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RACE AND REDISTRICTING: DRAWING CONSTITUTIONAL LINES AFTER *SHAW V. RENO*

*T. Alexander Aleinikoff**
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In a democratic society, the purpose of voting is to allow the electors to select their governors. Once a decade, however, that process is inverted, and the governors and their political agents are permitted to select their electors. Through the process of redistricting, incumbent office holders and their political agents choose what configuration of voters best suits their political agenda. The decennial redistricting battles reveal the bloodsport of politics, shorn of the claims of ideology, social purpose, or broad policy goals. Redistricting is politics pure, fraught with the capacity for self-dealing and cynical manipulation.

That different configurations of electors will yield different electoral results is hardly new or noteworthy. The pejorative term *gerrymander* draws from the creative line drawing of Massachusetts Governor Elbridge Gerry in 1812,¹ and from the founding strokes of the American republic.² What is still relatively new is the attempt to constrain, under the aegis of the Constitution, the most wanton excesses of the process. It was only thirty years ago that the Supreme Court forced the rural legislators in Tennessee³ and Alabama⁴ to re-

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1. The term *gerrymander* was coined by Gilbert Stuart after reflecting upon the redistricting of Essex County, Massachusetts signed into law by Governor Elbridge Gerry. Stuart, a noted painter, opined that the bizarre districting configuration looked like a dragon. After a companion noted that it looked more like a salamander, Stuart fashioned the term *gerrymander* in tribute to the district's political progenitor. See Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, in *MINORITY VOTE DILUTION* 85, 85 (Chandler Davidson ed., 1984). Perhaps as a consequence of these origins, the use of animal designations to describe convoluted districting patterns pejoratively remains in place to this day.

2. One of the earliest examples was the attempt of Patrick Henry to gerrymander a congressional district in Virginia to prevent the election to Congress of James Madison as a result of the latter's presumed opposition to the adoption of the Bill of Rights. *Id.*

3. *Baker v. Carr*, 369 U.S. 186 (1962) (establishing the justiciability of vote-dilution claims).

4. *Reynolds v. Sims*, 377 U.S. 533 (1964) (adopting the equipopulational rule of one person, one vote for state legislative districting).

district their states to reflect the growth of the urban population centers, thereby undermining their stranglehold on state political power.

The commands of the one-person-one-vote rule of redistricting are by now so ingrained as to obscure what else is new in the 1990s round of redistricting. For the first time since the great reapportionment decisions of the Supreme Court in the 1960s, redistricting authorities have had to contend not only with equipopulational districting, but also with vigilant protections for minority representation. The passage of the 1982 amendments to the Voting Rights Act⁵ and the Supreme Court's expansive endorsement of the amended Act in the 1986 North Carolina redistricting case, *Thornburg v. Gingles*,⁶ have placed the issue of minority-controlled districts front and center in the decennial battle over representation. In state after state, the question of minority districts became the most visible and debated issue after the 1990 Census,⁷ oftentimes creating an uncomfortable alliance of minority incumbents, aspirants for political office, and the Republican Party, the latter armed with the oversight powers of the Justice Department.⁸

Despite the centrality of minority representation to post-1990 redistricting, the process took place in the absence of well-developed governing standards of law, particularly with regard to the application of the Voting Rights Act. The leading cases under section 2 of the Voting Rights Act⁹ — the prohibition against the diminution of minority-voting influence — were forged in the battles against at-large or multimember electoral districts. These electoral systems permit all

5. Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1973b, 1973aa (1988)).

6. 478 U.S. 30 (1986).

7. 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 (1993).

8. The 1990 round of redistricting was of particular concern to moderate Republicans without ideological opposition to race-conscious politics. The prospect of concentrating — or "packing," as the practice is known in the redistricting trade — the traditional Democratic votes of racial and ethnic minorities into minority-dominated districts offered the possibility of eviscerating the biracial power bases of many liberal Democrats — thereby realizing the long-term strategy of the late Lee Atwater, who early on saw in the redistricting battles of the 1990s the chance to undermine the bastions of Democratic control in state legislatures and in the House of Representatives. See *id.* (describing political considerations in the 1990 round of redistricting); see also Henry A. Politz, *The Judicial Council of the Fifth Circuit, Order In Re: Complaint of Lewis S. Earl Against United States District Judge James R. Nowlin Under the Judicial Conduct and Disability Act of 1990* (May 15, 1992) (on file with the authors) (Judge Nowlin of the Western District of Texas breached judicial ethics in his ex parte contact with interested Republican parties during the course of developing a court-ordered redistricting plan). See generally Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEXAS L. REV. 1705 (1993) (documenting cases of misuse of the Voting Rights Act for partisan gain).

It should be disclosed that Professor Issacharoff was one of the counsel to the state of Texas in the redistricting litigation.

9. 42 U.S.C. § 1973 (1988).

members of a community or electoral jurisdiction to vote separately on each candidate for office, thereby allowing a voting majority to control every seat in an election. For example, if a community is sixty percent white and forty percent black, and if the two racial groups have consistently different voting preferences, the result of an at-large election for a city council in which black and white candidates vie for each of five council positions would be that the white candidate would likely prevail in each contest, with about sixty percent of the vote. In such cases, the perceived harm is the capacity of a majority community to capture a disproportionate share of representation through its ability to vote serially for each candidate for local office. The remedy of first recourse is to create electoral subdistricts in which minority electoral cohesion would bear fruit.

Unfortunately, the post-1982 vote dilution caselaw gave little guidance on how to arrange single-member electoral districts within districted systems in which all jurisdictional lines were presumptively up for grabs.¹⁰ Nor did the cases prior to 1990 articulate the conditions under which state redistricting entities were either permitted or required to resort to race-conscious practices. These issues were presented to the Supreme Court after the 1990 round of redistricting, in cases arising from the redistricting battles in Minnesota, Ohio, Florida, and, most notably, North Carolina — the setting for the landmark case of *Shaw v. Reno*.¹¹ Whereas prior cases had addressed the remedial use of race-conscious districting to alleviate proven exclusion, the 1990s redistricting cases concerned the affirmative use of race in the quintessentially political process of dividing electoral spoils.

North Carolina provided the Court with a combustible mix of race, politics, and undisguised self-dealing that was the perfect opportunity for considering these issues. The results of the 1990 Census entitled the state to an additional congressional seat, bringing its delegation to twelve. Although its population is twenty percent black, and despite the growing political power of blacks, there had been no black congressional representation from North Carolina this century. Nevertheless, the state initially apportioned itself in 1990 to create only one district likely to elect a black representative. The state presented

10. Although there are scores of cases under the Voting Rights Act after 1982, there were only four appellate cases prior to the post-1990 redistricting that addressed the application of the Act to the districting configurations within single-member systems. Bernard Grofman & Lisa Handley, *Identifying and Remedying Racial Gerrymandering*, 8 J.L. & Pol. 345, 348 (1992). The cases are *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990); *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990); *Armour v. Ohio*, 895 F.2d 1078 (6th Cir. 1990); and *Washington v. Tensas Parish Sch. Bd.*, 819 F.2d 609 (5th Cir. 1987).

11. 113 S. Ct. 2816 (1993).

the plan for approval to the Justice Department under the preclearance provisions of the Voting Rights Act.¹² The Justice Department objected to the state's refusal to create a second, heavily black district in the southeastern section of the state, which contained a significant concentration of black voters, and its decision instead to disperse black voters among a number of majority-white congressional districts. Following the Department's objection, the state went back to the drawing board with the avowed aim of increasing black representation.¹³

The creation of a black congressional district in the southeastern portion of the state would have disrupted the power base of incumbent Democratic congressmen.¹⁴ Consequently, the legislature decided instead to create the now notorious I-85 district in the north-central region of the state. This district stretched 160 miles in length, and often it was barely wider than the highway that it followed. Indeed, contiguity was maintained at one spot only because two parts of the district intersected at a single point. The plan satisfied the Justice Department objection by dividing towns, counties, and even precincts among as many as three congressional districts in order to capture sufficient numbers of black voters to create a second majority-black district. The plan earned the sobriquet "political pornography" from the *Wall Street Journal*¹⁵ before being dubbed the "snake" district and struck down as "political apartheid" by a sharply divided Supreme Court.¹⁶

Shaw is no doubt a major opinion that attempts to define limits on the use of racial or ethnic classifications in electoral redistricting. The main thrust of this article is to assess the critical question of whether *Shaw* renders unconstitutional the type of race-conscious realignment

12. 42 U.S.C. § 1973c (1988). See generally *Allen v. State Bd. of Elections*, 393 U.S. 544, 563-71 (1969) (discussing the scope of the preclearance provision); *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (describing the Voting Rights Act requirements as "shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims").

13. Under § 5 of the Voting Rights Act, a covered jurisdiction is required to obtain preclearance from the Department of Justice prior to the implementation of any change in voting practices. Since North Carolina did not receive preclearance, and since it failed to seek review in a declaratory judgment action before the District of Columbia District Court, its proposed redistricting could not be put into effect. See *Clark v. Roemer*, 111 S. Ct. 2096 (1991) (setting forth the prohibition of use of unprecared electoral arrangements under § 5). In its objection letter to the state, the Department of Justice identified the failure to create a second majority-black congressional district as the grounds for its failure to preclear. See *Shaw v. Reno*, 113 S. Ct. 2816, 2880 (1993). Accordingly, in order to obtain any future preclearance, the state was obligated to meet the terms of the objections set forth by the Department of Justice.

14. See *Shaw v. Barr*, 808 F. Supp. 461, 479 (E.D.N.C. 1992) (Voorhees, C.J., dissenting in part), *revd. sub nom.* *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

15. *Political Pornography*, WALL ST. J., Sept. 9, 1991, at A10.

16. *Shaw*, 113 S. Ct. at 2821 (referring to the district as "wind[ing] in snake-like fashion"), 2827 (referring to "political apartheid").

of electoral configurations that have given meaning to the voting-rights reforms of the past two decades.¹⁷ In making this assessment, we try to ascertain exactly how the Court has limited the use of race-conscious districting, and we try to determine whether there is any jurisprudential coherence to the Court's latest confrontation with the law and politics of race. Our conclusion is that *Shaw* is as important for what it does not say as for what it does: its inconclusive resolution of the ultimate issue whether race may ever be justifiably relied upon in redistricting reaffirms the messy jurisprudence of compromise that has guided the center of the Court since *Regents of the University of California v. Bakke*.¹⁸ The heart of this jurisprudence is a never quite satisfactory accommodation between deeply individualistic notions of appropriate treatment and a politically charged conception of the representational legitimacy of principal institutions in our society.

I. THE FUTURE OF AN EVOLUTION: EQUAL PROTECTION AND VOTING RIGHTS

A. *The Context of the Past*

"Strict scrutiny" was the handmaiden of the law of the Second Reconstruction. Unwilling to invalidate every use of a racial classification,¹⁹ the Court announced that race-dependent government decisions would demand extraordinary justification — a burden few such decisions were expected to, or could, meet. The strategy made eminent sense in a world where virtually all racial lines since the demise of the First Reconstruction had been used to subordinate historically discriminated-against groups.²⁰ By the 1970s, however, it was clear that state and federal policymakers were prepared to adopt race-conscious measures to ameliorate the exclusion of African Americans and others from important economic and educational opportunities.

The ensuing debate in constitutional law on "affirmative action" centered, in large part, on the appropriate level of scrutiny to apply. Those Justices and scholars inclined to uphold such measures stressed that the use of race was "benign" and therefore importantly different

17. Since *White v. Regester*, 422 U.S. 935 (1975).

18. 438 U.S. 265 (1978).

19. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Interestingly, the term *strict scrutiny* was not used in *Brown* — perhaps because of Chief Justice Warren's intent to write an opinion using legal jargon accessible to the educated lay reader. See generally Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991) (on the development of strict scrutiny analysis).

20. But see Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985) (detailing early race-conscious measures intended to benefit freed slaves).

from the immoral racial classifications of segregation. Accordingly, a lower level of justification for race-conscious measures aiding previously discriminated-against groups was appropriate.²¹ To others, the right not to be injured on the basis of one's skin color was a personal right secured by the Constitution, and the asserted lack of an invidious purpose could not be a sufficient reason for reducing the level of judicial scrutiny applied to measures that disadvantaged persons on the basis of race.²²

Justice Powell's opinion in the *Bakke* case split the difference. He held affirmative action plans in higher education to strict scrutiny,²³ yet he was willing to find that it was possible for the state to meet the burden of a compelling and close-fitting justification for the affirmative action plan.²⁴ Powell's compromise — that race could be a factor but not the only factor in crafting university admissions policies — struck many as an ipse dixit in search of a theory.²⁵ But his theory seems to have achieved widespread institutional incorporation, and employers and institutions of higher education have relied on it for the past fifteen years.

Thus, the pre-Reagan Court had two doctrinal routes for approving race-conscious policies: applying a more deferential standard to "benign" measures, or applying strict scrutiny yet finding that rigorous test to be met.²⁶ *Bakke* seemed to signal the latter route. But only a year earlier in the most important voting-rights case of this era, *United Jewish Organizations v. Carey*,²⁷ the Court opted for the first approach.

In *UJO*, a 1972 districting statute for New York State had included a Hasidic Jewish community of some 30,000 people in a single-assembly and single-senate district in the Bedford-Stuyvesant area of

21. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990); *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment); Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 16-22 (1976); Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preferences in Law School Admissions*, 75 COLUM. L. REV. 559 (1975); cf. JOHN H. ELY, *DEMOCRACY AND DISTRUST* 150-65 (1980) (discussing the stigmatizing effect as a differentiating factor).

22. Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 21-26; Antonin Scalia, *The Disease as Cure*, 1979 WASH. U. L.Q. 147; William Van Alstyne, *Rights of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979).

23. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978).

24. 438 U.S. at 294-306.

25. See Vincent Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CAL. L. REV. 21 (1979).

26. In *Fullilove* there was a little of both these routes, and perhaps a third route as well: relying on Congress's remedial § 5 power. *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980).

27. 430 U.S. 144 (1977).

Brooklyn. The Justice Department objected to the districting plan, asking the state to demonstrate that its plan had neither the effect nor intent of diluting minority voting strength. The state responded by submitting a new plan that divided the Hasidim between two assembly and two senate districts in order to create districts with substantial nonwhite majorities. Representatives of the Hasidic community filed suit, alleging that the new plan diluted the value of their vote by dividing their community and assigning them to districts on the basis of their race.

While there was no opinion for the Court, a majority of the Justices upheld the race-conscious districting of Brooklyn.²⁸ The various opinions identified two different grounds supporting the districting plan: characterization of the state conduct as benign, and a judgment that the Hasidim suffered no cognizable harm because their voting power had not been diluted in a constitutional sense.

For a majority of the Justices, the redistricting plan was benign in two senses. First, the Court understood the Voting Rights Act to permit a redistribution of political power to groups that Congress had concluded had been historically and unfairly excluded or underrepresented in the political process. Thus, the New York plan furthered the permissible goal of "prevent[ing] racial minorities from being repeatedly out-voted" through the creation of districts that "will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority."²⁹ The state's purpose, therefore, contrasted markedly with earlier race-conscious efforts that had intentionally disenfranchised protected groups. Indeed, under the Court's interpretation of the Act, the conscious decision of the state to provide for representation of previously underrepresented blacks was constitutionally permissible even without the predicate of a judicial finding of prior unlawful discrimination.³⁰ The plan was benign in a second sense: it did not stigmatize members

28. 430 U.S. at 145-46.

29. 430 U.S. at 168 (opinion of White, J.). White also noted that the New York plan did not dilute white voting strength because it left whites, who constituted 65% of the population in the county, with 70% of the seats. 430 U.S. at 166; see also John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974) ("When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking."); Samuel Issacharoff, *When Substance Mandates Procedure: Martin v. Wilks and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189, 247 (1992) (arguing that racial preferences are more likely to be benign when enacted by a majority that thereby burdens itself).

30. 430 U.S. at 161. The Court's reasoning was buttressed by the fact that Kings County (which is Brooklyn) was a covered jurisdiction under § 5 of the Voting Rights Act. 430 U.S. at

of the burdened (white) group, nor did it brand them with the imprimatur of second-class status. As Justice White wrote, in a portion of an opinion joined by Justices Stevens and Rehnquist:

There is no doubt that . . . the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race

It is true that New York deliberately increased the nonwhite majorities in certain districts in order to enhance the opportunity for election of nonwhite representatives from those districts. Nevertheless, there was no fencing out of the white population from participation in the political processes of the county³¹

Similarly, in a brief concurring opinion, Justice Stewart, joined by Justice Powell, rejected the constitutional challenge on the ground that the facts of the case foreclosed "any finding that [New York] acted with the invidious purpose of discriminating against white voters."³²

Arguably, the impact of the districting plan on Hasidic voters was not benign; they were, after all, targeted on the basis of an ethnic classification to be the odd-folks-out in the redistricting shuffle. But the Justices viewed this harm as distinct from the injury imposed by districting plans that are based on the invidious purpose of shutting minority groups out of the electoral process.³³

The second ground the Court found for upholding the state plan was that the plan did not unduly burden the Hasidim because they had suffered no deprivation of group rights.³⁴ The challenged districting plan did not have an adverse impact on white voters in Kings County or the state as a whole: under the plan, whites would still control roughly their proportionate share of legislative districts. Hence, the Court reasoned, "even if voting in the county occurred strictly according to race, whites would not be underrepresented relative to their share of the population."³⁵

As should be apparent, the baseline assumption for this analysis was that the Hasidic community of Williamsburgh could take solace for its electoral exclusion from the fact that it was "virtually represented" by white legislators from other parts of Brooklyn or from

148. That administrative designation lent both legitimacy and urgency to the state's aim of improving the political prospects of black voters.

31. 430 U.S. at 165 (opinion of White, J.).

32. 430 U.S. at 180 (opinion of Stewart, J.).

33. As best typified by the facts of *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). *UJO* also resembles *United Steelworkers v. Weber*, 443 U.S. 193, 205 (1979), in its acceptance of a benign use of race to avoid potential civil rights litigation.

34. 430 U.S. at 165-66 (opinion of White, J.).

35. 430 U.S. at 166 (opinion of White, J.).

other parts of the state. The assumption that the Hasidim were integral elements of an undifferentiated white electorate is troubling to say the least; indeed, the Hasidim of Brooklyn appear to be a textbook example of a "discrete and insular minority" for whom special judicial solicitude is warranted, particularly when political rights are at stake.³⁶ But the Court's focus on the noninvidiousness (indeed, positive good) behind the districting plan led it to indulge in a form of race "essentialism" — that is, the assumption that "white" voters share outlooks and interests simply on the basis of their race — that it would later attack in *Shaw v. Reno*. The political theory of "virtual representation" and an unstated sociological assumption about the nature of "whiteness" made the harm visited on the Brooklyn Hasidim unproblematic in the eyes of the Court.

As was true of *Bakke*, *UJO* revealed a deeply fragmented Court unable to issue a majority opinion.³⁷ Yet the Justices achieved a rough compromise in cases evaluating "benign" racial or sex-based classifications over the next decade. Although there was no general agreement over the level of scrutiny to be applied, affirmative action measures would be upheld when the classification was aimed at remedying a palpable pattern of exclusion of historically disadvantaged groups,³⁸ and when the costs borne by the dispreferred were not exceedingly onerous.³⁹ The Court therefore would uphold the benevolent use of

36. There is some evidence in the record in *UJO* that the Hasidim were being unfairly singled out for political division precisely for their particular status among the broad mass of white voters. The record shows that there were alternative districting arrangements that could have promoted the primary objective of providing black electoral opportunity, but that state authorities had chosen to localize the costs of providing black opportunity on the uninfluential and underrepresented Hasidic community. See 430 U.S. at 174-75 (Brennan, J., dissenting in part) (expressing concern for these charges raised by respondent-intervenors NAACP and others).

37. Between the 1977 *UJO* decision and 1989, the Court only once mustered five votes for a single opinion in a case addressing racial or other group-based preferences. Even in that one case, *United Steelworkers v. Weber*, 443 U.S. 193 (1979), Justice Brennan stitched together five votes by relying on a number of different rationales to support a preference program for black employees to enter into virtually all-white craft positions in a Gramercy, Louisiana aluminum factory. See, e.g., 443 U.S. at 200 (no state action in adoption of private affirmative action plan), 208 (plan does not bar advancement of white employees), 202 (*prima facie* evidence of minority exclusion as a result of broader discrimination), 198-99 (overwhelming statistical evidence of minority exclusion by employer in question), 207 (no congressional intent to create a cause of action against minority preference programs).

38. See *Johnson v. Transportation Agency*, 480 U.S. 616, 650-51 (1987) (O'Connor, J., concurring in judgment); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 292 (1986) (O'Connor, J., concurring in judgment); *United Steelworkers*, 443 U.S. at 210-11 (Blackmun, J., concurring).

39. The clearest example comes from Justice Powell's opinion in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986): "As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." 476 U.S. at 280-81. However, such costs must not be overly burdensome on those individuals or groups that are not preferred. Thus, for example, in the employment context, in which the bulk of the Court's jurisprudence on this issue was developed, Justice Powell writes, "While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the

classifications for approximately the same reasons articulated by the Court in the voting-rights context. Significantly, the Court also consistently rejected the argument advanced first by Justice Rehnquist,⁴⁰ and subsequently by Justice Scalia,⁴¹ that the Equal Protection Clause and the various civil rights statutes require the rejection of all group-based classifications, except in the most narrowly tailored remedial settings.⁴²

By the time the Court revisited *UJO* in *Shaw*, however, equal protection law had evolved. A clear majority of the Court now firmly believes that race-conscious measures warrant strict scrutiny, whether or not such programs purport to remedy disadvantages suffered by historically discriminated-against groups.⁴³ The Court has come to conceptualize the Equal Protection Clause as concerned with the use of classifications that injure individuals based on the presumptively irrelevant characteristic of race, not with the ameliorization of the practices and effects of historic racial subordination.⁴⁴

*City of Richmond v. J.A. Croson Co.*⁴⁵ typifies this rendering of the Equal Protection Clause. In *Croson*, the Court held that Richmond's minority business set-aside program violated the Equal Protection Clause, applying strict scrutiny despite the plan's purported "benign" purpose. The Richmond plan had certain features that seemed to invite the particular wrath of the Court. It extended its preferences to all minorities, regardless of whether they had been historically excluded from opportunity, or whether they were even present in the

entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive." 476 U.S. at 283 (footnote omitted).

40. *United Steelworkers*, 443 U.S. at 221 (Rehnquist, J., dissenting).

41. *Johnson*, 480 U.S. at 664-68 (Scalia, J., dissenting).

42. In this regard, Justice Rehnquist's position in *UJO* is hard to explain. Justice Rehnquist joins the portion of Justice White's opinion that allows for the race-conscious districting in Brooklyn on the grounds that neither the Hasidic community in particular nor whites in general have suffered any dilution of their overall representation. See 430 U.S. at 165-68. This position is at odds with the exclusive use of racial classifications in narrow remedial settings that Rehnquist articulates in other opinions.

43. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion of four Justices supporting strict scrutiny); 488 U.S. at 520 (Scalia, J., concurring). This conception of equal protection applied to the primary addressees of the Fourteenth Amendment, the states. Federal race-consciousness programs might be judged by a lower standard. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990).

44. Thus this view is a rejection of the "group-disadvantaging principle" put forth by Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976). See also the anticaste reasoning found in LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-22, at 1523 (2d ed. 1988), and in T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1063-65 (1991).

45. 488 U.S. 469 (1989).

city of Richmond.⁴⁶ Second, the Richmond plan was not a response to the total exclusion of minorities but was arguably, in the Court's eyes, a product of racial self-dealing; at the time of the adoption of the minority set-aside, African Americans constituted a majority of the voting members of the Richmond City Council.⁴⁷

In this context, it was not difficult for Justice O'Connor to reject the justifications of benignness and lack of an undue burden that had sustained earlier race-conscious programs. Echoing Justice Powell, she began by establishing that the level of scrutiny applied under the Equal Protection Clause would not vary based on the race of the preferred group: "To whatever racial group these citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking."⁴⁸

The "mere recitation of a benign, compensatory purpose"⁴⁹ could not justify a lower level of scrutiny because it might simply mask "illegitimate notions of racial inferiority or simple racial politics."⁵⁰ To apply lower-level scrutiny to "benign" race-conscious programs would put the cart before the horse: strict scrutiny is needed to ensure that, in fact, the state has pursued permissible purposes. The Justices also expressed concern about the untoward consequences of so-called "benign" classifications, concluding that such measures may well stigmatize the beneficiaries,⁵¹ as well as deepen racial divisions (by

46. See 488 U.S. at 506 (discussing inclusion of Aleuts, Orientals, Indians, and Eskimos in the preferred group).

47. 488 U.S. at 495-96 (noting that political power in Richmond, Virginia had shifted to a majority-black city council in striking down fixed minority set-asides for municipal contracts). The recognition that shifting political tides might affect equal protection claims has roots going back at least a century. See *Strauder v. West Virginia*, 100 U.S. 303 (1879):

If in those states where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend that no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws.

100 U.S. at 308; see also *Ely*, *supra* note 29, at 735 ("When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking."); *id.* at 739 n.58 ("Of course it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature.").

48. 488 U.S. at 493.

49. 488 U.S. at 495 (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975)).

50. 488 U.S. at 493. The Richmond program was apparently suspect, in part, because it was adopted by a city council on which blacks were a majority. See *Aleinikoff*, *supra* note 44, at 1102-07.

51. See 488 U.S. at 494 ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth." (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.))).

distributing opportunities on grounds generally viewed — from an individualistic perspective — as impermissible).⁵² Finally, the Court recognized that a strict standard of review — even for “benign” policies — would make it more difficult for states to adopt programs based on racial classifications.⁵³ Justice O’Connor criticized Justice Marshall’s “watered-down version of equal protection review” as “effectively assur[ing] that race will always be relevant in American life, and that the ‘ultimate goal’ of ‘eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being’s race’ will never be achieved.”⁵⁴

While *Croson* elevates Justice Powell’s approach to majority status (thereby suppressing the alternative approaches represented by *UJO*), Justice O’Connor’s opinion is, in reality, a hardened version of Powell’s analysis in *Bakke*. It is noteworthy that *Croson* is the first case to invalidate an affirmative action program in which the Court did not identify any individual who had been deprived of a vested interest or expectation as a result of the plan.⁵⁵ Arguably the two opinions are fully consistent because both strike down fixed quotas; Powell was willing to uphold only those affirmative action plans that, like the Harvard admissions program, used race as only one factor among many. But this reading misses the important atmospherics of tone that pervade the opinions. *Croson* does not read like *Bakke*. Gone is Powell’s nuanced reading of race and society, his recognition of the need to find ways to permit institutions to include historically excluded groups while reaffirming the potential harm of race-based clas-

52. See 488 U.S. at 493 (unless strictly reserved for remedial settings, classifications based on race may “lead to a politics of racial hostility”).

53. See 488 U.S. at 494-95 (describing the implications of adopting a relaxed standard of review for “benign” classifications).

54. 488 U.S. at 495 (citation omitted) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 320 (1986) (Stevens, J., dissenting)).

The idea that “benign” race-consciousness measures should be subject to relaxed review does not die altogether with *Croson*. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-66 (1990) (However, a solid core of the Court is clearly hostile, as evidenced by Justice O’Connor’s sharp dissent. 497 U.S. at 609-10 (O’Connor, J., dissenting) (“Untethered to narrowly confined remedial notions, ‘benign’ carries with it no independent meaning, but reflects only acceptance of the current generation’s conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable.”)). The lower federal courts have allowed benign classifications to survive scrutiny when undertaken by the federal government or undertaken pursuant to federal oversight. See, e.g., *Milwaukee County Pavers Assn. v. Fiedler*, 922 F.2d 419, 423-24 (7th Cir.) (federal government may authorize state to act beyond the confines of the Fourteenth Amendment), cert. denied, 111 S. Ct. 2261 (1991).

55. This contrasts with the facts of *Bakke*, where the Davis Medical School failed to argue forcefully, despite its ability to do so, that Allan Bakke was denied admission for reasons other than the minority set-aside program. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 276-78 (1978) (opinion of Powell, J.); see also JOEL DREYFUSS & CHARLES LAWRENCE III, *THE BAKKE CASE* 65-66 (1979).

sifications, and a balancing of the benefits to the preferred group against the harms imposed on the dispreferred. Powell sees an interest in cross-cultural learning and tolerance; O'Connor sees down-and-dirty interest-group politics. Powell is searching for a way to mediate the necessary but inconsistent demands of a group-based remedy under an individualistically understood Fourteenth Amendment; O'Connor is seeking to stop the easy recourse to race in the crafting of state policies, a practice she believes will only exacerbate deep and dangerous societal divisions. Thus, *Croson* is *Bakke* with a twist. It represents 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.

B. *Voting Rights and the New Equal Protection*

An individual-rights based view of equal protection is problematic when transferred to the voting context. Whereas most civil rights in this country are defined in terms of the state's treatment of individuals, voting rights are not demarcated so easily. An individual citizen can be guaranteed the right to go to the ballot box and cast a vote of roughly equal weight without needless encumbrances, such as a literacy test or a poll tax or overly burdensome registration requirements. But, while these rights are necessary to a democratic order, they are hardly sufficient. At this level, there is little that distinguishes a democratic electoral system from a system that engages in show elections for predetermined outcomes, such as in the former Soviet Union.

Nor can the problem of identifying individual voting rights be packaged as the right to vote for a winning candidate. In any contested electoral system, this condition cannot be satisfied. Elections will not satisfy every voter's electoral preferences if they are to have any meaning. Indeed, if the right to vote for a winning candidate were a genuine condition for democratic rule, the former Soviet Union would have the upper hand because all voters in a one-party state are guaranteed the ability to vote for the winning candidate — and only the winning candidate.

Therefore, once the conditions of equal weight and equal access to the ballot are satisfied, there is little in the way of individual rights that governs the electoral process.⁵⁶ Attention must at this point shift to

56. These issues are considered at length in Jonathan W. Still, *Political Equality and Election Systems*, 91 *ETHICS* 375 (1981).

group rights to differentiate a fair from an unfair system.⁵⁷ It is only as collective partisans of the same political preference — whether that preference is defined by party or race or any other measure — that voters can assert their right to meaningful participation in the political process. Moreover, once we recognize the collective quality of the civil right to vote, we must confront the compounding problem of identifying the groups that are entitled to claim this right. In the individual context, the problem is relatively straightforward; the ballot is guaranteed to all citizens who meet rules of simple application, such as age and residency requirements. No such rule of simple application exists to determine which groups warrant representation. Nevertheless, at some point the state must determine who merits control of a district and who does not.

The problem, however, does not simply stop at the point of identifying which groups merit representation. Any cohesive group that is unanimous in a district will claim that it has been the victim of discriminatory “packing”; they will claim they were forced to “waste” votes to win an election when a majority of just over fifty percent would have been sufficient. In a district of 1000 voters, for example, it would take 501 to control the electoral process. If all 1000 were partisans of the same party, 499 votes that could have been used to sway the outcome in another district would have been wasted. Similarly, any group that loses an election with forty-nine percent of the vote will claim it has been forced to “waste” just as many votes as the group that wins an election with one hundred percent of the vote (here the claim is one of dilution).

The demand for a right of political effectiveness on a nonpacked, nondiluted basis therefore requires the state electoral authorities to place some group or groups in a subordinate position. (We shall refer to such groups as “filler people.”) As a result, the claim of a right of effective participation in an electoral system not only entails the recognition of an affirmative group right, but — given the zero-sum quality of representation — the claim also assumes the right to subordinate electorally some other group or groups.

Despite the implicit group-based nature of a voting-rights claim, in *Shaw* the Court attempted to bring voting-rights law into the new equal protection model by reconceptualizing the right at stake as pertaining to individuals, not groups. Although the Court explicitly rejected what might appear the easiest route to this end — the

57. As Sanford Levinson has argued, the only logical stopping point may be proportional representation. Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257 (1985).

recognition of a right to a color-blind electoral process⁵⁸ — it fixed on another individually based understanding of the constitutional norm: the Court held that the Fourteenth Amendment establishes a right not to be segregated on the basis of one's race in electoral districting plans. *Shaw* does not overturn earlier group-based decisions which focus on whether electoral schemes "dilute" the voting strength of protected minorities. However, *Shaw* makes clear that the fact of nondilution does not immunize districting plans from constitutional challenge.⁵⁹ Thus, *Shaw* distinguishes but does not overrule *UJO*, finding the individual right defined by *Shaw* "analytically distinct"⁶⁰ from the dilution claim rejected in *UJO*.

Whether or not *UJO* has been declared dead, it is apparent that an individually minded understanding of the Fourteenth Amendment puts real pressure on *UJO*'s grounds of decision. The willingness of the Court to see no constitutional injury to the Hasidic voters appears to ignore their individual interests in not being viewed simply as means to the end of creating a minority district. Moreover, in *Shaw* the Court appears to be uninterested in the claim that the districting plan furthers the "benign" purpose of increasing minority representation in the North Carolina congressional delegation (although we suggest below why the Court might recognize such a justification for race-conscious districting for less bizarrely shaped districts⁶¹). If, under the new equal protection regime, it is the use of race to classify persons that is offensive, the state's race-conscious districting may perhaps be justifiable, but it cannot be "benign."

With *Croson* as the paradigm case for fin-de-siècle equal protection law, *UJO* stands on shaky ground, and the race-conscious districting generally thought permissible after *UJO* is subject to serious constitutional challenge. *Shaw v. Reno* might have told us whether *UJO*, and voting-rights law in general, had been "*Crosonized*." Indeed, plaintiffs specifically argued in the district court that *Croson* and other recent race cases had fundamentally undermined *UJO*.⁶² Nevertheless, the Court declined the opportunity to announce a clear and decisive norm

58. *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993). Compare Justice Powell's opinion in *Bakke* rejecting color blindness as a constitutional requirement in higher education admissions, yet conceptualizing equal protection rights in individualistic terms. 438 U.S. at 319-20.

59. 113 S. Ct. at 2829-30. Thus much of the dissents' arguments about "no dilution" seems rather beside the point. See 113 S. Ct. at 2838-40 (White, J., dissenting).

60. 113 S. Ct. at 2830.

61. See *infra* section II.C.

62. *Shaw v. Barr*, 808 F. Supp. 461, 471 (E.D.N.C. 1992), *revd. sub nom. Shaw v. Reno*, 113 S. Ct. 2816 (1993). In their Supreme Court brief, plaintiffs argue that *UJO* "is a dangerous relic from the past and should now be formally interred." Appellants' Brief on the Merits at 40, *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (No. 92-357).

for districting cases or to reconsider *UJO*, choosing instead to focus on the peculiar shape of the challenged North Carolina district and to arrive at a decision whose broader implications for the review of state districting decisions is unclear. The result is an unhappy one for lower courts and litigators looking for guidance in this complex and charged area of law located at the core of American political life.

II. *SHAW V. RENO*: AT THE CROSSROADS

In this Part, we examine three different readings of the Court's opinion in *Shaw*. We label these (1) the "cueing" reading; (2) the "strict-scrutiny-all-the-way down" reading; and (3) the "excessive reliance" reading. We hope that these rather infelicitous phrases become clearer in the pages that follow.

A. The "Cueing" Reading

Shaw might be read as merely "cueing" states to the need to comply with the Equal Protection Clause when making districting decisions. Philip Bobbitt, in an examination of the functions of judicial review, identified what he terms the "cueing function" of judicial decisions.⁶³ Bobbitt suggests that in some constitutional cases the Court does not attempt to lay down legal doctrines for further development, but rather provides "a cue to a fellow constitutional actor" to take constitutional values more seriously.⁶⁴ According to Bobbitt, "[i]t's not the threat of invalidating legislation *per se* so much as the argument for a different construction of the Constitution"⁶⁵ that matters in these cases. *National League of Cities v. Usery*,⁶⁶ which overturned the extension of federal minimum wage and maximum hour legislation to state and local governments, is Bobbitt's prime example (he wrote before the case was overturned). The Court showed no interest in developing the *National League of Cities* doctrine; indeed, it distinguished the case in the next half-dozen related cases it decided. On Bobbitt's account, *National League of Cities* served as a shot across the bow — a warning to the political branches to think more carefully about the important constitutional values of federalism.⁶⁷

It is possible that the Court intended *Shaw v. Reno* to serve this

63. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 191-95 (1982).

64. *Id.* at 194.

65. *Id.*

66. 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

67. BOBBITT, *supra* note 63, at 194-95.

"cueing function." Unwilling to wade too deeply into the political swamp of electoral districting, the argument goes, the Court picked an extreme case in which to emphasize that at some point the use of race in districting decisions had gone too far. The Court may have little interest in further elaborating the theory, or in identifying a set of norms that would tell courts and litigators what constitutes a "bizarre" shape for a district. It may also have little interest in providing guidance about what to do with a case involving race-conscious districting that draws more "normal" shapes for districts. Under this interpretation, the Court's focus on the shape of the challenged North Carolina district — dramatically limiting the impact of its decision — and its unwillingness to rule on the permissibility of race-conscious districting in general demonstrates that *Shaw* is not about doctrine, but about signaling the political branches.

The possibility that *Shaw* is a "cueing" case is cause for consternation. Such decisions might be appropriate vehicles for interbranch communications in areas of law unlikely to spawn much litigation — for example, federalism limits on congressional power. But reapportionment cases demand a willingness on the part of the Court to develop and supervise an extensive scheme for review of state districting decisions. Voting-rights cases are numerous, complex, and fact specific. Perhaps more centrally, these cases involve large numbers of interested parties who can be expected to exploit any uncertainty in the law. Therefore, in the voting-rights context, vague norms, especially norms that may not be enforced at all, will produce costly litigation and serious uncertainty about important political events.⁶⁸ Surely the Court is aware of these troubling consequences, and it is unlikely the Court would issue a "cueing" opinion in this volatile area of the law. Accordingly, we assume that there is something else to the *Shaw* opinion than a desire to cue but not to command.⁶⁹

B. The "Strict-Scrutiny-All-The-Way-Down" Reading

On another reading, *Shaw v. Reno* is an ordinary application of

68. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992), for a discussion of the costs of imprecision in areas of law likely to generate litigation.

69. See Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57-69 (1992). Indeed, the Court already has engendered a great deal of irresolute litigation in the reapportionment context with its decision in *Davis v. Bandemer*, 478 U.S. 109 (1986). In this case, the Court announced the justiciability of partisan gerrymandering without identifying any applicable, concrete standards to guide the lower courts. See Samuel Issacharoff, *Judging Politics: The Elusive Quest of Judicial Review of Political Fairness*, 71 TEXAS L. REV. 1643, 1671-72 (1993) (discussing fractious and indeterminate litigation under *Davis*).

prevailing equal protection norms.⁷⁰ The usual rules that apply are as follows:

- (1) all race-dependent decisions are subject to strict scrutiny;
- (2) rule (1) applies (a) to policies that include an explicit racial classification (*Croson*); (b) to policies that are neutral on their face but which are found to have been based on an intent to draw a racial classification (*Washington v. Davis*;⁷¹ *Arlington Heights v. Metropolitan Housing Development Corp.*⁷²); and (c) to policies that, although neutral on their face, may be assumed to be race based because they defy explanation on any other ground.

The structure of Justice O'Connor's opinion quite clearly follows this line of reasoning. O'Connor begins by declaring that the "central purpose" of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race."⁷³ She then notes that, when "the racial classification appears on the face of the statute," "[n]o inquiry into legislative purpose is necessary"⁷⁴ — that is, strict scrutiny automatically applies.⁷⁵ After rehearsing the justifications for strict scrutiny, O'Connor continues: "These principles apply not only to legislation that contains explicit racial distinctions, but also to those 'rare' statutes that, although race-neutral, are, on their face, 'unexplainable on grounds other than race.'"⁷⁶

The plaintiffs in *Shaw*, of course, contended that the districting in North Carolina was one of those "rare" situations in which the policy could be explained only in racial terms, so strict scrutiny applied. The majority of the Court agreed. The "bizarre" shape of the North Carolina district allowed the Court to forgo the search for race-dependent intent normally required in a case of a purportedly neutral classification.⁷⁷

70. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

71. 426 U.S. 229, 241-42 (1976). Note that *Washington v. Davis* is typically misread as requiring a showing of "invidious intent"; in fact, it is the demonstration of a race-dependent decision — invidious or not — that triggers strict scrutiny. Any such decision based on invidious intent clearly would violate the Fourteenth Amendment, but so might noninvidious race-based policies. See, e.g., *Croson*, 488 U.S. at 469.

72. 429 U.S. 252, 266 (1977).

73. *Shaw*, 113 S. Ct. at 2824 (citing *Washington v. Davis*, 426 U.S. at 239).

74. 113 S. Ct. at 2824.

75. 113 S. Ct. at 2824 (citing *Croson*, 488 U.S. at 493).

76. 113 S. Ct. at 2825 (quoting *Arlington Heights*, 429 U.S. at 266).

77. See 113 S. Ct. at 2825. Because the Court held only that the plaintiffs' claim was justiciable under the strict scrutiny standard of review, it reached no final conclusion on whether the state's purported interest, including meeting the requirements of the Voting Rights Act, constituted a sufficiently compelling state interest to pass constitutional muster. 113 S. Ct. at 2832.

Arguably, districting plans that create "black" and "white" districts should always "short circuit" the search for intent because, to the extent that intent is taken to mean purposeful ac-

In this way, *Shaw* can be viewed as a replay of earlier electoral boundary cases. In these cases the Court was willing to presume the intentionality requirement of a constitutional claim from the visible effects of state conduct. The leading example is *Gomillion v. Lightfoot*,⁷⁸ in which the Court invalidated a Tuskegee, Alabama districting plan that excluded black voters from the city limits by drawing the city limits as "an uncouth twenty-eight-sided figure."⁷⁹ In *Gomillion*, as in *Shaw*, the Court applied strict scrutiny because the shape of the electoral district strongly suggested that the districting plan had relied upon an explicit racial classification.⁸⁰ Of course, under the "benign purposes" analysis applied in *UJO*, *Gomillion* and *Shaw* are quite different cases. The electoral boundary in *Gomillion* reflected an intent to fence black voters out of exercising political power in Tuskegee, while the district plan in *Shaw* reflected an intent to enhance minority representation in the North Carolina congressional delegation. However, after *Croson*, this distinction matters not: "'A racial classification, regardless of purported motivation,'" quotes O'Connor in *Shaw*, "'is presumptively invalid and can be upheld only upon an extraordinary justification.'" ⁸¹

If *Shaw* is no more than a run-of-the-mill equal protection case, then it answers the question it purports to leave open. The Court in *Shaw* stated:

It is unnecessary for us to decide whether or how a reapportionment plan that, on its face, can be explained in nonracial terms successfully could be challenged. Thus, we express no view as to whether "the intentional creation of majority-minority districts, without more" always

tions yielding a predictable result, there are few if any unintended consequences in the redistricting context. See 113 S. Ct. at 2824 (citing *Personnel Admr. v. Feeney*, 442 U.S. 256, 272 (1979)). This is confirmed by the history of Justice Powell's efforts to apply the intent standard from *Washington v. Davis*, 426 U.S. 229 (1976), to electoral gerrymandering claims. See *Karcher v. Daggett*, 462 U.S. 725, 784 (1983) (Powell, J., dissenting). The Court expressly rejected Powell's proposed intent standard in *Davis v. Bandemer*, 478 U.S. 109, 138-39 (1986). The Court is willing to stipulate the presence of intentionality in all governmental conduct in this arena and to search elsewhere for the definition of constitutional harm. The Court is unwilling to engage the same presumption of intentionality for the racial as opposed to partisan consequences in districting. Justice O'Connor's opinion in *Shaw* seems to suggest that there is a difference between being aware of the demographic makeup of a district drawn to reflect political or geographic boundaries and the intentional creation of such districts. 113 S. Ct. at 2826.

78. 364 U.S. 339 (1960).

79. 364 U.S. at 340.

80. The Court reached a similar result in *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982). In a challenge to a state referendum prohibiting the use of school busing, the Court allowed the busing issue to be so closely tied to racial integration as to turn the outcome of the referendum into a racial classification. Having identified the basis for using strict scrutiny, the Court had little difficulty in striking down the referendum results as not furthering a compelling state purpose.

81. 113 S. Ct. at 2825 (quoting *Personnel Admr. v. Feeney*, 442 U.S. 256, 272 (1979)).

gives rise to an equal protection claim.⁸²

Under the reading of *Shaw* proposed here, the answer would have to be that strict scrutiny analysis would apply not just to “bizarre” districts, but “all the way down.” If a plaintiff could successfully show that a compact district had been drawn for racial purposes — for example, the situation in *UJO* — the usual equal protection rules would apply: the plan would be declared unconstitutional unless the state could come forward with the extraordinary justifications called for by strict scrutiny.

The potential implications of this reading of *Shaw* for everyday race-conscious districting should be apparent. As the Court has recognized on several occasions, including in *Shaw* itself,⁸³ the process of redistricting and reapportionment is highly political, and the participants in the process are exquisitely aware of the likely consequences of their decisions. When sophisticated political actors draw a precinct line to include one block but not another, create a district through the reshuffling of precincts, or assign an additional legislative seat to one region rather than another, they act with the knowledge that someone stands to benefit from the decision and that someone stands to bear the cost. It is for this reason that the Court in *Davis v. Bandemer*,⁸⁴ the 1986 Indiana case that established that partisan gerrymandering may violate the Constitution, refused to adopt an intent standard for distinguishing unconstitutional gerrymandering from routine line drawing.⁸⁵

There is no escaping the fact that at some level state actors making districting decisions always “intend” to rely on politics or race in making their decisions. Redistricting is an area in which classifications of all kinds — most notably partisan, socioeconomic, racial, and ethnic — are the lifeblood of the process. No state actors in a politically charged redistricting fight could credibly claim that they did not take into account any demographic information concerning proposed redistricting alignments. Given that racially polarized voting patterns are well documented, race and ethnicity will invariably be crucial demographic variables in redistricting decisions. Moreover, the open political horsetrading involved in every redistricting battle leaves state actors vulnerable to the charge not only that they used racial classifications in drawing the lines, but more notably that they used such classifications expressly to reward one racial or ethnic group, based on

82. 113 S. Ct. at 2828 (quoting 113 S. Ct. at 2839 (White, J., dissenting)).

83. 113 S. Ct. at 2826.

84. 478 U.S. 109 (1986).

85. 478 U.S. at 138-41.

that group's race or ethnicity. A strict-scrutiny-all-the-way-down approach would strike a severe blow to the redistricting process precisely because it would be exceedingly difficult, given the prevalence of race as a factor in "ordinary" districting decisions, to articulate a coherent justification for *any* districting plan, let alone a plan that expressly relied on race as a contributing rationale.

This is not to say that strict scrutiny would necessarily condemn all race-consciously drawn districts. The Court could apply strict scrutiny but still validate run-of-the-mill districting plans if it could identify a new, rather easily established, compelling state interest for the use of race in state districting decisions. For instance, state actors could cite the "diversity" interest articulated by Justice Powell in *Bakke*.⁸⁶ Such an approach could distinguish exclusionary from inclusionary race-conscious districting in terms of the likely outcomes in legislative representation. This would shift the focus of inquiry to the necessity and the closeness of the fit between the state's permissible objectives and its choice of means. Under this view, the articulation of what could constitute a compelling state interest permits strict scrutiny to be something other than "strict in theory, fatal in fact."⁸⁷ We address this issue below.⁸⁸

C. *The Theory of "Excessive Reliance"*

The strict-scrutiny-all-the-way-down reading of *Shaw* is troubling not only because strict scrutiny threatens the invalidation of a large number of state districting decisions, but also because the Court in *Shaw* itself backed away from such a rigid analysis. If *Shaw* is a run-of-the-mill equal protection case, why would the Court pay so much attention to the "bizarre" shape of the North Carolina district, and why did the Court render the equivocal holding that plaintiffs had stated a cause of action, rather than simply striking down the districting plan? As the lower court's opinion records, the state "formally concede[d] that the state legislature deliberately created the [district] in a way to assure black-voter majorities."⁸⁹ That is, there can be no doubt that, on the record before the Court, the decision to create the challenged district was race dependent. If the Court were truly com-

86. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-14 (1977).

87. *Fullilove v. Klutznick*, 448 U.S. 448, 518-19 (1980). The expression originates in Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for the Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

88. See *infra* text accompanying notes 223-43.

89. *Shaw v. Barr*, 808 F. Supp. 461, 470 (E.D.N.C. 1992), *revd. sub nom. Shaw v. Reno*, 113 S. Ct. 2816 (1993).

mitted to strict-scrutiny-all-the-way-down, it needed only to note the presence of a race-based classification and apply strict scrutiny. The shape of the district might be relevant to the state's defense of its actions, but it should — under run-of-the-mill equal protection theory — be irrelevant to the discussion of whether or not the plaintiffs had stated a cause of action.

This is not, however, how the Court's opinion reads. The shape of the district seems quite clearly to lie at the core of the Court's judgment. The Court characterized the plaintiffs' central claim as follows: "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 purpose of voting, without regard to traditional districting principles and without sufficiently compelling justification."⁹⁰ One might understand this language as simply allowing the Court to conclude that an arguably neutral classification was in fact race based under the strict-scrutiny-all-the-way-down theory, but perhaps it is signaling something else. Perhaps there is something that categorically distinguishes an "excessive" use of race⁹¹ in districting decisions from the use of race as one element among many.

The idea that race may be a factor but not the only factor traces to Justice Powell's opinion in *Bakke*.⁹² It is also consistent with Justice O'Connor's repeated characterization in *Croson* of the challenged set-aside program as an "an unyielding racial quota," "a rigid rule erecting race as the sole criterion."⁹³ To many, however, the one factor versus rigid quota distinction has no satisfactory theoretical underpin-

90. 113 S. Ct. at 2824 (emphasis added). This emphasis on irregular shape appears throughout the opinion. For example, the Court states: "*UJO's* framework simply does not apply where, as here, a reapportionment plan is alleged to be *so irrational on its face* that it immediately offends principles of racial equality." 113 S. Ct. at 2829 (emphasis added). Furthermore, the Court states:

Today we hold only that appellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme *so irrational on its face* that it can be understood only as an effort to segregate voters into separate voting districts because of their race . . .

113 S. Ct. at 2832 (emphasis added).

91. Despite intimations in the Court's opinion to the contrary, race was not the only consideration in the drawing of the challenged district. Geography played some role, as did a desire to protect incumbents elsewhere in the State. See Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 489-91, 516-26 (1993).

92. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-19 (1978) (opinion of Powell, J.).

93. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499, 493 (1989); see also 488 U.S. at 493 ("The Richmond Plan denies certain citizens the opportunity to compete for a *fixed percentage* of public contracts *based solely* upon their race.") (emphasis added), 499 ("rigid racial quota"), 505 ("rigid racial preferences"). For an examination of the linguistic devices used in *Croson* and other cases, see generally PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 103-06 (1991).

ning. As has been frequently noted, to use race as a factor in any case between two otherwise equally qualified aspirants for a job or place in a university is, in effect, the use of race as the sole criterion, at least at the final margin.⁹⁴ Yet the distinction resonates with public intuitions and convictions; it is probably the case that the Harvard affirmative action plan — in which race functioned as a “plus factor” — is, as Justice Brennan suggests in his *Bakke* opinion, “more acceptable to the public” than the quota system adopted by the Davis medical school.⁹⁵ But why should this be? If it is the simple use of race that triggers strict scrutiny under current equal protection doctrine, should constitutional law distinguish between the Harvard and Davis affirmative action plans? An “excessive reliance” reading of *Shaw v. Reno* suggests that there ought to be a difference. The challenge, however, is to develop a plausible theory to account for the difference.

Such a theory might begin with the Court’s telling comment in *Shaw* that “we believe that reapportionment is one area in which appearances do matter.”⁹⁶ That is, a bizarrely shaped district bespeaks a willful manipulation of the districting system to force an electoral outcome upon a disinclined electorate. When the gerrymander has a visible racial component, the Court implicitly reasons, the districting decision flashes the message: “RACE, RACE, RACE.” A “natural”⁹⁷ compact district sends no such message, even if it has been de-

94. See Justice Brennan’s opinion in *Bakke*:

There is no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points to the admissions rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants as was done here.

438 U.S. at 378. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 223-39 (1978); Blasi, *supra* note 25. Justice White’s dissent in *Shaw* makes the point this way:

The consideration of race in “segregation” cases is no different than in other race-conscious districting; from the standpoint of the affected groups, moreover, the line-drawings all act in similar fashion. . . .

... Given two districts drawn on similar, race-based grounds, the one does not become more injurious than the other simply by virtue of being snake-like, at least so far as the Constitution is concerned and absent any evidence of differential racial impact.

113 S. Ct. at 2840-41 (White, J., dissenting).

95. 438 U.S. at 379.

96. 113 S. Ct. at 2827. “Appearance” is a recurring concern in the Court’s opinions these days. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2803-04 (1992) (reflecting concern about “institutional integrity” and *stare decisis*); *Georgia v. McCollum*, 112 S. Ct. 2348, 2353-54 (1992) (concerning the appearance of excluding blacks from juries and the legitimacy of criminal justice system); see also William P. Marshall, “We Know It When We See It”: *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986) (arguing that the Court’s Establishment Clause jurisprudence is the product of judicial concern with appearances).

97. The line between gerrymanders and permissible permutations among districts is extremely elusive. While some commentators have defined gerrymanders by their “arbitrary” or “unnatural” manner, see, e.g., Leroy Hardy, *Considering the Gerrymander*, 4 PEPP. L. REV. 245, 247 (1977), others reject the idea of verifiable “natural” districts. See MARK E. RUSH, *DOES*

fined to create a majority-minority district. Why might the *symbolic* aspect of appearance matter so much? The Court offers several reasons:

[1] A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.

[2] It reinforces the perception that members of the same racial group — regardless of their age, education, economic status, or the community in which they live — think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. . . .

[3] By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

[4] The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.⁹⁸

As an initial matter, it is worth noting the extravagance of some of these claims. Labeling the North Carolina districting as “political apartheid” is a disturbing exaggeration that hinders the Court’s analysis in several ways.⁹⁹ First, the pejorative characterization equates the attempt to ensure representation of underrepresented minority groups with attempts to deny racially dominated groups a role in democratic governance. More importantly, it paints a false picture of the actual districts drawn by North Carolina. Given the strong images evoked by the Court’s language, one might expect districts that are overwhelmingly white or African American, as we have come to expect with “segregated” schools. In fact, half of the voting districts established under the challenged plan came close to the racial makeup of the state’s population, which was about seventy-six percent white and twenty-one percent African American.¹⁰⁰ In the two majority-minority districts, African Americans constituted fifty-seven and fifty-six percent of the overall population and slightly lower percentages of the

DISTRICTING MAKE A DIFFERENCE? 3 (1993). See generally Pildes & Niemi, *supra* note 91, at 537-39 (describing the various types of districting arguments).

98. 113 S. Ct. at 2827 (citations omitted; numbering added).

99. See 113 S. Ct. at 2840 (White, J., dissenting) (noting “the emotions stirred by words such as ‘segregation’ and ‘political apartheid’”).

100. The populations of North Carolina’s districts are as follows:

voting-age population. In other districts, the minority population fell below ten percent, the predictable outcome of creating districts in which African Americans are a majority. If these data described residential communities, we would consider them remarkably integrated by usual American standards.¹⁰¹ Thus, while some of the districts were undoubtedly drawn in order to guarantee that African Americans would constitute a majority, it is difficult to justify the hyperbolic labels the Court applied.

We are also troubled by the casual empirical assumptions of the Court's analysis. What is the evidence that race-conscious districting exacerbates racial bloc voting, or that it sends a message to an elected representative that she need only represent members of her group?¹⁰² There is only rudimentary evidence of the relative quality of representation and responsiveness in racially drawn districts,¹⁰³ none of which is referred to by the Court, and none of which supports the categorical assertion that representation from such districts is fundamentally different from that afforded other constituent groups who form a majority in a congressional district. The Court's description of democratic legitimacy also seems rather thin. It is certainly arguable that democratic processes are enhanced rather than degraded when previously

District	% White	% African American
1	41.61	57.26
2	76.23	21.94
3	76.65	21.48
4	77.19	20.13
5	83.85	15.17
6	91.32	7.48
7	71.48	7.27
8	72.85	23.25
9	89.14	8.93
10	93.69	5.46
11	90.89	7.20
12	41.80	56.63

State Appellees' Brief at 21a-24a, *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (No. 92-357).

101. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* (1993) on the extent of residential segregation.

102. It seems at least as plausible that a black representative who responds only to the needs of a black constituency in a district in which blacks constitute a majority of the voters might be challenged successfully by a black candidate who is able to put together a cross-racial coalition. A good example may be found in the defeat of Gus Savage by Mel Reynolds in a south side of Chicago congressional district. See Robert Davis, *More History for Congress*, CHI. TRIB., Nov. 4, 1992, (Chicagoland), at 1 (reporting significant white support for Reynolds as a result of Savage's alleged antisemitism).

103. CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS* 74-98 (1993); see also Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEXAS L. REV. 1479 (1993) (discussing the history of the Voting Rights Act in relation to Latinos). But see Randall L. Kennedy, *Blacks in Congress: Carol Swain's Critique*, in 2 RECONSTRUCTION, vol. 2, at 34 (1993) (criticizing the paucity of support for Swain's thesis).

excluded groups are able to elect representatives of their choice, even if those representatives primarily seek to further the interests of that constituency.¹⁰⁴ Indeed, claiming that representatives should look primarily to interests beyond their district calls into question the entire edifice of geographically based districting.

If the Court's comments about apartheid and democratic theory seem overstated and undersubstantiated, there is another version of the "appearance" claim that might support a distinction between using race to create "bizarrely shaped" districts and using race as a factor in the drawing of more "normally" shaped districts. Underlying the Court's insistence on strict scrutiny for racial classifications is the belief that such lines are inherently divisive, calling attention to differences that have poisoned American society in the past and that threaten to poison American society in the future. In *Croson*, Justice O'Connor spoke of "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity."¹⁰⁵ The problem in both *Croson* and *Shaw* is the ease with which decisionmakers resort to race in creating important public policies.¹⁰⁶ For O'Connor, and a majority of the Court in *Shaw* and *Croson*, protection against "a politics of racial hostility" demands that classifications based on race be "strictly reserved for remedial settings."¹⁰⁷ In *Shaw*, O'Connor also quotes the powerful objection to race-based districting articulated by Justice Douglas in his dissent in *Wright v. Rockefeller*:¹⁰⁸

When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan.¹⁰⁹

The danger of "balkanization" is more than a metaphor in the world of electoral district line drawing.¹¹⁰

It is here that one may begin to make some sense of the Court's

104. See 113 S. Ct. at 2849 n.9 (Souter, J., dissenting) ("As for representative democracy, I have difficulty seeing how it is threatened (indeed why it is not, rather, enhanced) by districts that are not even alleged to dilute anyone's vote.").

105. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989).

106. Cf. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1807 (1989) ("I simply do not want race-conscious decisionmaking to be naturalized into our general pattern of academic evaluation. I do not want race-conscious decisionmaking to lose its status as a deviant mode of judging people or the work they produce.").

107. 488 U.S. at 493, cited in *Shaw*, 113 S. Ct. at 2831.

108. 376 U.S. 52 (1964).

109. *Shaw*, 113 S. Ct. at 2827 (quoting *Wright*, 376 U.S. at 67).

110. See Clint Bolick, *Clinton's Quota Queens*, WALL ST. J., Apr. 30, 1993, at A12. But see T. Alexander Aleinikoff & Richard H. Pildes, *In Defense of Lani Guinier*, WALL ST. J., May 13, 1993, at A15; Randall L. Kennedy, *Lani Guinier's Constitution*, AM. PROSPECT, Fall 1993, at 36.

claim that reapportionment is one area in which "appearances do matter."¹¹¹ Peculiarly shaped districts that can only be described on the basis of race underscore the deep racial divisions that American society has yet to overcome. They tell us the unfortunate news that different races need and want representatives of "their own kind." Thus the Court repeatedly mentions the "message" and "signal" that such districts send.¹¹² Race-as-a-factor districts of a more compact nature are less likely to send these messages. Rather, they are likely to be viewed as primarily dependent on neutral, nonracial facts, such as geographical and political boundaries. To be sure, a racial group may be disproportionately present in compact districts, but this can be seen as the result of residential housing patterns,¹¹³ not an intent to draw a line in order to reaffirm racial differences. Thus, few Americans are likely to be surprised that congressional districts in Harlem or Chicago's south side have largely minority constituencies. However, if a district were created in Iowa by linking together African-American communities in Iowa's major cities, the "racial message" would be clear, and, from the Court's perspective, it would be a message that only heightens racial division in the nation.

The Court's theory is ultimately that classifications that can only be explained on the basis of race are just as divisive as those explicitly based on race, and concerns about such divisiveness link *Shaw* with the opinions that form the majority in *Croson*.¹¹⁴ But there is another, perhaps more important strand in the Court's *Shaw* opinion that

111. 113 S. Ct. at 2827.

112. *E.g.*, 113 S. Ct. at 2827 ("The message that such districting sends to elected representatives is equally pernicious."), 2828 ("[Race-conscious districting] reinforces racial stereotypes . . .").

113. See generally MASSEY & DENTON, *supra* note 101.

114. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."); 488 U.S. at 520 (Kennedy, J., concurring in part) (characterizing set-aside program as "a preference which will cause the same corrosive animosities that the Constitution forbids in the whole sphere of government and that our national policy condemns in the rest of society as well");

The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency — fatal to a Nation such as ours — to classify and judge men and women on the basis of their country of origin or the color of their skin.

488 U.S. at 520 (Scalia, J., concurring in judgment);

[T]hose who believe that racial preferences can help to 'even the score' display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures in our society, be the source of more injustice still. . . . Racial preferences appear to 'even the score' (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races

488 U.S. at 527-28 (Scalia, J., concurring in judgment).

traces to the dissenting opinions in *Metro Broadcasting*.¹¹⁵ The claim — which we term the *antiessentialism factor* — is that attribution of political or cultural views to persons based simply on their race denies persons recognition and treatment based upon their individual characteristics. According to the Court in *Shaw*, racial gerrymandering “reinforces the perception that members of the same racial group — regardless of their age, education, economic status, or the community in which they live — think alike, share the same political interests, and will prefer the same candidates at the polls.”¹¹⁶ To fashion public programs on the belief that all African Americans or Latinos or women have identical preferences and outlooks is to make a factual and moral error; it is to deny a basic, individualistic premise of the American creed.¹¹⁷ The injury runs not only to the “stereotyped” voters, but also to the democratic process: representatives elected from such districts “are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.”¹¹⁸ On this account, “bizarre” voting districts tell an “essentializing” story. The official line drawers roam around the state identifying members of protected groups in an effort to gather up enough voters of the appropriate race to form an electoral majority.

Race-as-a-factor districting strategies may be thought to be less essentializing. In attempting to create compact districts, state officials start with geographical and political considerations. Race may play a role at the margin. Indeed, race may well be linked to geography, political affiliation, and the existence of “communities of interest,” elements that are traditionally consulted to aid in districting decisions. But when race is only one element, it may be escaped: citizens may vote with their feet, choosing a district in a different area. When race is the sole factor, however, exit may not be so easy. As the challenged North Carolina district shows, African-American voters may be

115. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (“Social scientists may debate how peoples’ thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think.”); 497 U.S. at 636 (Kennedy, J., dissenting) (“Although the majority disclaims it, the FCC policy seems based on the demeaning notion that members of the defined racial groups ascribe to certain ‘minority views’ that must be different from those of other citizens.”).

116. 113 S. Ct. at 2827.

117. Unfortunately, there is substantial evidence to suggest that the assumption of racial cohesiveness is not an artifact of the state’s political imagination but reflects a persistent and troubling reality of American life. See Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1854-56 (1992) (describing prevalence of racial voting practices).

118. 113 S. Ct. at 2827.

tracked down no matter where they live in the state; race, not place of residence, is destiny.

The most rigid forms of antiessentialism collapse into the view, which dates at least to Justice Harlan's dissent in *Plessy v. Ferguson*,¹¹⁹ that the Constitution is "color-blind," and that *any* consideration of race is invidious. Justice O'Connor's antiessentialism claim is more limited and ultimately rests on an understanding of proper representation as geopolitical. "A reapportionment statute," reports Justice O'Connor, "typically does not classify persons at all; it classifies tracts of land, or addresses."¹²⁰ At times, geopolitical districting may produce districts of predominantly one race.¹²¹ Indeed, in our world of dramatic residential segregation, the existence of compact "black" districts may tend to reinforce the view that "neutral" — that is, nonracial — factors were used. It is only the "bizarre" district that so starkly points to the ascriptive use of race.

Of course, the "common knowledge" that districts largely track geographical and political boundaries is frequently quite wrong. For example, the Court's quoted witticism about the North Carolina district — "[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district'"¹²² — was coined in Texas in the 1970s,¹²³ not in North Carolina in 1993. The quip was used not to describe a district drawn to ensure election of an African-American representative — no African-American member of Congress from Texas had yet been elected in this century — but rather to lampoon an oddly configured district created to protect incumbents in adjacent districts after the 1970 census. Moreover, even the foundation blocks of the Union, the states, reveal odd configurations which would violate the "traditional" districting patterns. The odd shapes of Maryland and West Virginia, and the peculiar inclusion of the Upper Peninsula in Michigan are notable examples.

Nonetheless, the fact that deviations from geopolitical compact-

119. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

120. 113 S. Ct. at 2826. This view is strikingly at odds with Chief Justice Warren's admonition that "[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

121. See 113 S. Ct. at 2826:

[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions.

122. 113 S. Ct. at 2820 (quoting Joan Biskupic, *N.C. Case To Pose Test of Racial Redistricting*, WASH. POST, Apr. 20, 1993, at A4 (quoting State Rep. Mickey Michaux)).

123. See Adam Clymer, *Congressional Districts, Custom Made*, N.Y. TIMES, Aug. 19, 1991, § 4, at 4.

ness are common has not seemed to alter the Court's intuitions about what an electoral district "ought to look like." It is this sense of what constitutes a "proper" district that adds a final element to the distinction between "excessive reliance" and "race-as-a-factor" districting. "Naturally" drawn reapportionment plans may well yield majority-minority districts, if minority communities are large and dense enough, but a "bizarre" district crafted solely to yield a black representative is seen as unfairly enhancing black voting power. The claim here parallels the frequent charge that affirmative action plans unfairly manipulate a "neutral" set of standards to provide advantages to racial minorities. From this perspective, it is no answer to say that, overall, whites control a proportionate share of the electoral districts.¹²⁴ When the baseline is "neutral" districting, the measure of dilution from the geopolitical perspective is not proportionality, but rather what a compact reapportionment plan would yield. If blacks are not residentially concentrated in such a way as to guarantee majority status in a district, so be it.¹²⁵ When members of one political party are scattered throughout a state so that compact districting produces a disproportionate share of seats for the opposing party, the Court would see no problem unless the districts were drawn "in a manner that will consistently degrade the electoral power of the minority party."¹²⁶ The same principles should apply, this argument would run, for racial minorities. In this way, compact race-as-a-factor districting may be viewed as simply shifting predetermined grids, corresponding to "natural" districts, over existing population distributions. If decisionmakers move the grids up or down a bit, or left or right on the map, even if they do so based on their awareness of the race of the voters, the manipulation is quite different from distorting the "natural" shape of electoral districts to capture minority communities dispersed across the state.

To describe these analytical bases for the "excessive reliance" model is not to defend the implicit descriptive and normative ele-

124. As the dissenting Justices asserted in *Shaw*. See 113 S. Ct. at 2837-38 (White, J., dissenting), 2843 (Stevens, J. and Blackmun, J., dissenting); see also *United Jewish Org. v. Carey*, 430 U.S. 144, 165 (1977).

125. Note the parallel to the factors outlined in *Thornburg v. Gingles*, 478 U.S. 30 (1986), for proving vote dilution in multimember districts:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.
478 U.S. at 50-51 (emphasis added) (citations and footnotes omitted).

126. See *Davis v. Bandemer*, 478 U.S. 109, 132 (1986).

ments. We have real difficulty with the concept of a "naturally" shaped district. We are also troubled that the theory condemns "race-conscious" attempts to craft minority districts from scattered minority communities, yet complacently relies upon massive residential discrimination to justify compact majority-minority districts. Indeed, there is some evidence that the challenged district in North Carolina corresponded in part to the growth of black communities along land adjacent to the principal railroad line, and that the district constituted the principal urban district in North Carolina.¹²⁷ And there is something inherently unsettling about a constitutional principle that allows race to be a key factor in drawing minority-dominated districts so long as the result does not advertise the ingredients of the process. Such distinctions may respond as much to the aristocratic squeamishness of the Court as to sound constitutional principle. We address these and additional questions in Part III. Nevertheless, we do believe that we have located in the Court's opinion and in its general civil rights jurisprudence a plausible basis for the "excessive reliance" interpretation of *Shaw*.

III. CRITIQUE OF THE "EXCESSIVE RELIANCE" APPROACH

For the Court to have meaningful constitutional oversight of the political process, it must fashion rules that do more than simply resolve fact-specific controversies. The Court must also craft a rationale for its decisions that is both doctrinally coherent and instructive of future conduct. By merely stating a preference for nonbizarrely contoured districts and an aversion to excessive reliance on race or ethnicity, *Shaw* fails on this score unless state actors can put its commands into operation. We therefore turn now to an assessment of how well *Shaw* is likely to work at both a practical and a theoretical level. The critical inquiries concern what sort of concrete meaning one can give to the exhortation not to go "too far" in relying upon race in redistricting, and whether the Court's implicit analytical defense of the "too far" theory undermines the legitimacy of both race-conscious compact districting and districting in general.

A. *How Will We Know It When We See It?*

A curious misperception pervades this opinion so concerned with appearances. The Court declares that a cause of action exists to chal-

127. Interview with Professor Rudolph Wilson, Department of Political Science, Norfolk State University (Oct. 30, 1993) (regarding preliminary results of study of black population trends in North Carolina).

lenge a district "so extremely irregular on its face that it rationally can be viewed *only as an effort to segregate the races.*"¹²⁸ But of course no district, no matter how bizarrely drawn, can be viewed *on its face* as an attempt to separate voters on the basis of race. As Professors Richard Pildes and Richard Niemi show in their contribution to this colloquium, oddly shaped districts may further all sorts of interests — be they defined by geography, interest groups, partisanship, or incumbency.¹²⁹ A district is no more than lines on a map; unless the map shows demographic data, there is no basis for inferring anything about the racial makeup of the constituency. Thus, to be operational, the *Shaw* standard requires the development of a factual record — a legend for the map — that "interprets" the oddly shaped district. The need for further data does not mean that *Shaw* is for that reason alone unworkable or incoherent, just that it is more complex than the Court leads us to believe.¹³⁰ It also means that, even as the Court edges toward a color-blind understanding of the Constitution, it is unaware of its own race-conscious assumption that lines on a map can alone demonstrate an intent to segregate voters based on race.¹³¹ While North Carolina may have been willing to stipulate the exclusive racial purpose behind the creation of the I-85 district,¹³² it is unlikely in the aftermath of *Shaw* that district courts will find quite so streamlined a factual basis for discerning the excessive reliance on race in a complex redistricting plan.

Second, the success of the Court's opinion in *Shaw* will depend on

128. 113 S. Ct. at 2824 (emphasis added).

129. Pildes & Niemi, *supra* note 91, at 576-84.

130. Interestingly, the Court does not explore the possibility of other explanations for the irregularly shaped district. An important element of its equal protection jurisprudence is its unwillingness to assume that disparate impact evidences bad intent. In situations in which the reasonable observer might believe that further evidence is unnecessary — for example, the virtual absence of minority contractors in Richmond, Virginia — the Court has entertained the possibility that some noninvidious reason accounts for the statistical disparity. In *Croson*, the Court made the highly doubtful suggestion that African-American "career choices" account for the data. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 503 (1989). See also Justice O'Connor's opinion in *Thornburg v. Gingles*, 478 U.S. 30, 100-02 (1986), regarding causes other than race for voting patterns.

131. *Cf. Croson*, 488 U.S. at 495-96, in which the Court takes notice of the fact that a majority of the city council that adopted Richmond's set-aside program was African American. See Aleinikoff, *supra* note 44, at 1102-07 (discussing this aspect of *Croson*).

132. Even here it must be noted that the state may very well have wished not to confess to the partisan considerations that may have forced the creation of the I-85 district. The partisan desire to protect incumbents in the southeastern portion of the state was certainly a proximate cause of the creation of a contrived black district in the north-central region. The Department of Justice objected to this aspect of the redistricting in *Shaw* on the grounds that a majority-minority district in fact could have been created in the southeastern part of the state. 113 S. Ct. at 2820; see also 113 S. Ct. at 2832 (suggesting that a better configured black district in the southeastern part of the state might be constitutionally acceptable).

the ability of lower courts to give operational meaning to the concept of an excessive reliance on race in redistricting. Unfortunately, the fleshing out of this standard may prove quite difficult — and far more difficult than the Court's earlier "some but not too much" incarnations in academic settings or in employment, where there generally exists some neutral baseline against which the Court can measure the extent to which preferences have been utilized and the extent to which those preferences may have disrupted the settled expectations of the dispreferred. Courts can gauge academic preferences against standardized performance indicators, such as tests or grades, that give some indication of the extent to which race has been used as a "plus" factor. Similarly, in employment prior measures of job performance or selection exams can be used to demarcate the extent of the racial preference. Under the balancing approach developed in employment discrimination cases, therefore, courts can look to such verifiable criteria as labor-market demographics to gauge the extent of exclusion on the one hand, and performance indicators or seniority expectations to measure the amount of the preference on the other.¹³³ These measures also distinguish, at least in theory, the use of race as "a" factor from race as "the" dispositive factor. Consequently, in these contexts it is possible to accept race consciousness in the broadly remedial sense,¹³⁴ but to weigh carefully any remedial preference against the costs imposed on the dispreferred.¹³⁵

It may prove difficult to rest constitutional doctrine on the extent of departures from neutral baselines in the redistricting context. Unlike employment decisions or academic admissions, redistricting does not readily admit a neutral baseline against which "bizarrely" shaped districts can be measured. Even within the confines of "one person, one vote," the number of redistricting configurations in a large state such as California borders on the infinite. If *Shaw* is to have meaning as a working definition of permissible boundaries in redistricting, its ambiguous commands must be given some operational content.

A stricture from the Supreme Court not to do anything in excess does little to guide state redistricting authorities in the delicate negotiations that inevitably surround decennial reapportionment. Lower courts interpreting *Shaw* may conclude that the essential problems of districting are intractable, and that the Court's reluctance to confront these problems is a recognition that no judicially manageable solution

133. See *Johnson v. Transportation Agency*, 480 U.S. 616, 631-32 (1987); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986).

134. See Aleinikoff, *supra* note 44, at 1077.

135. See Issacharoff, *supra* note 29, at 208-14.

is likely to be found. If so, then the available alternative is not to cure the inherent problems of districting, but rather to constrain the districting process to alleviate some of the worst manifestations of the manipulation of redistricting to accomplish race-specific goals. We turn now to three possible mechanisms, one judicial and two within the ambit of the political process, that could bring some order to the ambiguity of *Shaw*. While none is entirely satisfactory, these mechanisms suggest ways to reorder the redistricting process in compliance with *Shaw*, to constrain the "excessive" use of race as a factor.

1. *Objective Standards of Compactness*

One possible resolution of the ambiguities in *Shaw* is to reify the concept of compactness by imposing absolute constraints on the shape districts may take. These constraints could either be based on the actual configuration of the district lines, or on the extent to which geographically proximate blocks of individuals are fenced out of a district.¹³⁶ For years, groups such as Common Cause have tried to devise compactness formulae to limit the amount of discretion available to state redistricting authorities. One such formula prohibits redistricting plans in which the aggregate length of the boundaries of all districts exceeds by more than five percent the aggregate length of all districts under any alternative plan.¹³⁷ Such strategies would regiment the redistricting process by creating a presumption of unconstitutionality whenever there is a significant deviation from maximum compactness.

This solution would resemble the use of legal presumptions that has developed under the one-person-one-vote rule following *Baker v. Carr*¹³⁸ and *Reynolds v. Sanders*.¹³⁹ It is important to recall that the Court in *Baker* announced the justiciability of claims of unconstitutional malapportionment without indicating what would be the standard by which such claims would be measured.¹⁴⁰ Two years later in

136. See Pildes & Niemi, *supra* note 91, at 553-57; Daniel D. Polsby & Robert O. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652, 663 (1993).

137. Consider, for example, the proposal interposed by Common Cause in California that "[i]n no case shall the aggregate length of the boundaries of all districts exceed by more than five percent the shortest possible aggregate length of all the districts under any other plan" BRUCE ADAMS, TOWARD A SYSTEM OF "FAIR AND EFFECTIVE REPRESENTATION" 54 (1977); see also Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POLY. REV. 301, 339-51 (1991) (reviewing mathematical standards for demonstrating departures from compactness requirements).

138. 369 U.S. 186 (1962).

139. 377 U.S. 533 (1964).

140. 369 U.S. at 237.

Reynolds and its companion case, *Wesberry v. Sims*,¹⁴¹ the Court announced the one-person-one-vote benchmark for constitutional claims but carefully stopped short of making it an absolute requirement for all redistricting.¹⁴² Instead, the Court intended the equipopulation rule only to impose an external discipline on state redistricting authorities, forcing them to rationalize the reapportionment process. The Court's concern was that "[i]ndiscriminate districting . . . may be little more than an open invitation to partisan gerrymandering."¹⁴³ Within a short period of time, however, the equipopulation rule created a presumption of invalidity in any congressional redistricting challenge in which population disparities between districts had not been driven down to as near zero as practicable.¹⁴⁴

If a standard measure of compactness could be fashioned, and if courts could identify straightforward compactness measures that are comparable to the one-person-one-vote standard, then *Shaw* could lead to the development of a similar legal presumption. Just as one-person-one-vote became the simple test to judge the complex equation of representational fairness, so too could bizarre districting be defined by deviation from a model of compactness. Under such a scenario, failure to design compact districts would provide prima facie evidence of the impermissibility of a challenged redistricting plan. *Shaw* would then be the *Baker* of compactness standards, with its own *Reynolds* presumably to follow.

This scenario is not without its complications. In the first instance, it will be quite difficult to define the difference between "compact" and unconstitutionally diffuse districts. As Pildes and Niemi show, it is not as if there are only two categories of districts: compact and bizarre.¹⁴⁵ American districting practices run a full spectrum, and our guess is that most lay observers would find "bizarreness" in the shape of most congressional districts of the nation.¹⁴⁶ Therefore, the Court's

141. 376 U.S. 1 (1964).

142. The Court instead stated:

So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.

377 U.S. at 579.

143. 377 U.S. at 578-79. For a fuller discussion of this theme, see Issacharoff, *supra* note 69, at 1647-55.

144. See *Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983); *Kirkpatrick v. Preisler*, 394 U.S. 526, 533 (1969).

145. Pildes & Niemi, *supra* note 91, at 540-63.

146. There would have to be something analogous to what Professor Bernard Grofman in a different context referred to as the "interocular test." Joint Appendix at JA-129, *Thornburg v. Gingles*, 478 U.S. 30 (1986) (No. 83-1968) (testimony of Bernard N. Grofman in an excerpt from

desire to ground the legitimacy of redistricting practices in the appearance of propriety cannot bear fruit. A compactness standard is likely to be far too overinclusive to capture only those districts whose odd configurations are a product of racial considerations, and not also those districts that are the product of considerations that the Court has found constitutionally tolerable, including the protection of incumbents¹⁴⁷ or the preexisting distribution of power in a state.¹⁴⁸

The major problem with this solution, however, is that the Court in *Shaw* insisted that it was not seeking to make compactness an independent constitutional requirement. There is no evidence either in *Shaw*, or in the few other Court examinations of actual districting configurations,¹⁴⁹ that the Court wished to elevate compactness above all other districting criteria.¹⁵⁰ Moreover, to the extent that the Court's underlying concern in the redistricting context remains the elusive concept of "political fairness" inherited from *Reynolds v. Sims*,¹⁵¹ an overriding concern with compactness provides no independent normative command. We are unaware of any comparable example of presumptions of unconstitutionality being created exclusively by a departure from a norm that has no independent constitutional force.¹⁵²

If *Shaw's* "too far" theory cannot be applied to require compactness, there is a strong risk that *Shaw* will be nothing more than an invitation to ad hoc judicial review of redistricting decisions.¹⁵³ Ab-

the trial transcript) [hereinafter Joint Appendix]; see also Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1096 n.90 (1991). According to Grofman, statistics indicating polarized voting practices are not sufficiently reliable unless they "jump[] up and hit you between the eyes." See Joint Appendix, *supra*, at JA-129.

147. *Karcher*, 462 U.S. at 740 (citing incumbency protection as a potential reason for a departure from one person, one vote).

148. *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) (upholding oddly configured districting of Connecticut as a permissible attempt to divide the state between Democrats and Republicans); cf. *Davis v. Bandemer*, 478 U.S. 109, 144-45 (1986) (O'Connor, J., concurring in judgment) (positing that state may have a legitimate interest in preserving the stability of the two-party system).

149. See, e.g., *Gaffney*, 412 U.S. at 735.

150. Cf. *Pope v. Blue*, 809 F. Supp. 392, 398 (W.D.N.C.), *aff'd*, 113 S. Ct. 30 (1992) (holding that compactness is not required in a *Bandemer* challenge to the same North Carolina districts contested in *Shaw*).

151. 377 U.S. 533 (1964).

152. In fact, Justice O'Connor makes an analogous point in criticizing the creation of a political gerrymandering cause of action where the Court tried to avoid identifying the triggering mechanism for the new legal claim: "Absent any such [constitutional] norm, the inquiry the plurality proposes would be so standardless as to make the adjudication of political gerrymandering claims impossible." *Davis v. Bandemer*, 478 U.S. 109, 157 (1986) (O'Connor, J., concurring).

153. See Karlan, *supra* note 8, at 1733-37 (describing ad hoc responses to the Voting Rights

sent explicit guidance from the Supreme Court on what constitutes an impermissible use of race in state districting decisions, each decade will inaugurate a new impressionistic course of litigation, presumably following the developmental structure of the animal kingdom, over the proper shape of districts. Under an uncertain standard, snakelike districts would clearly fail, but "bug-splats" might stay on the margin,¹⁵⁴ and even amoeboid¹⁵⁵ or octopus-shaped districts may survive. There is good reason for the Court in *Shaw* sheepishly to disavow any analogy to the embarrassing area of failed judicial line drawing in pornography cases — the "I know it when I see it" definition of actual, as opposed to metaphorical, pornography.¹⁵⁶ Yet, without a clear baseline definition of what constitutes a "natural" or "compact" district, the "too far" theory may be just such a murky and unworkable standard.

2. Administrative Redistricting

A second solution might come from the state actors against whom *Shaw* has been directed. In this regard, *Shaw* and its appeal to "traditional districting principles" might propel states to change the process through which they arrive at districting decisions and to redistrict at some remove from the immediate demands of the political process. In effect, the prospect of liability under *Shaw* might compel states to abandon the most traditional districting practice of all — the use of a process that is rife with political compromise. The new redistricting process after *Shaw* could take the form of either independent redistricting commissions¹⁵⁷ or the nascent technology of computer-automated redistricting.¹⁵⁸ In either case, states could capitalize on the Court's apparent discomfort in *Shaw* with the *excessive* use of race in creating the I-85 district. If race or some proxy for ethnically defined communities could be one of the factors utilized by a redistricting au-

Act and redistricting); Issacharoff, *supra* note 69, at 1671 (describing ad hoc quality of adjudication under *Davis v. Bandemer* review of partisan gerrymandering).

154. For some unexplained reason the Supreme Court in *Shaw* left untouched the other majority-black district in North Carolina that had been alternatively described as a "Rorschach ink-blot test" and a "bug splattered on a windshield." 113 S. Ct. at 2820.

155. See Grofman, *supra* note 7, at 1257 (describing what he sees as a troubling black congressional district in Dallas as an "amoeba").

156. 113 S. Ct. at 2827 (alluding to Stewart's concurrence in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)).

157. Two of the leading political scientists in this area have referred to this as "the sustained international trend toward keeping incumbent legislators out of the redistricting process and relying more on neutral commissions and stricter formal criteria such as population equality." DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING 124 (1992).

158. See Issacharoff, *supra* note 69, at 1696-702; Michelle H. Browdy, Note, *Computer Models and Post-Bandemer Redistricting*, 99 YALE L.J. 1379, 1384-89 (1990).

thority, as in states such as Hawaii¹⁵⁹ and Montana¹⁶⁰ that assign redistricting to independent bodies, then these independent bodies could give preferences to minority representation without running afoul of *Shaw*. It is unlikely that such independent redistricting bodies would create a district quite so convoluted as that in North Carolina, but that may not be a significant blow to minority representation. Recall that a major impetus behind the creation of the I-85 district was the desire to protect *white* incumbents in other parts of the state, an objective that would likely diminish in importance if redistricting were to be removed from partisan hands.

As the amount of litigation over the decennial reapportionment process has increased, there has developed a corresponding disenchantment with the cost and delay involved in the process of drawing district lines. A handful of states have abandoned the traditional partisan control of redistricting and moved in the direction of administrative redistricting. It is striking that, of those states that redistricted at a remove from the political process in the 1980s round of reapportionment, not one found itself challenged in court over its ultimate district lines.¹⁶¹ Most telling perhaps is the example of New Jersey, which handled its state legislative redistricting administratively through a blue-ribbon commission, and its congressional redistricting through a nasty partisan battle in the state legislature. Although the legislative redistricting effort went unchallenged, the Supreme Court

159. Under Hawaii's redistricting statute, permissible congressional redistricting criteria include:

- (1) No district shall be drawn so as to unduly favor a person or political faction.
- (2) Except in the case of districts encompassing more than one island, districts shall be contiguous.
- (3) Insofar as practicable, districts shall be compact.
- (4) Where possible, district lines shall follow permanent and easily recognized features such as streets, streams, and clear geographical features, and when practicable, shall coincide with census tract boundaries.
- (5) Where practicable, state legislative districts shall be wholly included within congressional districts.
- (6) Where practicable, submergence of an area in a larger district wherein substantially different socioeconomic interests predominate shall be avoided.

HAW. REV. STAT. § 25-2 (1988).

160. Montana provides for a commission comprised of five citizens, "none of whom may be public officials." MONT. CONST. art. V, § 14.

The majority and minority leaders of each house shall each designate one commissioner. . . .

[T]he four commissioners shall select the fifth member The commission shall submit its plan . . . to the legislature . . . [which] shall return the plan . . . with its recommendations. . . . [T]he commission shall file its final plan . . . and it shall become law.

MONT. CONST. art. V, § 14. The commission is allowed to review five criteria in reapportioning the state: governmental boundaries, geographic boundaries, communities of interest, consideration of existing district boundaries, and an attempt to stay within a five percent, plus or minus, deviation from the ideal district population. *McBride v. Mahoney*, 573 F. Supp. 913, 915 (D. Mont. 1983).

161. See Issacharoff, *supra* note 69, at 1690, for statistics underlying this claim.

ultimately struck down the congressional districts in *Karcher v. Daggett*.¹⁶²

Any solution that depends on established political machines yielding huge sources of partisan power is inherently problematic. Nonetheless, both the extent and cost of litigation surrounding redistricting has already induced some states to adopt nonpartisan reapportionment. To the extent that *Shaw* adds one more irresolute element to the redistricting wars, the Court's ambiguous commands may lead more states in this direction.¹⁶³ Even so, the problem remains that politicians will be extremely reluctant to turn the redistricting process over to experts, or that expert panels may themselves succumb to the political influences and racial gerrymandering that inspired the Court's ire in *Shaw*.¹⁶⁴

3. *Nondistricted Elections*

Another possibility is that *Shaw* could bring renewed attention to nondistricted concepts of representation, both as remedial tools in voting-rights litigation and as a potentially more substantively fair mechanism for running elections. Advocates of nondistricted representation begin with the insight that traditional districting necessarily constricts the range of permissible electoral alliances based on the inescapable criterion of geographic proximity. Nondistricted elections, on the other hand, allow individuals to aggregate themselves according to interests that are of moment to them, be those interests territorially centered or rooted in some ideological stance. This is an advantage of the most common form of nondistricted representation: at-large elections. Such electoral systems, by reducing the role of the geographic component of elections, help avoid the bloodletting associated with the drawing of subdistrict lines. But the disadvantage of at-large schemes, and the cause of their downfall under the Voting Rights Act, is that they permit individuals to aggregate on the basis of racial identity.¹⁶⁵ If so, and if nondistricted elections allow individuals to aggregate on

162. 462 U.S. 725 (1983); see also Issacharoff, *supra* note 69, at 1690, for further documentation.

163. This is independent of whether the Constitution commands computer-generated districts. See *Pope v. Blue*, 809 F. Supp. 392, 398 (W.D.N.C.) (three-judge court), *aff'd*, 113 S. Ct. 30 (1992) ("While requiring the General Assembly to adopt nonpartisan, computer-generated districts might be a good idea, it clearly goes beyond what the Constitution mandates.").

164. Among the problems introduced by expert panels is what Professor Bruce Cain refers to as a "bipartisan gerrymander." BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE* 159-66 (1984). It is entirely conceivable that attempts to preserve the power bases of incumbents of both parties while providing some opportunity for growing minority communities could lead to extremely oddly configured districts, perhaps even on the order of that which confronted the Court in *Shaw*.

165. See T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance*

whatever basis is important to them, then isn't the problem with nondistricted elections that they might permit a replication of the pattern of minority exclusion from elective office that prompted the second generation of voting-rights challenges? In other words, if individuals can aggregate as they wish in nondistricted elections, can't they aggregate in ways that systematically exclude minorities from representation?

This problem may not be intractable, as observers of the Lani Guinier episode will realize. There are a number of voting mechanisms that can allow intermediate groups to form alliances and elect representatives based on voter self-identification while preventing the complete capture of all representation by a strongly motivated majority voting bloc. To understand how these systems might work, consider a five-member city council elected under at-large voting in which each voter would be allowed to cast one vote for each of the five positions to be filled. Because the election would turn into a sequence of single elections for each position, the same voting majority could control the outcome in each election and thereby reproduce its preference for each council position. Districting systems cure this problem by allowing each voter to elect only one of the five council members by restricting each voter's participation to one designated electoral sub-district. The same goal of preventing a majority monopoly on representation can be achieved through the use of modified at-large elections, termed *semiproportional systems* by political scientists.¹⁶⁶

The two most promising of these systems are limited¹⁶⁷ and cumu-

of *Racism*, 63 COLO. L. REV. 325, 355-64 (1992) (arguing that voting-rights law implicitly condemns the continuing discrimination manifest in polarized voting practices).

166. Cf. 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, 223-36 (1989).

167. Limited voting accomplishes this goal by allowing each voter to vote across the entire slate of candidates for office, but to cast fewer votes than there are positions to be filled. Thus, voting in this system is "limited" in the sense that each voter is to cast fewer votes than the total number of positions to be filled. Each voter is still allowed to pass on each candidate in that electoral district. However, each voter, for example, would be permitted to vote for only three candidates for five city council positions. The limited voting system therefore preserves the accountability of each candidate to all voters in the district but takes away from a cohesive majority voting bloc the ability to have its candidates fill all the contested offices.

The amount of support necessary for a group of voters to achieve electoral success is expressed as the threshold of exclusion. If the number of votes each voter may cast is divided by the number of votes each voter may cast plus the number of seats to be filled, the threshold can be calculated. For example, if each voter could cast three ballots in a five-seat election, the threshold of exclusion would be $3/8$ or 37.5%. This means that any candidate getting votes from 37.5% of the voters could not be denied election whatever the configuration of remaining votes. This in turn means that any candidate who is the choice of 37.5% of the voters would be elected. This contrasts with the current multimember election districts in which the candidates who are the choice of 49% of the voters may be defeated if the majority 51% bloc votes cohesively for a slate of candidates. The threshold of exclusion can be raised or lowered by the number of votes

lative¹⁶⁸ voting. Both of these systems restrict the capacity for majority domination, without the use of electoral divisions, by modifying the way in which each voter may cast votes.

While these systems were once the esoterica of a few academics¹⁶⁹ and a handful of litigants around the country, they came into national prominence in the controversies surrounding the failed nomination of Professor Lani Guinier as Assistant Attorney General for Civil Rights. It is one of the ironies of *Shaw* that it not only vindicates many of the concerns that Guinier expressed, but that it may propel many electoral jurisdictions to follow her encouragement of nondistricted voting-rights remedies as a way of avoiding redistricting battles. *Shaw*, which was announced only two months after Guinier's nomination was withdrawn, may move "the mainstream" in the direction of the precise course charted by Guinier. Nonetheless, it must be recognized that, to the extent that the Court's apparent dedication to geographically based districts continues to reflect the norm in American politics,¹⁷⁰ it seems unlikely that *Shaw* will provoke mass departures from district-based representation in the near future.

B. "Filler People" and the Voting Rights Act

The Court in *Shaw* clearly wished to confine its displeasure to the excesses rather than the essence of districting, but it is far from clear that the ultimate problem identified in *Shaw* can be so neatly cabined. Once the restorative justice principle of benefiting historically disad-

given to each voter. Limited voting further has the advantage of not requiring redistricting to account for population shifts within electoral subdistricts.

168. The same benefits can be obtained from an alternative modification of at-large elections through cumulative voting, a common form of corporate governance. Cumulative voting and limited voting share the ability to allow greater minority participation within a nonsingle-member district election system. The difference is that in cumulative voting each voter is given a number of votes equal to the positions to be filled. Thus, if there were five city council positions to be filled, each voter would have five votes. Each voter would then be allowed to bundle his or her votes — also described as "plumping" or "bulleting" the votes — by aggregating the votes among the candidates in any fashion desired. A voter could cast one vote for each of five candidates, five votes for only one candidate, three for one candidate and two for another, or any other division chosen by the voter.

Cumulative voting shares with limited voting the feature of a mathematically obtainable "threshold of exclusion" that would identify the voting patterns necessary for a cohesive minority to guarantee the selection of at least one of its candidates. Unlike limited voting, however, the threshold of exclusion in cumulative voting is at least in part dependent on the level of organization of voters to ensure that they maximize their return on their votes.

169. See Richard L. Engstrom et. al., *Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico*, 5 J.L. & POL. 469 (1989); Karlan, *supra* note 166; Daniel Ortiz, Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144 (1982); Richard H. Pildes, *Gimme Five*, NEW REPUBLIC, Mar. 1, 1993, at 16.

170. Indeed, one federal judge, when confronted with a proposed plaintiffs' remedial plan calling for limited voting, rejected such an approach as "contrary to most general concepts of a democratic two-party system." *Martin v. Mabus*, 700 F. Supp. 327, 337 (S.D. Miss. 1988).

vantaged groups is rejected, as was the case in *Shaw*, the real problem of state-assigned districts stands independently. Under any discretionary districting system, state authorities arrogate to themselves the ability and authority to determine how representation will be allocated, and which individuals or groups will be frustrated participants in the electoral marketplace. The obvious confrontation arises in the use of race in drawing any set of districts, even those that conform to "traditional districting principles." In order to flesh out this point, it is necessary to retrace how the issue of minority districts came to the fore in the redistricting context.

1. *Districting Under the Voting Rights Act*

The Voting Rights Act and the constitutional voting cases of the 1960s successfully dismantled the "first generation"¹⁷¹ of overt barriers to minority exercise of the franchise. This early struggle targeted literacy tests, grandfather clauses, poll taxes, and voter-registration barriers that served as the political armor of Jim Crow. As blacks began to exercise the franchise, a second layer of barriers emerged in the form of electoral systems that frustrated the electoral opportunities of minority-supported candidates and led to the "dilution" of minority electoral strength. The primary target of the "second generation"¹⁷² of voting-rights cases was the widespread use of at-large or multimember election systems. These electoral systems perpetuated the electoral exclusion of minorities by allowing an electoral majority to control each elected position.¹⁷³ The remedy was to concentrate minority voters in geographic subdistricts in which the minority franchise could translate into the election of candidates of choice of minority electors. The success of this second generation of voting-rights cases in dismantling at-large or multimember electoral systems and erecting single-member systems¹⁷⁴ pressured states to take a new approach to districting not only in the legislative setting, but also in smaller units of local government, including city councils, county commissions, school boards, and even lesser bodies.

171. See Guinier, *supra* note 146, at 1093-101, for a discussion of the different generations of voting-rights litigation.

172. *Id.*

173. See text accompanying notes 9-10 (describing the reasons for this phenomenon).

174. See FRANK R. PARKER, BLACK VOTES COUNT 78-129 (1990) (describing the pattern of such litigation in Mississippi). The creation of single-member districts in turn created the conditions for the mushrooming of successful black political participation. Between the passage of the Voting Rights Act in 1965 and the 1990 round of redistricting, the number of black elected officials had risen from some 500 to over 7000. See Issacharoff, *supra* note 117, at 1856 n.112 (citing PARKER, *supra*, at 1).

The impetus to district in a way that promotes minority representation subsequently immersed the courts and the Department of Justice in the delicate task of ensuring minority voters a meaningful chance to elect representatives of their choice. On the one hand, if minorities are distributed among newly created single-member districts, or among congressional or legislative districts, in a more-or-less even manner, then a districting system may be drawn to subordinate minorities mathematically within each of the electoral districts, effectively denying them the opportunity to elect any representatives of choice. If the same patterns of polarized voting that resulted in minority exclusion from representation in at-large elections persist in districted elections, then the shift from at-large to single-member districts would yield the same result in terms of the ethnic composition of elected representatives. In a city that is forty percent minority, little is accomplished by moving from at-large elections to single-member districts, each of which is also forty percent minority. Simply dispersing minority voters equally among single-member districts replicates the effect of at-large elections.

On the other hand, the overconcentration of minority voters, known in the trade as "packing," could also limit the opportunity for minority electoral representation. Take, for example, the districting of a city that is forty percent black, is relatively segregated, and has a five-member city council. The city could create two seventy percent black city council districts that would probably elect two black city council members, a result that would replicate minority representation in the population as a whole. However, if the council districting lines were instead drawn to create one district that was one hundred percent black and another that was forty percent black, black voters would likely complain that their electoral influence had been diminished; such a plan would result in only one minority-elected council member. Voting-rights law therefore moves between the concepts of dilution, which describes the creation of districts in which minority-backed candidates are not truly viable, and packing, in which the viability of minority candidates is overdetermined.

2. *Filler People*

These principles of districting under voting-rights law ensure that for the state to create viable minority districts, even without violating the principles of compactness, the state must create two groups of voters, both "essentialized" and one marginalized, on the basis of their race or ethnicity. First, the state must assign black voters to compact, majority-black districts on the basis of their race. Second, the state

must assign some group of voters to nondiluted, nonpacked districts to balance out the numerical mandates of one person, one vote. These additional individuals must not be of the relevant demographic group (in order to avoid claims of packing); and, in the interest of minority representation, they should not be expected to compete in any genuine sense for electoral representation in the district to which they are assigned lest they undo the preference given to the specified minority group. It is the status of this precarious group — the *filler people* — that raises extraordinarily troubling problems under current voting-rights jurisprudence, regardless of the geographic configuration of the districts. Indeed, it is in the name of the filler people that the Court ultimately reacted in *Shaw*.

The recent redistricting of Florida provides a particularly telling, though typical,¹⁷⁵ illustration. In the last round of redistricting, Florida was faced with the task of creating an additional congressional district. Two alternative plans were contemplated: one would have created a district that would likely have elected a black to Congress; the other would have rearranged the lines to create an additional Hispanic seat. Each plan laid the foundation for the enhanced representation of one group by using the other as numerical filler. As the reapportionment battles in Florida heated up, the never quite amicable relations between black and Hispanic political leaders became increasingly frayed. According to one newspaper article, black spokespersons claimed a preferential stake in the additional congressional seat on the grounds that the Voting Rights Act was truly intended to benefit blacks and not Hispanics; as one black state legislator commented, “[i]f the basis of an extra minority seat is the Voting Rights Act, then we ought to look and see who it was standing on the Edmund Pettus Bridge in Selma getting trampled.”¹⁷⁶ For their part, Hispanics countered by arguing that they were the more excluded group in terms of actual representation, and that black interests were secured by, among other things, the depths of black political power in Atlanta.

While *Shaw* seeks to sidestep *UJO*,¹⁷⁷ the Court’s critique of redistricting in North Carolina implicitly challenges *UJO*’s toleration of

175. Similar controversies have brewed at the congressional and state legislative levels in Texas, New York City, and a number of other jurisdictions.

176. Larry Rohter, *A Black-Hispanic Struggle Over Florida Redistricting*, N.Y. TIMES, May 30, 1992, at A6 (quoting State Rep. James C. Burke; the reference to Selma concerns the well-publicized beating of civil rights demonstrators on March 7, 1965, the broadcast of which garnered support for the passage of the Voting Rights Act); see also Brief for Appellee Florida State Conference of NAACP Branches, *Johnson v. Degrandy*, 124 L. Ed. 2d 634 (1993) (Nos. 92-593, 92-767, and 92-519) (arguing that, when there is a conflict, the Court should err on the side of protecting black rights versus those of Hispanics).

177. 430 U.S. 144 (1977).

the division of the Hasidic community of the Williamsburgh section of New York in order to create a majority-black district.¹⁷⁸ *Shaw* only governs the fact pattern of *UJO* to the extent to which the willful exclusion of the Hasidic community from the opportunity for representation was accompanied by the use of asymmetric or otherwise "uncouth" districting patterns. However, *Shaw* does not clearly articulate a normative basis for rejecting the Hasidic community's claim of exclusion from the opportunity for representation, when that denial was accomplished within relatively "couth" electoral districts.

Thus, to the extent that *Shaw* turns on the unseemliness of essentialism, the opinion threatens to invalidate any district that creates a seat with an intended beneficiary. This is the case regardless of whether the district is based on anticipated racial voting patterns, or whether it has been carved out to protect the flanks of an incumbent politician. Nor does the Court's invocation of traditional districting principles provide any reasonable basis for rejecting the explosive claims advanced by filler people who have been assigned the role of providing numerical chaff to the representational wheat of another group. Simply put, why should the claims of the Hasidim in Williamsburgh turn on the shape of the district that was knowingly created to deprive them of an independent opportunity to elect representatives of their choice?

Shaw therefore does not foreclose the resurrection of the plaintiffs' principal argument in *UJO*, which is the assertion that a districting plan violates some rights inherent to the "filler" community. Nor does *Shaw* foreclose a second claim rejecting the adequacy of "virtual representation."¹⁷⁹ In the ethnic context, these arguments are all the more volatile because proponents on each side of the debate advance their claims in the language of entitlement, with representation portrayed as the grant of a right to dispense patronage, rather than an assurance of representation and political self-expression.

The majority in *UJO* had no problem rejecting the claims of the

178. The Supreme Court in *Shaw*, as we developed above, see *supra* notes 59-62 and accompanying text, undermined both rationales by which the Court upheld the willful division of the Hasidic community in *UJO*.

179. See Lani Guinier, *Groups, Representation and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEXAS L. REV. 1589, 1607-13 (1993) (criticizing concept of virtual representation). For a classic defense of not holding representatives accountable to their narrow constituencies, see Edmund Burke, Speech to the Electors of Bristol, in *ON GOVERNMENT, POLITICS AND SOCIETY* 157 (B.W. Hill ed., 1976) ("But [a representative's] unbiased opinion, his mature judgement, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. These he does not drive from your pleasure, — no, nor from the law and the Constitution. They are a trust from Providence, for the abuse of which he is deeply answerable.").

filler people because the Court assumed that filler people were not subjected to a dilution of their aggregate group strength, and the Court found no stigma associated with the state's classification. But this response is not available to a Court now dedicated to an individualistic explication of the Fourteenth Amendment. Filler people are by their very nature electoral fodder, means to others' ends.¹⁸⁰ *Shaw* rejected the argument, advanced by the dissenters, that whites in North Carolina were not harmed by the districting plan because they, like their counterparts in *UJO*, are sufficiently represented in the redistricting plan as a whole. But it is not clear why the same harm is not suffered in race-conscious districting regardless of the shape of the district. Whenever districts are drawn to create a designated group beneficiary, the nonpreferred group is essentialized or, worse, denied their dignitary right to equal treatment and respect by having their welfare discounted.

The Court's apparent response is that there is no reason to assume that a representative will not represent all residents of the district. That is, once an election is held, "filler people" become "constituents" and command the same attention from their representative as other members of the district. But this view seems mere wishful thinking, particularly in districts drawn to comply with the Voting Rights Act. In such cases, polarized voting is a proven fact, and there is little reason to believe that a representative will not pay primary attention to the majority group in the district — a group expressly brought together to elect the representative of its choice. This point can be generalized beyond voting-rights cases. If we do not think that there are predictable consequences from the way we draw district lines, then any lines will do. But just the opposite is true. Line drawers invariably know who stands to gain or lose when pencil meets map, and winners, not surprisingly, use their power to elect representatives responsive to their concerns.

180. This was directly raised by the *Shaw* appellants in their Supreme Court brief:

[T]he black neighborhoods along Interstate 85, which have been purposely gathered into North Carolina's Twelfth Congressional District, are an American version of the black townships under South Africa's apartheid system. Moreover, although they are whites, Ruth Shaw and Melvin Shimm, the two Appellants registered to vote in that Twelfth District, are in a position like that of the black voters in *Gomillion*; they have been purposefully "fenced" out of a district (the Second District) where there is a majority of white voters and "fenced" in a district with bizarre boundaries drawn for the specific purpose of placing in the district enough black voters to assure that a black person will be elected therefrom to the House of Representatives.

Appellants' Brief on the Merits at 31-32, *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (No. 92-357).

3. *Balkanization and Districting*

In *Shaw*, the Court is eager to identify the "balkanizing" aspect of "bizarrely" shaped districts that can be explained only on the basis of race. But it fails to confront the fact that districting is inherently balkanizing, particularly districting done under the watchful eye of the Voting Rights Act, and that it is balkanizing regardless of the geographic shape of the districts created.

The reason is quite straightforward. Unlike other civil rights statutes, the Voting Rights Act is notably passive in its treatment of the central operational pattern that it addresses, at least once the first generation cases removed the issues of complete exclusion from the franchise. The Act's strictures are triggered by majority racial bloc voting which, given otherwise nondiscriminatory electoral structures, defeats the electoral aspirations of the minority community. For reasons having to do with the nature of voting as a fundamental individual right, the Act does not address the exclusion of minorities from the opportunity of representation at the individual level. Even in the aftermath of a successful voting-rights lawsuit, individual voters are free to vote along racial lines. Indeed, they are free to vote explicitly on the basis of race. This lack of an "individual" remedy sets the Voting Rights Act apart from statutes governing employment or housing discrimination, for example, whose intervention is designed to break down patterns of workplace or residential segregation. Those statutes are directed at the primary conduct that is to be avoided, the decision to discriminate on an individual level.

By contrast, the Voting Rights Act seeks to alter the consequences of racial bloc voting patterns without governing the way individual voters cast their ballots; the primary conduct — the racial patterns in voting — is unaffected. The individual act of voting along racial lines no more threatens equal opportunity in the electoral arena than the individual right to vote secures it. Both the wrong and the right are collective by their nature, and together these features of the political realm have given rise to demands for structural changes. As the Act has developed, the structural changes have been brought about primarily through the race-conscious drawing of district lines.

The Voting Rights Act also protects the right of participation based only on one characteristic, race or ethnicity, and only under one condition, the lack of substantial integration. Under the test set forth in *Thornburg v. Gingles*,¹⁸¹ a minority group seeking the protection of the Act must establish, as a threshold requirement, that under a sin-

181. 478 U.S. 30, 50 (1986).

gle-member districting plan the minority group could create a district in which it would constitute a majority of the voting-age population. This standard protects those minority communities that are residentially segregated, but it does not provide geographically integrated communities with any remedy should they repeatedly fail in trying to elect a candidate of their choice. This feature of voting-rights litigation supports the charge that the Act promotes ghettoization¹⁸² — now recast as balkanization by *Shaw*.

We, like Lani Guinier,¹⁸³ share the Court's concerns about a voting-rights jurisprudence so strongly committed to the creation of "safe" minority seats. The remedy provided by single-member districts has some troubling features. As a descriptive matter, the model fails to incorporate the features of an increasingly multihued society. Blacks are still remarkably segregated into geographically distinct communities, but other minorities — especially Hispanics, Asians, and non-first-generation immigrants — are less geographically confined.¹⁸⁴ As a result, voting-rights claims seeking to satisfy the first prong of the *Gingles* test — the ability to create a "majority-minority" district — are increasingly being brought in the name of more than one minority group, aggregated to achieve the numerical threshold established by *Gingles*. This leads to two separate problems. First, these aggregated claims are subject to the charge that they merely seek statutory protection for coalition activities and not a remedy for racial exclusion from political life.¹⁸⁵ Second, these aggregate "districts" may have distinct political lives from the majority community, but this does not necessarily translate into internal political coherence. Blacks and Hispanics often have very different political agendas, as is clearly evident in the current Florida redistricting battles. These differences may even surface where competing Latino communities are combined, as with the creation of a Chicago congressional seat comprised of distinct Mexi-

182. See *United Jewish Org. v. Carey*, 430 U.S. 144, 186 (1977) (Burger, C.J., dissenting).

183. See Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135 (1993); Guinier, *supra* note 179, at 1625-32; see also de la Garza & DeSipio, *supra* note 103, at 1515-17 (questioning whether Hispanic safe districts decrease levels of political participation and inculcation of civic values in newly naturalized citizens).

184. See Douglas S. Massey & Nancy A. Denton, *Trends in the Residential Segregation of Blacks, Hispanics, and Asians: 1970-1980*, 52 AM. SOC. REV. 802 (1987).

185. This charge is pressed most vociferously by Judge Patrick Higginbotham of the Fifth Circuit. See *Campos v. City of Baytown*, 849 F.2d 943, 944-46 (5th Cir. 1988) (Higginbotham, J., dissenting from denial of rehearing en banc); see also *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc) (opinion of Higginbotham, J.); Katharine I. Butler & Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a "Rainbow Coalition" Claim the Protection of the Voting Rights Act?*, 21 PAC. L.J. 619 (1990).

can-American and Puerto Rican communities.¹⁸⁶

At a more fundamental level, the focus on districting may limit the transformative aspirations of political integration. One of the goals of the entire movement to broaden political participation, of which the Voting Rights Act was an indispensable component, was to open the halls of elective office to representatives of and from the diverse communities that make up American society. If such integration of elective office is an independent good, a goal that merits promotion in a democratic society, then the narrow focus on geographically isolated districts is at the very least problematic. Insofar as a minority community "integrates" into society, the benefits of the Voting Rights Act are withdrawn, regardless of whether political advancement has accompanied the first stages of integration.¹⁸⁷

To the extent that districting under the Voting Rights Act is intended to be the path to inclusion of minority interests, it has been underinclusive of the full community that needs to be served. Geographic districting necessarily brings to the fore the problems of the filler people on the one hand, and of virtual representation on the other. At a fundamental level, the problem is conceptual, and it turns on the difficulty of assigning the right to representation to one community at the expense of another. The Court in *Shaw* ultimately responded to this problem, presented in a particularly crude and visually graphic form. In the process of assigning representation, an external authority, such as a state redistricting body, is determining how access to electoral power will be allocated. To the nonminorities in a designated minority district, or even to minority voters who are not of the group expected to determine representation in any given district — the filler people — representation over district-specific issues is delegated to representatives over whose selection they will have little control. On broader policy matters external to the district, the assumption in

186. See Constanza Montana, *Daley Walks a Tightrope on Remap*, CHI. TRIB., Apr. 24, 1991, (Chicagoland), at 3.

187. In addition one can raise arguments that to the extent that a core minority area is marked by depressed socioeconomic conditions, and to the extent that more educated and technically skilled members of the minority community may be found outside the core minority area, the focus on geographic representation removes a cadre of potentially skilled advocates from the minority group's political processes, as geographically defined by *Gingles*. The importance of access to leadership — the group that W.E.B. DuBois termed the *talented tenth* — should not be disregarded as a cost of districting. 1 W.E.B. DuBOIS, *THE SEVENTH SON: THE THOUGHT AND WRITINGS OF W.E.B. DuBOIS* 385 (Julius Lester ed., 1971). As Arthur Schlesinger recently noted, "All government known to history has been government by minorities, and it is in the interests of everyone, most especially the poor and powerless, to have the governing minority composed of able, intelligent, responsive, and decent persons with a large view of the general welfare." Arthur Schlesinger, Jr., *The Radical*, in N.Y. REV. BOOKS, Feb. 11, 1993, at 6 (reviewing GEORGE F. KENNAN, *AROUND THE CRAGGED HILL: A PERSONAL AND POLITICAL PHILOSOPHY* (1993)).

UJO is that the interests of those filler people will be represented by elected officials from elsewhere. For minorities who do not live in a majority-minority district — for instance, blacks living outside a core inner city neighborhood — the presumption is that their distinct racial interests will be effectively served by representatives elected from the core neighborhood for whom they cannot vote and with whom they may share neither socioeconomic status nor political outlook.

These inherent problems in districting extend beyond the context of race. Geographically based districts assume that political identity will primarily correlate with geography. However, the focus on geographic proximity in districting developed in a time when communities were smaller and transportation was more difficult. The concept of “geographical coherence” may be far less relevant in defining primary communities of interest in today’s society. The census demographic data reveal a highly fluid society in which changes of residence are far from unexpected, and in which the growth of “exurbs” — defined by proximity to the highway networks — have replaced any pre-existing sense of geographic coherence. To the extent that political communities of interest do not fall within neat geographic contours — as with, for example, feminist concerns, environmentalism, foreign policy preferences — the persistent use of geographically based districts reflects arbitrariness and heavy-handedness on the part of government line drawers.

Finally, redistricting in the guise of compliance with the Voting Rights Act can too easily mask an effort to reward the holders of political power — for instance, the protection of incumbents. Political majorities have always been able to manipulate neighborhood identity in order to reap the benefits of political line drawing. Ultimately the focus on geography in *Shaw* should be read as more than an elevation of territorial integrity for its own sake. *Shaw*, together with *Davis*, expresses the Court’s concern with the increasingly naked use of governmental power to dispense electoral patronage through the redistricting process.

It should be clear that this note of sympathy we strike with aspects of *Shaw* does not endorse the Court’s focus on district shape. It is districting itself, not the bizarreness of the line drawing, that creates the problems we have identified. It is unlikely that the Court intended *Shaw* as an opening move toward doing away with districting; indeed, the opinion reinforces the Court’s satisfaction with geographical representation, particularly because, under the facts of *Shaw*, the alternative seems to be divisive interest and race representation. Thus the Court

purified geographical districting without realizing that its reasons for the purification undermine the normative bases of districting.

In sum, there is nothing quite so destructive to the legitimacy of a representative political system as a challenge to the integrity of the process by which representatives are chosen. The Court in *Shaw* attempted to preserve the institutional legitimacy of the representative bodies of government by striking down what it considered to be an excessive manipulation of traditional districting norms. The Court's attempt to repair surgically only "excesses" is problematic for several reasons. First, it is not clear that the problems underlying the Court's decision can be confined to the excesses, rather than the essence, of districting. Second, the problems of essentialism and state manipulation are inherent in the districting process, and it therefore appears that the Court was willing to tolerate the inescapable evils of districting until minorities developed sufficient political clout to claim their spoils as well.¹⁸⁸ This criticism raises a serious point about the institutional integrity of the Supreme Court itself, especially because *Shaw* struck down part of a congressional districting alignment that provided for the election of the first two North Carolina African Americans to Congress in this century.¹⁸⁹ 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.

* * *

This Part and the preceding one suggest that the essentialism and balkanization that bothered the Court in *Shaw* appear not to be limited to the "bizarrely" shaped district, particularly when "normal" districts are drawn under the gravitational pull of the Voting Rights Act. If *Shaw* is intended to be more than a "cueing case,"¹⁹⁰ one might expect the Court to expand its insights to take a serious look at districting in general. But, as we have suggested in section II.A, this seems an unlikely outcome. That districting wastes votes, the Court appears to think, is the price we pay for democracy American-style. No system is perfect. Majority rule creates losers and winners,¹⁹¹ and

188. Contrast the Court's willingness to tolerate the manipulation of district lines to achieve a claimed partisan equity between Democrats and Republicans in the redistricting of Connecticut. *Gaffney v. Cummings*, 412 U.S. 735 (1973).

189. 113 S. Ct. at 2834 (White, J., dissenting).

190. See *supra* text accompanying notes 63-69.

191. At moments of uncertainty in voting-rights challenges, the Court readily retreats to the limited insight that in each electoral contest there are of necessity winners and losers. See, e.g., *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971).

our system has tolerated the routine creation of losers with remarkable equanimity.

If the Court seems to have neglected the implications of its reasoning, it may be because it had different game in sight: the Voting Rights Act itself. *Shaw* fairly invites a constitutional reexamination of section 2 of the Act. Should any court decide that the broad remedial purposes of the Act compel districting akin to North Carolina's, or should any state purport to justify its districting as an attempt to avoid section 2 liability, the question will be directly put whether such a justification is sufficient, under strict scrutiny analysis, to justify the overt use of race as the dispositive factor in the districting decision.¹⁹²

Our aim in questioning the coherence of the Court's reasoning is not to cast doubt on the constitutionality of the Voting Rights Act. To worry about the essentialism and divisiveness of race lines is not to condemn their use in appropriate remedial circumstances. The Voting Rights Act is an imperfect remedy for an imperfect world. Congress — and perhaps here, as on no other issue, our representatives are experts — recognized the important, frequently ugly, role that race plays in our electoral politics. The 1982 amendments to the Act were written to condemn voting structures that relegated African Americans and other protected groups to perennial loser status. Congress knew that the inability of such groups to elect representatives of their choice could not be explained in terms of party affiliation or socioeconomic status; rather, race has been and continues to be of singular importance in the casting of votes in American elections. The presence of "racial bloc voting" — a prerequisite to liability under the Act — means that we are not yet living in the Court's preferred world.¹⁹³ It is our messy, mortal world that calls for the strong and intrusive remedies of the Voting Rights Act. Were *Shaw* to be read to condemn remedial race-conscious districting as constitutionally impermissible essentialism, it would take direct aim at core principles of voting-rights law developed through almost three decades of litigation.

192. See *Shaw*, 113 S. Ct. at 2831 (reserving question that "if § 2 did require adoption of North Carolina's revised plan, § 2 is to that extent unconstitutional"); see also *Voinovich v. Quilter*, 113 S. Ct. 1149, 1157 (1993) (reserving question of constitutionality of Voting Rights Act); *Chisom v. Roemer*, 111 S. Ct. 2354, 2376 (1991) (Kennedy, J., dissenting) (reserving the question of the constitutionality of § 2).

193. This is the persistent though unfortunate message of voting-rights case law:

The view of American electoral practices that emerges from the voting rights jurisprudence is that of a pluralism that has failed to overcome a paralyzing attachment to racially and ethnically defined group identities. Case after case supports the conclusion that the electoral arena remains charged with group-based battles in which the simple cueing device of race or ethnicity serves as the mobilizing force for legions of voters. The integrative hopes of the American melting pot fail at the political frontiers of race and ethnicity.
Issacharoff, *supra* note 117, at 1872.

IV. STILL AT THE CROSSROADS

To recapitulate, we have argued that *Shaw v. Reno* offered the Court the opportunity to decide whether its recent Fourteenth Amendment jurisprudence — typified by *Croson* — necessitated the fundamental reordering of the constitutional law of voting rights.¹⁹⁴ The Court, however, gave no clear answer. The Justices gave short shrift to the “benignness” and “nondilution” theories adopted by the majority in *UJO*; but *Shaw* does not overturn *UJO*. While the Court’s rhetoric is powerful and lasting — castigating the extensive reliance on racial characteristics as “political apartheid,”¹⁹⁵ “balkanization,”¹⁹⁶ and “inciting racial hostility”¹⁹⁷ — the Court was careful to emphasize that “apartheid” does not automatically result from the use of racial classifications. Nor did the Court hold that such classifications are a per se evil departing from a constitutional requirement of color blindness. In the Court’s words, “race consciousness does not lead inevitably to impermissible race discrimination.”¹⁹⁸ Rather, the Court condemned only the use of an “extremely irregular” district that is “so bizarre on its face” and “irrational” as to be presumptively invalid for its disregard of “traditional districting principles such as compactness, contiguity, and respect for political subdivisions.”¹⁹⁹ Even in this limited holding, the Court was careful to stress that it did not enunciate a new constitutional principle; rather, it was explicating the facts underlying its reasoning: “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.”²⁰⁰

This bobbing and weaving has bought the Court time. But, as we hope our critique of *Shaw* has shown, it has also bought the Court — and lower courts and litigators — troubles. While we know that bizarrely shaped districts that can be explained only on the basis of race are bad (assuming we have a reasonable definition of “bizarreness” and an appropriate factual record from which to conclude that the odd shape is attributable to race) we have no clear guidance on a question of singular importance. We do not know how to determine the constitutionality of creating “minority” districts that do not have “bizarre”

194. So urged by the plaintiffs. 808 F. Supp. at 471.

195. 113 S. Ct. at 2827.

196. 113 S. Ct. at 2832.

197. 113 S. Ct. at 2824.

198. 113 S. Ct. at 2826.

199. 113 S. Ct. at 2827.

200. 113 S. Ct. at 2827 (citation omitted).

shapes.²⁰¹

Let us suppose that the State of Ohio announced that its reapportionment plan, while adopting remarkably compact districts, was drawn with the express purpose of ensuring African Americans roughly proportionate representation in the state legislature, and that other plans yielding fewer minority districts were rejected precisely on that ground. Would the Court announce that the explicit use of race raised no constitutional issue? Or, to phrase the question another way, would geometry serve not only as a sword to condemn the excessive reliance on race, but as a shield to protect an otherwise suspect racial classification? The Court's final summary in *Shaw*, closely read, is ambiguous on just this critical point:

[W]e conclude that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim 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, and that the separation lacks sufficient justification.²⁰²

It seems obvious, though, that if the state has announced the race consciousness of its plan, then the plan "rationally cannot be understood as anything other than an effort to separate voters" based on race.²⁰³

Nevertheless, it is unclear how the Court would address this issue. If we have correctly identified the reasons why the use of race in the creation of "nontraditional" districts is more troubling than race-conscious compact districting, perhaps the Court would stick to its guns by announcing that *UJO* still rules in cases of "normal" race-conscious districting.²⁰⁴ Thus, plaintiffs challenging the Ohio plan would have to make out an "analytically distinct"²⁰⁵ dilution claim in order to allege a cause of action under the Fourteenth Amendment. But, as we have argued in section I.A, all signs are that the Court's more recent cases have significantly undermined the "benign" purposes and "dilu-

201. Nor is there much in the Court's prior experience with gerrymandering that provides any guidance. In general, the Court has looked at oddly configured jurisdictional lines in the past to infer the purpose of the political actors responsible for drawing those lines. For example, in the breakthrough case challenging the racial exclusion of blacks from the municipal boundaries of Tuskegee, Alabama, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Court found that the city's alteration of its boundaries to create "an uncouth twenty-eight sided figure" to be probative of an impermissible effort to exclude black voters, and only black voters, from the municipal electorate. 364 U.S. at 347.

202. 113 S. Ct. at 2828.

203. 113 S. Ct. at 2828.

204. The continued vitality of the *UJO* reasoning is open to doubt. Contrast, for example, Justice Rehnquist's willingness to join in upholding nondilutionary race consciousness in *UJO*, 430 U.S. at 165-68, with his participation in the *Shaw* majority, which rejects the nondilution arguments put forward in the various dissents. 113 S. Ct. at 2828-29.

205. 113 S. Ct. at 2830.

tion" aspects of *UJO*. The Fourteenth Amendment does more than invalidate state action that invidiously discriminates against a racial minority. It is the use of a racial classification denying equal treatment to individuals that triggers the Court's concern.²⁰⁶ It is thus difficult to imagine that the current Court would hold any case involving an express use of race nonjusticiable.

Indeed, the intuition that any race-based classification will be subject to challenge is confirmed by the Court's treatment of the question of standing to challenge express racial set-asides in another case last Term, *Northeastern Florida Chapter of the Associated General Contractors v. Jacksonville*.²⁰⁷ In *Jacksonville*, the Court significantly eased the traditional standing requirement of "injury-in-fact"²⁰⁸ for cases in which state bodies had used an express quota or set-aside to fence out, in an unalterable fashion, designated racial or ethnic groups. The Court reversed the holding below that an association representing white contractors who were precluded from bidding for ten percent of municipal contracts lacked standing to sue because of an inability to prove which of its members would have obtained the contracts absent the minority set-aside.²⁰⁹ In such circumstances, the Court held, there is the potential for an independent dignitary harm caused by the state's use of the racial classification.²¹⁰ The threat of such dignitary harm caused by the state's "excessive reliance," as we have phrased it, on racial classifications exempts a would-be plaintiff from the normal requirement that he or she have a personal stake in the outcome to satisfy the Article III case-or-controversy requirement. Thus, the Court concluded,

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the *denial of equal treatment* resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.²¹¹

If neither justiciability nor standing will bar potential challenges to

206. Although, as *Shaw* makes clear, the Court wishes to stop well short of proclaiming that the Constitution requires all governmental decisionmaking to be color-blind. See 113 S. Ct. at 2824.

207. 113 S. Ct. 2297 (1993).

208. *Valley Forge Christian College v. Americans United for the Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982); *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975).

209. 113 S. Ct. at 2301, 2305.

210. 113 S. Ct. at 2302-03.

211. 113 S. Ct. at 2303 (emphasis added).

the nonbizarre use of race in redistricting, is there any stopping point short of the "strict-scrutiny-all-the-way-down" model? If that is the result of *Shaw*, as we have noted above,²¹² then the Court's opinion will have inaugurated a decennial plague of litigation challenging the reapportionment plans of states caught between a race-conscious, group-based Voting Rights Act and the individualistic, approaching-color-blindness ideology of *Croson*.

One way out of this muddle is to see *Shaw* not as choosing one of the readings we offered above,²¹³ but as combining them. Following the "strict-scrutiny-all-the-way-down" interpretation, all race-conscious districting would be formally subject to review under the Fourteenth Amendment. But the risk posed — that every redistricting plan in America with any racial consideration would be subject to a strict scrutiny that is "strict in theory but fatal in fact" — would be mitigated by a judicial standard that, as applied, condemns only "bizarrely" shaped districts. The result would parallel the current situation with affirmative action in higher education. Formally, every college and university plan is subject to strict scrutiny, but very few suits are brought because the affirmative action plans have been constructed with Justice Powell's race-as-one-factor-only scheme in mind.²¹⁴

If we are correct in this assessment, then *Shaw*, rather than *Crosonizing* reapportionment law, will ultimately be understood to have *Bakked* it. But this conclusion needs further defense in light of our earlier argument that *Croson*, representing a hardened version of *Bakke*, now serves as the paradigmatic case for equal protection analysis. That is, why might a Court that has written the unforgiving opinions striking down an affirmative action plan in *Croson* be led to adopt a standard in the voting cases more sympathetic to race-conscious districting?

One response is that, in fact, the tension between *Bakke* and *Croson* is not at the level of formal doctrine: both condemn quotas, and Justice O'Connor, heir to Justice Powell and the chief expositor in *Croson*, has cited favorably Powell's opinion in *Bakke*.²¹⁵ This interpretation, however, just does not seem to square with *Croson*. It is not

212. See *supra* text accompanying notes 70-88.

213. See *supra* text accompanying notes 63-127.

214. This is also in part because the Supreme Court's standing jurisprudence required that potential plaintiffs prove that they would have been admitted but for the challenged plan. In most cases challenging law school affirmative action programs, for example, the plaintiffs' claims have been dismissed on standing grounds.

215. See *Metro Broadcasting v. FCC*, 497 U.S. 547, 621, 625 (1990) (O'Connor, J., dissenting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 285 (1986) (O'Connor, J., concurring).

as if the Court has said to the Richmond City Council, "if you had only used race as one factor in crafting your program, it would have been acceptable." *Croson* exhibits extreme unfriendliness to race-conscious measures, rejecting common-sense readings of the historical and social context of the city's action and insisting upon a burdensome level of proof of prior discrimination to sustain such programs.

We think the answer may lie in the subject matter of the race-conscious programs. Until *Shaw*, the Court had developed no reverse discrimination case law in the voting-rights field comparable to the employment discrimination cases of the 1980s. This is how *UJO* could appear to be an equal protection relic by the 1990s. Tacit approval of race-conscious efforts to increase minority representation in the political sphere serves two important interests that are less evident in the employment context. First, it supports systemic legitimacy by permitting the construction of political bodies more broadly representative of American society (contrast cultural readings of an all-white board of directors of a major corporation versus an all-white state legislature). Second, greater inclusivity at the political level permits the Court a weakened role in the evaluation of the outputs of the elective branches.²¹⁶ Thus, it is not surprising that the Court has been noticeably more charitable to the Voting Rights Act than to other restorative civil rights statutes.²¹⁷ In sum, we believe that there are good grounds for believing that, for all its *Croson*-sounding rhetoric, the harsh tone of *Shaw* will be muted in subsequent districting cases. The Court's focus on a district's shape rather than the state's use of a racial classification will make the turn toward *Bakke* in the voting-rights field possible.

So read, *Shaw v. Reno* will come to be understood as part of a larger "jurisprudence of compromise" to which the center of the Court is turning. This compromise has both substantive and methodological components. Substantively, the Court has located its doctrine somewhere between "extreme" positions. Thus, in *Shaw*, the Court rejected the reasoning of *UJO* that no white suffers injury unless dilution could be established because this position would mean that no white voter could state a viable constitutional claim. It also rejects the

216. This point is developed at greater length in Issacharoff, *supra* note 117, at 1862-71. Justice O'Connor's explicit reference to John Ely in her opinion in *Croson* is also worthy of note in this regard. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495-96 (1989).

217. Compare, for example, the Court's expansive treatment of the Voting Rights Act in *Thornburg v. Gingles*, 478 U.S. 30 (1986), with, for example, its narrow reading of Title VI of the 1964 Civil Rights Act in *Grove City College v. Bell*, 465 U.S. 555, 566 (1984), and Title VII of the same Act in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). In addition, note Justice O'Connor's separate opinion in *Gingles*, unwilling to take the hard line of the other dissenters. 478 U.S. 30, 83 (O'Connor, J., concurring).

polar opposite position that the Constitution guarantees a color-blind electoral system, and that any use of race states a Fourteenth Amendment claim.²¹⁸

Methodologically, the Court's "jurisprudence of compromise" relies upon vague fact and context specific "standards" and "balancing" tests, rather than bright-line, categorical "rules."²¹⁹ Our reading of *Shaw* — that it embodies an "it's-OK-to-use-race-but-not-too-much" standard — is an example.²²⁰ The "undue burden" test of Justice O'Connor in the abortion cases²²¹ and the balancing called for in affirmative action cases such as *Wygant v. Jackson Board of Education*²²² are other obvious examples.

To make the compromise work for redistricting cases, the Court must supply one additional element. It must identify a "compelling state interest" that would justify race-conscious districting under strict scrutiny. The Court's race cases — including *Croson* — have established the remedying of past discrimination as one iron-clad compelling interest. Justice Powell's opinion in *Bakke* suggests another possibility — a First Amendment-ish value in maintaining a "diverse" student body. How might these compelling interests work in the redistricting context?

If we are right that the Court would tolerate the nonexcessive use of race, it would follow that the Court would grudgingly approve the continued use of race-conscious districting in the face of a proven violation of the Voting Rights Act or the constitutional provisions guar-

218. Cf. ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992) (charting the adoption of a "reasonableness" test, rather than a bright-line test of color blindness, in the Court's race cases from *Plessy* to the affirmative action cases). The move to the center in *Shaw* also recalls the opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), which attempts to steer a middle course between the argument that the state has no compelling interest in fetal existence until the point of viability and the claim that the Constitution does not protect a woman's decision to terminate her pregnancy. 112 S. Ct. at 2804-08; see also *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). For another manifestation of this in-between jurisprudence in the First Amendment religion context, see Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 443-49 (1986).

219. Sullivan, *supra* note 69, at 26-27. Of course, "balancing" constitutes a method of choice for the jurisprudence of compromise, and it is no coincidence that the current compromisers are heirs to Justice Powell, balancer par excellence.

220. See also O'Connor's resolute unwillingness to identify a standard in the Court's most important voting-rights case. *Thornburg v. Gingles*, 478 U.S. 30, 100-01 (1986).

221. *Casey*, 112 S. Ct. at 2819-21; *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 529-31 (1989) (O'Connor, J., concurring).

222. 476 U.S. 267 (1986). Justice O'Connor, concurring in *Wygant*, noted: Ultimately, the Court is at least in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference. 476 U.S. at 287 (O'Connor, J., concurring).

anteeing nondiscrimination in voting.²²³ A more difficult question is whether a state could create minority districts to forestall a constitutional or statutory challenge.²²⁴ A mere recitation of a remedial purpose will not satisfy the Court;²²⁵ a state, we are quite sure, would have to make a reasonably strong showing that it would in fact be held liable under the Act before the Court would permit the state to adopt a preemptive race-conscious districting plan.²²⁶ The kind of factual predicate necessary to make this showing is far from clear.²²⁷ In the employment discrimination context, the Court has not yet fixed on a standard for validating voluntary affirmative action plans. Perhaps particular attention ought to be paid to Justice O'Connor's formulation of the standard, both because of her pivotal role in the race cases, and because of her stated view that "the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause."²²⁸ According to O'Connor, an employer must have "a firm basis for believing that remedial action was required;"²²⁹ an employer could establish a "firm basis" if it could "point to a statistical disparity sufficient to support a prima facie claim under Title VII"²³⁰

It is not obvious what a "prima facie" standard would look like in the voting-rights cases. Neither the Constitution nor the Voting Rights Act mandates proportional representation for minority groups, nor is the Court likely to believe that nonproportionality necessarily reflects a defect in the process, or that standing alone it could constitute evidence of discrimination. In a political system dedicated to majority rule, underrepresentation of a minority group hardly demon-

223. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986).

224. Justice Souter asserts in *Shaw* that "consideration of race to comply with the Voting Rights Act (quite apart from the consideration of race to remedy a violation of the Act or the Constitution)" would be a "constitutionally permissible use of race in electoral districting." 113 S. Ct. at 2847 (Souter, J., dissenting).

225. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497 (1989) (citing *Wygant*, 476 U.S. at 276).

226. "[T]he state must have a 'strong basis in evidence for [concluding] that remedial action [is] necessary.'" *Shaw v. Reno*, 113 S. Ct. 2816, 2832 (1993) (quoting *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277)).

227. The Court expressly leaves the question open in *Shaw*.

228. *Johnson v. Transportation Agency*, 480 U.S. 616, 649 (1987) (O'Connor, J., concurring in judgment). It is likely that the constitutional test will do the work here. That is, race-conscious districting plans adopted to prevent successful voting-rights challenges will be held to constitutional standards.

229. *Johnson*, 480 U.S. at 649.

230. 480 U.S. at 649.

strates a flawed or invidious process.²³¹ Exactly what more must be offered to justify remedial, race-conscious districting, short of full blown proof of a violation, is unclear. A record of racial bloc voting — perhaps established by past, but recent, litigation in the state — and a history of discrimination ought to go some of the distance. But O'Connor's opinion in *Shaw*, unlike her ruminations on this theme in *Johnson v. Transportation Agency*,²³² is not sensitive to previously established patterns of racially polarized voting,²³³ to the history of discrimination in North Carolina, (a former de jure jurisdiction), or to the absolute exclusion of blacks from the state's congressional delegation.²³⁴

The second compelling state interest — “diversity” — would be significantly easier to establish.²³⁵ A more diverse legislature or congressional delegation would better represent the various interests of the state, as well as improve deliberations in the legislature, by adding to the debate a point of view that is frequently ignored by majority legislators.²³⁶ But this justification faces heavy sledding for its strong essentialist undertones. *Shaw* condemns the idea that elected officials represent only members of their own race. In this regard, *Shaw* echoes the vituperative dissents by Justices O'Connor and Kennedy in *Metro Broadcasting*, which attacked as demeaning and stereotyping the “diversity” justification that had been offered in support of the F.C.C.'s race-conscious licensing rules.²³⁷

Therefore, to make the diversity justification acceptable to the Court, it must be recast along two dimensions.²³⁸ First, a districting

231. Any districting system must accept deviations from proportionality to some extent because there is no basis to believe that the distribution of voter preferences across a large state will be evenly replicated at the local level. See Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 SUP. CT. REV. 175, 223-24.

232. 480 U.S. 616, 647-57 (1987) (O'Connor, J., concurring) (explaining that affirmative action can be permitted as a remedial device only when there is evidence of past discrimination).

233. As was proven in *Thornburg v. Gingles*, 478 U.S. 30, 41 (1986) (finding by district court of “severe and persistent racially polarized voting”).

234. Cf. *Johnson*, 480 U.S. at 621 (noting the complete exclusion of women from skilled craft worker positions as a justification for using gender-based preferences).

235. Note that Powell's formulation allows colleges and universities that either have not discriminated, or do not want to admit that they have, to adopt race-conscious admissions programs. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-20 (1978).

236. See, e.g., Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991); cf. Karlan, *supra* note 8 (discussing the need for multiracial coalitions); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1585-89 (1988).

237. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602-03, 632 (1990) (O'Connor & Kennedy, JJ., dissenting).

238. Interestingly, Justice O'Connor appears open to the diversity justification of Powell's *Bakke* opinion. See *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 286 (1986). Similarly, in *Metro*, in the midst of a crushing critique of the FCC's reasoning, O'Connor writes:

The asserted interest [of the FCC] is in advancing the Nation's different “social, political,

plan must not adopt a "rigid quota" to increase black representation. Second, the compelling purpose must not be characterized as the assurance that a "black voice" will be heard in the legislature. Both these elements attach a hardness to race-conscious programs — an unnuanced appeal to race essentialism — that the Court is apparently quite prepared to reject.

As to the first issue, as we have argued above,²³⁹ *Shaw* can be read as distinguishing between "race-as-a-factor" districting plans and "excessive reliance" plans. That distinction, however, is not precisely congruent with Justice Powell's conclusion in *Bakke* that race may be one factor among many considered in the pursuit of diversity. To a certain extent, geographic districting is intended to guarantee a crude form of diversity in the home base of representatives. But a true analogy to *Bakke* would arise if a state were to draw districts with the intent of ensuring representation of a wide range of groups, such as those based on religion, gender, party affiliation, or urban-rural residence. Yet this kind of interest-group districting would be virtually impossible to accomplish within geographical districts without imposing a system of proportional representation, and it would constitute a dramatic shift in the way districting is done. It is unlikely that the Court would require this approach to race-conscious districting or that legislatures would adopt it on their own.

Nevertheless, there is another way in which "race-as-a-factor" may enter the districting calculus. As with the Harvard admissions plan, states may use race as a "plus factor," as one element among many that determines the shape districts take. Consistent with *Shaw*, the antiessentialist critique can be reserved for "excessive reliance" districting that creates bizarre districts explainable only on the basis of race: a bizarre district can be analogized to the "rigid" quota in *Bakke*. Using race as only one factor to be considered in combination with traditional districting techniques is a different matter. These traditional elements — geography, political boundaries — do not contribute to "diversity" in the same sense, but they protect against an

esthetic, moral, and other ideas and experiences," yet of all the varied traditions and ideas shared among our citizens, the FCC has sought to amplify only those particular views it identifies through the classifications most suspect under equal protection doctrine. Even if distinct views could be associated with particular ethnic and racial groups, focusing on this particular aspect of the Nation's views calls into question the Government's genuine commitment to its asserted interest; see *Bakke*, 438 U.S. at 314 (opinion of Powell, J.) ("Race-conscious measures might be employed to further diversity only if race were one of many aspects of background sought and considered relevant to achieving a diverse student body.").

497 U.S. at 621 (other citations omitted).

239. See *supra* text accompanying notes 91-127.

over-reliance on race. They therefore mitigate the dangers identified by the Court in *Shaw*.

The second issue is reformulation of the diversity justification away from essentializing claims about representation of "the minority perspective." A more defensible version, we believe, would focus on *legitimacy* rather than *voice*: a legislature without minority representation is less likely to be perceived as legitimate by the polity in general, or by the minority groups over whom it exercises power. Indeed, from this perspective Justice O'Connor's statement that "appearances do matter" seems right. The Court has recognized that legitimacy is, in large part, a function of appearance, whether the appearance is one of not bending to public pressure in the crafting of constitutional doctrine²⁴⁰ or ensuring that litigants do not exclude members of minority groups from juries.²⁴¹ It is in this way that race-conscious districting, achieved without drawing districts that call attention to themselves, might appeal to a Supreme Court that is eager to send a message about the limits of racial gerrymandering but is also acutely aware of the compelling interest states have in ensuring that members of minority groups believe they have a stake and a role in the political process.²⁴²

Thus, if the Court is interested in preserving the ability of states to create compact, racially identified districts, it has a way to do so that is doctrinally coherent. It could hold that race-as-a-factor districting furthers a compelling state interest in enhancing the legitimacy of the political system without running afoul of *Croson's* condemnation of "rigid quotas" or the *Metro* dissents' concerns with essentialism.²⁴³

And what of the filler people? So long as there are electoral districts and human line drawers (or computer programmers), there will be filler people. It is not enough to say there have always been Democrats in safe Republican districts.²⁴⁴ As recent cases show, in major urban areas filler people are increasingly members of one minority group placed in a district made safe for another minority group.

240. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2803-04, 2815-16 (1992) (opinion of O'Connor, J.) (regarding *stare decisis*).

241. *Georgia v. McCollum*, 112 S. Ct. 2348, 2353-54 (1992) (pointing to need for public confidence in justice system, which is eroded when group is excluded intentionally through exercise of peremptory challenges).

242. The claim here is not that the Constitution requires minority representation; it is that a state may permissibly pursue diversity in representation in the name of systemic legitimacy.

243. Under strict scrutiny, this is also an issue of "close fit." This would put pressure on states to draw relatively compact districts and provide another reason for distinguishing bizarre districts from race-as-a-factor districts, but it could not sensibly produce a requirement for the most compact districts — there are simply too many other variables that states may legitimately take into account, such as geography and political boundaries, in drawing districts.

244. See *United Jewish Org. v. Carey*, 430 U.S. 144, 167 (1977) (White, J., plurality opinion).

There is no easy or ideal answer here. Perhaps the best that can be expected or required is that a state seek some fair accommodation of the interests of historically excluded groups if it chooses to use race-based lines in the drawing of districts.

CONCLUSION

At the end of the day, *Shaw* remains an enigmatic decision most charitably read for its identification of the inherent difficulties and dangers of racially charged politics. Even that reading, however, cannot hide the tremendous failings of intellectual coherence and practical application that attach to the ever perilous middle ground of compromise. We believe that Justice O'Connor and a majority of the Court would ultimately like to push equal protection law toward a color-blind standard. In the specific context of redistricting, this would translate into race-neutral, compact districting that would be indifferent to the racial composition of districts. *Shaw* presented the Court with an opportunity to impose just such a categorical norm on the unruly processes of redistricting, but the Court conspicuously refused to adopt this norm. The failure to move in the direction of absolute race neutrality reflects a reasoning that can only be imputed to the Court. *Shaw* is an opinion that rises or falls with the concept of legitimacy. The Court is quite clear and outspoken on the manner in which excessive reliance on race threatens legitimacy. But the Court's refusal to reject all considerations of race is an acknowledgment that the interests of systemic legitimacy demand that important public institutions be integrated in late twentieth century America.

Under this view, *Shaw* follows its doctrinal progenitors, most notably *Bakke*, in searching for a principle of fair accommodation to the needs of a diverse and heterogeneous society. Even assuming the validity of long-term aspirations toward a constitutional norm of color blindness, the fact remains that this society can no longer tolerate an absence of minority representation in its elite institutions, be they professional academies or legislative halls. Accordingly, race consciousness within the confines of "normal" districting behavior will be held to impose no undue burden on individual rights of equal treatment. Nevertheless, excessive or unalterable race-based decisionmaking will be deemed to inflict dignitary harm on affected individuals and to threaten systemic legitimacy because of its inherent divisiveness.

Oddly, then, *Shaw* implicitly resurrects the conclusion, though decidedly not the reasoning, of *UJO* to provide the only intelligible approximation of a standard to be applied in subsequent redistricting challenges:

[W]e think it . . . permissible for a State, *employing sound districting principles such as compactness and population equality*, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous *and whose residential patterns afford the opportunity* of creating districts in which they will be in the majority.²⁴⁵

Despite the problems we identify above, geography will subdue — or hide — the evils of race-conscious districting while serving the goal of political legitimacy.

So we are left with an unsatisfactory theory that yields an unsatisfactory standard for its implementation. *Shaw* does not adequately instruct lower courts as to how they should review subsequent claims, it does not resolve the ongoing claims of the filler people, and it does not answer the more troubling questions that lie close to the heart of any system of districting. It is, in short, *Bakke* all over again. Perhaps the only uncontested conclusion that we can reach is that this murkiness seems regularly to result when law meets race.

245. *Shaw v. Reno*, 113 S. Ct. 2816, 2829 (1993) (quoting *UJO*, 430 U.S. at 168 (alterations and emphasis in original; citation omitted)).