[214]

The Court thus injected shape into the question to be decided.

The majority's analysis then focused on inferring what the State conceded, that the challenged districts were drawn with race in mind.[215] However, there was never any dispute that Districts 1 and 12 were deliberately drawn to create safe districts. The only reason the legislature enacted the second plan was, as the Court explained, the Attorney General's objection to the inclusion of only one safe district in the first plan.[216]

The shape test lacks a convincing constitutional or precedential foundation. Whereas one person, one vote is founded on a defensible inference from the text of the Constitution,[217] no provision exists that directly or impliedly supports a right to regular-shape districting. Thus, no method exists to elicit from the Constitution how regular shape districting should be administered. The Court stressed that "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" are significant and will guide the lower courts in adjudicating the new shape test.[218] Yet the Court's practice is to the contrary: in its rigid application of

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> Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own.

Shaw v. Reno, 113 S. Ct. 653 (1992) (grant of certiorari).

[214] Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993) (emphasis added).

[215] *Id.* at 2843 (Stevens, J., dissenting).

[216] *Id.* at 2817.

[217] *See* discussion *supra* part I.C.2.

[218] *Id.* at 2827.

the equipopulous requirement to congressional districts, it has honored these "principles" only in the breach.[219] It is difficult to understand why on the one hand the Court so readily sacrifices these principles for the vanishingly small advantages derived from forcing districts to be nearly perfectly equipopulous, while on the other it grants them overriding constitutional status when the right to an undiluted vote is directly at issue.

The shape test provides a startling contrast to the Court's conservative, intent-based adjudication of other constitutional claims. Although the Court until recently required a showing of discriminatory intent to prove a constitutional violation, the shape test liberally infers both intent and effect from evidence as abstract as the shape of a districting map. As discussed earlier, in *City of Mobile v. Bolden*,[220] the Court required plaintiffs making an equal protection challenge to an at-large electoral scheme to show discriminatory intent.[221] It later relaxed that requirement, but only so far as to permit intent to be inferred from a showing of severely discriminatory effect.[222] However, under *Shaw*, both intent and effect are readily presumed from shape, leading quickly to strict scrutiny.[223]

In justifying the application of the exacting standard of strict scrutiny, the majority chided the dissent that "the very reason that the Equal Protection Clause demands strict scrutiny of all racial classifications is because without it, a court cannot determine whether or not the discrimination truly is 'benign.'"[224] Yet there was no evidence that the state legislature adopted the race-conscious plan with an intent to discriminate. Nothing in the record justified the Court's conclusory labels of "racial classification" or "benign discrimination."[225]

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[219] *See supra* notes 104-111 and accompanying text.

[220] 446 U.S. 55 (1980).

[221] *See supra* notes 83-86 and accompanying text.

[222] *See supra* notes 91-93 and accompanying text.

[223] Although the Court held out the possibility that this presumption could be rebutted, the strident tenor of the opinion makes it clear that this window of opportunity is narrow. *See infra* part III.B.1.

[224] Shaw v. Reno, 113 S. Ct. 2816, 2830 (1993).

[225] "Benign discrimination" is an oxymoron, given the firmly negative association given discrimination and race. Justice Souter indicated in dissent that he would distinguish between permissible and impermissible awareness of race rather than forgive certain kinds of discrimination as benign. *Id.* at 2848 n.7 (Souter, J., dissenting).

2. *Where Is the Injury?*

It should be uncontroversial, and is probably constitutionally required, that the federal courts should not remedy illusory wrongs.[226] The *Shaw* Court, however, provided little indication of what harm might be caused by the redistricting plan at issue. The North Carolina plan, the Court claimed, "bears an uncomfortable resemblance to apartheid" and "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."[227] "It is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past."[228] "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions."[229] Finally: "By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that [safe] districting is sometimes said to counteract."[230] But none of these suppositions was proven.

There was substantial evidence in the record, however, that the strange shapes of Districts 1 and 12 resulted from merely political considerations. According to the Attorney General's denial of preclearance, the legislature could have constructed a second safe district of reasonable shape in a different part of the

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[226] Technically, the doctrine of standing should prevent plaintiffs from bringing suit when they personally have not suffered injury, in part to avoid entangling the unelected judiciary with the political branches of government. However, the Court's conception of standing in affirmative action cases, including *Shaw*, has become so expansive as to provide little, if any, restraint. *See* Northeastern Fla. Ch. of the Assoc. Gen. Contractors of Am. v. Jacksonville, 113 S. Ct. 2297, 2303 (1993) (granting standing to white plaintiff challenging affirmative action program, though redressability of the injury had not been shown; the Court held that plaintiff's interest in equal protection of the laws sufficed for standing purposes); Shaw v. Hunt, 861 F. Supp. 408, 426 (E.D.N.C. 1994) ("[W]e think the *Shaw* Court must have intended to transpose to race-based districting the expansive concept of standing to challenge born in *Bakke* and brought to maturity in *Northeastern Florida Contractors*."). *See generally* Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. (forthcoming July 1995) (arguing that Court's law of standing is racially skewed to the disadvantage of minority plaintiffs).

[227] *Shaw*, 113 S. Ct. at 2827.

[228] *Id.* at 2824.

[229] *Id.* at 2832.

[230] *Id.*

state,[231] but the state instead designed its own irregular District 12. The first challenge to the plan was brought and lost by Republicans as a political gerrymandering claim.[232]

Although the Bush Administration may have hoped otherwise, the final plan, with its two strange-shape safe districts, led to the re-election of six incumbent Democratic representatives from the non-safe districts.[233] The Democratic legislature, compelled by the Republican Attorney General to redraw the districting plan, carefully manipulated *all* of the districts so as not to unseat any white incumbent Democratic representatives.[234] Contrary to the Court's implication, the legislature's actions were not of the kind that "can be understood only as an effort to segregate voters into separate voting districts because of their race."[235]

As a general matter, there is nothing inherently racial about a strange-shape gerrymander. The most extraordinarily contorted gerrymanders have been drawn for ordinary political reasons. For example, the eponymous gerrymander was drawn in 1812 for political reasons, strengthening Massachusetts Governor Gerry's Republican party.[236] Similarly, the *Shaw* districts were drawn with partisan power in mind, carefully protecting sensitive Democrat incumbencies.[237] The Court

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[231] *See* Attorney General's Letter, app. to Brief for Federal Appellees at 10a-11a, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357).

[232] Pope v. Blue, 809 F. Supp. 392 (W.D.N.C.), *aff'd mem.*, 113 S. Ct. 30 (1992). Art Pope, the lead plaintiff from the dismissed action, was later permitted to intervene in the consideration of the *Shaw* case on remand as an additional plaintiff. Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994).

[233] *Results of Contests for the U.S. House, District by District*, N.Y. TIMES, Nov. 5, 1992, at B18; *See Patrick's Actions on Minority Districts Leave Doubts*, 4 No. 12 DOJ ALERT 2, July 4, 1994 (Prentice Hall Law and Business) ("The [Voting Rights Act] was aggressively enforced by the Bush administration after political strategists concluded that separating white Democrats and black Democrats could give Republicans an edge in the white districts.").

[234] Professors Polsby and Popper suggest that foremost on the legislature's agenda was protecting "Steve Neal of the ugly Fifth District [and] Charlie Rose of the very ugly Seventh District." Polsby & Popper, *supra* note 118, at 653.

[235] Shaw v. Reno, 113 S. Ct. 2816, 2832 (1993).

[236] Eric J. Stockman, *Constitutional Gerrymandering:* Fonfara v. Reapportionment Commission, 25 CONN. L. REV. 1227, 1227-28 (1993).

[237] Aleinikoff & Issacharoff, *supra* note 156, at 590-91.

seems to have disregarded these facts and relied on its visceral reaction to the political nature of the gerrymander.

The Court's intimations of apartheid and an "effort to segregate the races" are startling and ironic.[238] Far from being black townships, both safe districts were approximately fifty-three percent African-American; as Professor Guinier observed, District 12 "was bizarrely shaped to link urban voters together, to create one of the most integrated urban districts in North Carolina and to protect the incumbency of some white Democrats."[239] If compactness is understood functionally as a value that enhances the operation of the district as a political entity,[240] arranging District 12 along a highway ostensibly makes it easy for the district representative to visit his or her constituency.[241] Far from being irrational, the plan was an historic achievement of African-American electoral success in North Carolina, restoring a rough sense of proportionality. The African-American population in North Carolina accounts for between two and three of the state's seats in the House of Representatives, and the plan gave these voters an opportunity to choose candidates for two of these seats for the first time in modern history.

The Court suggested several times that race-consciousness might inflict racial stigma. *Shaw* warns that "[c]lassifications of citizens solely on the basis of race . . . threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility."[242] This language evokes the classic racial stigma case, *Brown v. Board of Education*,[243] in which the Court held that segregation of the races in public education unconstitutionally denigrated and stigmatized African-American

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[238] *Shaw*, 113 S. Ct. at 2824.

[239] *See* Reuben, *supra* note 14, at 39 (reporting remarks of Professor Guinier).

[240] At least one court adopted a functional tack by defining a compact district as a district having a "sense of community." Dillard v. Baldwin County Bd. of Educ., 686 F. Supp. 1459, 1465 (M.D. Ala. 1988).

[241] The placement of the highway itself may have had political roots. Melvin Watt, the U.S. Representative elected from District 12 in 1992, suggested that the interstate was built where it was because the path of least resistance lay through African-American communities. Brian Naylor, *Black-Majority Districts Face Charges of Gerrymandering* (NPR radio broadcast, Mar. 1, 1994).

[242] *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993).

[243] 347 U.S. 483 (1954).

children.[244] The *Brown* Court, relying partly on sociological evidence, concluded that "[s]eparate educational facilities are inherently unequal."[245] To separate children "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[246]

However, in *Shaw* no districting-induced stigma or racial hostility was alleged or found. Justice Souter sharply questioned the Court's invocation of stigma, commenting that it was "utterly implausible" to presume that strange-shape districts could inflict stigma on white voters in any way comparable to that inflicted on African-American children by segregation in *Brown*.[247] Given the *Shaw* Court's generous sense of standing, the Court may have even felt that the black voters, not the white plaintiffs, suffered this stigmatic injury. Again, however, in contrast to *Brown*, the Court presented no evidence of such stigma in this or any other case of race-conscious districting. The only stigma suggested by the facts was that African-American voters were deliberately deprived of political participation for so long solely because of their race.

Finally, one of the harms perceived by the Court might be an "aesthetic" injury.[248] The *Shaw* majority earnestly asserted that "reapportionment is one area in which appearances do matter."[249] The slip opinion underscores the Court's belief in appearances: stapled in the middle is a large color map of the contested districting plan.[250] The description of District 12 also suggests exploitation: the plan "winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighbor-

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[244] *Id.* at 494.

[245] *Id.* at 495.

[246] *Id.* at 494.

[247] *Shaw*, 113 S. Ct. at 2849 n.9 (Souter, J. dissenting).

[248] The majority's offense at the appearance of the district is apparent from its repeated references using the expression "on its face" or a similar variation fourteen times. *Id. passim.*

[249] *Id.* at 2827.

[250] Several other opinions, including *Gomillion*, *Karcher*, and *Bandemer*, included maps to illustrate irregular political boundaries. None, however, used shape as a test of constitutionality. *See* discussion *supra* part I.C.3.

hoods.'"[251] However colorful these depictions may be, they have little relevance to the Constitution.

The Court's ambiguity concerning injury is difficult to explain as anything but frank hostility towards affirmative action. Notably, the Court's agnostic stance as to who may be injured in North Carolina conflicts with its own findings of only a few years earlier.[252] In *Gingles v. Thornburg*,[253] the Court acknowledged ample racial discrimination and polarization in the state.[254] Yet only ill-defined questions of appearances dominate *Shaw*. As one article about *Shaw* commented: "In the absence of any real content to the Court's repeated invocation of the 'traditional principles of districting,' we are left with the gnawing impression that the rules of the game were changed only when minorities started to figure out how to play."[255]

The new rules are strange ones. The label "political pornography," applied in a newspaper editorial to the *Shaw*

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[251] *Shaw*, 113 S. Ct at 2821 (quoting Shaw v. Barr, 808 F. Supp. 461, 476-77 (E.D.N.C. 1992) (Voorhees, C.J., concurring in part and dissenting in part)).

[252] The Court expressed interest in the appellants' arguments that "there is no evidence of black political cohesion" and that "recent black electoral successes demonstrate the willingness of white voters in North Carolina to vote for black candidates," citing the narrow defeat of Harvey Gantt, an African-American contender for Jesse Helm's Senate seat in 1990. *Id.* at 2831. However, it is evident that the two safe districts, not the enlightenment of white voters, precipitated the election of the first African-American representatives from North Carolina in nearly a hundred years. The failure of African-Americans to stop the reelection of Senator Helms was testimony not to lack of cohesion, but to the majority's overwhelming power in racially polarized voting: Ninety-three percent of African-American voters supported Helms' opponent. *1990 Elections State by State*, N.Y. TIMES, Nov. 8, 1990, at B8.

Additionally, the Attorney General's refusal to grant § 5 preclearance is not ad hoc; it is based on specific factfinding procedures established by the Department of Justice. *See* 28 C.F.R. §§ 51.51-.61 (1994) (setting forth factors and standards used by Attorney General in making substantive determinations under § 5). The Court did not account for its disregard of the "considerable deference" it until recently accorded the factual determinations of the Attorney General when enforcing the Voting Rights Act. *See* NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 178-79 (1985). *But see* Presley v. Etowah County Comm'n, 112 S. Ct. 820, 831 (1992) ("Deference does not mean acquiescence.")

[253] 478 U.S. 30 (1986).

[254] *Id.* at 38-41.

[255] Aleinikoff & Issacharoff, *supra* note 156, at 638.

districting,[256] may better describe the Court's weak resolution of the case. Like the judiciary's labored efforts to define obscenity, the *Shaw* test is reminiscent of the dictum "I know it when I see it."[257] Although the Court denied any need to resort to such a dreaded subjective standard,[258] it offered no objective standard of its own.[259] Indeed, even *Shaw*'s application to its own facts is ad hoc. While the Court focused on the "snakelike" District 12, it noticeably ignored the "Rorschach ink-blot" District 1.[260] Is a distinction to be drawn between snakes and ink-blots?

*Shaw*'s inability to identify the nature of the harm and its lack of meaningful standards will spawn adverse effects not just in the courts, but also in state legislatures. Without a threshold definition of how irregular is too irregular, and without a nexus between irregularity and harm, legislators will not be able to choose intelligently among alternative plans. If the legislature must comply with the Voting Rights Act, race will be a prominent factor in its decisionmaking, thus implicating *Shaw*. An irregular remedial plan will have to be "narrowly tailored" to its purpose, presumably by being no more irregular than all available alternatives and perhaps by narrowing the majority-minority ratio that is considered "safe."[261] Because *Shaw* assumed

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[256] *Political Pornography — II*, *supra* note 166.

[257] This phrase was coined by Justice Stewart in the obscenity case Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964).

[258] *Shaw v. Reno*, 113 S. Ct. 2816, 2827 (1993) (denying reliance on "I know it when I see it").

[259] There have been, for example, many proposals for mathematical indices of district shape. *See, e.g.*, Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 348-51 (1991); Karcher v. Daggett, 462 U.S. 725, 757 n.19 (1983), *aff'd*, 467 U.S. 1222 (1984) (Stevens, J., concurring) (citing numerous proposals). Of course, the mere possibility of numerical rules does not answer the fundamental question of whether regular shape has anything to do with political fairness.

[260] *See* Aleinikoff & Issacharoff, *supra* note 156, at 624 n.154.

[261] As Professors Pildes and Niemi correctly point out, to conclude that "narrowly tailored" districts "must be drawn in the most compact way possible" makes little sense in strict scrutiny analysis, because "[t]he purpose of demanding close connections between means and ends is to ensure that the state is not covertly pursuing forbidden ends," not to enforce the constitutionally optional goal of compactness. 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, 584-85

and did not prove harm, the Court provided legislators — and district court judges — no guidance in comparing plans or knowing when and how to sacrifice the efficacy of the remedy for the regularity of the shape. Remedial districting may be reduced to rough gambles and guesswork.

Unless narrowly defined, the *Shaw* test will reignite litigation every ten years as the decennial federal census compels redistricting. As legislators attempt to avoid controversy, the test will have a chilling effect on plans that may never enter a courtroom. The imposition of strict scrutiny will more often than not seal the fate of many remedial plans. Even if a plan ultimately prevails, it will do so only after subjecting the state to costly litigation under the time pressure of an impending election. While race-conscious measures are still permitted, their scope is now uncertain.[262]

### B. THE FUTURE OF VOTING RIGHTS REFORM

*Shaw* has far-reaching importance. As the foregoing discussion shows, *Shaw* accomplished much more than creating a seemingly obscure voting rights claim. The decision has already played an important role in redistricting litigation in California, Colorado, Connecticut, Maryland, Arkansas, Georgia, Louisiana, Mississippi, and Texas, leading to the invalidation of remedial plans or dismissal of Section 2 challenges in the latter five cases.[263] Aside from the *Shaw* test's broad application and poten-

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(1993). The argument in this Note, however, is that there was never any suggestion that the state was pursuing covert ends. The *Shaw* decision will chill legislatures from pursuing worthwhile ends, such as compliance with the Voting Rights Act, by imposing a senseless presumption of guilt on irregular districts.

[262] As Justice O'Connor noted, the Court "never has held that race-conscious state decisionmaking is impermissible in all circumstances." *Shaw*, 113 S. Ct. at 2824. However, given her emphasis on the potential harms of race-consciousness per se, Justice O'Connor would be unlikely to give much substance to this concession.

[263] *See* Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C.) (upholding plan), *petition for cert. filed*, 63 U.S.L.W. 6439 (U.S. Nov. 21, 1994) (No. 94-923); Dewitt v. Wilson, 856 F. Supp. 1409, 1411-13 (E.D. Cal. 1994) (same), *petition for cert. filed*, 63 U.S.L.W. 3127 (U.S. Aug. 8, 1994) (No. 94-275); Bridgeport Coalition v. City of Bridgeport, 26 F.3d 271 (2d Cir. 1994) (same), *vacated on other grounds*, 115 S. Ct. 35 (1994); Marylanders for Fair Representation v. Schaefer, 849 F. Supp. 1022 (D. Md. 1994) (same); *see also* White v. Alabama, 867 F. Supp. 1519 (M.D. Ala. 1994) (extending *Shaw* principles to judicial elec-

tially severe consequences, the Court's reliance on shape provides only the barest restraint on invalidating virtually all color-conscious remedies.[264] However, the Court still has many opportunities to change course, some of which are explored below.

1. *Protecting the Voting Rights Act*

The construction given to the *Shaw* test by the lower courts provides a potential defense for the Voting Rights Act. The lower court interpretations have varied widely. One district court went so far as to ignore *Shaw*'s limiting language altogether, reading *Shaw*'s requirement of irregularity as an "evidentiary 'minuet'" for proving race-conscious intent and invalidating a fairly ordinary-looking safe district.[265] On the other hand, on remand the district court in North Carolina also treated shape as a circumstantial consideration, but upheld the dramatically irregular *Shaw* plan in its entirety.[266]

Some courts have overlooked the Supreme Court's curious and potentially important point that a *Shaw* presumption of "racial gerrymandering" might be rebuttable by the state. Specifically, the Court held that strict scrutiny would apply on

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tions and upholding remedial plan). *But see* Jeffers v. Tucker, 847 F. Supp. 655, 661-62 (E.D. Ark. 1994) (rejecting § 2 challenge); Sanchez v. Colorado, 861 F. Supp. 1516, 1522-23 (D. Colo. 1994) (same); Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga.) (invalidating remedial plan), *prob. juris. noted*, 115 S. Ct. 713 (1995); Hays v. Louisiana, 862 F. Supp. 119 (W.D. La.) (same), *prob. juris. noted*, 115 S. Ct. 687 (1994); Houston v. Lafayette County, 841 F. Supp. 751, 765-66 (N.D. Miss. 1993) (rejecting § 2 challenge); Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex.) (invalidating remedial plan), *petition for cert. filed*, 63 U.S.L.W. 3388 (U.S. Oct. 31, 1994) (No. 94-805).

[264] For a contrary view, see Pildes & Niemi, *supra* note 261, at 495 n.57 (arguing that *Shaw* "does not stand for, or portend a sweeping proscription on, intentional race-conscious districting that does not involve actual vote dilution.").

[265] Hays v. Louisiana, 839 F. Supp. 1188, 1197 (W.D. La. 1994) ("Hays I"), *vacated and remanded*, 114 S. Ct. 2731 (1994). The Supreme Court vacated this decision because the Louisiana legislature passed a new districting plan while its appeal was pending. Nevertheless, the Louisiana court invalidated the new plan after applying the same per se rule that race-conscious districting always requires strict scrutiny. Hays v. Louisiana, 862 F. Supp. 119, 122-23 (W.D. La.) ("Hays II"), *prob. juris. noted*, 115 S. Ct. 687 (1994).

[266] Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C.), *petition for cert. filed*, 63 U.S.L.W. 6439 (U.S. Nov. 21, 1994) (No. 94-923).

remand if "the allegation of racial gerrymandering remains uncontradicted."[267] The state must essentially show that it did not engage in "racial gerrymandering," but because this term remains undefined, the amount of proof required to rebut is ambiguous. Race, as the Court has acknowledged, is often a legitimate part of political decision-making.[268] Because of the novelty of the *Shaw* claim, the line where a districting plan crosses over from race-conscious to race-based remains unclear. However, if courts properly construe race-consciousness in service to the Voting Rights Act as not just tolerable but required, they may avoid application of strict scrutiny altogether.

Where the *Shaw* presumption of a "racial gerrymander" remains uncontradicted, the courts must apply strict scrutiny. In doing so, the courts must determine whether the legislature intended to comply with the Voting Rights Act, and whether compliance is a compelling state interest. If so, the plan must also be the least restrictive means of compliance. Strict scrutiny is a deliberately stringent standard and has been described as "'strict' in theory, fatal in fact."[269] It is too soon to tell how these standards will evolve. Voting rights cases are so fact-specific that they defy ready comparison to one another. In any event, the decisions of the lower courts will as a matter of course be appealed to the Supreme Court, and the Court will have the final say.

Although the *Shaw* Court avoided addressing the fundamental validity of color-conscious measures under the Voting Rights Act, it is inevitable that the Court will soon review a case that requires choosing between permitting a violation of the Act and imposing a remedy that violates the Court's conception of colorblind equal protection. The Court has unmistakably expressed a narrow view of the permissible scope of antidiscrimination measures under a "colorblind" Fourteenth Amendment.[270] When presented with a choice between nar-

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[267] *Shaw*, 113 S. Ct. at 2832. *See also id.* at 2830 ("[I]f appellants' allegations of a racial gerrymander are not contradicted on remand, the District Court must determine whether the General Assembly's reapportionment plan satisfies strict scrutiny.").

[268] United Jewish Organizations v. Carey, 430 U.S. 144, 155-65 (1977).

[269] *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[270] In response to, but not reaching the merits of, the *Shaw* appellee's contention that compliance with the Voting Rights Act by safe districting was

rowing the inherently color-conscious Act and expanding colorblindness, the Court will likely conclude that the Act must yield.[271]

However, there are a number of important grounds upon which the Court should uphold safe districting and preserve the viability of color-conscious remedies. At the most basic level, the Court must consider the Voting Rights Act's grounding in the Fifteenth Amendment and the fundamental significance of the right to vote. To the extent that the Act is consistent with the Fifteenth Amendment, it cannot, as a matter of constitutional construction, be inconsistent with the earlier-ratified Fourteenth Amendment. If balancing is required, or even constitutionally permitted, the essential right to vote, the right that is "preservative of all rights,"[272] must outweigh the essentially policy-based objective of colorblindness.

Furthermore, the Court has held that acts of Congress are entitled to special deference for several reasons.[273] First, the Equal Protection Clause of the Fourteenth Amendment by its own terms applies only to the states.[274] However, the Court held that equal protection regulates the federal government as an implied component of the Due Process Clause of the Fifth

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a compelling state interest, the Court sounded a dubious note:

> "The States certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied. 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."

Shaw v. Reno, 113 S. Ct. 2816, 2830 (1993). *See also* discussion *supra* part I.C.4.

[271] Because many critical civil rights and equal protection decisions have been such close cases, the Court's decision will likely turn in part on its membership. Since *Shaw* was decided, Justice Ginsberg and Justice Breyer have replaced two of the *Shaw* dissenters, Justice White and Justice Blackmun. It is too soon to judge how these changes will affect the Court's view of voting rights and race issues.

[272] Reynolds v. Sims, 377 U.S. 533, 562 (1964) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

[273] For the Voting Rights Act to receive the benefit of such deference, safe districting plans enacted by state legislatures in order to comply with the Act must be construed as federal action delegated to the state.

[274] The Equal Protection Clause provides: "*No State* shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added).

Amendment.[275] In *Metro Broadcasting v. FCC*[276] the Court held that because of this analytical distinction, federal race-conscious affirmative action programs were properly subjected to heightened scrutiny, an intermediate standard of review, rather than strict scrutiny.[277] Second, the *Metro Broadcasting* Court reasoned that the national legislature could be accorded greater deference because it was less susceptible than local governments to manipulation by minority racial factions. Thus, the Court further distinguished the case, and perhaps the Act, from local programs such as that struck down in *City of Richmond v. J.A. Croson Co.*[278]

Finally, and perhaps most importantly, both the majority and the dissenters in *Metro Broadcasting* agreed that Congress has remedial power to expand constitutional safeguards under Section 5 of the Fourteenth Amendment.[279] In her plurality opinion in *Croson*, Justice O'Connor distinguished state and local from federal affirmative programs by observing that "[the Section 5] power to 'enforce' may at times also include the power to define situations which *Congress* determines threatens principles of equality and to adopt prophylactic rules to deal with those situations."[280] Congress' power to create affirmative action statutes, though currently ill-defined, strengthens the Act against a colorblindness challenge.[281]

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[275] *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[276] 497 U.S. 547 (1990).

[277] *Id.* at 564.

[278] *Id.* at 565-66. *See Croson*, 488 U.S. 469 (1989). This reasoning also appeared in *Bakke*, in which Justice Powell distinguished the districting plan in *UJO* as representing an authoritative determination of discrimination and remedy by a state legislature. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 304 (1978). The admissions program in *Bakke* was entitled to less deference because it was created by the state regents and lacked any authoritative determination of the existence of past discrimination. *Id.*

[279] *Metro Broadcasting*, 497 U.S. at 564-65 (majority opinion), 605-06 (O'Connor, J., dissenting). However, the case did not require the Court to resolve the scope of the power to expand constitutional safeguards.

[280] *Croson*, 488 U.S. at 490.

[281] The Voting Rights Act was enacted pursuant to Congress' power under Section 2 of the Fifteenth Amendment. However, the Court deemed the right to vote fundamental in Reynolds v. Sims, 377 U.S. 533, 561-62 (1964), and for Congress to legislate under its § 5 power, it need not "recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection.'" EEOC v. Wyoming, 460 U.S. 226, 243 (1983).

Remedial voting rights measures should be permitted greater latitude in the use of race than other forms of affirmative action. As the Court explained in *Regents of the University of California v. Bakke*,[282] the purpose of these measures is "to improve the previously disadvantaged group's ability to participate, without excluding individuals belonging to any other group from enjoyment of the relevant opportunity — meaningful participation in the electoral process."[283] Although a university implementing affirmative action may have to exclude some and preferentially admit others on the basis of race, with remedial districting everyone still has the opportunity to vote.[284]

Some will argue that remedial districting merely grants the minority the power to "reverse discriminate." However, this argument reflects a basic misunderstanding of two issues: First, the majority will continue to win in the non-safe districts in rough proportion to its numbers. It is at most deprived of the power, for which it has no right, to *maximize* its representation by dominating *all* of the districts.

Second, the cynical hypothesis that the minority will become as overbearing as the majority if only given the chance is not supported by evidence or logic. On the contrary, the minority's interests are better served by negotiating with the majority, even if the minority need not do so to win individual seats. If minority members are to have any hope of influencing legislative decisions, of expanding their political influence beyond the confines of the safe districts, or of diversifying their political ranks along the spectrum from liberal to conservative, they must form interracial coalitions. Thus, the ultimate significance of the remedy lies in providing the minority a choice where it had none before.

### 2. *Improving Judicial Review and Remedies*

The shape test adds disarray to the Court's standards of review in voting rights cases and complicates the design of remedies. The Court's post-*Baker* over-reliance on single standards, such as one person, one vote, and its failure to articulate a coherent *set* of standards are taking their toll. As Justice

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[282] 438 U.S. 265 (1978).

[283] *Id.* at 305.

[284] Shaw v. Reno, 113 S. Ct. 2816, 2846 (1993) (Souter, J., dissenting).

Frankfurter predicted, fairly indeterminate policy considerations inevitably must be weighed in developing such standards.[285]

One person, one vote dealt only with the first and simplest part of the judicial review puzzle, that of preserving majority rule for the majority. As the electorate has diversified, the thorny problem of protecting minority voting rights has grown in prominence. That there is no "quick fix" similar to one person, one vote should be no surprise. The practical fairness of electoral practices, as the amended Section 2 recognizes, can be meaningfully judged only by the totality of the circumstances.[286] Moreover, in accordance with the Act and the Court's practice before *Shaw*, an electoral practice should be judged discriminatory only when it directly or indirectly causes the classic harm of vote dilution or another constitutionally-recognized injury.

Although regular district shape does not equate with political fairness,[287] aesthetic values are not wholly irrelevant. Bizarrely shaped safe districts, despite their remedial purpose, may significantly detract from the perceived legitimacy of the electoral system.[288] Yet a sense of proportion must be maintained. Familiar appearances are scant comfort for those whom the status quo leaves in the cold.[289] As Professor Dixon ob-

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[285] *See supra* notes 73-79 and accompanying text.

[286] 42 U.S.C. § 1973 (1988).

[287] *But cf.* Pildes & Niemi, *supra* note 261, at 484 (*Shaw* "reaffirms the continuing centrality of physical territory to legitimate political representation").

[288] For example, Professor Grofman proposes, but does not fully develop, a "cognizability" standard, suggesting the test of acceptable districting should be whether it is readily understandable to the average person. Grofman, *supra* note 49, at 1262. In particular, he believes that "[c]entral to American politics is the notion that representation should be based on geographically defined districts." *Id.* However, the practical and aesthetic advantages of such districts may be outweighed by the right of political participation.

[289] For an instructive discussion of reliance on tradition to establish or challenge the legitimacy of a practice, see Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177 (1993). Professor Brown notes that "objectivity, neutrality and legitimacy are illusory when dependent on a theory of interpretation that yields to the judgments of others through traditionalism." *Id.* at 210. While agreeing that use of tradition enhances the legitimacy of the Court's decisions, Brown argues that the Court should be more forthright about tradition's limitations and concede that few decisions are truly dictated by tradition; some problems do not have "correct" solutions. *Id.* at 211-12.

served, districts must be judged by the function they serve, not the form they take.[290] Safe districting will result at times in strange-shape districts, especially when mixed with strange politics.

Although, as this Note argues, safe districting and even strange-shape safe districting are correctly deemed constitutional, it does not follow that they are always the wisest or best alternatives.[291] Safe districting is vulnerable to criticism for its rigidity, geographic constraints, manufacture of unwieldy shapes, straitjacketing of the minority voting bloc, strengthening of the white majority bloc in non-safe districts, and marginalization of majority members left in the safe district — "electoral fodder" put in the shoes of the minority.[292]

Additionally, the practical effect of the shape test sharply reduces the usefulness of the safe districting remedy. Restricting the safe districting remedy to some ideal of regular shape will permit the remedy to work only where the excluded group

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Strange-shape districts may arouse concern in part because of arbitrary assumptions about democracy that society inculcates in us at a young age. As an illustrative example, Professor Guinier tells this anecdote about her then four-year-old son, Nikolas:

> Nikolas and I had a conversation about voting prompted by a Sesame Street Magazine exercise. The magazine pictured six children: four had raised their hands because they wanted to play tag; two had their hands down because they wanted to play hide-and-seek. The magazine asked its readers to count the number of children whose hands were raised and then decide what game the children would play.
>
> Nikolas quite realistically replied: "They will play both. First they will play tag. Then they will play hide-and-seek." . . . In a nutshell, Nikolas had expressed the goal of my work: to find voting rules that allow both winners and losers to play.

Lani Guinier, *Who's Afraid of Lani Guinier?*, N.Y. TIMES MAG.1., Feb. 27, 1994, at 38, 41. The child did not give the winner-take-all answer the magazine wanted. Yet what "looked right" to the child is not antidemocratic; it reflects James Madison's understanding of the justice in sharing power.

[290] *See* DIXON, *supra* note 60, at 459.

[291] As Justice Frankfurter cautioned in another context:

> Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional.

Board of Educ. v. Barnette, 319 U.S. 624, 670 (1943) (Frankfurter, J., dissenting).

[292] *See supra* notes 159-168 and accompanying text.

is densely packed together, physically separate from other voter groups. Physically integrated but politically excluded groups will have no remedy at all. *Gingles* first limited the availability of relief under Section 2, and *Shaw* now extends this limitation to Section 5.

Alternative remedies must be explored. The lesson of *Shaw* should not be that we have reached the constitutional limits of the Voting Rights Act, but that we have perhaps reached the political limits of the single-member districting model. A more "narrowly tailored" race-conscious remedy might also better endure the Court's scrutiny in the face of an equal protection challenge.

The courts can encourage voting rights litigants to adopt alternative remedies voluntarily, as by consent decree, but the courts' powers to force them to do so are probably limited.[293] Congress, with its superior fact-finding ability, is a better forum than the courts for exploring modifications or alternatives to safe districting. It can also enact legislation to permit or encourage the adoption of more sophisticated remedies.[294] In 1982 Congress clarified the judicial standards of voting rights violations by amending the Act. Learning from the experience of the courts, it can now flesh out more sophisticated remedies.

In areas where multiracial coalitions are practical, one solution lies in a milder version of safe districting that recognizes the importance of "strong plurality" or "influence districts," within which a minority group has substantial but not overwhelming influence in a greater number of districts.[295] A wider distribution of sympathetic voters would help minority politicians generate the broader support needed to pursue higher offices.[296] Influence districting would also permit the

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[293] *See* Cane v. Worcester County, 35 F.3d 921 (4th Cir. 1994) (abuse of discretion for trial court to order unwilling county to implement cumulative voting remedy).

[294] For example, federal law currently requires single-member districts in congressional elections and must be modified if alternatives are to be implemented. 2 U.S.C. § 2c (1988).

[295] *See* Karlan, *supra* note 160 (criticizing single-member districting as failing the goals of the Voting Rights Act). However, influence districts are presently thought to be nonjusticiable, in part because of the difficulty in developing standards by which to judge them. *See* Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984); Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983); Guinier, *supra* note 15 at 1425 n.44, 1452 n.146.

[296] *See* CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESEN-

courts to recognize the right of minority plaintiffs to bring Voting Rights Act suits even when they are unable to satisfy the *Gingles* requirement of being able to establish a safe district.[297]

More substantial departures from classic single-member districting must also be considered.[298] Choosing among them is difficult because of their relatively complex rules, because political theory must be contended with closely, and because decisions like *Shaw* and *Gingles*, which emphasize familiarity as a test of validity, cause reflexive public hostility to change.[299] However, neither tradition nor familiarity provide answers to the long-standing problems of racial division and polarization.

Among the most promising approaches are those that partially dispense with districting yet skirt the pitfalls of the at-large and multimember election.[300] For example, Professor Guinier promotes cumulative voting,[301] a scheme that uses a relatively large multimember district in which each voter receives a number of votes equal to the number of representatives to be elected. These votes can be cast each for different candidates or all for the same candidate. A candidate must still receive a majority of votes to become elected; thus, it is not a proportional representation system.

For example, in a hypothetical election of five city council members, each voter has five votes. If the election were run under traditional majoritarian rules, a fifty-one percent majority

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TATION OF AFRICAN-AMERICANS IN CONGRESS 203 (1993).

[297] In Chisom v. Roemer, 501 U.S. 380, 397 n.24 (1991), the Court expressed in passing the more expansive view that a small minority group of voters might have standing to bring a Voting Rights Act claim that their right of political participation had been infringed, due to their ability to influence (but not control) the outcome of elections.

[298] *See, e.g.*, Abrams, *supra* note 90, at 520-31 (discussing alternatives to safe districting).

[299] *See* Anna Quindlin, *Political Illiteracy*, N.Y. TIMES, June 6, 1994, at D5 (discussing public hostility over the Guinier nomination based on second-hand perceptions, rather than direct knowledge, of her proposed voting rights reforms).

[300] *See supra* part I.B.

[301] Corporate law currently employs cumulative voting to protect minority interests. The discussion here is adapted from Lani Guinier, *Groups, Representation, And Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1632-41 (1993) (describing alternative voting schemes, including cumulative voting).

could choose all five members seriatim. However, a cumulative system does not require each voter to cast one vote for each of five candidates; instead, the voter can cast two votes for one candidate and three for another, or all five votes for the same candidate.[302] The majority can therefore elect several, but not all, of the representatives, because the minority does not "waste" its votes in losing head-to-head contests for individual seats. If polarization diminishes and interracial coalitions form, the minority voters can spread their votes to exert more diffuse political influence without redistricting and without penalty. As Professor Guinier explains, such voting "would allow voters, by the way they exercise their votes, to 'district' themselves based on what they think rather than where they live."[303] This remedial approach has already been applied to public elections on a small scale[304] and is gaining mainstream attention.[305]

Note that this approach diminishes but does not eliminate race-consciousness in voting rights policy. Racial voting patterns must still be examined to determine where a cumulative voting remedy is required, how the district must be drawn, and what minimum number of seats the legislative body must have for the aggregate of minority votes to exert some control. Not surprisingly, Guinier's cumulative voting proposals draw fire from the same critics who attack safe districting, again on the grounds that such "antidemocratic" remedies represent interven-

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[302] This works somewhat like the technique of "bullet voting" described in Thornburg v. Gingles, 478 U.S. 30, 38 n.5 (1986). In bullet voting, a voter entitled to vote for five candidates might vote for just one in order to avoid diluting support for the one desired candidate. By contrast, cumulative voting permits the constructive use of these "extra" votes. *Cf.* Alexander Athan Yanos, Note, *Reconciling The Right To Vote With The Voting Rights Act*, 92 COLUM. L. REV. 1810 (1992) (arguing for system of "single transferable votes" that would dispense with districting).

[303] *See* Reuben, *supra* note 14, at 41 (remarks of Professor Guinier).

[304] In Chilton County, Alabama, a voting rights challenge to election procedures for the seven-member county commission was settled by adoption of a cumulative voting scheme, thereby benefiting both African-Americans *and* Republicans; both groups had been unable to obtain representation on the commission. *See* Lani Guinier, *supra* note 289, at 55, 64. *But see* Cane v. Worcester County, 35 F.3d 921 (4th Cir. 1994) (abuse of discretion for trial court to preemptively order unwilling county to implement cumulative voting remedy).

[305] *See* Peter Applebome, *Guinier Ideas, Once Seen as Odd, Now Get Serious Study*, N.Y. TIMES, Apr. 3, 1994, at E5 (illustrating how cumulative voting scheme might hypothetically apply to North Carolina).

tion to help racial minorities achieve different political outcomes.[306]

The legitimacy of current electoral strategies should be evaluated for reasons beyond immediate remedial needs. If James Madison was correct, factional domination on diverse grounds will always endanger the vitality of political dialogue. Establishing meaningful standards of judicial review, avoiding flawed measures such as the shape test, placing colorblindness in perspective, and exploring alternatives to safe districting will invigorate reform and invest in the future of democracy.

## CONCLUSION

District shape is a misleading and inadequate criterion on which to gamble judicial review of districting legislation. The fundamental right to vote cannot tolerate dilution by aesthetics and formalisms. The shape test, through reasoning from mere appearances to strict scrutiny, establishes an unstable standard for judicial review in this sensitive area and promotes a colorblind theory of equal protection in disregard of the contemporary and color-conscious problem of minority vote dilution.

The *Shaw* Court erred because it relied all too faithfully on formal race analysis. While optimistically calling for colorblind and traditional districting principles, the Court failed to protect the fundamental right of minorities to vote free of racial discrimination. As the Court itself has often stated, the essential democratic right, the right that guarantees all rights, is the right to vote. When the confrontation between colorblindness and the Voting Rights Act reaches its denouement, it is this right that must prevail.

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[306] For example, George Will suggested that Professor Guinier "believes blacks should have special rights" and, "believing that results are more important than rules, would dilute democracy in order to promote 'progressive' social outcomes." George Will, *Sympathy for Guinier*, NEWSWEEK, June 14, 1993, at 78. *See also* Clint Bolick, *Clinton's Quota Queens*, WALL ST. J., April 30, 1993, at A12 (mistakenly arguing Guinier believes in using quotas to force racially proportional electoral outcomes).

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