Michigan Law Review

Volume 95 | Issue 5

1997

The Unwelcome Judicial Obligation to Respect Politics in Racial Gerrymandering Remedies

Jeffrey L. Fisher

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [Election Law Commons](#), [Law and Race Commons](#), [Legal Remedies Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Jeffrey L. Fisher, *The Unwelcome Judicial Obligation to Respect Politics in Racial Gerrymandering Remedies*, 95 MICH. L. REV. 1404 (1997).

Available at: <https://repository.law.umich.edu/mlr/vol95/iss5/5>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

The Unwelcome Judicial Obligation to Respect Politics in Racial Gerrymandering Remedies

Jeffrey L. Fisher

INTRODUCTION

Like it or not, the attack on “bizarrely” shaped majority-minority electoral districts is now firmly underway. Nearly four years have passed since the Supreme Court first announced in *Shaw v. Reno*¹ that a state’s redistricting plan that is “so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting” may violate the Equal Protection Clause.² Such a district, the Court held, reinforces racial stereotypes, carries us further from the goal of a political system in which race no longer matters, and “threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.”³ The Court shows no signs of reconsidering this stance.⁴

Yet *Shaw*’s constitutional harm is still often misunderstood. *Shaw* claims are not reverse discrimination claims. In fact, the *Shaw* Court took pains to emphasize that the harm caused by racially gerrymandered⁵ districts was “analytically distinct” from the

1. 509 U.S. 630 (1993).

2. 509 U.S. at 642.

3. 509 U.S. at 650; see also *Miller v. Johnson*, 115 S. Ct. 2475, 2486 (1995).

4. Although each of the Court’s decisions in *Shaw*’s line of cases has been by a five-to-four vote, even dissenting Justices recently conceded that “the Court seems settled in its conclusion that racial gerrymandering claims such as these may be pursued.” *Bush v. Vera*, 116 S. Ct. 1941, 1977 (1996) (Stevens, J., dissenting, joined by Breyer and Ginsburg, JJ.).

5. This Note uses the term “racial gerrymander” to refer to a gerrymander that is sufficiently bizarre and connected to race to trigger strict scrutiny. See *infra* text accompanying notes 9, 24 (describing the Court’s threshold in this respect).

The term “gerrymander” describes efforts to manipulate district lines in order to serve the political or social goals of the architect of a redistricting plan. See generally Bernard Grofman, *Criteria for Redistricting: A Social Science Perspective*, 33 UCLA L. REV. 77, 99-100 & n.94 (1985); Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POLY. REV. 301, 301-04 (1991). The word pays homage to Elbridge Gerry, the late governor of Massachusetts, who became famous for his ability to draw district lines that allowed Democrats to achieve representation far in excess of their popular support. See David L. Anderson, Note, *When Restraint Requires Activism: Partisan Gerrymandering and the Status Quo Ante*, 42 STAN. L. REV. 1549, 1550-51 (1990). Such manipulation is probably as old as the Republic, but it is far easier today with the assistance of computer programs that allow the user to appreciate instantly the partisan and racial effects of any given district-line change. See *Bush*, 116 S. Ct. at 1953 (plurality opinion); *Shaw v. Hunt*, 861 F. Supp. 408, 457 (E.D.N.C. 1994), *revd.*, 116 S. Ct. 1894 (1996); CONGRESSIONAL QUARTERLY, INC., REDISTRICTING IN THE 1990s xv, 11

previously recognized harms of vote dilution and malapportioned districts.⁶ Even when a *Shaw* violation occurs, each citizen's vote is still worth the same amount as every other citizen's; white voters do not suffer because the district unfairly prevents them from electing the representative of their choice. In other words, plaintiffs in *Shaw* claims do not suffer any cognizable harm tied to election results, but rather feel only the "expressive" injury of being subjected to a racial classification in and of itself.⁷

Nonetheless, *Shaw*-type lawsuits have proliferated. Since the *Shaw* decision, courts in several states have subjected to strict scrutiny⁸ congressional districts in which race constituted the "dominant and controlling" consideration⁹ and largely have struck them down.¹⁰ During the past two years, the Supreme Court has struck down majority-minority districts in Georgia,¹¹ North Carolina,¹²

(1993); Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. (forthcoming 1997); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1381 (1987).

6. See *Shaw*, 509 U.S. at 652; see also *Miller*, 115 S. Ct. at 2485. For a description of vote dilution and malapportionment claims, see *infra* text accompanying notes 33-36.

7. See *Shaw*, 509 U.S. at 641; Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 278-79 (1994).

8. In subjecting a voting district to strict scrutiny, courts first determine whether race constituted the predominant motivating factor in drawing district lines. See *Miller*, 115 S. Ct. at 2486. If this is so, courts ascertain whether the state's excessive reliance on race was narrowly tailored to achieve a compelling interest, such as remedying past discrimination, see, e.g., *Miller*, 115 S. Ct. at 2490, or complying with the tenets of the Voting Rights Act's prohibition of vote dilution, see *Bush*, 116 S. Ct. at 1970 (O'Connor, J., concurring) (indicating that she is prepared to provide the fifth vote on the Court for this proposition); *Diaz v. Silver*, No. CIV.A.95-CV-2591, 1997 WL 94175, at *36 (E.D.N.Y. Feb. 27, 1997) (per curiam) (holding that compliance with section 2 of the Voting Rights Act constitutes a compelling interest); *Moon v. Meadows*, 952 F. Supp. 1141, 1149 (E.D. Va. 1997) (same). If the state does not narrowly tailor the district to achieve such an interest, it is unconstitutional. See, e.g., *Miller*, 115 S. Ct. at 2486.

9. *Miller*, 115 S. Ct. at 2486.

10. Compare *infra* notes 11-17 and accompanying text with *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994) (upholding congressional districts against *Shaw* challenge), *summarily aff'd.*, 115 S. Ct. 2637 (1995).

State legislative districts also have been subjected to *Shaw* challenges, and also have been struck down. See *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996); *Quilter v. Voinovich*, 912 F. Supp. 1006 (N.D. Ohio 1995) (per curiam), *vacated*, 116 S. Ct. 2542 (1996). Neither of these cases has reached the remedial stage; therefore, neither is discussed in this Note.

11. See *Miller*, 115 S. Ct. 2475.

12. See *Shaw v. Hunt*, 116 S. Ct. 1894 (1996) ("*Shaw II*").

and Texas;¹³ lower courts also have struck down such districts in Louisiana,¹⁴ New York,¹⁵ Florida,¹⁶ and Virginia.¹⁷

Now that courts staunchly have entered the thicket of racial gerrymandering, they are beginning to face the difficult task of providing appropriate remedies. Principles of federalism and separation of powers initially require federal courts to afford states a meaningful opportunity to cure defective districts by adopting new redistricting plans.¹⁸ Yet once federal courts have interjected themselves into states' redistricting controversies, many states have found themselves too politically paralyzed, or politically unwilling, to enact remedial plans — thus defaulting this duty back to the federal courts.¹⁹

These courts are then faced with a thorny question: What principles should guide federal courts in redrawing racially gerrymandered districts? It is well settled that federal courts charged with the "unwelcome obligation" of curing a redistricting violation must alter the state's original plan only as necessary to cure the constitutional defect²⁰ while deferring, as much as possible, to all

13. See *Bush*, 116 S. Ct. 1941. Additionally, the Supreme Court recently vacated and remanded a three-judge panel's decision upholding the constitutionality of a majority-Hispanic district in Illinois. See *King v. Illinois Bd. of Elections*, 117 S. Ct. 429 (1996) (mem.), summarily vacating and remanding No. 95-C-827, 1996 WL 130439 (N.D. Ill. March 15, 1996).

14. See *Hays v. Louisiana*, 936 F. Supp. 360 (W.D. La. 1996) (per curiam), *appeals dismissed as moot*, 116 S. Ct. 2542 (1996).

15. See *Diaz v. Silver*, No. CIV.A.95-CV-2591, 1997 WL 94175 (E.D.N.Y. Feb. 27, 1997) (per curiam).

16. See *Johnson v. Mortham*, 926 F. Supp. 1460 (N.D. Fla. 1996).

17. See *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997).

18. See, e.g., *Grove v. Emison*, 507 U.S. 25, 34 (1993); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). Thus far, Florida is the only state to adopt successfully a redistricting plan to cure a racial gerrymandering violation. See *Johnson v. Mortham*, No. TCA 94-40025-MMP, 1996 WL 297280 (N.D. Fla., May 31, 1996) (holding the state's reworked plan effectively cured the *Shaw* violation at issue). The North Carolina General Assembly has until April 1, 1997, to adopt such a remedial measure. See *Shaw v. Hunt*, Civ. A. No. 92-202-CIV-5-BR (E.D.N.C. Aug. 8, 1996). The New York legislature has until July 30, 1997, to adopt a new plan. See *Diaz*, 1997 WL 94175, at *39.

19. See *Vera v. Bush*, 933 F. Supp. 1341 (S.D. Tex. 1996) (mem.); *Miller v. Johnson*, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995), *prob. juris. noted sub nom. Abrams v. Johnson*, 116 S. Ct. 1823 (1996). In Texas, for example, Republican governor George W. Bush, Jr. refused to call the Democratic-controlled state legislature into session, apparently calculating that fellow Republicans would be better served by a remedial plan drawn by the district court composed of three Republican-appointed judges, one of whom, Circuit Judge Edith H. Jones, had previously served as general counsel for the Texas Republican Party. See *Vera*, 933 F. Supp. at 1344; see also Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEXAS L. REV. 1705, 1730-31 (1993) (discussing state political actors' incentives to stonewall, and detailing maneuvering by Alabama's governor, in hopes of more favorable plans from courts). In Louisiana, the court took the duty of redistricting upon itself after the state submitted three consecutive plans that the court deemed unconstitutional. See *Hays*, 936 F. Supp. at 372.

20. See, e.g., *Upham v. Seamon* 456 U.S. 37, 43 (1982) (per curiam); *Connor v. Finch*, 431 U.S. 407, 415 (1977).

legitimate state policies — such as respecting traditional political lines, protecting incumbents, and avoiding vote dilution — embodied in the original plan.²¹ Yet these seemingly straightforward directives can dissolve quickly when federal courts attempt to apply them to the “expressive harm”²² caused by a racial gerrymander. The problem is that any attempt to cure *Shaw*’s expressive harm forces a court to redraw district lines, an action that imposes very concrete consequences on a state’s political landscape.²³ To put the conundrum succinctly: Just how far can a federal court go in affecting electoral outcomes when its purpose is to cure only appearances and motivations?²⁴

If the answer is to be judged by the actions of the first few federal district courts to address the issue, the answer would appear to be “pretty far.” Despite the fact that *Shaw* injuries purport to have nothing to do with electoral outcomes or *partisan* gerrymandering, all three courts that have drafted congressional redistricting plans as remedies for these racial gerrymandering violations have altered dramatically the political landscape of the states at issue, in terms of both trampling states’ policies of protecting incumbents and altering the partisan balance of states’ congressional delegations. In Texas, after striking down three districts as unconstitutional racial gerrymanders,²⁵ the court redrew thirteen districts — invalidating already-held primaries in each of those districts — significantly altered the partisan balance in two of those districts, and moved two

21. See, e.g., *White v. Weiser*, 412 U.S. 783, 795-97 (1973).

22. For an explanation of the nature of “expressive harms” under *Shaw*, see *infra* text accompanying notes 78-88.

23. As the Court itself has noted, “it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another.” *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973); see also 412 U.S. at 753 (“The reality is that districting inevitably has . . . substantial political consequences.”); Kristen Silverberg, Note, *The Illegitimacy of the Incumbent Gerrymander*, 74 TEXAS L. REV. 913, 920-21 (1996) (highlighting the relevance of district lines).

24. Decisions following *Shaw* have insisted that the constitutional violation at issue stems from state legislatures’ improper motivations (that is, their excessive reliance on race), a violation of which bizarre appearance is relevant but not dispositive evidence. See *Miller v. Johnson*, 115 S. Ct. 2475, 2486 (1995); *Bush v. Vera*, 116 S. Ct. 1941, 1951-52 (1996) (plurality opinion). Despite the Court’s disclaimer, however, many commentators — and even some members of the Court — contend that district appearance remains the driving force behind the Court’s decisions. See *Bush*, 116 S. Ct. at 1962 (plurality opinion) (holding that a district’s bizarre shape “is not merely evidentially significant; it is part of the constitutional” harm); *Shaw*, 509 U.S. at 647 (“[W]e believe that reapportionment is one area in which appearances do matter.”); 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, 536-40, 587 (1993) (arguing that district appearances must be the starting point in evaluating *Shaw* claims); Pildes, *supra* note 5 (suggesting that the Court’s “predominant motive” test is destined to be reduced to an appearance-based test in order to be administrable). In any event, a court can cure impermissible “motives” only by altering their expressions or appearances.

25. See *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994), *affd. sub nom. Bush*, 116 S. Ct. 1941.

primary winners into new districts.²⁶ In Georgia, after striking down one district, the district court redrew all eleven of the state's districts, placed four incumbents in two districts — thereby creating two open seats — and moved a fifth incumbent into a new district.²⁷ In Louisiana, after striking down one district, the court redrew all seven of the state's districts, shifting decisively the partisan balance in one district, and altering the majority-minority district so drastically that its incumbent, Cleo Fields, decided that it would be futile to run for re-election.²⁸

These striking results were caused, at least in part, because each remedial court claimed to ignore all "political" considerations in its redistricting plan.²⁹ Granted, if political changes this drastic were

26. See *Vera v. Bush*, 933 F. Supp. at 1342, 1349 (S.D. Tex. 1996) (mem.) (noting, incorrectly, that only one primary winner was moved). On the issue of the partisan shift and the second dislocated primary winner, see Application for a Stay of the District Court's Remedial Order and/or for an Injunction Pending Appeal, *Vera v. Bush*, 933 F. Supp. 1341 (S.D. Tex. 1996) No. H-94-0277 [hereinafter *Texas Stay Application*] (stating, before the November 1996 election, that the court's plan switched the Fifth and Twenty-fifth Districts from slightly Democratic to, based on 1994 statewide returns, 53.7% Republican and 52% Republican, respectively). The shift in the Fifth District occurred precisely as predicted; Republican Pete Sessions carried the open seat with 53% of the vote. See *Results of Contests for the U.S. House, District by District*, N.Y. TIMES, Nov. 7, 1996, at B19 [hereinafter *Results of Contests*]. In the Twenty-fifth District, Democrat Ken Bentsen, with the advantage of incumbency, prevailed in a runoff election. Some observers believed that unusual partisan voting patterns critically aided Bentsen's victory when crossover voters from anti-abortion Republicans abandoned the Republican candidate, Dolly Madison. See Sam Howe Verhovek, *Something for Both Sides in the Texas Runoffs*, N.Y. TIMES, Dec. 12, 1996, at B22; Sam Howe Verhovek, *Republican Opposition to Party's Candidate Could Elect Democrat in Texas District*, N.Y. TIMES, Dec. 9, 1996, at A14.

At this point, I should note that several ideas in this Note stem from time I spent working on the remedial phase of the *Bush* litigation, including the Stay Application cited above. In that vein, I am especially thankful to Sam Hirsch, Don Verrilli, and Gerry Hebert for their guidance and insights regarding many issues discussed herein.

27. See *Johnson v. Miller*, 922 F. Supp. 1556, 1563-68 (S.D. Ga. 1995), *prob. juris. noted sub nom.* *Abrams v. Johnson*, 116 S. Ct. 1823 (1996). The partisan balance of Georgia's delegation remained unchanged in the 1996 elections, as all eleven incumbents won reelection. See *Results of Contests*, *supra* note 26, at B18.

28. See *Hays v. Louisiana*, 936 F. Supp. 360, 371-72 (W.D. La. 1996) (per curiam) (describing court-ordered plan), *appeals dismissed as moot*, 116 S. Ct. 2542 (1996); Kevin Sack, *Victory of 5 Redistricted Blacks Recasts Gerrymandering Dispute*, N.Y. TIMES, Nov. 23, 1996, at A1; compare *House Membership in 104th Congress*, 52 CONG. Q. WKLY. REP. 3299, 3299 (1994) (listing 1994 delegation) with *Results of Contests*, *supra* note 26, at B18 (showing that the Fifth District, formerly the Fourth District, switched to the Republican column by a 58% - 42% margin). While Louisiana's statewide voting age population is more than 30% African-American, the court reduced the African-American voting age population in the remodeled district from 55% to 27%. See Cleo Fields & A. Leon Higginbotham, Jr., *Why the Anxiety When Blacks Seek Political Power?*, NEW ORLEANS TIMES-PICAYUNE, July 23, 1996, at B18.

29. See *Vera*, 933 F. Supp. at 1351 (claiming that incumbents "are entitled to little deference in the process of redistricting") and that the court ignored the "partisan impact of its actions"; *Hays*, 936 F. Supp. at 372 ("[The court's plan] ignore[s] all political considerations."); *Johnson*, 922 F. Supp. at 1564 n.10 (stating that incumbency protection was given less weight than other factors because it is "inherently more political in nature"). Thus, it is very difficult to credit the court with the stability of the partisan balance in the Georgia delegation.

unavoidable, regardless of the remedy chosen, these claims of neutrality might have added legitimacy to the courts' remedies. But the troubling aspect of these early decisions is that such excessive political changes did not need to take place; the courts chose to subordinate states' express political redistricting policies to other redistricting criteria, such as compactness and respect for natural geographical boundaries.³⁰ Even more unsettling is the fact that the bulk of these critical alterations occurred in districts already declared *constitutional*,³¹ and that, at least in Texas and Louisiana, the partisan shifts consistently benefitted the same political party, the Republicans. For some reason, these federal courts apparently viewed the states' political considerations in the states' redistricting plans as either not worthy of respect or beyond their institutional reach.

This Note contends that neither of the courts' possible suppositions is accurate: if a state has expressed a policy of furthering identifiable political ends through redistricting, then a federal court *can* and *should* respect that policy when it remedies a *Shaw* violation in that state's redistricting legislation. Part I of the Note defines the expressive harm recognized in *Shaw* violations, emphasizing that the injury this harm involves district appearances and racial classifications, not electoral outcomes. Based on this harm, Part II describes the principles that should guide courts in fashioning remedies to *Shaw* claims. In particular, the second Part argues that, if the state has sought to further political ends through its redistricting plan, federal courts should strive to minimize alterations of the state's political landscape. Part III examines the policy consequences of such a rule. It maintains that requiring courts to consider the political consequences of their decisions does not cause courts to overstep institutional constraints on the federal judiciary. Rather, it encourages courts to exercise judicial restraint in refusing to alter unnecessarily a state's political status quo.

I. THE HARM CAUSED BY RACIAL GERRYMANDERING

In order to fashion an appropriate remedy for racial gerrymandering violations, one must first understand the Supreme Court's concept of the harm to be cured. Therefore, this Part separates *Shaw's* myths from its realities. Section I.A focuses the discussion by straining out harms *not* implicated in *Shaw* violations. Section I.B then surveys the Court's various attempts to define the real

30. See *infra* text accompanying notes 136, 141-46.

31. See, e.g., *Vera v. Richards*, 861 F. Supp. 1304, 1345 (S.D. Tex. 1994) (explicitly upholding the constitutionality of surrounding districts), *aff'd. sub nom.* *Bush v. Vera*, 116 S. Ct. 1941 (1996). In some other states, the constitutionality of surrounding districts was not even challenged. See, e.g., *Miller v. Johnson*, 115 S. Ct. 2475 (1995).

harm *Shaw* violations cause, and concludes that the only constitutional harm that concerns the entire *Shaw* majority is the appearance of a state classifying its citizens along racial lines.

A. Harms Not Implicated by *Shaw* Violations

As a preliminary step toward productively examining the constitutional harm that *Shaw* seeks to address, two points must be made clear at the outset: (1) *Shaw* claims are not vote-dilution claims; and (2) *Shaw* claims are not partisan-gerrymandering claims.

1. Vote Dilution

The Supreme Court has carefully emphasized that *Shaw* claims are “analytically distinct” from vote-dilution claims.³² In the case of racial vote dilution, plaintiffs, as members of a racial minority, suffer the injury of having the strength of their votes systematically “diluted” on a statewide basis as compared to members of the majority group.³³ In short, the state’s plan harms the plaintiffs because it prevents them from having equal opportunities to elect representatives of their choice.³⁴ Similarly, in a malapportionment case, the plaintiffs suffer the injury of having their vote diluted because there are more people in their district than in another; thus, each of their votes does not “count” as much as someone’s in a district with fewer people.³⁵ These harms strike at the heart of what is considered “the right to vote.”³⁶

32. See *Shaw v. Reno*, 509 U.S. 630, 652 (1993); see also *Miller*, 115 S. Ct. at 2485.

33. Section 2 of the Voting Rights Act, as amended, provides the basis for racial “vote dilution” claims. See 42 U.S.C. § 1973 (1994). Section 2 is implicated when, for instance, a state fails to draw a majority-minority district around a reasonably compact and politically cohesive minority population large enough to form the majority of a district, see, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986), or when a state creates a multi-member district in an area where racially polarized voting prevents the election of minority representatives, see, e.g., *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

34. See *Shaw v. Hunt*, 116 S. Ct. 1894, 1906 (1996) (construing 42 U.S.C. § 1973(b) (1994)); *Gingles*, 478 U.S. at 93 (O’Connor, J., concurring in judgment) (noting that “electoral success” is “the linchpin of vote dilution claims”); Pildes, *supra* note 5. In a very real sense, then, vote-dilution claims are racial discrimination claims.

35. See *Karcher v. Daggett*, 462 U.S. 725 (1983); *Reynolds v. Sims*, 377 U.S. 533 (1964); Karlan, *supra* note 19, at 1717 (describing the injury in malapportionment cases).

The impulse behind *Reynolds* was a concern for something approximating proportional representation. As Chief Justice Warren explained, “[I]t would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators.” *Reynolds*, 377 U.S. at 565. This type of harm, however, clearly is not implicated in *Shaw* litigation. See *infra* note 37 and accompanying text.

36. Cf. *Reynolds*, 377 U.S. at 555 (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society . . .”); *United States v. Saylor*, 322 U.S. 385, 386, 389 (1944) (noting that the right to vote protects against the diluting effect of ballot-box stuffing); Karlan, *supra* note 7, at 248-49 (describing the “right to vote” as encompassing the ability to participate in and, through aggregation, to affect the outcome of elections).

Yet in *Shaw* cases, the “right to vote” — in other words, the right to affect electoral outcomes — remains unaffected. In each of the *Shaw* challenges brought to date, the percentage of congressional districts that were majority-white districts equalled or exceeded the percentage of the state’s white population.³⁷ This point is absolutely crucial: successful *Shaw* plaintiffs do not bear the harm of enduring unfair or flawed election results due to discrimination in the state’s redistricting map.³⁸ No one’s vote is diluted;³⁹ no one’s vote counts more than anyone else’s.⁴⁰ As Professor Pamela Karlan elaborates, in *Shaw* cases “[n]o one [is] denied the ability to participate in congressional elections. No one’s ability to elect her preferred candidate [is] impaired. No allegations [are] made that the plaintiffs ha[ve] been hindered in any way from participating fully in the governance process of reapportionment.”⁴¹ *Shaw* injuries do not stem from unfair outcomes or unfair processes; by simple logic, plaintiffs seeking the ability to participate in a colorblind electoral process could not claim that their right to vote has been impaired because there are too many blacks in their district.⁴²

2. Partisan Gerrymandering

It is equally clear that the Court views *Shaw*’s harm as distinct from the harm caused by partisan gerrymandering.⁴³ Indeed, this distinction is underscored by the fact that the very plans containing the districts struck down by the Court in North Carolina⁴⁴ and

37. In North Carolina, for example, whites — who accounted for 78% of the state’s total population — comprised the overwhelming majority in 10 of the state’s 12 districts (83%). See *Shaw*, 509 U.S. at 634-35; CONGRESSIONAL QUARTERLY, INC., *supra* note 5, at 549.

38. In other words, *Shaw* plaintiffs do not suffer because, in effect, the “wrong” person was elected. See also *infra* section I.B.1 (showing that *Shaw*’s harm is not related to the representative elected from the district at issue).

39. Indeed, the plaintiffs in *Shaw* did not even assert that the state’s redistricting plan diluted their votes in any way. See *Shaw*, 509 U.S. at 641.

40. For example, the redistricting plan struck down in *Bush v. Vera* achieved exact mathematical equality: every district contained precisely 566,217 people. See 116 S. Ct. 1941, 1979 n.10 (1996) (Stevens, J., dissenting).

41. Karlan, *supra* note 7, at 286; see also Karlan, *supra* note 19, at 1736-37; Pildes & Niemi, *supra* note 24, at 506, 514.

42. See Karlan, *supra* note 7, at 279. Despite the fact that, at one point, the *Shaw* Court characterized the plaintiffs’ claim as an alleged violation of their “right to participate in a ‘color-blind’ electoral process,” see *Shaw* at 641-42, later opinions abandoned this characterization and have demonstrated that *Shaw*’s harm stems from the expression of racial classifications, manifested primarily by the appearances of bizarre districts. See *infra* subsection I.B.2.

43. At least Justice Stevens views the Court’s logic as flawed on this point. He sees racial gerrymanders as merely a subset of political gerrymanders. See *Bush*, 116 S. Ct. at 1975 n.2, 1987-92 (Stevens, J., dissenting, joined by Ginsburg and Breyer, JJ.); see also *infra* note 54.

44. *Shaw v. Hunt*, 116 S. Ct. 1894 (1996).

Texas⁴⁵ had been previously upheld under explicit, partisan-gerrymandering challenges.⁴⁶

The Court applies an entirely separate doctrine to claims of partisan gerrymandering, articulated in *Davis v. Bandemer*.⁴⁷ Under the *Bandemer* plurality's test, a redistricting plan constitutes an unconstitutional partisan gerrymander only if it "will consistently degrade a voter's or a group of voters' influence on the political process as a whole."⁴⁸ This standard is so difficult to satisfy that the doctrine has proven to be completely without teeth.⁴⁹ In effect, the complaining political party must be entirely shut out of the political process. And neither the Supreme Court nor any other court has ever found that to have occurred in legislative districting.⁵⁰

The Court's consistent judicial restraint in partisan gerrymandering disputes is particularly important because it is firmly supported by two of the five Justices who support the *Shaw* doctrine, Justice O'Connor and Chief Justice Rehnquist. In fact, they would prefer to make the doctrine absolute. Concurring in the judgment in *Bandemer*, Justice O'Connor, joined by then-Justice Rehnquist, would have held all claims of partisan gerrymandering non-justiciable.⁵¹ In their view, partisan redistricting is the essence of politics; therefore, even if a redistricting plan clearly dilutes a political party's voting power, courts have no business interfering with

45. *Bush v. Vera*, 116 S. Ct. 1941 (1996).

46. See *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.), *summarily affd.*, 506 U.S. 801 (1992); *Terrazas v. Slagle*, 789 F. Supp. 828, 834-35, 839 (W.D. Tex. 1991), *summarily affd.*, 506 U.S. 801 (1992).

47. 478 U.S. 109 (1986).

48. 478 U.S. at 132 (plurality opinion).

49. See Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEXAS L. REV. 1643, 1671 (1993) (highlighting the weakness of the doctrine); Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1208-09 (1996) (same).

50. See Issacharoff, *supra* note 49, at 1671 (The "partisan gerrymandering standard [has] yet to be used by any court to invalidate any legislative action, [and] the Supreme Court also threw its hands in the air when confronted with the most wanton political gerrymander of the 1980s: the infamous Burton gerrymander of California." (citing *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394 (D. Md. 1991), *affd.*, 112 S. Ct. 2269 (1992); *Republican Party v. Wilder*, 774 F. Supp. 400 (W.D. Va. 1991))).

In 1994, a federal district court granted a temporary injunction and later held that North Carolina's districts for electing superior court judges violated *Bandemer*. The Fourth Circuit, however, vacated the judgment and remanded the case in light of increased success by the complaining party, the Republicans, in the 1994 elections. See *Republican Party v. Hunt*, No. 94-2410, 1996 WL 60439 (4th Cir. Feb. 12, 1996) (per curiam).

51. See *Bandemer*, 478 U.S. at 144-61 (O'Connor, J., concurring in judgment). For scholarly support of this view, see Larry Alexander, *Lost in the Political Thicket*, 41 FLA. L. REV. 563, 564 (1989) (asserting that, in *Bandemer*, the Court "indeed entered the political thicket, a trackless wilderness best left unexplored"). See also *id.* at 564 n.9 (citing other commentators holding similar views). For a persuasive argument in support of *Bandemer*, however, see Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 SUP. CT. REV. 175, 177.

the legitimate exercise of political power by the victorious party.⁵² For these two Justices, at least, expressly attempting to classify voters according to political party — or, perhaps more accurately stated, according to past voting practices — presents no constitutional harm.

But while politics and race often seem inescapably intertwined — for example, statistics in *Bush* indicated that ninety-seven percent of blacks in Dallas voted Democratic⁵³ — the five-member *Shaw* majority continues to insist that racial gerrymandering is viable as a distinct, justiciable harm. The Court's tenacious adherence to the idea that *Shaw* represents a distinct theory is especially significant because plans like Texas's, North Carolina's, and New York's could easily have been viewed as political gerrymanders.⁵⁴ In each case, the state was required by the Voting Rights Act to draw majority-minority districts.⁵⁵ And in each case, the state could have drawn more compact majority-minority districts. But instead, Democratic-controlled legislatures spread out minority-Democratic voters to avoid "packing"⁵⁶ too many Democratic voters into already "safe" majority-minority districts,⁵⁷ thereby potentially costing Democrats seats in surrounding districts that they controlled at

52. See 478 U.S. at 145 (O'Connor, J., concurring in judgment).

53. See *Bush*, 116 S. Ct. at 1956 (plurality opinion); see also DAVID A. BOSITIS, REDISTRICTING AND REPRESENTATION: THE CREATION OF MAJORITY-MINORITY DISTRICTS AND THE EVOLVING PARTY SYSTEM IN THE SOUTH 46-47 (1995) (estimating that 91% of southern African-Americans voted Democratic in the 1994 congressional elections).

54. See *Bush*, 116 S. Ct. at 1957 (plurality opinion); *Diaz v. Silver*, No. CIV.A.95-CV-2591, 1997 WL 94175, at *12-18, (E.D.N.Y. Feb. 27, 1997) (per curiam) (discussing political motivations in adopting plan); Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1389-90 (1995) (book review) (discussing North Carolina's plan). Indeed, Justice Stevens explained the Texas plan in exactly these terms. See *Bush*, 116 S. Ct. at 1975 n.2, 1987-92 (Stevens, J., dissenting) (stating that the Texas plan should be upheld because it was predominately a political, not racial, gerrymander). Yet at the same time, Justice Stevens called for a more stringent application of the political gerrymandering doctrine. See *Bush*, 116 S. Ct. at 1975 n.2. (Stevens, J., dissenting) (arguing that the "evils of political gerrymandering should be confronted directly, rather than through the race-specific approach that the Court has taken in recent years").

Several commentators also contend that stepping up the political gerrymandering doctrine will more forthrightly and effectively deal with racial gerrymandering than does the *Shaw* doctrine. See, e.g., Samuel Issacharoff & Richard H. Pildes, *No Place of Partisan Gerrymandering*, TEX. LAW., Aug. 5, 1996, at 25. Briefly stated, these commentators maintain that because race and politics are so intermingled, "address[ing] the aspect of race alone is both artificial and unduly explosive." *Id.* In effect, then, the Court's recent decisions really only unveil a subset of partisan gerrymandering. "Rather than polarized debates over race," these commentators contend, "we ought to focus on getting rid of political gerrymandering altogether." *Id.*

55. See *supra* note 33 (describing the requirements of section 2 of the Voting Rights Act).

56. Roughly speaking, "packing" describes efforts to place into one district (or a few districts) inefficiently high numbers of voters supporting a particular partisan interest, thereby preventing these voters from altering election results in surrounding districts.

57. A "safe" district is one in which a particular political party has a comfortable majority that essentially guarantees a victory in that district.

the time.⁵⁸ Nevertheless, the Court has determined that it can and will strike down any plan that crosses the line dividing partisan gerrymandering from racial gerrymandering — that is, whenever state legislatures go so far as to use “race as a proxy” for voting patterns.⁵⁹ *Shaw* is concerned only with harm caused by the latter.⁶⁰

B. *Shaw's Real Harm*

Having focused the discussion on *Shaw's* particular area of concern — racial gerrymanders that do not dilute votes — one may proceed to identify the specific injury that *Shaw* seeks to remedy. This section analyzes the two harms that the Court has discussed, (1) “representative harms” and (2) “expressive harms,” and concludes that only the latter properly encapsulates the Court’s view of the constitutional harm that *Shaw* seeks to redress.

1. *Representative Harms*

The majority in *Shaw* wrote that racial gerrymanders “threaten[] to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.”⁶¹ Such a

58. See *Shaw v. Hunt*, 861 F. Supp. 408, 458, 465-66 (E.D.N.C. 1994) (describing the prominence of partisan politics in North Carolina redistricting, including Republican admissions that increased numbers of majority-minority districts favored their interests), *rev'd.*, 116 S. Ct. 1894 (1996); Issacharoff & Pildes, *supra* note 54, at 25; Timothy G. O'Rourke, *Shaw v. Reno: The Shape of Things to Come*, 26 RUTGERS L.J. 723, 756 (1995); Pildes, *supra* note 54, at 1389-90. Partisan manipulation also played a role — though not as overpowering a role — in drafting Georgia's and Louisiana's plans that included unconstitutional districts. See *Hays v. Louisiana*, 839 F. Supp. 1188, 1201 (W.D. La. 1993), *vacated*, 114 S. Ct. 2731 (1994); Laughlin McDonald, *Can Minority Voting Rights Survive* *Miller v. Johnson*, 1 MICH. J. RACE & L. 119, 146 (1996) (describing Georgia's plan). Incumbency protection was also employed extensively in all of these plans. See *infra* note 141.

59. See *Bush*, 116 S. Ct. at 1961-62 (plurality opinion) (striking down districts because “the bizarre shaping and noncompactness of these districts were predominantly attributable to racial, not political, manipulation”); cf. *Davis v. Bandemer*, 478 U.S. 109, 160-61 (1986) (O'Connor, J., concurring in judgment) (advocating a doctrine under which partisan gerrymandering claims are nonjusticiable, but maintaining that “[r]acial gerrymandering claims should remain justiciable, for the harms it engenders run counter to the central thrust of the Fourteenth Amendment”). What makes race different? For starters, race, unlike political affiliation, is an immutable characteristic. Moreover, under our constitutional scheme, race-based classifications, unlike political classifications, are “inherently suspect and thus call for the most exacting judicial examination” *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.), *quoted in* *Miller v. Johnson*, 115 S. Ct. 2475, 2482 (1995).

60. See *Bush*, 116 S. Ct. at 1956 (plurality opinion) (holding that “[i]f district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify,” and thus strict scrutiny does not apply).

61. *Shaw v. Reno*, 509 U.S. 650 (1993); see also *Miller*, 115 S. Ct. at 2487; *Louisiana v. Hays*, 115 S. Ct. 2431, 2436 (1995); *Shaw*, 509 U.S. at 648 (“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.”).

message might be pernicious, but, for three principal reasons, no harm connected to the actual representation voters receive in *Shaw*-type districts could be the real harm that *Shaw* seeks to address.

First, representative harms would apply not only to the bizarrely shaped majority-minority districts to which *Shaw* speaks, but also to compact majority-minority districts created under the Voting Rights Act — districts to which *Shaw* does not apply.⁶² Both types of districts are created with the same level of intent toward ensuring that the given minority has an opportunity to elect a representative of its choice. But while some members of the Court stand prepared to strike down the Voting Rights Act for this very reason,⁶³ at least five Justices have stated unequivocally that majority-minority districts may be created when race does not subordinate other traditional districting principles.⁶⁴ If representative harms were truly the thrust behind *Shaw*, the Court could not take this carefully articulated position. It practically would be forced to declare the Voting Rights Act, and every district created under it, unconstitutional. That the Court has explicitly shunned this drastic action suggests that some other harm drives *Shaw* — a harm not present in compact, intentionally drawn, majority-minority districts.

Second, claiming that representatives will feel as though they represent only the interests of the minority group assumes precisely the “demeaning notion”⁶⁵ that the *Shaw* majority says is impermissible: “that members of the same racial group . . . share the same political interests.”⁶⁶ Moreover, even if the Court could somehow avoid this pitfall, surely a state could not defend a *Shaw*

62. See *Bush*, 116 S. Ct. at 1969 (O'Connor, J., concurring) (arguing that compliance with section 2 of the Voting Rights Act constitutes a compelling state interest and therefore satisfies strict scrutiny); *Shaw v. Hunt*, 861 F. Supp. at 471 n.59 (noting that any claim regarding representative harms is a “question for Congress concerning the remedial provisions of the Voting Rights Act,” but not for *Shaw* remedial courts); see also *supra* notes 8 & 33 (describing the relationship between *Shaw* and the Voting Rights Act).

63. See *Bush*, 116 S. Ct. at 1973-74 (Thomas, J., concurring in judgment); Pildes, *supra* note 5 (manuscript at 2 n.2) (“[T]here is reason to think that at least two, and as many as four, Justices are likely to . . . find the results test of amended Section 2 [of the Voting Rights Act] unconstitutional.”).

64. See *Bush*, 116 S. Ct. at 1961 (plurality opinion) (“The constitutional problem [with race-conscious districting] arises only from the subordination of [traditional districting] principles to race.”); 116 S. Ct. at 1951 (plurality opinion) (“Strict scrutiny does not apply . . . to all cases of intentional creation of majority-minority districts.” (citing *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *summarily affd.*, 115 S. Ct. 2637 (1995))).

65. *Miller*, 115 S. Ct. at 2487 (quoting *Metro Broadcasting v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting), *overruled by* *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995)).

66. *Shaw*, 509 U.S. at 647; see also *Miller*, 115 S. Ct. at 2487; *supra* note 59 and accompanying text (noting the Court's denunciation of the use of race as a proxy for voting patterns). Justice Stevens also has articulated this concern. See *Miller*, 115 S. Ct. at 2497-98 (Stevens, J., dissenting).

claim by pointing to evidence that, for instance, the Representative of the district at issue actually furthered white voters' interests at the expense of the African-American or Latino majority.⁶⁷ Hinging *Shaw* claims on a Representative's voting record would inject the judiciary into the business of the political branches at an unprecedented level, a level that the Court has demonstrated no previous desire to attain.⁶⁸

Third, even when the Court discusses representative harms, it only mentions them as a *possibility*; such a speculative view of harm, however, has never been enough to satisfy Article III's standing requirement.⁶⁹ Consider the following invocations: "[v]oters in such districts *may* suffer the special representative harms racial classifications can cause";⁷⁰ "a racial gerrymander *may* exacerbate . . . patterns of racial-bloc voting";⁷¹ "elected officials are *more likely* . . . to represent only the members of [the majority] group."⁷² The Court has found constitutional violations without ever saying that any of these representative harms has actually occurred or will occur. Thus, if the notion of representative harm has any force, it must be only insofar as it adds to the injurious *message* that racially gerrymandered districts convey — and not as part of any concrete electoral consequences the districts actually cause. Alternatively stated, *Shaw* plaintiffs are harmed when the intentional creation of a bizarre majority-minority district *expresses* that its Representative is more beholden to one racial group than another, but not through any actual failure on the part of the plaintiffs' Representative to

67. See *Shaw v. Hunt*, 861 F. Supp. at 471-72 & n.59 (recognizing that any claims regarding the quality of representation in challenged districts is irrelevant to the constitutionality of the districts), *revd. on other grounds*, 116 S. Ct. 1894 (1996).

68. This conception of *Shaw*'s injury would totally remove the harm from the intentions of the gerrymandered district's drafters and from expressions of the district itself — the two places where the Court has exclusively looked to determine liability. See *supra* note 24. It would also require the Court to resolve a quintessentially "political question." To cite just one other example, hinging *Shaw*'s harm on voting records would produce extreme tension with the plurality's statement in *Bandemer* (with which Justice O'Connor agreed in her concurrence) that "[a]n individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district." 478 U.S. 109, 132 (1986) (plurality opinion); see 478 U.S. at 152-53 (O'Connor, J., concurring in judgment) (agreeing with this position).

69. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-64 (1992) (requiring distinct and palpable, rather than hypothetical or speculative, injury to satisfy Article III's standing requirement); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (same). As the Court has explained in the context of the *Shaw* doctrine itself, "[o]nly those citizens able to allege injury 'as a direct result of having *personally* been denied equal treatment' may bring [an Equal Protection] challenge." *United States v. Hays*, 115 S. Ct. 2431, 2437 (1995) (quoting *Allen*, 468 U.S. at 755) (alteration in original).

70. *Hays*, 115 S. Ct. at 2436 (emphasis added).

71. *Shaw*, 509 U.S. at 648 (emphasis added).

72. 509 U.S. at 648 (emphasis added).

protect their interests. Otherwise, every disgruntled constituency within a district could press an equal protection claim.⁷³

Perhaps recognizing these infirmities, the Court's recent opinions have virtually abandoned the idea of representative harms. The *Miller* Court barely mentioned the notion,⁷⁴ and in the following Term's cases, *Bush*⁷⁵ and *Shaw II*,⁷⁶ the Court failed even to mention the concept. This abandonment has been a wise maneuver, for, as the following subsection demonstrates, the only harm that *Shaw* may attempt to remedy stems from the message that bizarre districts convey, not from any inequities in representation that they conceivably may cause.

2. Expressive Harms

Because *Shaw* is not directed toward curing any purportedly harmful election results caused by racially gerrymandered districts, the harm on which *Shaw* rests must flow solely from the drawing of the districts themselves. *Shaw*, therefore, addresses an "expressive harm" — the inherent harm that stems, in and of itself, from a state subjecting its citizens to a racial classification without sufficient justification.⁷⁷

The idea of an expressive harm can be rather nebulous. Professors Richard Pildes and Richard Niemi eloquently encapsulate the concept:

An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about. On this view, the *meaning* of a governmental action is just as important as

73. A close inspection of *Hays* reveals this distinction. Only after the Court held that "the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action," 115 S. Ct. at 2436, did the Court address representative harms. This demonstrates that "the legislature's reliance on racial criteria" constituted the real harm through which the potential for, but not the necessity of, representative harms was expressed.

74. See Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47, 58-59 (1996) (noting that the Court in *Miller* "only glancingly mentioned" representative harms); Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 288 (1996) (stating that "*Miller* [] apparent[ly] abandon[ed]" the requirement that plaintiffs prove representative harms).

75. 116 S. Ct. 1941 (1996).

76. 116 S. Ct. 1894 (1996).

77. Recall that a state *may* classify its citizens by race if the classification is narrowly tailored to meet a compelling governmental interest. See *supra* note 8 (listing such interests). Equal protection forbids states only from "subordinat[ing] traditional districting principles to race substantially more than is 'reasonably necessary.'" *Bush*, 116 S. Ct. at 1961 (plurality opinion). Thus, racially motivated district lines are apparently valid if they comport with the requirements of section 2 of the Voting Rights Act. See *Bush*, 116 S. Ct. at 1961; *supra* note 8. But when section 2 has failed to require such a district, the Court has yet to uphold any district subject to strict scrutiny.

what that action *does*. Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values.⁷⁸

This is exactly the principle that drives *Shaw*. The *Shaw* doctrine says that even though racial gerrymandering does not cause material injuries, the state violates the Constitution whenever it conveys the message of classifying its citizens by race without a good reason — especially in an area as sensitive as voting districts.

The Justices themselves now refer to *Shaw*'s harm as an expressive harm,⁷⁹ and other language in their opinions supports this view. In *Shaw* itself, the Court worried about "[t]he message that such districting sends,"⁸⁰ the "perception" that racial classification "reinforces,"⁸¹ and the "signal[s]" racially gerrymandered districts convey.⁸² Subsequent opinions established that this anxiety over the message conveyed by the state's "racial classification" forms the essence of racial gerrymandering's harm.⁸³ Simply put, the state's unwarranted and implied racial classification, in and of itself, is the harm that *Shaw* seeks to remedy.⁸⁴

Shaw and its progeny, therefore, hold that, because of the threatening message they convey to a democracy based on equality,

78. Pildes & Niemi, *supra* note 24, at 506-07; see also *id.* at 507-10 (elaborating on this idea).

79. See *Bush*, 116 S. Ct. at 1964 (plurality opinion) ("the nature of the expressive harms with which we are dealing . . ."); 116 S. Ct. at 2002 (Souter, J., dissenting) (citing Pildes & Niemi, *supra* note 24, at 506-07).

80. *Shaw v. Reno*, 509 U.S. 630, 648 (1993).

81. 509 U.S. at 647.

82. 509 U.S. at 650.

83. *Shaw* and its progeny are replete with references to the harms of "racial classifications." See *Bush*, 116 S. Ct. at 1951 (plurality opinion) (emphasizing that a citizen must suffer "racial classification" to bring *Shaw* claim); *Shaw v. Hunt*, 116 S. Ct. 1894, 1900 (1996) (focusing inquiry on "racial classification"); *Miller v. Johnson*, 115 S. Ct. 2475, 2485 (1995) (rejecting notion that "deliberate classification of voters on the basis of race" fails to state a *Shaw* claim); *United States v. Hays*, 115 S. Ct. 2431, 2433 (1995) (holding that plaintiffs must be "subjected to a racial classification" to have standing under *Shaw*); 115 S. Ct. at 2437 (stating that "racial classification" is necessary to satisfy standing requirement); *Shaw*, 509 U.S. at 643 ("Classifications of citizens solely on the basis of race are by their very nature odious to . . . equality." (quotation omitted)); 509 U.S. at 649-50 ("Classifying citizens by race . . . threatens special harms that are not present in our vote-dilution cases."); 509 U.S. at 657 ("Racial classifications of any sort pose the risk of lasting harm to our society.").

84. See Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1184 n.35 (1996) ("[T]he harm is, quite literally, the drawing of lines based on race." (internal quotation omitted)); Issacharoff & Goldstein, *supra* note 74, at 62 (asserting that both Justice O'Connor's and Justice Kennedy's opinions "turn[] on the dangers of racial classifications"). Notably, this concept of a racial classification itself causing constitutional harm also provides the basis for the Court's recent decisions regarding peremptory challenges. See Katharine Inglis Butler, *Affirmative Racial Gerrymandering: Rhetoric and Reality*, 26 CUMB. L. REV. 313, 326-27 (1996) (citing *Batson v. Kentucky*, 476 U.S. 79 (1986); *Powers v. Ohio*, 499 U.S. 400 (1991)).

even “benign”⁸⁵ racial classifications in districting are unconstitutional when unsupported by a compelling justification.⁸⁶ In the words of Professor Butler:

The message is that the state believes that skin color matters more than all other bases for shared political interest. . . . For voters of all races it says that blacks have a greater community of representational interest with other blacks hundreds of miles away than they have with people in the community where they live and work.⁸⁷

In the Court’s eyes, a state’s purposeful racial classification, expressed by a bizarrely shaped racial gerrymander, signals differences between the races to a degree that is incompatible with America’s goal of equality.⁸⁸ Thus, even though *Shaw*-type racial gerrymandering does not cause any electoral or representative harms, its unjustified racial classification itself yields a constitutional harm that, in the Court’s view, requires a remedy.

85. Here, “benign” means that the classification neither causes disparate impact (in the form of vote dilution) nor constitutes any “racial slur.” See *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 165 (1977); see also *supra* section I.A.1.

86. For the Court, no piece of evidence is more convincing of an excessive use of race than the bizarre shapes of the districts themselves. Though the Court has provided somewhat contradictory messages as to whether shape is merely evidence of, or actually part of, the harm, compare *Miller*, 115 S. Ct. at 2486 (bizarre shape is merely evidence of *Shaw* violation) with *Bush*, 116 S. Ct. at 1962 (plurality opinion) (“bizarre shape and noncompactness . . . [are] not merely evidentially significant,” they are “part of the constitutional [harm]”), no single factor more pointedly represents the pernicious messages of racial redistricting.

87. Butler, *supra* note 84, at 340.

88. Therefore, this *direct* classification present in *Shaw* cases seemingly distinguishes *Shaw* claims from “citizen suits” claiming that the state has imposed a racial stigma, like the one present in *Allen v. Wright*, 468 U.S. 737 (1984), where the Court has refused to grant standing to sue. Compare *Hays*, 115 S. Ct. at 2435-36 (discussing *Allen*) with *Allen*, 468 U.S. at 766. Such a direct and explicit classification was absent in *Allen*, at least with respect to the residents within *Hays*’s purportedly unconstitutionally gerrymandered district. Arguably, a direct racial classification signals differences between the races in a way that the indirect tax inducement scheme in *Allen* did not, and in a way that a majority of the Court now steadfastly refuses to accept. Cf. *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996) (striking down Colorado’s Amendment Two because it was “a classification [of gays and lesbians] undertaken for its own sake, something the Equal Protection Clause does not permit”); *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2112-13 (1995) (holding that strict scrutiny applies to all governmental classifications based on race).

Under *Hays*, only citizens residing in the allegedly unconstitutional district have standing to sue. See 115 S. Ct. at 2436. Some commentators have questioned this restriction: If the state’s act of classification is the harm, why are only the people within the district classified? See, e.g., Karlan, *supra* note 74, at 288; Pildes, *supra* note 5. The Court’s response to this concern has been less than satisfactory, but the most persuasive reply is probably that the expressive harms from classification are most directly felt by residents of the district because the bizarre district lines tell members of the racial minority that the state has used their skin color as a proxy for their political interests, while signaling to whites in the district that their presence “is just incidental [— that they] are just the ‘filler people’ needed to comply with one-person/one-vote.” Butler, *supra* note 84, at 340.

II. THE PROPER REMEDY

The current Supreme Court has worked diligently to define narrowly the role of federal courts in crafting constitutional remedies. As recently as last Term, the Court reaffirmed that well-established "[p]rinciples of federalism and separation of powers impose stringent limitations on the equitable power of federal courts."⁸⁹ Our federal system requires that once a federal court has identified a particular harm caused by state action, the federal court must limit its remedy to the inadequacy that produced the plaintiff's injury.⁹⁰ Consequently, in the words of Justice O'Connor, the Court has consistently refused to give "federal courts a blank check to impose unlimited remedies upon a constitutional violator."⁹¹

Nowhere do these principles of judicial restraint have more force than in the context of redistricting. Therefore, this Part argues that, in remedying *Shaw* violations, federal courts should strive to alter the offensive district lines that express the *Shaw* harm without upsetting states' overall political compromises contained in states' redistricting plans. Section II.A describes the Court's application of the doctrines of federalism and separation of powers to redistricting, highlighting its emphasis on judicial restraint in remedying redistricting violations. Section II.B explains the importance and legitimacy of states' political policies, namely, protecting incumbents and establishing a particular partisan balance, which states often further through redistricting legislation. Section II.C contends that the Court's principles of judicial restraint in remedying faulty redistricting plans require federal courts to strive to preserve the essence of states' political policies in crafting remedial plans that cure racial gerrymandering violations.

A. General Principles

Since the federal courts' entry into the redistricting arena,⁹² the Supreme Court consistently has advocated a policy of judicial restraint in remedying redistricting violations. Drawing electoral districts is in many ways the quintessential act of state sovereignty; it represents the ultimate interaction and compromise between a

89. *Lewis v. Casey*, 116 S. Ct. 2174, 2197 (1996) (Thomas, J., concurring).

90. See *Lewis*, 116 S. Ct. at 2183; see also *Lewis*, 116 S. Ct. at 2186 (Thomas, J., concurring) ("[O]verreaching by a federal district court simply cannot be tolerated in our federal system."); *Missouri v. Jenkins*, 115 S. Ct. 2038, 2049 (1995); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977); *Milliken v. Bradley*, 433 U.S. 267, 280-82 (1977); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

91. *Jenkins*, 115 S. Ct. at 2058 (O'Connor, J., concurring) (commenting on the permissible geographic scope of remedies in school desegregation cases).

92. This entry essentially began with *Baker v. Carr*, 369 U.S. 186 (1962). In *Baker*, the Court held for the first time that a claim asserting that a state's apportionment scheme was unfair presented a justiciable controversy under the Equal Protection Clause.

state's political forces.⁹³ Thus, redistricting is first and foremost a privilege and duty of the states.⁹⁴ Accordingly, the Court ordinarily prohibits lower federal courts from ordering any remedy before giving an implicated state a meaningful opportunity to cure the violation.⁹⁵ Only when a state defaults on its duty to cure does a federal court assume the authority to order a new plan.⁹⁶

Even when a state does abdicate its responsibility to redistrict, the federal court exercising remedial authority must tread lightly. Finding constitutional infirmity in one aspect of a state's plan does not license a federal court to reconfigure other parts of the plan in a way it considers more appropriate or even fairer.⁹⁷ A long line of cases culminating with *White v. Weiser*⁹⁸ and *Upham v. Seamon*⁹⁹ requires federal courts to implement remedial redistricting plans that cure the discrete constitutional violation at issue *while disrupting legitimate state policies as minimally as possible*.¹⁰⁰ In other words, federal courts must limit their "modifications of a state plan . . . to those *necessary to cure any constitutional . . . defect*."¹⁰¹ All

93. See, e.g., *Bush v. Vera*, 116 S. Ct. 1941, 1979 n.9 (1996) (Stevens, J., dissenting) (noting that "the inherently political process of redistricting is as much at the core of state sovereignty as any other"); *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) (terming redistricting "the essential[] political process[] of the sovereign States"); *Baker*, 369 U.S. at 323-24 (Frankfurter, J., dissenting).

94. See *Miller v. Johnson*, 115 S. Ct. 2475, 2488 (1995) ("It is well settled that 'reapportionment is primarily the duty and responsibility of the State.' " (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975))); *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) ("[I]t is the domain of the States, and not the federal courts, to conduct apportionment in the first place."); cf. *Bush*, 116 S. Ct. at 1960-61 (plurality opinion) (noting the "longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan").

95. See *Voinovich*, 507 U.S. at 156; *Grove v. Emison*, 507 U.S. 25, 34 (1993); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (plurality opinion) (federal courts should defer to states "whenever practicable"); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964).

96. See *White v. Weiser*, 412 U.S. 783, 794-95 (1973); *Reynolds*, 377 U.S. at 586.

97. See *Wise*, 437 U.S. at 540-44 (plurality opinion) (holding, in the context of at-large districts, that federal courts must follow legitimate state policies, even if they are "disfavored" by the judiciary); *Bush*, 116 S. Ct. at 1987 (Stevens, J., dissenting) (asserting that "[w]hile egregious political gerrymandering may not be particularly praiseworthy," it is sufficiently legitimate to allow district lines to avoid strict scrutiny); Alfange, *supra* note 51, at 203 (explaining that a legislature's political choices cannot be put aside because of a judicial preference for a different policy goal).

98. 412 U.S. 783 (1973).

99. 456 U.S. 37 (1982) (per curiam).

100. See *Upham*, 456 U.S. at 43; *Weiser*, 412 U.S. at 795 (holding that a federal court "should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.' " (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971))); see also *Sixty-seventh Minn. State Senate v. Beens*, 406 U.S. 187, 202 (1972) (Stewart, J., dissenting) (noting that a federal court "seeking to remedy an unconstitutional apportionment [must] right the constitutional wrong while minimizing disturbance of legitimate state policies").

101. *Upham*, 456 U.S. at 43 (emphasis added).

other policies furthered by the state's plan must be deemed legitimate and, therefore, deserving of preservation.¹⁰²

B. *Political Considerations in Redistricting*

Political considerations, in the form of partisan balancing¹⁰³ and incumbency protection, are usually paramount in a state's redistricting legislation.¹⁰⁴ Indeed, it is doubtful that any single aspect of a redistricting plan receives greater attention from most legislators.¹⁰⁵ Hence, when — as in *Shaw* cases — these political considerations do not constitute any part of the harm caused by a state's plan, the remedial court¹⁰⁶ is bound to respect them.¹⁰⁷

102. See *Weiser*, 412 U.S. at 795 (“[W]hen adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment.”); see also *Karcher v. Daggett*, 466 U.S. 910, 916 (1984) (mem.) (Brennan, J., dissenting) (“[A] District Court must defer to any state policies that are ‘consistent with constitutional norms and . . . not [themselves] vulnerable to legal challenge.’” (alteration in original) (quoting *Weiser*, 412 U.S. at 797)).

103. “Partisan balance,” as the term is used in this Note, refers simply to the dispersion of partisan majorities that the state legislature placed in congressional districts. It is not meant to imply that the state legislature gave each political party a majority in a number of districts proportionate to its statewide support.

104. See *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (“Politics and political considerations are inseparable from districting and apportionment.”). Admittedly, in a few states today this is not the case. Some states, like Iowa, have commissions draw their districts based on purely apolitical criteria, such as compactness and contiguity. See IOWA CODE ANN. §§ 42.1-42.6 (West 1991). Political considerations, however, played a large part in each of the plans that spurred *Shaw* cases thus far, see *supra* text accompanying notes 54-58, and it is hard to imagine a *Shaw* claim arising in the absence of political gerrymandering of some sort.

105. See *Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in judgment) (highlighting the extreme importance of apportionment to legislators and political parties); *infra* notes 110-15 and accompanying text.

106. Because some *Shaw* claims never reach the remedial stage in federal courts, this Note uses the separate term “remedial court” to describe federal courts that are forced to remedy *Shaw* violations in separate proceedings after states prove unable to enact a remedial plan. See *supra* text accompanying notes 95-96.

107. This is especially true when a federal court is charged with the task of correcting one or two districts in a plan that was recently enacted by the state's legislature. Such has been the case in all *Shaw* violations to date. When a plan has become malapportioned because of a new census (as happens at each new decade), and the federal court must draw a new plan because the state has proven unable to do so, a federal court may have slightly more leeway because the state policies embodied in the old plan are a bit more stale. See, e.g., *Fletcher v. Golder*, No. 91-2314C(7), 1992 U.S. Dist. LEXIS 5894, at *33-*34 (E.D. Mo. Feb. 4, 1992) (utilizing increased discretion in drafting plan where no legislatively adopted plan was before the court). Nevertheless, a federal court should still recognize that, under principles of state sovereignty, somewhat dated state policy still has far more authority than policy created by a federal court.

In Georgia, the federal district court added yet another twist to attempts to measure the bounds of federal authority in redistricting. There, the court attempted to avoid the constraints of *Upham* and *Weiser* by claiming that influence applied by the U.S. Department of Justice overcame the will of the Georgia legislature. See *Johnson v. Miller*, 922 F. Supp. 1556, 1560 (S.D. Ga. 1995), *prob. juris. noted sub nom.* *Abrams v. Johnson*, 116 S. Ct. 1823 (1996). Nonetheless, the plan with the unconstitutional district eventually passed Georgia's legislative process, and it is difficult to understand how a federal court, in creating its own plan, could surmise more accurately the will of the state of Georgia.

Of course, remedial courts are bound to respect all legitimate state policies,¹⁰⁸ not just political ones. There will be instances, then, when preserving political choices conflicts with furthering other state policies. In these situations, federal courts should pay close attention to the state's redistricting plan. If the state's plan demonstrates that political considerations played a dominant force in its drafting,¹⁰⁹ courts remedying *Shaw* violations should give those political choices at least as much respect as they regularly give to other state policies.

1. *Partisan Balance*

As flatly stated by Justice White, "[t]he reality is that districting inevitably has and is intended to have substantial political consequences. . . . [Those who redistrict] seek, through compromise and otherwise, to achieve the political or other ends of the State."¹¹⁰ Make no mistake: under the winner-take-all system that districting imposes, slightly altering district lines can have enormous — and decisive — consequences on the outcomes of contested elections and policy decisions.¹¹¹ Robert Dixon described this precept well:

The key concept to grasp is that there are no neutral lines for legislative districts. No matter how the lines are drawn — whether by a ninth-grade civics class or a group of Ph.D.'s or a computer specialist — every line drawn aligns partisans and interest blocs in a particular way, unlike the alignment that would result from putting the line somewhere else.¹¹²

Hence, it is nearly impossible to overstate the prevalence of partisan politics in redistricting.¹¹³ State legislators invariably fight

108. See *supra* section II.A.

109. Courts could garner such evidence both from the plans' legislative histories and from the political appearances and realities of the plans themselves.

110. *Gaffney v. Cummings*, 412 U.S. 735, 753-54 (1973); see also *White v. Weiser*, 412 U.S. 783, 795-96 (1973) ("Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task.").

111. As the Court aptly summarized in *Gaffney*:

[I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely.

412 U.S. at 753; see also Alfange, *supra* note 51, at 211 ("Every line drawn on a map to define a legislative district has a political significance — whether the person (or computer) drawing the line knows it or not."); Polsby & Popper, *supra* note 5, at 351.

112. *Congressional Anti-Gerrymandering Act of 1979: Hearings on S. 596 Before the Senate Committee on Governmental Affairs*, 96th Cong. 212 (1979) (statement of Robert G. Dixon, Jr., Professor of Law, Washington University School of Law).

113. As Justice Frankfurter explained, "in every strand of this complicated, intricate web of values [present in redistricting] meet the contending forces of partisan politics." *Baker v. Carr*, 369 U.S. 186, 324 (1962) (Frankfurter, J., dissenting); see also *Diaz v. Silver*, No. CIV.A.95-CV-2591, 1997 WL 94175, at *9 (E.D.N.Y. Feb. 27, 1997) (*per curiam*) (evidencing

tooth and nail to preserve favorable cores of existing districts¹¹⁴ while seeking to increase their political power elsewhere in the state.¹¹⁵ It is highly doubtful that any other consideration more intensely commands redistricting legislators' attention.

The Court has held expressly that states' political decisions may further legitimate state interests.¹¹⁶ To be sure, the Court has gone further to sanction practices like the one in *Gaffney v. Cummings*, where the legislature sought to give each political party control over roughly its own proportionate share of districts, than it has ventured to sanction lawful partisan gerrymanders.¹¹⁷ Nevertheless, the Court has stated clearly that when the state's policy fails to violate a federal right — as is the case in lawful partisan gerrymanders — remedial courts are bound to defer to that policy.¹¹⁸ This requirement ensures that judicial remedies are “free from any taint of arbitrariness or discrimination.”¹¹⁹ Thus, the Court has warned lower courts not “unnecessarily [to] put aside [states' political com-

predominance of partisan concerns in redistricting); Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 8 (1985) (referring to redistricting as “a political life-or-death issue for . . . members” of a legislature).

114. See, e.g., *Miller v. Johnson*, 115 S. Ct. 2475, 2483 (1995) (noting that Georgia has a policy of attempting to preserve cores of existing districts); *Shaw v. Hunt*, 861 F. Supp. 408, 467-69 (E.D.N.C. 1994) (describing North Carolina's efforts to maintain cores of existing districts in drafting redistricting plan), *revd.*, 116 S. Ct. 1894 (1996).

115. Put candidly by Professor Issacharoff:

Redistricting . . . is . . . a nasty, brutish power grab.

....

. . . Even if no racial considerations were introduced, the “traditional practices” of redistricting amount to an invitation to manipulate district lines to reward friends and punish foes. What is key, and what reviewing courts have recognized uniformly, is that the consequences of redistricting practices are fully predictable and that political actors enter the redistricting battles with a clear agenda of partisan gain.

Samuel Issacharoff, *Racial Gerrymandering in a Complex World: A Reply to Judge Sentelle*, 45 CATH. U. L. REV. 1257, 1258-59 (1996) (footnote omitted); see also Karlan, *supra* note 74, at 302 (noting the prevalence of partisan and incumbency concerns in redistricting). Indeed, in perhaps one of the more frank explanations of this practice, the State of Texas admitted that the “only traditional districting principles that have ever operated [in Texas] are that incumbents are protected and each party grabs as much as it can.” State Appellant's Brief at 8, *Bush v. Vera*, 116 S. Ct. 1941 (1996) (Nos. 94-805, 94-806, 94-988).

116. See *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (preserving cores of prior districts is a valid redistricting policy); *Gaffney v. Cummings*, 412 U.S. 735, 752-54 (1973) (respecting political compromises regarding partisan balance); *White v. Weiser*, 412 U.S. 783, 791 (1973) (respecting state policy of preserving core constituencies); *Weiser*, 412 U.S. at 796 (respecting states' authority to make political decisions in redistricting).

117. See, e.g., *Pildes & Niemi*, *supra* note 24, at 581.

118. See *supra* section II.A. There exists reason to believe, moreover, that judicial deference regarding partisan gerrymandering in particular is sound policy because “political gerrymandering is a self-limiting enterprise . . . [that can] be checked or cured by the people or by the parties themselves.” *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring in judgment) (citation omitted).

119. *Roman v. Sincok*, 377 U.S. 695, 710 (1964).

promises] in the course of fashioning relief appropriate to remedy”¹²⁰ an unconstitutional redistricting plan.

White v. Weiser is especially instructive in this regard, because in that case the Court struck down the lower court’s remedy based on just this type of judicial overreaching. In an effort to remedy Texas’s malapportioned redistricting plan, the district court had before it two proposed plans that effectively cured the malapportionment violation: Plan B and Plan C.¹²¹ Plan B adhered to the basic configurations in the state’s original plan, but adjusted district lines where necessary to achieve greater population equality.¹²² The district court, however, chose to implement remedial Plan C because, despite the fact that it “ignored legislative districting policy,” Plan C’s districts were “significantly more compact and contiguous” than Plan B’s districts.¹²³ The Supreme Court reversed, holding that “[g]iven the alternatives, the court should not have imposed Plan C, with its *very different political impact*, on the State.”¹²⁴

More than a decade later, in the context of asserting the non-justiciability of partisan gerrymandering claims, Justice O’Connor succinctly stated the principle underlying the Court’s policy of judicial restraint in redistricting: “Federal courts [should not] attempt to recreate the complex process of legislative apportionment in the context of adversary litigation in order to reconcile the competing claims of political, religious, ethnic, racial, occupational, and socio-economic groups.”¹²⁵ From *Weiser* to the present, the best path that federal courts faced with the “unwelcome obligation”¹²⁶ of redistricting can take is to respect all of a state’s permissible political compromises while following the preexisting district lines — as expressions of those compromises — as closely as the Constitution will allow.

120. *Weiser*, 412 U.S. at 796.

121. Both plans cured the malapportionment violation to essentially the same degree. See *Weiser*, 412 U.S. at 786 nn.4-5.

122. See *Weiser*, 412 U.S. at 793-94.

123. See *Weiser*, 412 U.S. at 796.

124. *Weiser*, 412 U.S. at 796 (emphasis added).

125. *Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O’Connor, J., concurring in judgment). Other Justices agree with O’Connor’s position. See *Miller v. Johnson*, 115 S. Ct. 2475, 2500 (1994) (Ginsburg, J., dissenting) (“District lines are drawn to accommodate a myriad of factors — geographic, economic, historical, and political — and state legislatures, as arenas of compromise and electoral accountability, are best positioned to mediate competing claims; courts, with a mandate to adjudicate, are ill equipped for the task.”); *Baker v. Carr*, 369 U.S. 186, 323-24 (1962) (Frankfurter, J., dissenting) (discussing the “extraordinary complexity” of redistricting).

126. *Connor v. Finch*, 431 U.S. 407, 415 (1977).

2. Incumbency Protection

Closely related to the practice of balancing partisan interests in redistricting are the well-known practices of protecting district cores of, and avoiding contests between, incumbents. Though this practice seems to some like an overt abuse of power,¹²⁷ the Court repeatedly has recognized that incumbency protection is a legitimate state policy.¹²⁸

Whether or not one likes the practice,¹²⁹ protecting incumbents does serve at least four independently valid state goals. First, it promotes experience in the legislature and enhances the quality of the state's representation in Congress.¹³⁰ Second, bipartisan incumbency protection promotes stability by preventing small swings in the popular vote from having large effects on the composition of a state's congressional delegation.¹³¹ If every district had essentially equal numbers of Republicans and Democrats, a narrow margin in the popular vote could cause swings in a state's delegation far in excess of the shift in voter preferences. By responding to this danger, "[safe] districts provide assurance that particular points of view will always be represented" in Congress.¹³² Third, because the in-

127. See, e.g., Silverberg, *supra* note 23, at 927-29 (arguing that political gerrymanders undermine the legitimacy of our government and deny voters the right to cast a meaningful vote). It is somewhat difficult, however, to discern any constitutional argument in Silverberg's complaint. The right to cast a "meaningful" (as distinguished from an "equally weighted") vote certainly has never been thought to be a constitutional right. Her concern over the legitimacy of our government is well founded, but, under our federal system, it is difficult for a federal court to say that this overcomes states' legitimate, self-serving reasons for engaging in this practice. Perhaps this explains why the Supreme Court has declined invitations to prevent incumbency protection.

128. See, e.g., *Bush v. Vera*, 116 S. Ct. 1941, 1954 (1996) (plurality opinion); *Weiser*, 412 U.S. at 797; see also *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966); *Burton v. Sheheen*, 793 F. Supp. 1329, 1342 (D.S.C. 1992) (describing incumbency protection as "an important state goal"); Pildes & Niemi, *supra* note 24, at 579.

Additionally, courts have interpreted *Bandemer*, 478 U.S. 109, see *supra* text accompanying notes 47-50, as saying that courts should avoid placing more than one incumbent in a district. See Pildes & Niemi, *supra* note 24, at 579; Silverberg, *supra* note 23, at 934. But the desirability of this interpretation has been questioned by some commentators. See, e.g., Issacharoff, *supra* note 49, at 1672 (lamenting that "[t]he doctrine born of the desire to curb self-serving manipulation of the process by incumbent powers has been transformed into a constitutional guarantee of sinecure for the pre-existing power base of those incumbent forces").

129. For a sampling of the arguments against incumbency protection, see Grofman, *supra* note 5, at 115, and Issacharoff, *supra* note 49, at 1672 n.145.

130. See Alfange, *supra* note 51, at 226-27; Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts*, in REPRESENTATION AND REDISTRICTING ISSUES 7, 17 (Bernard Grofman et al. eds., 1982); Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623, 674-77 (1996) (recognizing that "experience appears to be the critical factor in developing the skills necessary for legislator effectiveness"); Lowenstein & Steinberg, *supra* note 113, at 45.

131. See DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 75-76 (1992); Lowenstein & Steinberg, *supra* note 113, at 39-40.

132. Alfange, *supra* note 51, at 226.

ternal rules of the House of Representatives put a substantial premium on seniority for purposes of allocating power, continued incumbency provides concrete benefits to the states of the favored representatives.¹³³ Fourth and finally, protecting incumbents safeguards constituent-representative relationships that have been built up over time.¹³⁴ While reasonable minds can disagree on whether these justifications should carry the day, it is extremely difficult to maintain — and, therefore, the Supreme Court never has — that states act *impermissibly* when they seek to protect incumbents to further these goals.

C. Application to Shaw Remedies

When states seek to advance political choices regarding partisan balance or incumbency protection through their redistricting plans — which they nearly always do — federal courts remedying discrete *Shaw* violations within those plans should respect states' choices. Because the harm caused by racial gerrymanders has *nothing* to do with partisan or incumbency-related effects of decisions made by states,¹³⁵ federal courts lack both the power and the authority to affect such state-enacted policies. They should strive to alter only "racial" district lines, while affecting the state's political choices as minimally as possible.¹³⁶

It might seem rather obvious that federal courts cannot use *Shaw* violations as an excuse to "remedy" perceived political inequities in states' redistricting plans — especially when the plans have been expressly upheld against partisan gerrymandering chal-

133. See *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1912 (1995) (Thomas, J., dissenting); MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 50-53 (1977); Garrett, *supra* note 130, at 662-65; cf. Alfange, *supra* note 51, at 226-27 (highlighting the importance of protecting incumbents with experience and seniority).

134. See *LaComb v. Grove*, 541 F. Supp. 160, 165 n.3 (D. Minn. 1982); Grofman, *supra* note 5, at 111; Silverberg, *supra* note 23, at 938.

135. See *supra* section I.A.

136. Of course, there will be times when remedial courts will be unable to avoid altering the political balance of the state. All that this Note advocates is that courts implement a plan that alters the state's political balance to the least extent possible while still curing the *Shaw* violation. This seems a modest tenet. In Texas, however, a less politically disruptive plan was dismissed in federal court without any finding that the plan inadequately cured the *Shaw* violation at issue. See *Vera v. Bush*, 933 F. Supp. 1341, 1351 (S.D. Tex. 1996) (stating that the Court began with the proposal submitted by the Lieutenant Governor and the Speaker of the House — which remained largely true to the state's political choices — but then, without finding that plan infirm, critically "adjusted the plan with an eye toward smoothing the boundaries"). The Georgia court also rejected a less politically disruptive plan, but did so under the somewhat dubious claim that that plan would have violated *Shaw*. See Brief Amicus Curiae of the Georgia Association of Black Elected Officials in Support of Appellants at 21-27, *Abrams v. Johnson*, 117 S. Ct. 605 (1997) (Nos. 95-1425, 95-1460), *United States v. Johnson*, 117 S. Ct. 356 (1997) (No. 95-1460). The Louisiana court imposed its own plan, to which there were no alternative proposals at that time. See *Hays v. Louisiana*, 936 F. Supp. 360, 372 (W.D. La.) (per curiam), *appeals dismissed as moot*, 116 S. Ct. 2542 (1996).

lenges.¹³⁷ But this principle of judicial restraint extends further. Federal courts also should not be able to escape their duty to respect states' political choices by simply "blinding" themselves — in order to avoid complaints of partisanship — to the political consequences of their remedial plans.¹³⁸ Whether or not remedial courts admit it, their plans will alter to some degree (the question is how much) a state's political landscape in the most fundamental of ways. Because of the enormous impact that the composition of districts can have on a state's benefits and policies, redistricting represents a federal court's intrusion into the state's political sovereignty at the most basic level. In undertaking such a delicate task, should we not ask more of federal courts than allowing, or requiring, them to "ignore"¹³⁹ the consequences of their actions?¹⁴⁰

Yet this is exactly the early trend demonstrated by the first three courts to remedy *Shaw* claims. Virtually without explanation, these courts ignored explicit state policies of protecting incumbents¹⁴¹ and preserving cores of existing districts,¹⁴² even altering the partisan balance of two states' congressional delegations,¹⁴³ in favor of

137. Texas's and North Carolina's plans had been upheld against such challenges. See *supra* note 46 and accompanying text.

138. See *Roman v. Sincok*, 377 U.S. 695, 710 (1964) (indicating that legislative remedial plans should be "free from any taint of arbitrariness").

139. The remedial court in Louisiana used exactly this word. See *Hays v. Louisiana*, 839 F. Supp. 1188, 1196 (W.D. La. 1993). The Texas court "proceeded without respect to partisan impact" and did "not evaluate[] the partisan impact of its actions." *Vera*, 933 F. Supp. at 1351 (mem.). The Georgia court gave political factors "less weight" than all other districting criteria. See *supra* note 29.

140. Alternately stated, if the political considerations underlying a state's plan are legitimate, why should we allow a federal court to remove them from a remedial plan? As Professor Alfange noted in the context of partisan gerrymandering, this would "remove politics from politics. No more quixotic effort can be imagined." Alfange, *supra* note 51, at 212.

141. See *Vera*, 933 F. Supp. at 1351; *Johnson v. Miller*, 922 F. Supp. 1556, 1565 (S.D. Ga. 1995) (subordinating incumbency protection to other considerations), *prob. juris. noted sub nom.* *Abrams v. Johnson*, 116 S. Ct. 1823 (1996). In their plans, which were subsequently struck down by the Court, Texas and Georgia explicitly had sought to protect incumbents in redistricting. See *Bush v. Vera*, 116 S. Ct. 1941, 1956-57 (1996) (plurality opinion); *Johnson v. Miller*, 929 F. Supp. 1529, 1535 n.14 (S.D. Ga. 1996) (noting that, in Georgia, incumbency protection is a "traditional redistricting principle" that "figure[s] greatly in the drawing of a [state legislative] district"); *Miller v. Johnson*, 115 S. Ct. 2475, 2483 (1995). North Carolina's and New York's invalid plans, now in the remedial stage, also sought aggressively to protect incumbents. See *Shaw v. Hunt*, 861 F. Supp. 408, 420, 473 (E.D.N.C. 1994), *revd.*, 116 S. Ct. 1894 (1996); *Diaz v. Silver*, No. CIV.A.95-CV-2591, 1997 WL 94175, at *9 (E.D.N.Y. Feb. 27, 1997); T. Alexander Alienikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 625 (1993).

142. See *Miller*, 115 S. Ct. at 2483 (observing that Georgia has a state policy of attempting to preserve the cores of existing districts); Texas Stay Application *supra* note 26, at 21-22 (noting that nearly 1.5 million people were placed into new districts under the court-imposed plan).

143. See *supra* notes 26, 28 and accompanying text (regarding the courts' redrawing of district lines in Texas and Louisiana).

drawing more compact districts and “smoothing boundaries”¹⁴⁴ — all despite the fact that the bizarre districts themselves demonstrated nothing if not that these states did *not* favor compactness over political considerations.¹⁴⁵ Further, these courts did this in the face of far less politically disruptive plans.¹⁴⁶ In point of fact, these federal courts made conscious decisions to subordinate states’ political concerns to other, more sterile, redistricting criteria.

In attempting to explain themselves, these *Shaw* remedial courts might have pointed to other courts that have previously refused to consider the political consequences of their remedial plans.¹⁴⁷ Those situations, however, were decidedly different. Previous courts that have ignored the political ramifications of their plans were remedying vote-dilution and malapportionment claims, and —

144. *Vera*, 933 F. Supp. at 1351. Knowing the relevant law, Georgia’s remedial court at least claimed to follow the state’s “traditional” districting criteria. See *Johnson*, 929 F. Supp. at 1564. But, in pretending that such criteria did not include political considerations, it is somewhat difficult to understand exactly what the court meant. Perhaps it followed all traditional and relevant redistricting criteria, except for political considerations, but that omission is precisely the problem.

145. The courts’ preference for “pretty” districts is all the more odd, considering that compactness and like considerations are not constitutional requirements. See *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (citing *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973)).

146. See *supra* note 136.

147. See *Good v. Austin*, 800 F. Supp. 557, 564 (E. & W.D. Mich. 1992) (“[T]he maintenance of the geographic and population cores of existing districts is a criterion designed primarily to protect incumbents. Criteria that are so laden with political considerations are inappropriate, in our judgment, in the formulation of a judicial districting plan.”); *Emison v. Growe*, 782 F. Supp. 427, 445-46 (D. Minn. 1992) (developing a redistricting plan “without regard to the residence of incumbents . . . [and] without regard to partisanship”), *revd. on other grounds*, 113 S. Ct. 1075 (1993); *Terrazas v. Slagle*, 789 F. Supp. 828, 844 (W.D. Tex. 1991) (“[E]nsuring free and equal access to the ballot, not partisan considerations or the protection of incumbents, is the sole focus of federal law in the area of redistricting and reapportioning seats to legislative bodies.”), *summarily affd.*, 506 U.S. 801 (1992). But see *Dillard v. City of Greensboro*, 1997 WL 96674, at *5-6 (M.D. Ala. Feb. 26, 1997) (adopting the “prevailing view” that, in curing a section 2 violation, “incumbency protection is a legitimate factor, but one that is subordinate to [other] traditional districting criteria”); *Buskey v. Oliver*, 574 F. Supp. 41, 43 (M.D. Ala. 1983) (regarding as an imperative protecting incumbents in drawing a remedial plan); *LaComb v. Growe*, 541 F. Supp. 160, 165 (D. Minn. 1982) (recognizing that protecting incumbents justifies “minor adjustments in district lines” by courts). None of the *Shaw* remedial courts cited any of these cases, though.

Perhaps the most convincing precedent on which a “blind” *Shaw* remedial court might rely is the remedy from the malapportionment violation in *Karcher v. Daggett*, 466 U.S. 910 (1983) (mem.). The district court in *Karcher*, having two plans from which to choose its remedy, imposed a plan on the state that significantly altered the partisan balance contained in the original plan. Despite the fact that the unchosen plan had been truer to the political choices in the original plan, the Supreme Court, three Justices dissenting, refused to stay the remedial order. Notwithstanding the fact that the case did not receive full consideration by the Court, however, this opinion far from supports utilizing the same practice in *Shaw* remedies. The plan that the *Karcher* district court adopted, despite its more severe political impact, (i) cured a malapportionment violation which tainted *all* of the state’s districts and potentially caused *unfair electoral outcomes*, and (ii) adjusted a partisan gerrymander that the court viewed as constitutionally suspect — as compared to recent *Shaw* cases where the plans at issue had already passed partisan gerrymandering challenges, see *supra* note 46 and accompanying text. See 466 U.S. at 910-11.

though one can debate whether or not this justified those courts' blindfolding¹⁴⁸ — these different harms cast their remedies in a decidedly different light. In those situations, the states' political decisions had yielded "unfair" outcomes; they had produced inequities in voting which federal law refuses to allow.¹⁴⁹ Thus, it could fairly be said that the states' political considerations were not actually legitimate. Further, the vote-dilution violations infected either the states' entire plans or large portions thereof,¹⁵⁰ enhancing judicial authority to alter district lines throughout the states.

These factors are not present in discrete *Shaw* violations. Notwithstanding the expressive harm that the faulty district causes, every voter enjoyed, and continues to enjoy, fair representation and equal access to the ballot box. Moreover, every district except the one or two culprits is entirely constitutional.¹⁵¹ By making one discrete mistake in drafting a redistricting plan — namely, excessively relying on race in drawing some district lines — a state legislature does not forfeit its right and duty to control the state's political policy.¹⁵² Thus, remedial *Shaw* courts must view the states' prior polit-

148. Such a discussion is beyond the scope of this Note, which is limited to *Shaw* remedies. The point here is that whether or not those courts' blindfolding was acceptable (something that appears to be an open question, *see supra* note 147), such action is unacceptable in *Shaw* cases.

149. *See supra* text accompanying notes 33-35 (describing the harms of vote dilution and malapportionment). Professor Samuel Issacharoff essentially made this point while a student in 1982, arguing that the Court should not leave the resolution of vote dilution to states' political processes:

[S]uch deference is absurd on its face; the vindication of voting rights can hardly be trusted to the very representatives whose election is the result of the alleged vote dilution. If the Court is motivated by a genuine wish to encourage the political settlements of the historic and ongoing effects of discrimination, it can do so only by first ensuring that blacks have adequate access to the political process.

Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328, 346 (1982) (internal quotation and citation omitted).

150. When courts strike down congressional redistricting plans on vote-dilution grounds, they typically strike down the plan as a whole, rather than striking down a particular district as in *Shaw* claims. Indeed, the very idea of congressional vote-dilution assumes that a minority's voting power is unfairly diminished on a statewide, or at least a large-scale, basis. *See* Karlan, *supra* note 7, at 250-51 (describing vote-dilution claims in terms of aggregating votes on a statewide level). Thus, every district, or nearly every district, contributes to the redistricting violation. This distinguishes vote-dilution judgments from *Shaw* decisions which strike down only one or a small number of districts and uphold the rest. *See, e.g.,* Vera v. Richards, 861 F. Supp. 1304, 1345 (S.D. Tex. 1994), *affd. sub nom.* Bush v. Vera, 116 S. Ct. 1941 (1996).

151. Indeed, persons may challenge on racial gerrymandering grounds only the particular district in which they reside. *See* United States v. Hays, 115 S. Ct. 2431 (1995). Of course, because unconstitutional districts share boundaries with constitutional ones, it is necessary to alter the lines of constitutional districts in order to remedy the unconstitutional ones. But the point is that *Shaw* remedial courts should strive to alter as few districts as possible. More importantly, such a practice should be done with care not to disturb unnecessarily the political considerations manifested in the constitutional districts. *See supra* note 31 and accompanying text.

152. This principle holds especially true when a federal court has decided to redistrict a state because it is not practicable to allow the state legislature an opportunity to remedy the

ical decisions as legitimate. Simply put, when a state's legitimate political decisions are enacted through a lawful process, federal courts remedying *Shaw* violations must respect, not ignore, the political will of sovereign states.

Furthermore, even if federal courts could overlook allowable state policies in order to preserve some notion of political neutrality, an additional concern exists. Even accepting for the moment the dubious claim that courts can fully "blindfold" themselves to the political consequences of their *Shaw* remedies,¹⁵³ there is strong reason to believe that blind *Shaw* remedies nonetheless *almost always* will favor the same side of the partisan struggle: the Republicans. Ignoring states' political choices in order to preserve judicial "neutrality" will, in fact, not yield neutral results at all.

In states like North Carolina, Texas, and Louisiana, bizarrely shaped majority-minority districts are not necessary to create safe minority districts, but "rather result from Democratic efforts to limit the partisan effects of redistricting" in compliance with the Voting Rights Act.¹⁵⁴ When, in the 1990s round of redistricting, the Voting Rights Act required certain state legislatures to create additional majority-minority districts, Democrats preferred less compact districts because they more efficiently dispersed the large numbers of dependably liberal voters that would be contained in

Shaw violation. See *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (plurality opinion) (explaining that federal courts should defer to states "whenever practicable"). But this idea still holds force in the more common case: when, after having part of its original plan struck down, a state is unable to pass a new plan and defaults the duty of redistricting back to the federal court. Even then, the federal court should draw its plan based on the last duly-enacted state plan. A simple analogy demonstrates that this makes sense. If, after a referee disallows points in a game, the two sides suddenly disagree on the score, the equitable solution is to go back to the last score on which the teams agreed, not to go back to zero-zero.

153. Many commentators have expressed serious doubts that this can be, or is ever, done. See Alfange, *supra* note 51, at 206 (asserting that it is unlikely that the drafter of a plan would not discover the partisan effects of her plan before implementation); *Transcript, The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates*, 28 ARIZ. ST. L.J. 17, 47 (1996) (comments of Professor Daniel Lowenstein, UCLA Law School) ("[I]f you believe that federal judges go about deciding redistricting cases without regard to their own political views and partisan preferences, there's a bridge in New York that I'd like to sell you."); see also *supra* note 111. Such blindfolding seems especially dubious when practiced by local district courts which have a substantial knowledge of the local politics and geography.

154. Pildes, *supra* note 54, at 1390; see also *Gaffney v. Cummings*, 412 U.S. 735, 753 (noting that a "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results"); *supra* text accompanying notes 54-58. Moreover, Democrats may favor less compact districts in general. Political science literature suggests that drawing more compact districts favors Republicans over Democrats because dependable Democratic voters tend to be more highly concentrated in cities, and therefore more susceptible to "packing." See, e.g., J. Morgan Kousser, *Shaw v. Reno and the Real World of Redistricting and Representation*, 26 RUTGERS L.J. 625, 637 n.47 (1995); Martin Shapiro, *Gerrymandering, Unfairness, and the Supreme Court*, 33 UCLA L. REV. 227, 237-38 (1985). Although some have questioned this finding as insufficiently supported, see, e.g., Polsby & Popper, *supra* note 5, at 334-35, no one has offered any evidence to rebut its intuitive appeal.

extremely compact majority-minority districts.¹⁵⁵ This allowed the Democrats to promote the reelection prospects of Democratic incumbents in districts adjacent to the majority-minority districts by preserving the Democratic cores of those districts.¹⁵⁶

Democratic-controlled state legislatures therefore typically fashion less compact districts to protect their political interests — yet when they draw these bizarre lines according to race, a *Shaw* claim results. (Republican-controlled legislatures faced with the same Voting Rights Act requirement do not have this problem: they generally seek, for equally partisan reasons, simply to pack all of the minority and other dependably liberal voters into compact districts — districts that typically splice the cores of preexisting Democratic districts.¹⁵⁷ But because the districts are compact, Republican legislatures' equally partisan tactics and results evade *Shaw* litigation.¹⁵⁸) Hence, the upshot is this: whenever remedial courts randomly alter lines surrounding bizarrely shaped majority-minority districts, common sense should tell the courts that, in curing racial, not partisan, injuries, they are far more likely to be favoring partisan Republican interests than Democratic interests.¹⁵⁹

That the consequences of courts' willful blindness are far from random or unpredictable should give any equitable jurist pause, especially when the partisan balance of the state's plan already falls

155. See, e.g., Butler, *supra* note 84, at 321; *supra* note 58 and accompanying text.

156. See Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of Shaw v. Reno*, 3 D.C. L. REV. 1, 55-56 (1995); see also *supra* notes 58, 141.

157. Indeed, in the 1990s round of redistricting, the Republican National Committee adopted a strategy "to create new majority-black districts and new, presumably Republican, majority-white districts." Michael Kelly, *Segregation Anxiety*, THE NEW YORKER, Nov. 20, 1995, at 46, 48; see also Laughlin McDonald, *The Counterrevolution in Minority Voting Rights*, 65 MISS. L.J. 271, 292 & n.99 (1995) (reporting that the Republicans viewed the creation of majority-minority districts as a way to pack traditionally Democratic voters and to make the surrounding districts more vulnerable to Republican takeovers); *supra* notes 56, 154 (discussing such "packing").

158. Though Democrats controlled the state legislatures in each of the southern states where additional majority-minority districts were created in the 1990s, see McDonald, *supra* note 157, at 291, the creation of Alabama's Seventh Congressional District reflects this Republican strategy. The 67.5% black district, drafted by a Republican state senator and adopted by a three-judge panel composed of three Republican appointees, fortified Republican-held districts and caused a partisan shift in the Sixth District. See CONGRESSIONAL QUARTERLY, INC., *supra* note 5, at 19; see also Tyler Whitley, *Assembly Defends How It Drew District*, RICHMOND TIMES-DISPATCH, Feb. 8, 1997, at A9 (noting that, in Virginia, Republicans pushed for a single majority-minority district "with a large majority of blacks because they figured that would enhance their chances in adjacent districts, which would be whiter").

Recall that compact, majority-minority districts created under section 2 of the Voting Rights Act do not violate *Shaw*. See *supra* note 8. In this instance, legislators explicitly pay attention to race with impunity.

159. This describes in the most favorable light — that is, fully accepting the courts' statements that they were unaware of the political consequences of their plans — exactly what happened in Texas and Louisiana, where each partisan shift favored the Republicans. See *supra* notes 26, 28.

within constitutional bounds.¹⁶⁰ Yet some commentators argue that even though blindly drawing more compact districts may favor Republicans, this should not affect courts' remedial calculus.¹⁶¹ If one party is helped or harmed more by compact districts, they contend, this is a "purely fortuitous result"; it should not detract from the worthy goal of "fairer" districting.¹⁶² This criticism, however, essentially begs its own question. It assumes that when the two conflict, compactness is a "fairer" districting criterion than, for instance, proportional representation. But some notion of proportional representation is precisely the concern that underlies gerrymandering's purported illegitimacy. Thus, if compactness helps to defeat the very principle of equal representation it is designed to vindicate, it must be subordinated to broader goals of the political process. While some of the plans at issue in *Shaw* cases are substantially Democratically gerrymandered beyond proportional representation, the need for federal courts to respect states' distributions of political power — rather than imposing their own preferable distributions through norms like compactness — prevails nonetheless. If courts want to take on partisan gerrymanders, *Shaw* remedies are not the place; courts should do so only under a direct doctrine that scrutinizes and punishes both parties to the same degree.¹⁶³

As a final matter, some may question the ability of courts to preserve the partisan balance enacted by a state legislature.¹⁶⁴ To be sure, districting has become a very sophisticated enterprise. Yet

160. See *supra* text accompanying note 46 (noting that Texas's and North Carolina's plans had passed partisan gerrymandering challenges).

161. See, e.g., Polsby & Popper, *supra* note 5, at 336.

162. See Shapiro, *supra* note 154, at 240, quoted in Polsby & Popper, *supra* note 5, at 336. Specifically, Professor Shapiro maintains that the result is fortuitous because it is "unforeseeable by either party when it chose its ideologies and clientele." Shapiro, *supra* note 154, at 240. Yet such a claim seems debatable at best. In America's primarily two-party system, the competing political parties are constantly refashioning their messages to appeal to constituencies in order to produce the most effective results for the party. Does Professor Shapiro really think that the dispersion of "swing" voters in districts escapes the parties' notice?

163. See *infra* section III.B (presenting this alternative).

164. See MARK E. RUSH, DOES REDISTRICTING MAKE A DIFFERENCE? 54, 135-36 (1993) (questioning legislators' ability to enact effective partisan gerrymanders because people frequently switch political parties and actually vote for individuals, not parties). This claim, however, seems to overstate the argument; surely certain plans are more beneficial to particular parties than others. In fact, modern technology allows drafters of districts to see immediately the partisan makeup, based on recent election returns, of any proposed district. See Issacharoff, *supra* note 115, at 1259 (noting that today the partisan consequences of redistricting plans are "fully predictable"); *supra* note 5 (noting technological advances). These numbers generally hold true over short time spans. To give just one example, Democratic congressmen in Texas alerted the district court to the fact that, based on 1994 statewide election returns, the court's remedial plan shifted the partisan balance in District 5 from slightly Democratic to 53% Republican. See Texas Stay Application, *supra* note 26, at 22-23. In the 1996 congressional election between two first-time candidates, Republican Pete Sessions took over District 5 with 53% of the vote. See *Results of Contests*, *supra* note 26, at B19.

difficulties in redistricting should not relieve courts of their duty to *try* to respect state policies. Insofar as a federal court attempts to respect state policies, the court's plan can only gain legitimacy. Furthermore, courts generally do not draft redistricting plans from scratch. Parties and amici in the litigation normally provide courts with several remedial plans from which to choose. The parties to the litigation are typically intimately familiar with the partisan implications of different plans, and are sure to alert courts of any adjustments to the state's political landscape caused by proposed plans.¹⁶⁵ In many instances, then, courts need only follow the dictates of *Weiser* and *Upham* and choose the least politically disruptive plan.¹⁶⁶ When faced with more difficult choices, and when specific state policy cannot be discerned from the plans or their legislative history, courts should use their equitable discretion to strive to avoid favoring any political group more than did the original plan. In the end, though, federal courts do not have to balance every state policy; the state has already done that. Courts must simply follow the original lines to the greatest extent possible while striving to avoid moving incumbents or creating any decisive partisan shifts.¹⁶⁷

III. COURTS WEIGHING POLITICS: TOO DEEP INTO THE THICKET?

Requiring courts to take notice of political considerations may strike one as rather unsavory. Indeed, ever since the Supreme Court's entry into the business of redistricting, the Court itself has been justifiably wary of becoming hopelessly entangled in the "political thicket."¹⁶⁸ As Professor Jo Desha Lucas suggested in the wake of *Baker v. Carr*,¹⁶⁹ "[c]ourts are themselves frequently in need of protection from partisan politics, and for this reason traditionally they have kept out of partisan struggles."¹⁷⁰ Thus, the

165. This is exactly what the parties did in Texas, but the district court claimed that it refused to look at the evidence. See *Vera v. Bush*, 933 F. Supp. 1341, 1351 (S.D. Tex. 1996).

166. See *supra* section II.A.

167. Before moving on, it is worth mentioning that if a federal court is remedying a state legislative (rather than congressional) district's *Shaw* violation, preserving incumbency protection and the partisan balance should hold even more weight. Under this scenario, even if the federal court distorted the importance of other state policies, so long as the court preserved the state's political balance, the legislature, composed of essentially the same interests, could simply correct the federal court's mistakes. If, however, the federal court altered the political balance of the state, it would be far more difficult to avoid a more significant intrusion and effect on state policy.

168. See *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (opinion of Frankfurter, J.) (coining the term "political thicket").

169. 369 U.S. 186 (1962).

170. Jo Desha Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 MICH. L. REV. 711, 802 (1963).

Court has acted carefully to investigate and to weigh political choices of state legislatures only when necessary to vindicate voters' right to fair and equal access to the political process.

This Part contends, however, that this precise principle of avoiding excessive entanglement in legislative and political business counsels in favor of courts taking notice of and respecting states' political choices when remedying *Shaw* violations. Only by affirmatively striving to leave states' permissible political choices intact can federal courts avoid being perceived as unjustifiably meddling in states' legitimate management of their own political affairs. Section III.A examines the appropriateness and institutional competency of federal courts to weigh overtly political considerations, and concludes that, while this practice is far from entirely satisfying, it is the most acceptable course to pursue under the Court's current doctrine. Insofar as this solution still proves unpalatable, however, section III.B quickly presents the most viable alternative: fortifying the partisan gerrymandering doctrine, thereby allowing courts to treat some *Shaw* violations as partisan gerrymandering violations.

A. Institutional Concerns

The institutional concerns over federal courts taking notice of, respecting, and replicating states' political choices in redistricting legislation fall into roughly two categories: (1) whether such a practice would provide undeserved legitimacy to often self-serving political compromises; and (2) whether such a practice would represent an unwarranted entry into the territory of "political questions."

1. The Legitimizing Power of Courts

Federal courts, and, in particular, the Supreme Court, hold a special place in American society. As Professor Charles Black explained, the significance of judicial review goes far beyond mere checks and balances; judicial review also helps to assure the public of the validity of governmental actions.¹⁷¹ By sanctioning governmental actions in constitutional terms, the Supreme Court, through the virtue it symbolizes, lends *legitimacy* to such actions in a way that no other institution can.¹⁷² Yet this legitimizing function depends heavily on public confidence in the Court as an apolitical institution: "If the public should ever become convinced that the

171. See CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 59-86 (1960).

172. See *id.* at 64-65; see also Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 48 (1961) ("The Court's prestige, the spell it casts as a symbol, enable it to entrench and solidify measures that may have been tentative in conception or that are on the verge of abandonment in the execution. The Court, regardless of what it intends, can generate consent and may impart permanence.").

Court is merely another legislature, that judicial review is only a euphemism for an additional layer in the legislative process, the Court's future as a constitutional tribunal would be cast in grave doubt.¹⁷³ Hence, the danger becomes apparent: requiring courts to take notice of, and expressly to consider, political consequences of redistricting plans may make states' political gerrymandering and incumbency protection seem legitimate, instead of merely not unconstitutional.

There undoubtedly exists a degree of difference between allowing nakedly political policies because they fail to violate a federal right and actively seeking to preserve them in a redistricting remedy. By refusing to strike down severe partisan gerrymanders, for example, the Court does offer a certain measure of (perhaps undeserved) legitimacy to that practice; yet the Court's level of complicity is undeniably higher when it expressly preserves such a situation. Is this slight increase in perceived accountability enough to turn the tables?

Before one condemns active preservation, one should inspect its alternative. The alternative to taking notice of and respecting states' political choices in crafting *Shaw* remedies is to require courts to blind themselves — assuming that is possible — to the political consequences of their remedial plans. But, as detailed above, blindness cannot avoid the inevitability of political consequences in redistricting.¹⁷⁴ If anything, blindness can only exacerbate political consequences and sacrifice the very neutrality that courts seek to represent by increasing significantly the likelihood that the political consequences of courts' plans will benefit one side, the Republicans, disproportionately — all while the harm that courts are purporting to cure has nothing to do with any message sent by, or any effect resulting from, states' partisan considerations.

There is no perfect answer to this quandary, but the better solution is clear. Though it may seem ironic, the best way for federal courts to *stay out* of the political thicket is for courts actively to strive to preserve states' political considerations when, as in *Shaw* violations, those considerations are not implicated in the harm they

173. Robert G. McCloskey, *The Supreme Court, 1960 Term — Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 67 (1962); cf. Schuck, *supra* note 5, at 1383-84 (noting that "the Court's prestige seems to be burnished" in the public eye when it challenges politicians' self-interest). Phrased in Professor Schuck's terms, then, the Court must be wary of appearing to aid politicians in pursuit of their own self-interest.

174. As the Court itself said in *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973): "[I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area." See also *supra* text accompanying notes 110-15, 154-59; cf. RUSH, *Freewill, on PERMANENT WAVES* (PolyGram Records, Inc. 1980) ("If you choose not to decide, you still have made a choice.").

are remedying. In other words, when federal courts refuse to disturb the political compromises of a state, they more effectively “ignore” politics than when they alter — even blindly alter — a state’s political landscape.¹⁷⁵

Federal courts should admit forthrightly that redistricting inevitably has political consequences, and that because this is so, they, as the apolitical branch of government, have the duty to defer to a state’s political policies in that practice. While this action backhandedly may lend some legitimacy to somewhat distasteful state politics, it will safeguard public respect for a federal judiciary that refuses *unnecessarily* to become involved in political squabbles.¹⁷⁶ So long as the Court allows states to pursue political objectives through redistricting, the tenets of federalism and separation of powers necessarily trump any institutional argument — no matter how queasy it makes us — and require that federal courts defer to all state policies that are not part of any constitutional violation. Because *Shaw* violations fail to implicate the partisan consequences of states’ political redistricting policies, federal courts must strive to leave them intact.

175. Federal courts thereby follow the dictates of *Wise v. Lipscomb*, which emphasized that federal courts remedying redistricting violations, “‘lacking the political authoritativeness that the legislature can bring to the task,’ must act ‘circumspectly, and in a manner “free from any taint of arbitrariness or discrimination.” ’ ” 437 U.S. 535, 541 (1978) (plurality opinion) (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977) (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964))).

Such a practice raises a related concern: if the thrust of *Shaw*’s expressive harm lies in districts’ uncouth appearances, see *supra* note 86 and accompanying text, one might argue that public confidence in federal courts would be undermined if courts altered only a few offending racial lines and submitted as a remedy an equally bizarre-looking district. It is true that respecting states’ political compromises may result in remedial districts that appear almost as bizarrely shaped as their predecessors. But while these results may not be perfectly desirable, they cannot be avoided.

First, it should be reiterated that a significant strain in the Court’s opinions suggests that *Shaw*’s harm is *not* dependent on the shape of a district. See *Miller v. Johnson*, 115 S. Ct. 2475, 2486 (1995) (holding that intent, not shape, creates a violation); *supra* subsection I.B.2 (emphasizing that racial classification is *Shaw*’s harm). Indeed, in the Texas case, the district court, without challenge from the Supreme Court, upheld several districts that were as bizarrely shaped as the ones it struck down because those districts allegedly failed to employ racial classifications. See *Bush v. Vera*, 116 S. Ct. 1941, 1965-67, 1994-96 (1996) (displaying those districts). Furthermore, under *White v. Weiser*, a district court is bound to reject a remedial plan with more compact districts if another plan fully cures the constitutional violation while being more true to the state’s political redistricting policies. See 412 U.S. 783, 793-96 (1973). Finally, even if their remedial districts are also oddly shaped, federal courts will garner some measure of legitimacy from residents of states who see that the courts refused to reach beyond their institutional bounds.

176. In so doing, federal courts will retain their “indispensable intellectual disinterestedness . . . in [apportionment] matters.” *Baker v. Carr*, 369 U.S. 186, 268 (1962) (Frankfurter, J., dissenting). This is no small matter. Such a practice could help avoid accusations of bias like those that occurred in the Texas redistricting case. In that case, local Democrats complained vehemently when the three judges on the district court, all appointed by Republican presidents, drafted a plan that heavily favored Republicans. See Wendy Benjaminson, *Legislators Seeking Redistricting Delay / Panel Asked to Wait on High Court Ruling*, *HOUSTON CHRON.*, Aug. 15, 1996, at A1.

2. Avoiding "Political Questions"

At first blush, considering political choices in redistricting appears to tread dangerously close to passing judgment on a political question, something the Court has declined to do since its inception.¹⁷⁷ When federal courts actively consider states' political compromises in the arena of redistricting, which is itself extraordinarily political, one might argue that federal courts enter a territory best left to the political branches of government. Without a doubt, apportioning political power is the job of state legislatures. But in the case of *Shaw* remedies, states have already constitutionally apportioned that power; this Note asks federal courts only to *preserve* those choices. Thus, as a closer inspection of the political-question doctrine reveals, federal courts curing *Shaw* violations actually act in accordance with the policy of the political-question doctrine by refusing to alter legitimate political compromises that they lack the constitutional authority to modify.¹⁷⁸

In the words of Justice Brennan in *Baker*, "the mere fact that [a] suit seeks protection of a political right does not mean it presents a political question. Such an objection 'is little more than a play upon words.'"¹⁷⁹ This is all the more true in the case of a *remedy* — that is, when a suit does not involve a "political right" in the first place, but when a state now seeks protection of its political rights in curing an unrelated unconstitutional racial classification.

At bottom, the political-question doctrine is really a tenet of judicial self-restraint.¹⁸⁰ The crux of the political question doctrine counsels federal courts to avoid meddling in questions thought to be inappropriate for judicial control¹⁸¹ — questions, again to quote Justice Brennan, "impossib[le] [to decide] without an initial policy determination of a kind clearly for nonjudicial discretion; or [] impossib[le] [to undertake] independent resolution without expressing [a] lack of the respect due coordinate branches of government."¹⁸²

177. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803); see also *Baker v. Carr*, 369 U.S. 186, 210-17 (1962); 369 U.S. at 289 (1962) (Frankfurter, J., dissenting); *Luther v. Borden*, 48 U.S. (7 How.) 1, 39-47 (1849); McCloskey, *supra* note 173, at 59-61.

178. See *supra* text accompanying notes 135-38.

179. *Baker*, 369 U.S. at 209 (quoting *Nixon v. Herndon*, 273 U.S. 536, 540 (1927)); see also RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 292 (4th ed. 1996) ("The mere fact that a case has political stakes or has generated political controversy clearly does not render it nonjusticiable under the political question doctrine.").

180. See Bickel, *supra* note 172, at 51-58; McCloskey, *supra* note 173, at 64.

181. See McCloskey, *supra* note 173, at 64; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7 (1959) (maintaining that courts regard political questions as ones that "are not to be resolved judicially, although they . . . arise in the course of litigation").

182. *Baker*, 369 U.S. at 217. Other traditional concerns of the political-question doctrine, namely, the need for judicially manageable standards, see 369 U.S. at 217, and the desire to prevent excessive litigation that strips state legislatures of their redistricting function, see *City*

Above all else, federal courts should refrain from meddling in partisan struggles within the political branches of state governments absent a showing that those branches have unconstitutionally allocated power or benefits in the first place.¹⁸³

This requirement of self-restraint describes exactly the situation posed in *Shaw* remedies. Federal courts are asked to modify a redistricting plan which unconstitutionally classifies voters on the basis of race, but which is difficult to adjust without treading on political considerations inappropriate for judicial control. This is quite a thorny problem. But in order to make any progress toward an acceptable solution, it is crucial to recognize that, no matter what federal courts say or do, the problem cannot be escaped. Federal courts cannot avoid altering states' legitimate political choices by refusing to consider them; creating political consequences from moving lines on a redistricting plan is nearly inevitable.¹⁸⁴ That being the case, it seems far better to require courts to confront the problem with their eyes open. Only by purposefully seeking to respect political considerations that — in the context of discrete racial gerrymandering violations — must be deemed legitimate may federal courts truly attempt to avoid affecting political choices properly left to the political branches of state government.

B. *The Viable Alternative: Reconsider Bandemer*

The predicament in which the Court has placed itself is now clear: in remedying racial gerrymandering violations, it should consider and respect political choices made by state legislatures, regardless of their potentially partisan flavor. But if this seems too unsavory or untidy for the Court, there is one viable alternative: it could reconsider *Bandemer's* partisan-gerrymandering doctrine and put some teeth into it. Such reconsideration would allow federal courts to deal with states' self-serving political choices head-on and properly to adjust extreme partisan aspects of states' redistricting plans under partisan vote-dilution challenges, rather than inadvertently and improperly doing so under *Shaw* racial classification challenges.

of *Mobile v. Bolden*, 446 U.S. 55, 90-92 (1980) (Stevens, J., concurring), are much less relevant here. Regarding the former, federal courts encounter this issue only when balancing the equities in the remedial phase of *Shaw* cases, so ironclad standards need not exist. Certainly, no specific standards for compactness, contiguity, respecting political subdivisions, or preserving communities of interest exist, and federal courts always weigh each of these factors when drawing remedial plans. Regarding the latter, the restriction of this issue to the remedial phase of cases will greatly restrict the spawning of new litigation. Moreover, because federal courts are required to defer to legislative redistricting remedies, *see supra* text accompanying notes 95-96, the frequency of appeals will be lesser still.

183. This remains true even when a federal court seeks to replace a state's politically self-serving policy with what it deems a "fairer" policy. *See supra* text accompanying note 97.

184. *See supra* text accompanying notes 111-12.

It would be fine, and perhaps even desirable,¹⁸⁵ if the Court decided to strengthen its partisan gerrymandering doctrine in order to modify political consequences of redistricting plans when they deprive citizens of their right to affect electoral outcomes; it just should not take that action, or allow lower courts to take that action, under the *Shaw* doctrine.¹⁸⁶ If the Court is so uncomfortable with the prospect of legitimizing states' nakedly political redistricting objectives, perhaps it should revamp the doctrine that purports to constrain these practices. Indeed, the public may applaud such an increased check on its elected officials.¹⁸⁷ But, in the meantime, when federal courts alter these political practices under the guise of remedying *Shaw* violations — and especially when they alter them largely in favor of one political party — the judiciary abandons the very legitimacy and neutrality it seeks to represent.¹⁸⁸

CONCLUSION

Shaw litigation is entering a critical phase. Now that federal courts are beginning to implement racial gerrymandering remedies — the Supreme Court heard its first two such appeals this Term¹⁸⁹

185. Justice Stevens, joined by several commentators, has advocated this approach. See *Bush v. Vera*, 116 S. Ct. 1941, 1975 n.2, 1987-92 (1996) (Stevens, J., dissenting); Issacharoff & Pildes, *supra* note 54, at 25; see also Polsby & Popper, *supra* note 5, at 303-16 (providing a persuasive argument against allowing partisan gerrymanders).

While an extended discussion of the desirability of strengthening *Bandemer* is beyond the scope of this Note, it is important to note that doing so might well allow the Court to deal more effectively with "mixed motive" cases like *Bush* and *Shaw II*. In these cases, racial boundaries may often be seen as merely a side-effect (or an ancillary outcome) — but *not an antecedent* — to political considerations and attempts to comply with the Voting Rights Act, both of which the Court has recognized as legitimate districting policies. See *supra* notes 9, 107, 116 and accompanying text. Indeed, as Professor Rush has pointed out, because racial minorities vote overwhelmingly Democratic, and because they tend to remain in specific geographic locales, see *Rush*, *supra* note 164, at 126-29, what — after the fact — appears to be racial gerrymandering is often actually political gerrymandering. By addressing these gerrymanders under a nonracial doctrine, the Court could refute current concerns that *Shaw* punishes only Democratic and pro-minority gerrymanders while permitting equally egregious Republican gerrymanders to avoid serious constitutional scrutiny. Strengthening *Bandemer* also would avoid *Shaw's* effect of applying compactness criteria only to majority-minority districts, see Pildes, *supra* note 5, something that, while perhaps justifiable under the expressive harm doctrine, nevertheless appears somewhat inequitable.

186. Some scholars have argued that the Court's malapportionment doctrine also was largely an attempt to constrain partisan gerrymandering. See Alfange, *supra* note 51, at 177, 201-03; Lucas, *supra* note 170, at 801 (noting that partisan political struggles are just beneath the surface of apportionment cases). But, as the fallout from those decisions has demonstrated, indirect doctrines of dealing with partisan gerrymandering are insufficient. See, e.g., Pildes, *supra* note 5.

187. See *supra* note 173 and accompanying text.

188. Cf. Wechsler, *supra* note 181, at 15-19 (arguing that courts should judge only by "neutral principles").

189. See *Abrams v. Johnson*, 116 S. Ct. 1823 (1996) (noting probable jurisdiction); *Lawyer v. Department of Justice*, 117 S. Ct. 292 (1996) (same). According to one commentator, the issues in *Abrams* focused on the lower court's application of the Voting Rights Act to its redistricting remedy. After striking down a plan with three majority-minority districts, the

— they must be reminded to adhere carefully to the narrow scope of *Shaw*'s reach. The *Shaw* doctrine is designed to constrain "short-sighted and unauthorized"¹⁹⁰ racial classifications in redistricting plans; it is not designed to address the apportionment of political power throughout states. But allowing federal courts, in remedying *Shaw* violations, to ignore permissible political considerations that form the core of states' redistricting plans threatens to make the stakes of *Shaw* cases inexorably higher.

Because the Court's partisan-gerrymandering doctrine makes it exceedingly difficult to attack redistricting plans on political grounds,¹⁹¹ political parties and interest groups are gaining an incentive to couch partisan grievances in racial terms.¹⁹² Absent a requirement that federal courts remedying *Shaw* violations strive to leave states' political compromises intact, federal courts seriously risk providing such groups with political gains they were unable to achieve through valid state legislative processes or at the polls. Such overreaching by federal courts is difficult, if not impossible, to square with our basic principles of federalism and separation of powers.

Thus, as the Court's doctrine currently stands, federal courts remedying *Shaw* violations have no choice but to take notice of and respect states' political policies — even if they appear colored with self-interest — so long as the policies fail to violate any constitutional norms. If this proves too unsavory to the Court, it should reconsider its position on partisan gerrymandering and deal forthrightly with the problem of partisan vote-dilution. But whatever the Court's ultimate answer, the current practice of self-imposed blindness in crafting *Shaw* remedies is an escape hatch that leads

district court included only one majority-minority district in its remedial plan. Appellants argued that the Voting Rights Act required the court to create a second such district. See Linda Greenhouse, *Lower Courts Become Issue in Redistricting*, N.Y. TIMES, Dec. 19, 1996, at A10 (recounting oral argument). The *Lawyer* appeal focused on whether a remedial plan accepted by the district court itself violated *Shaw* and, perhaps more importantly, whether the district court's use of mediation in the settlement process violated principles of federalism, or the separation of powers. See 65 U.S.L.W. 3282 (listing questions presented). Therefore, it appears unlikely that the Supreme Court's opinion in either case will tackle the issues central to this Note.

190. *Miller v. Johnson*, 115 S. Ct. 2475, 2494 (1995).

191. See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 132-33, 139 (1986) (plurality opinion); *Badham v. Eu*, 694 F. Supp. 664, 667-72 (N.D. Cal. 1988), *summarily aff'd.*, 488 U.S. 1024 (1989); *supra* text accompanying notes 47-50.

192. See Karlan, *supra* note 7, at 251; see also Charles Fried, *The Supreme Court, 1994 Term — Forward: Revolutions?*, 109 HARV. L. REV. 13, 66 n.355 (1995). The recent challenge to New York's Twelfth District, for example, was brought by Angel Diaz, the district's Republican candidate in the 1992 congressional election, after she lost the election. See *Diaz v. Silver*, No. CIV.A.95-CV-2591, 1997 WL 94175, at *1 (E.D.N.Y. Feb. 27, 1997) (*per curiam*). Suits like this lend credence to the popular notion that many *Shaw* cases are not about race at all, but rather are "vehicle suits" aimed at increasing partisan representation. See Karlan, *supra* note 19, at 1727-30; Pildes, *supra* note 54, at 1378-80.

only to less judicially legitimate and more politically disruptive remedies. It should not be tolerated.