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OF SNEETCHES AND SNAKES: RACE AND REDISTRICTING AFTER *SHAW v. RENO*

I. INTRODUCTION

*"We know who is who! Now there isn't a doubt.
The best kind of Sneetches are Sneetches without!"
Then, of course, those with stars all got frightfully mad.
To be wearing a star now was frightfully bad.
Then, of course, old Sylvester McMonkey McBean
Invited them into his Star-Off Machine.
Then, of course from THEN on, as you probably guess,
Things really got into a horrible mess."*¹

Dr. Seuss' tale *The Sneetches*² creates a humorous illustration of the problems created by discrimination based on appearance. In his story, Dr. Seuss describes how the Star-Belly Sneetches do not allow the Plain-Belly Sneetches to participate in their beach activities. One day Sylvester McMonkey McBean appears with a machine that can add or subtract stars from the bellies of the Sneetches. In a race to be the superior group, the Sneetches keep paying Sylvester to add and subtract stars. Ultimately, there is such a confusion over whether Star-Belly Sneetches or Plain-Belly Sneetches are superior, they decide Sneetches are Sneetches regardless of the stars.

Although the message of *The Sneetches* seems clear enough, prejudice continues to be a "horrible mess" in American society, as well as in its political and legal systems.³ The issue of differential treatment due to race has a long history of litigation under the Equal Protection Clause of the Fourteenth Amendment.⁴ As a part of Equal Protection jurispru-

1. DR. SEUSS [THEODOR S. GEISEL], *The Sneetches*, in *THE SNEETCHES AND OTHER STORIES* 18-19 (1961).

2. *Id.*

3. See ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 1-10 (1987).

4. See Stuart Taylor, Jr., *Race: The Most Divisive Issue*, N.J. L.J., August 23, 1993, at 10. Section 1 of the Fourteenth Amendment provides:
All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the United States, nor

dence, the "group" of rights and remedies associated with voting rights has had a distinct history, particularly after the passage of the Voting Rights Act of 1965.⁵ With voting rights litigation becoming increasingly common in the last two decades, several lawsuits have been filed challenging reapportionment plans that intentionally create "majority-minority voting districts"⁶ under the Voting Rights Act.⁷

One of the most publicized recent battlegrounds over reapportionment on the basis of race took place in North Carolina, where the Twelfth District for the United States House of Representatives [hereinafter "District 12"] was challenged by five white voters on the basis that the district constituted an unconstitutional "gerrymander."⁸ Popularly known as the "I-85 District,"⁹ Justice O'Connor described District 12 as a 160 mile long "snake" no wider at points than one lane of highway I-85.¹⁰ The district is long enough to be served by

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

5. Bernard Grofman, *Would Vince Lombardi Have Been Right if He had Said: "When it Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 CARDOZO L. REV. 1237, 1244 (1993) [hereinafter Grofman, *Vince Lombardi*]. See Appendix 2 for relevant sections of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1993) [hereinafter Voting Rights Act].

6. Majority-minority voting districts are defined as "districts in which a majority of the population is a member of a specific minority group." Voinovich v. Quilter, 113 S. Ct. 1149, 1153 (1993). Section 2 of the Voting Rights Act requires that such districts be created wherever possible. *Id.*

7. Bernard Grofman attributes some of the increasing litigation to anti-voting rights backlash, based in part on partisan (mainly conservative) concern as well as the increasingly convoluted shapes of districts, including the twelfth district of North Carolina. Grofman, *Vince Lombardi*, *supra* note 5, at 1247-49 (citing, *inter alia*, Abigail Thernstrom, "Voting Rights" Trap, THE NEW REPUBLIC, Sept. 2, 1985, at 21).

8. "Gerrymander" is defined as "to divide (a territorial unit) into election districts to give one political party an electoral majority in a large number of districts while concentrating the voting strength of the opposition in as few districts as possible." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 515 (1986). The term "gerrymander" was coined to describe a district formed by Governor Elbridge Gerry's creation of a "salamander" shaped district in 1812 to protect his party's interests. *Davis v. Bandemer*, 478 U.S. 109, 164 n.3 (1986).

9. David G. Savage, *High Court Rules Against Racial Gerrymandering*, L.A. TIMES, June 29, 1993, at A1.

10. *Shaw v. Reno*, 113 S. Ct. 2816, 2820-21 (1993) (citing *Shaw v. Barr*, 808 F. Supp. 461, 476-77 (E.D.N.C. 1992), *rev'd and remanded sub nom.*, *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (Voorhees, C. J., concurring in part and dissenting in part)). See Appendix 1 for a reproduction of the North Carolina Congressional Plan, illustrating the shape of District 12.

three national airports and three television markets.¹¹ North Carolina State Representative Mickey Michaux commented, "if you drove down the interstate with both car doors open, you'd kill most of the people in the district."¹² This "bizarre" district was created by the North Carolina legislature in an attempt to create a black voting district under section 5 of the Voting Rights Act.¹³

In *Shaw v. Reno*,¹⁴ the Supreme Court recognized for the first time that voters have standing to challenge a voting district based on its appearance under the Equal Protection Clause of the Fourteenth Amendment.¹⁵ A violation exists if legislation creating a voting district, though race-neutral on its face, "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race."¹⁶ To appreciate the impact of the Court's recognition of the Equal Protection claim based on district appearance in *Shaw*, it is first necessary to trace the legislative and judicial treatment the role of race in voting rights cases, with a special focus on how race has been applied to the process of redistricting.

The procedural history of *Shaw*, leading up to its acceptance for review by the Supreme Court, is traced in order to outline plaintiff's attacks on District 12.¹⁷ This comment proceeds to analyze the manner in which the holding of *Shaw* affects the rights of voters by allowing discrimination claims under the Equal Protection Clause of the Fourteenth Amendment.¹⁸ The analysis focuses on the role of race and geo-

11. *Shaw v. Hunt*, No. 92-202-CIV-5-BR, 1994 U.S. Dist. LEXIS 11102, at *272 (E.D.N.C. Aug. 1, 1994) (Voorhees, J., dissenting).

12. Joan Biskupic, *N.C. Case to Pose Test of Racial Redistricting; White Voters Challenge Black-Majority Map*, WASH. POST, Apr. 20, 1993, at A4. Interestingly, this quote was originally used to describe a Texas district which was drawn to protect an incumbent after the 1970 Census. T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 616.

13. Section 5 of the Voting Rights Act of 1965 prohibits jurisdictions subject to the section from creating changes in a "standard, practice, or procedure with respect to voting" without the approval of the Attorney General or United States District Court for the District of Columbia. 42 U.S.C. § 1973(c) (1993). See Appendix 2 for the complete text of § 5.

14. 113 S. Ct. 2816 (1993).

15. *Id.* at 2832.

16. *Id.* at 2828.

17. See discussion *infra* part II.

18. See discussion *infra* part III.A.

graphic appearance in redistricting as articulated in *Shaw*.¹⁹ It evaluates alternate ideals and approaches to districting, concluding that a consistent standard for compactness is central to implementing the mandates of *Shaw*.²⁰ This comment next analyzes the approaches taken by courts to redistricting cases subsequent to the *Shaw* decision²¹ and suggests that a quantitative standard for compactness is a solution which can harmonize *Shaw's* Fourteenth Amendment concerns as well as the compactness requirements of the Voting Rights Act.²²

II. BACKGROUND

*When the Star-Belly Sneetches had frankfurter roasts
Or picnics or parties or marshmallow toasts,
They never invited the Plain-Belly Sneetches.
They left them out in the cold, in the dark of the beaches.
They kept them away. Never let them come near.
And that's how they treated them year after year.*²³

The role of race in redistricting has been evident since blacks obtained the right to vote.²⁴ The process of redistricting came to the forefront of racial issues by the passage of the Voting Rights Act of 1965,²⁵ ushering in what has been termed the "reapportionment revolution."²⁶ *Shaw v. Reno*²⁷ illustrates the conflict between two important legal constraints on redistricting.²⁸ Consequently, this section focuses on voting rights in the context of the Fourteenth Amendment, and the roles of the Equal Protection Clause and the Voting Rights Act on redistricting. It then describes the central voting rights cases which led up to the Supreme Court's decision in *Shaw*. Finally, this section analyzes the holding in *Shaw* and the rationales that the Court employed in recognizing a

19. See discussion *infra* part III.B.

20. See discussion *infra* part IV.A-C.

21. See discussion *infra* part IV.D.

22. See discussion *infra* part V.

23. DR. SEUSS, *supra* note 1, at 7.

24. See THERNSTROM *supra* note 3. See also discussion *infra* part II.B.1 and accompanying notes.

25. 42 U.S.C. § 1973 (1993).

26. Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 246.

27. 113 S. Ct. 2816 (1993).

28. See discussion *infra* part II.D.

new cause of action, based on district appearance, under the Equal Protection Clause.

A. *The Special Role of Voting Rights*

Redistricting in order to obtain partisan advantage is not a new concept. Patrick Henry attempted to redraw the lines of James Madison's congressional district in Virginia to prevent Madison's election to Congress.²⁹ *Shaw's* 160-mile "snake" of 1993 is certainly part of the heritage of protecting party interests, first evidenced by Governor Gerry's "salamander" district of 1812.³⁰ However, several factors make District 12 significantly more difficult to deal with.³¹ *Shaw* contains the added ingredient of race. It also comes after legal restraints have been added to the redistricting process.³² Most importantly, voting rights have a special status as a cornerstone of a democratic society.³³ *Baker v. Carr*³⁴ recognized voting rights as a constitutional concern in 1962. While voting rights cases continue to draw on Equal Protection analysis, much of the litigation has focused on the role of race. Such cases are additionally subject to the provisions of the Voting Rights Act.³⁵ Indeed, *Shaw* addresses a point of conflict between the Fourteenth Amendment and the Voting Rights Act.³⁶ The next section traces the development of this conflict.

29. Henry attempted to prevent Madison's election by redrawing district lines because of Madison's presumed opposition to the adoption of the Bill of Rights. Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, in MINORITY VOTE DILUTION 85, 85 (Chandler Davidson, ed., 1984).

30. See *supra* note 7.

31. See Grofman, *Vince Lombardi*, *supra* note 5, at 1244.

32. See *infra* part II.B.2-3 for a discussion of the Voting Rights Act. Cf. *Wood v. Broom*, 287 U.S. 1, 6-7 (1932) (discussing Congressional repeal of federal contiguity and compactness requirements for voting districts).

33. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

34. 369 U.S. 186 (1962) (establishing one-man one-vote principle).

35. See Grofman, *Vince Lombardi*, *supra* note 5, at 1244-45.

36. See discussion *infra* part II.C. See also *Davis v. Bandemer*, 478 U.S. 109, 143 (1986) (plurality opinion) (recognizing a cause of action under the Equal Protection Clause for an unconstitutional political gerrymander).

B. *Pervasive Discrimination: The Equal Protection Clause and the Voting Rights Act*

1. *The Civil War Amendments*

The Thirteenth, Fourteenth and Fifteenth Amendments of the Constitution were passed after the Civil War with the specific intention of guaranteeing equal rights to black citizens.³⁷ The Fifteenth Amendment provides, "[t]he right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."³⁸ Despite the intent of the Civil War Amendments, southern states used a variety of methods such as "grandfather clauses"³⁹ and "good character" requirements⁴⁰ to circumvent the enfranchisement of black citizens. A slightly more subtle, but equally persistent form of discrimination, "racial gerrymanders," redrew political lines in order to minimize the effect of the black vote.⁴¹ One of the earliest examples of this phenomena, was the "shoestring" district created in Mississippi in 1877 which packed most black voters into one of six districts, running the length of the Mississippi River.⁴² The ongoing nature of this problem was reflected in the landmark decision of *Gomillion v. Lightfoot*,⁴³ in which the Supreme Court struck down an attempt by the city of Tuskegee to change its municipal boundaries so that nearly all of the city's 400 black voters, but none of the white voters, were eliminated.⁴⁴

37. J. Morgan Kousser, *The Undermining of the First Reconstruction*, in MINORITY VOTE DILUTION 27, 28 (Chandler Davidson, ed., 1984).

38. U.S. CONST. amend. XV, § 1.

39. Grandfather clauses were enacted to prevent blacks from voting by denying the right to vote to any descendent of persons who had not been allowed to vote prior to the Civil War. See *Guinn v. United States*, 238 U.S. 347 (1915) (striking down an Oklahoma grandfather clause which denied the right to vote to descendants of slaves).

40. Don Edwards, *The Voting Rights Act of 1965, As Amended*, in THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS 1, 5 (Lorn Foster, ed., 1985).

41. *Davis v. Bandemer*, 478 U.S. 109, 164 (1986) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring)). A "racial gerrymander" is defined as "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes." *Id.*

42. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION*, 1863-1877, at 590 (1988). Gerrymanders were used extensively in the period after Reconstruction to minimize black voting strength. *Id.*

43. 364 U.S. 339 (1960).

44. *Id.* at 341, 347-48.

2. *The Voting Rights Act*

In 1965, ninety-five years after the passage of the Fifteenth Amendment, Congress determined that discrimination in voting was an "insidious and pervasive evil which has been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."⁴⁵ In response to ongoing attempts to prevent blacks from exercising the right to vote in the South, Congress passed the Voting Rights Act of 1965 with the express purpose of allowing blacks a real chance to vote.⁴⁶ Two central provisions of the Act are sections 2 and 5. Section 2 outlaws any procedure which denies or abridges the right to vote.⁴⁷ In terms of voting, section 2 prohibits any state or subdivision from denying minorities the opportunity to "participate in the political process and to elect representatives of their choice."⁴⁸ Section 5 requires pre-clearance⁴⁹ by the U.S. Attorney General or United States District Court for the District of Columbia before any proposed changes to voting procedures are made within that state.⁵⁰

From the outset, the Voting Rights Act played an instrumental role in eliminating "first generation" obstacles to minority voting such as literacy tests, grandfather clauses, poll taxes, and other voter registration barriers commonly known as "Jim Crow" laws.⁵¹ For example, the Act was highly successful in drawing black voters to the polls, with nearly a 900

45. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

46. *Edwards*, *supra* note 40, at 5.

47. 42 U.S.C. § 1973(a) (1988).

48. *Id.* § 1973(b). Section 2 applies nation-wide. *Id.*

49. "Preclearance" refers to the requirement that a state or subdivision which is subject to this section must submit any change to the U.S. Attorney General or the United States District Court for the District of Columbia for approval before implementation. 42 U.S.C. § 1973(c) (1993). See Appendix 2 for text of § 5.

50. Section 5 pre-clearance applies only to specific districts which have a history of depressed political participation by minorities. Any jurisdiction which falls under § 5 must obtain either a judgment from the United States District Court for the District of Columbia or pre-clearance from the Attorney General that the change in voting procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973(c) (1993). Forty of North Carolina's one hundred counties are subject to § 5 pre-clearance, therefore making any redistricting effort subject to the provisions of the Voting Rights Act. Karlan, *supra* note 26, at 272 n.111.

51. Aleinikoff & Issacharoff, *supra* note 12, at 621. See also Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Elec-*

percent increase in the number of blacks registered to vote in southern states.⁵² These blatant forms of discrimination, however, were more easily overcome than less direct forms of discrimination, or "second generation" barriers, such as reapportionment, which were challenged in the 1960's.⁵³

The Supreme Court's first major recognition that the guarantee of equal access to voting polls would be insufficient to guarantee equal voting rights occurred in *Allen v. State Bd. of Elections*.⁵⁴ *Allen* focused on minority groups and the fact that voting power is based on the right of minorities to elect candidates of that group's choice.⁵⁵ When such groups are denied voting power as a bloc through practices such as at-large voting districts,⁵⁶ the voting power of that group is "diluted."⁵⁷ Stated differently, "the Equal Protection Clause is violated only when an election structure 'affects the political strength' of a racial group by unduly diminishing its influence on the political process."⁵⁸ As the Court discussed in *White v. Regester*,⁵⁹ any districting scheme which has the purpose and effect of diluting minority voting power is discriminatory, and therefore unconstitutional.⁶⁰ This standard

toral Success, 89 MICH. L. REV. 1077, 1093-101 (1991) [hereinafter, Guinier, *The Triumph of Tokenism*].

52. Edwards, *supra* note 40, at 5.

53. *Id.* at iv. See also Guinier, *The Triumph of Tokenism*, *supra* note 51, at 1093-101.

54. 393 U.S. 544 (1969).

55. *Id.* at 569.

56. In an at-large voting district, all voters within a geographical area (e.g., a city) vote for a number of candidates who will fill all of the elective positions. Single-member districts, in contrast, elect a single representative for a certain geographical area. Minority candidates can be consistently denied any representation in such a system. See Chandler Davidson, *Minority Vote Dilution: An Overview*, in MINORITY VOTE DILUTION 1, 4-7 (Chandler Davidson, ed., 1984).

57. Chandler Davidson defines dilution as "a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable group to diminish the voting strength of at least one other group." *Id.* at 4. Richard L. Engstrom defines dilution as "the practice of limiting the ability of [minorities] to convert their voting strength into the control of, or at least influence with, elected public officials." Richard L. Engstrom, *Racial Vote Dilution: The Concept and the Court*, in THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS 63 (Lorn S. Foster ed., 1985).

58. 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, 493 (1993) (citing *City of Mobile v. Bolden*, 446 U.S. 55, 83 (1980) (Stevens, J., concurring)).

59. 412 U.S. 755 (1973).

60. *Id.* at 765-66.

"dovetailed" with the constitutional standards of the Equal Protection Clause until the Voting Rights Act was amended in 1982.⁶¹

3. *The 1982 Amendments*

The 1982 Amendments to the Voting Rights Act greatly increased the scope of the Act. The expanded section 2 encompasses nearly every racial challenge to redistricting and supplants the constitutional basis for a claim with a statutory basis.⁶² The requirement that a plaintiff prove only the effect of minority vote dilution in order to make out a discrimination claim is the most important change to the Act in terms of redistricting.⁶³ The effects of this change are twofold. First, plaintiffs in voting rights cases can now seek relief under section 2 because there is a lower standard of proof of discrimination than the constitutional standard, which requires a showing of intent.⁶⁴ Second, the lower standard of proof required by section 2 encourages partisan groups to use a vote dilution claim under the Voting Rights Act to seek more favorable districting lines.⁶⁵

Section 2(b) of the Voting Rights Act, as written into the 1982 amendments, mandates a "totality of the circumstances" approach for determining whether there is equal participation in the political process and election of representatives.⁶⁶ The seminal case interpreting the "totality" requirement of section 2 is *Thornburg v. Gingles*,⁶⁷ which sets forth a three-part test to determine whether a redistricting scheme is valid under the Voting Rights Act. *Gingles* holds that plaintiffs who bring a suit under section 2 must prove first that a minority community is "sufficiently large and geographically compact to constitute a majority in a single-member district."⁶⁸ The minority must also demonstrate common voting preferences so as to be considered "politically cohesive."⁶⁹ Finally, a plaintiff must prove that the majority is

61. Karlan, *supra* note 26, at 250.

62. Grofman, *Vince Lombardi*, *supra* note 5, at 1238-39.

63. Engstrom, *supra* note 57, at 36.

64. Karlan, *supra* note 26, at 251.

65. *Id.*

66. 42 U.S.C. § 1973(b) (1988).

67. 478 U.S. 30 (1986).

68. *Id.* at 49.

69. *Id.* at 51.

engaged in "racially polarized" voting behavior in which the candidate of the majority bloc usually defeats the preferred candidate of the minority community.⁷⁰ If each of the three prongs is met, the "totality of the circumstances" establishes that the minority vote has been diluted, and has resulted in unequal access to the electoral process.⁷¹ Once such a violation has been established, the Voting Rights Act requires that the government or agency which created the district institute a new voting system which allows for effective minority representation.⁷²

The Supreme Court created the *Gingles* criteria to describe the circumstances in which there is minority vote dilution in multi-member or at-large voting schemes.⁷³ It has evolved, however, as a bright-line rule that avoids the "totality of the circumstances" rule in section 2(b) of the Voting Rights Act.⁷⁴ While *Gingles* may be applied to challenges against single-member voting districts,⁷⁵ the remedy provided by *Gingles* does not fit as neatly in single-member districts as multi-member or at-large districts because it is more difficult to establish a minority group that is "sufficiently large and geographically compact."⁷⁶ This problem of establishing a community in which to create a new minority district has, generally, led courts to give no substantive meaning to the compactness requirement as articulated in *Gingles*.⁷⁷

70. *Id.* at 55-56. See generally Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992).

71. Pildes & Niemi, *supra* note 58, at 487 n.17.

72. *Id.* at 487. Professor Karlan characterizes the *Gingles* test as one of causation, in which the central question is whether the current system denies minority voters "a fair opportunity to elect the candidates of their choice, and is there an alternative system which *would* provide that opportunity?" Karlan, *supra* note 26, at 262.

73. Thornburg v. *Gingles*, 478 U.S. 30 (1986). See *supra* note 56.

74. Karlan, *supra* note 26, at 262.

75. The Supreme Court only recently held that the *Gingles* criteria apply to Voting Rights Act challenges against single-member districts. *Grove v. Emison*, 113 S. Ct. 1075 (1993).

76. Subsequent to the *Gingles* case, plaintiffs sought to divide multi-member districts into single-member districts. Problems concerning application of this remedy to single-member districts have been recognized in pending litigation. Pildes & Niemi, *supra* note 58, at 488-89.

77. The Supreme Court has implied that districting bodies, as well as courts, were not giving any weight to the compactness requirement in *Grove v. Emison*, 113 S. Ct. 1075 (1993). Justice Scalia questioned the compactness of

This lack of any real notion of compactness is precisely what led to the claim in *Shaw*.⁷⁸

C. *The Path to the Supreme Court*

Until the redistricting brought forth by the 1990 Census, North Carolina had not elected a black representative to the United States Congress since the Reconstruction Era, despite its twenty percent black voting population.⁷⁹ The black population remains, however, relatively dispersed, with blacks constituting a majority in only five of North Carolina's 100 counties.⁸⁰ As a result of its history of discrimination in voting rights, North Carolina is required to submit any change in its voting practices or structures to the Attorney General or United States District Court for the District of Columbia for pre-clearance under section 5 of the Voting Rights Act.⁸¹ As a result of the 1990 Census, North Carolina was entitled to an additional Congressional district, therefore requiring a change in the voting structure of the state. Because a new district would be created, the redistricting effort required more than "tinkering" with district lines. The additional elements of strong partisan and racial interests complicated the North Carolina General Assembly's attempts to carve out a new district.⁸²

North Carolina's first attempt to redistrict included one majority-black district which was created with the dual intentions of compliance with the Voting Rights Act and protection of the Democratic incumbents in neighboring districts.⁸³ The Attorney General refused to clear the districting scheme, based on both the failure of the state to create a second ma-

Minnesota's Senate District 59, which linked minority populations in the northern and southern parts of Minneapolis. *Id.* at 1083-85.

78. See discussion *infra* part II.D. On remand, Judge Voorhees' dissent noted that District 12 ignores the geographical compactness requirement. *Shaw v. Hunt*, No. 92-202-CIV-5-BR, 1994 U.S. Dist. LEXIS 11102, at *234 (E.D.N.C. Aug. 1, 1994) (Voorhees, C.J., dissenting in part).

79. Whites make up 78% of the voting age population with the remaining 2% consisting of primarily Native Americans and Asians. *Shaw v. Reno*, 113 S. Ct. 2816, 2820 (1993).

80. *Id.*

81. See *supra* notes 49-50 and accompanying text.

82. Karlan, *supra* note 26, at 272-73. The General Assembly of North Carolina controls redistricting, with no veto provision for the Governor. Additionally, both houses were controlled by the Democratic party. *Pope v. Blue*, 809 F. Supp. 392, 394 (W.D.N.C. 1992) (three-judge court), *aff'd*, 113 S. Ct. 30 (1992).

83. *Pope*, 809 F. Supp. at 394.

jority-black district and concern with incumbent protection.⁸⁴ Although the Attorney General had listed the southeastern part of North Carolina as a potential area for a second, reasonably compact black-majority district,⁸⁵ North Carolina decided against this option in order to protect the incumbents in that area of the state.⁸⁶ Instead of challenging the finding of the Attorney General in federal court, North Carolina created Congressional District 12, which was subsequently pre-cleared.⁸⁷ District 12 has a voting-age population which is 53.34% black, and 45.21% white.⁸⁸

The new District 12 was challenged almost immediately. The first case to arrive in court was *Pope v. Blue*,⁸⁹ brought by Republican voters and others as a political gerrymandering case. The plaintiffs claimed that District 12 was unconstitutional because it diluted their political influence.⁹⁰ Under *Davis v. Bandemer*,⁹¹ a political group may bring a vote dilution claim under the Equal Protection Clause. *Bandemer* held that any election rule that serves no other purpose than to favor one group interest, be it racial, ethnic, economic, religious, or political, is justiciable.⁹² The district court in *Pope*, relying principally on *Bandemer*'s language that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence on the political process as a whole,"⁹³ dismissed the case for failure to state a claim.⁹⁴ The holding in *Pope* is not surprising since Justice O'Connor

84. *Id.*

85. *Shaw v. Reno*, 113 S. Ct. 2816, 2820 (1993).

86. *Shaw v. Barr*, 808 F. Supp. 461, 479 (E.D.N.C. 1992), *rev'd and remanded sub nom.*, *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

87. The "I-85" District is 160 miles long and meanders through parts of ten counties. It is no wider than a single point in some places. *Shaw*, 113 S. Ct. at 2820-21. See Appendix 1 for a reproduction of District 12.

88. Appendix to State Appellees' Brief, *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (No. 92-357).

89. 809 F. Supp. 392 (W.D.N.C. 1992) (three-judge court), *aff'd*, 113 S. Ct. 30 (1992).

90. The plaintiffs in this case were the North Carolina Republican Party, thirty Republicans, nine Democrats, and three independent voters. *Id.* at 394.

91. 478 U.S. 109 (1986) (plurality opinion).

92. *Id.* at 143. See also, Alexander Athan Yanos, *Reconciling the Right to Vote with the Voting Rights Act*, 92 COLUM. L. REV. 1810, 1820 (1992).

93. *Bandemer*, 478 U.S. at 132.

94. *Pope v. Blue*, 809 F. Supp. 392, 399 (W.D.N.C. 1992) (three-judge court), *aff'd*, 113 S. Ct. 30 (1992).

noted that "[v]ote dilution analysis is far less manageable when extended to major political parties than if confined to racial minority groups."⁹⁵ The Supreme Court affirmed the district court's finding that the plaintiffs had failed to state a claim because exclusion of Republicans in redistricting does not equal exclusion from the political process as a whole.⁹⁶ In retrospect, the key point of *Shaw* is that a successful claim requires race as an element in a constitutional challenge.⁹⁷

At the same time *Pope* was in the court system, five plaintiffs sued the federal and state officials who had redistricted North Carolina. This case, *Shaw v. Barr*,⁹⁸ challenged District 12 as well as the constitutionality of section 2 of the Voting Rights Act. Two of the plaintiffs, Ruth Shaw and Melvin Shimm, were in somewhat the same position as the black voters in the *Gomillion* case.⁹⁹ They effectively had been "fenced out" of a district with a majority of white voters, and placed in the 12th District which was specifically drawn to create a black majority.¹⁰⁰ The plaintiffs in *Shaw v. Barr*¹⁰¹ alleged that the creation of a district which was "in no way related to considerations of compactness, [sic] contiguousness, and geographic or jurisdictional communities of interest" violated the Fourteenth Amendment.¹⁰² They further sought to "participate in a process for electing members of the House of Representatives which [is] color-blind," of which apportionment was a part.¹⁰³ The district court rejected this argument, relying on the holding in *United Jewish Orgs. of Williamsburgh, Inc. v. Carey (UJO)*.¹⁰⁴ As its central analysis, *UJO* adopted the language of section 2, holding that redis-

95. *Davis v. Bandemer*, 478 U.S. 109, 156 (1986) (O'Connor, J. concurring).

96. *Pope*, 809 F. Supp. at 392.

97. See discussion *infra* notes 109-14 and accompanying text.

98. 808 F. Supp. 461 (E.D.N.C. 1992), *rev'd and remanded sub nom.*, 113 S. Ct. 2816 (1993).

99. Aleinikoff & Issacharoff, *supra* note 12, at 633 n.180.

100. *Id.* See *supra* notes 43-44.

101. 808 F. Supp. 461 (E.D.N.C. 1992), *rev'd and remanded sub. nom.*, *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

102. *Id.* at 465-66.

103. Brief for Federal Appellees, *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (No. 92-357).

104. 430 U.S. 144 (1977). *UJO* involved the division of a Hasidic Jewish community of 30,000 people in Brooklyn. The purpose of the division was to create districts with nonwhite majorities as required by the Department of Justice. Members of the Jewish community filed suit on a vote dilution claim. *Id.* at 152-53.

tricting violates the voting rights of white voters under the Voting Rights Act and Equal Protection Clause if the district has the purpose and effect of discriminating against them.¹⁰⁵ In its analysis of the *Barr* claim, the district court found no legislative intent to deprive white voters of an equal opportunity to participate in the political process.¹⁰⁶ The plaintiffs likewise could not allege discriminatory effect since there was no cognizable injury or general dilution of white voting strength. The district court therefore granted the federal appellees' motion to dismiss.¹⁰⁷ The Supreme Court granted review limited to one issue:

Argument shall be limited to the following question, which all parties are directed to brief: "Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own."¹⁰⁸

D. *Why Does Appearance Matter? The Shaw Holding*

"If more specific guidelines to minimize gerrymandering are not forthcoming, then a great democratic principle—one man, one vote—will have degenerated into a simplistic arithmetical facade for discriminatory cartography on an extensive scale."¹⁰⁹ James Baker, who expressed this concern in 1973, appears to have foreseen the problem which the Supreme Court decided to address in *Shaw* twenty years later. The holding of *Shaw* recognizes a new, analytically distinct cause of action under the Equal Protection Clause of the Fourteenth Amendment.¹¹⁰ Any reapportionment plan which "though race-neutral on its face, rationally cannot be

105. *Id.* at 165-68.

106. *Shaw v. Barr*, 808 F. Supp. 461, 473 (E.D.N.C. 1992), *rev'd and remanded sub nom.*, *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

107. *Id.*

108. *Shaw v. Barr*, 113 S. Ct. 653, *probable jurisdiction noted and remanded*, 808 F. Supp. 461 (E.D.N.C. 1992), *rev'd and remanded sub nom.*, *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

109. *Karcher v. Daggett*, 462 U.S. 725, 751 n.8 (1983) (Stevens, J., concurring) (citing James Baker, *Quantitative and Descriptive Guidelines to Minimize Gerrymandering*, 219 ANNALS N.Y. ACAD. SCI. 200, 208 (1973)).

110. *Shaw v. Reno*, 113 S. Ct. 2816, 2828 (1993).

understood as anything other than an effort to separate voters into different districts on the basis of race," is unconstitutional unless it has sufficient justification.¹¹¹

The Court based its holding on the premise that reapportionment is an "area in which appearances do matter."¹¹² The rationale behind this proposition is that, in the search for a color-blind society, voters can be injured by a political system which reinforces racial stereotypes by intentionally drawing districts in which blacks (or other minorities) are a majority.¹¹³ In drawing parallels to other areas of law in which racial stereotypes are unacceptable, the Court justified *Shaw* by expressing its desire to prevent the perception that a racial group will have the same political views simply because of race—without giving weight to such factors as age, education, economic status, or community.¹¹⁴ Justice O'Connor explained:

reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes 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.¹¹⁵

However, the Court did not stop there. It argued that a district based on race alone, without considerations of geographical or political boundaries, "bears an uncomfortable resemblance to political apartheid."¹¹⁶ This singular reliance on race as the basis for districting led the Supreme Court to demand strict scrutiny of such line-drawing under the Equal Protection Clause. The opinion, remanded to the District Court, therefore left open questions regarding justification for *Shaw's* holding.

III. ANALYSIS

"Belly stars are no longer in style," said McBean.

"What you need is a trip through my Star-Off Machine.

111. *Id.*

112. *Id.* at 2827.

113. *Id.*

114. *Id.*

115. *Shaw v. Reno*, 113 S. Ct. 2816, 2828 (1993).

116. *Id.* at 2827.

*This wondrous contraption will take off your stars
So you won't look like Sneetches who have them on
thars.*¹¹⁷

McBean's Star-Off Machine wiped the stars off the Star-Belly Sneetches so that the Plain-Belly Sneetches could not tell the difference. In this way, the Plain-Bellies could not keep the Star-Bellies from participating in beach games. While *Shaw* does not purport to act as a "Star-Off Machine" that will make the districting process fair to all races, the question remains whether it will recognize appropriate limits to gerrymandering while permitting minorities full participation in redistricting. This section examines the central concerns that *Shaw* addresses, and the role that race will play in redistricting cases subsequent to *Shaw*.

A. *The Application of Shaw*

1. *Strict Scrutiny*

The Supreme Court has held that "state legislation that expressly distinguishes among citizens because of their race . . . [must] be narrowly tailored to further a compelling governmental interest" in order to comply with the Fourteenth Amendment.¹¹⁸ *Shaw* recognizes the appearance of a district as a threshold issue in establishing a constitutional claim, as opposed to an ultimate issue that in and of itself makes a certain district unconstitutional. The Supreme Court, therefore, remanded the case for the District Court to determine whether District 12 was narrowly tailored to further a compelling government interest.¹¹⁹ Once strict scrutiny has been triggered by a district with a bizarre shape, the districting

117. DR. SEUSS, *supra* note 1, at 17.

118. *Shaw v. Reno*, 113 S. Ct. 2816, 2825 (1993) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986) (plurality opinion)). Both race, as a suspect classification, and the right to vote, as a fundamental right, trigger strict scrutiny analysis under the Equal Protection Clause. Where strict scrutiny is invoked, a classification will be upheld only if it is necessary to promote a compelling governmental interest.

119. *Id.* at 2832. On remand, the district court expressed its opinion that the Supreme Court would not "adopt a definition of 'narrow tailoring' in the redistricting context that requires consideration of whether the challenged plan deviates from traditional notions of compactness, contiguity, and respect for political subdivisions to a greater degree than is necessary to accomplish the state's compelling purpose." *Shaw v. Hunt*, No. 92-202-CIV-5-BR, 1994 U.S. Dist. LEXIS 11102, at *123 (E.D.N.C. Aug. 1, 1994). See discussion *infra* notes 250-57 and accompanying text.

body bears the burden of proving that it has a compelling interest in drawing the lines in the manner it has.¹²⁰ The justification of "bizarrely" drawn districts must therefore pass "the same close scrutiny that we give other state laws that classify citizens by race."¹²¹ In order to meet the familiar "ends-means" test of the Equal Protection Clause, "the odd shape of a district must result from a state's pursuit of aims that are legitimate and constitutionally compelling. Second, the means the state chooses must be narrowly tailored to achieving those legitimate aims and no others."¹²²

Shaw failed to articulate the ends which would be sufficient to justify districts drawn under circumstances similar to District 12.¹²³ Traditional districting ends, such as naturally irregular political boundary lines, geographic features (i.e., coastlines, mountains), and communities of interest are probably sufficient ends.¹²⁴ A related question is whether race itself can ever be considered a sufficiently legitimate end to justify drawing oddly-shaped districts in order to establish a community of interest.¹²⁵ *Shaw* seems to imply a limit on what may be considered a legitimate interest. It is unlikely that partisan interests and incumbency protection would satisfy the requirement of a compelling interest under a strict scrutiny analysis.¹²⁶

2. *The Limits of the Shaw Holding*

In order to place *Shaw* in proper perspective, it is helpful to recognize the types of claims the case did not address. Although *Shaw* was analyzed as an Equal Protection claim, it is wholly distinct from a vote dilution claim, such as that

120. Karlan, *supra* note 26, at 282 n.166.

121. *Shaw v. Reno*, 113 S. Ct. 2816, 2825 (1993).

122. Professors Pildes and Niemi believe these justification questions are as important as questions of appearance. Pildes & Niemi, *supra* note 58, at 575.

123. *Shaw*, 113 S. Ct. at 2832.

124. Pildes & Niemi, *supra* note 58, at 576-77.

125. *Id.* Cf. *Shaw*, 113 S. Ct. at 2827.

126. The *Shaw* holding specifically rests on the analysis of race as a concern addressed by the Equal Protection Clause. "Its central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993)(citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)). See also *Vera v. Richards*, C.A. No. H-94-0277, 1994 U.S. Dist. LEXIS 12368, at *99 (S.D. Tex. Aug. 17, 1994).

presented in *UJO*.¹²⁷ Secondly, while *Shaw* recognized a claim based on the shape of a voting district, it is important to recognize that the shape of the district alone did not create a constitutional claim.¹²⁸ It is only the creation of a "bizarrely" shaped district in conjunction with the express intent to benefit race that creates a constitutional concern.¹²⁹ The Court also distinguished *Shaw* from purely political districting as presented in *Davis*.¹³⁰ Again, the racial component in *Shaw* subjected District 12 to strict scrutiny. Finally, *Shaw* did not prohibit all types of race-conscious districting, though it did not endorse them either.¹³¹ The above limitations of *Shaw*, therefore, have led scholars to interpret the decision in a limited context, as opposed to an "opening volley" which will lead to the invalidation of race-conscious districting.¹³²

3. *Standing and Injury Concerns*

Shaw has been criticized by commentators as showing a "complete disregard" for the standing requirement of Article III of the Constitution.¹³³ This criticism rests on the argument that the plaintiffs did not show any individual injury in fact, the traditional requirement to establish standing.¹³⁴ Justice Souter, in his dissent, argued that vote dilution claims have been the only judicially-cognizable type of injury recognized in voting rights cases under the Fourteenth Amendment, and should remain so.¹³⁵ In the context of voting rights and Equal Protection analysis, *Shaw* did not include a claim of vote dilution.

127. Aleinikoff & Issacharoff, *supra* note 12, at 602. See *supra* part II.C for discussion of vote dilution claim under the Fourteenth Amendment.

128. The Court expressly states that the Constitution does not generally require that districts be compact or contiguous. *Shaw*, 113 S. Ct. at 2826-27.

129. *Id.* at 2825.

130. See *supra* at part II.C. Justices White, Blackmun, and Stevens argued that *Shaw* should be functionally equivalent to gerrymanders for non-racial purposes. *Id.* at 2844 (Stevens, J., dissenting); *Id.* at 2835-36 (White, J., dissenting).

131. *Shaw v. Reno*, 113 S. Ct. 2816, 2828 (1993).

132. Pildes and Niemi read *Shaw* as "an exceptional doctrine to form aberrational contexts" rather than as a prelude to a sweeping constitutional condemnation of race-conscious redistricting. Pildes & Niemi, *supra* note 58, at 495. See, e.g., Voinovich v. Quilter, 113 S. Ct. 1149 (1993).

133. Karlan, *supra* note 26, at 278.

134. *Id.*

135. *Shaw v. Reno*, 113 S. Ct. 2816, 2845-46 (1993) (Souter, J., dissenting).

Just as *Shaw* recognized a completely separate cause of action, the majority concluded that standing must be based on a different theory of injury.¹³⁶ The decision labeled the injury to plaintiffs as one of "special harms."¹³⁷ The plaintiffs described the injury as prevention of the right to participate in a color-blind electoral process, a harm that potentially any voter could bring as a cause of action.¹³⁸ With the theoretical underpinning to a concern with color-blind politics, *Shaw* can be viewed as recognizing a concern with the "values of political integrity and legitimacy."¹³⁹ Therefore, when race dominates over any other concern in the creation of voting districts, the district violates constitutional principles of political integrity. The *Shaw* opinion supports this interpretation by expressing its concern regarding districts drawn with the purpose of creating minority districts in which 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."¹⁴⁰ Recognizing that race may not be the sole factor in redistricting, it remains to be determined exactly the role it may play.

B. *The Role of Race in Redistricting*

1. *Constitutional Nature of the Problem*

Professors Richard Pildes and Richard Niemi argue that *Shaw* addresses a particular type of constitutional problem, which they describe as a corruption of a decisionmaking process.¹⁴¹ The constitutional problem is created when "policy-makers have transformed a decision process that ought to involve multiple values—as a matter of constitutional law—

136. Pildes & Niemi, *supra* note 58, at 515 n.115. For a discussion of standing based on individualized injury, in the context of legislative apportionment, see Craig R. Gottleib, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1078-81 (1994).

137. *Shaw v. Reno*, 113 S. Ct. 2816, 2828 (1993).

138. *Id.* at 2824.

139. Pildes & Niemi, *supra* note 58, at 502.

140. *Shaw*, 113 S. Ct. at 2827.

141. Pildes and Niemi classify three types of problems "through which constitutional law can appraise government action." They identify two basic modes: those that focus on the illegitimacy of legislative purpose; and those that focus on effect of policy decisions on people's (or groups') rights. The *Shaw* problem, arguably a third mode of constitutional analysis, focuses on what is labeled as a "problem of value reductionism in public policy." Pildes & Niemi, *supra* note 58, at 500.

and reduced it to a one-dimensional problem."¹⁴² The *Shaw* opinion should therefore be viewed not as a condemnation of the use of race as a consideration in redistricting, but rather as a recognition that race cannot completely supersede traditional criteria in districting.¹⁴³ The fact that a district is of "bizarre" shape triggers the *Shaw* concern that race has supplanted other concerns in districting.¹⁴⁴ Returning to the Court's concern for legitimate decisionmaking processes, the bizarre shape of a Congressional (or other) district distorts community lines, and therefore affects the legitimacy of districts based on communities.¹⁴⁵ Stated another way, race may be taken into account in districting only up to the point that it becomes the dominant factor.

2. *Is Race the Only Factor in Shaw?*

The complex and inherently political nature of districting makes it difficult to single out any one factor that determines the shape of a given district. Indeed, attempting to explain a district's shape has been compared to attempting to explain the level of any given federal budget.¹⁴⁶ The factors, other than race, which led to the bizarre shape of District 12 must be considered. It is certain that District 12 was drawn in its present convoluted manner to protect incumbents and the Democratic Party.¹⁴⁷ However, the degree to which race or partisan politics "created" District 12 is by no means certain. Limiting the districting to these two factors alone, it is arguable that District 12 was the manipulation of race by politics,

142. *Id.*

143. Traditional concerns of redistricting include seeking "to ensure effective representation for communities of interest, to reflect the political boundaries of existing jurisdictions, and to provide a district whose geography facilitates efficient campaigning and tolerably close connections between officeholders and citizens." *Id.* at 500. See *infra* part IV.B.1.

144. Pildes & Niemi, *supra* note 58, at 501.

145. Pildes and Niemi draw an interesting analogy between *Shaw* and Regents of University of California v. Bakke, 438 U.S. 265 (1978), which permits "noninvidious" use of race as long as it does not become, or appear to be, the most important value. *Id.* at 502.

146. Pildes & Niemi, *supra* note 58, at 586.

147. The General Assembly could have created a comparatively compact district in the southeastern part of North Carolina, but chose not to do so because it would disrupt "safe" incumbent districts. *Shaw v. Reno*, 113 S. Ct. 2816, 2832 (1993). Justice White noted this in his dissenting opinion. *Id.* at 2841 n.10 (White, J., dissenting). See also *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992).

as opposed to the manipulation of politics by race, the view adopted by the Supreme Court.¹⁴⁸ Applying the interpretation that race was used to political advantage, the General Assembly of North Carolina can be seen as having used the constraints imposed by the Justice Department under the Voting Rights Act to create a new voting district which did not disturb the power bases of Democratic incumbents. This interpretation seems particularly plausible in light of the fact that a minority district, relatively compact, could have been drawn in the southeastern part of the state.¹⁴⁹ The fact that such a district would have disrupted incumbents' districts suggests that incumbency and partisan interests played a major role in the creation of District 12. The uncertainty of the degree to which race, incumbency, and partisan concerns created District 12 leads to different possible interpretations of how broadly *Shaw* should be applied.

3. *How Narrow is Shaw?*

Justice O'Connor specifically distinguished *Shaw* from *UJO* on the basis that the plaintiffs in *UJO* could not have claimed that the district was so irregular that it could only have been understood as an effort to segregate voters by race.¹⁵⁰ The *Shaw* decision notes that three of the Justices in *UJO* found that it is permissible for a State,

employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority.¹⁵¹

Shaw therefore is, at least in one sense, very limited. A challenged district must be bizarrely-shaped, and intentionally shaped on the basis of race. However, this does not eliminate two other possible interpretations of how broadly *Shaw* could be interpreted.

148. Pildes & Niemi, *supra* note 58, at 516-17.

149. See *supra* notes 85-87 and accompanying text.

150. *Shaw v. Reno*, 113 S. Ct. 2816, 2829 (1993).

151. *United Jewish Orgs. of Williamsburgh, Inc. v. Carey (UJO)*, 430 U.S. 144, 168 (1977) (opinion of White, J., joined by Stevens & Rehnquist, JJ.).

First, *Shaw* could be interpreted in a comparatively limited sense—as addressing only similar factual contexts. In a limited interpretation *Shaw* would apply only if a State “must justify ‘highly irregular’ minority districts under strict scrutiny when—and only when—the state could have created a reasonably compact minority district instead.”¹⁵² “Alternatively, *Shaw* might stand for the broader proposition that, even when a state has no other way of creating a minority district, it cannot resort to ‘highly irregular’ shapes to do so without other compelling justifications.”¹⁵³ The first analysis requires only that regularly-shaped districts be chosen over bizarre ones. The second interpretation, however, requires an independent justification for a bizarre district, even if it is the only option for the creation of a minority district in accordance with the Voting Rights Act. Though an open question, commentators predict that the second interpretation will prevail.¹⁵⁴ In either interpretation, the question remains what standard will be required to establish a “bizarre” district, thereby triggering judicial review.

IV. COMPACTNESS AS A POSSIBLE SOLUTION

And that handy machine

Working very precisely

*Removed all the stars from their tummies quite nicely.*¹⁵⁵

McBean's machine easily added and removed stars to the bellies of the Sneetches. The machine was used to equalize the Sneetches, so that they could all participate in beach activities. This solution raises the question whether a district compactness requirement could act as a “machine” which affects appearance and implements fairness in districting. First, this section discusses a threshold issue: how bizarre must a district be to trigger an Equal Protection claim? The section next evaluates the role that district compactness requirements can play in answering the problem of appearance.

152. Pildes & Niemi, *supra* note 58, at 523.

153. *Id.*

154. *Id.* at 524. Pildes and Niemi base this opinion on the broad rhetorical and legal terms used in the *Shaw* opinion. *Id.* This interpretation seems to have been borne out in the *Shaw* remand decision and *Vera v. Richards*, C.A. No. H-94-0277, 1994 U.S. Dist. LEXIS 12368, at *130-32 (S.D. Tex. Aug. 17, 1994).

155. DR. SEUSS, *supra* note 1, at 17.

Finally, this section analyzes the different approaches cases subsequent to *Shaw* have applied to compactness concerns.

A. *How Bizarre is "Bizarre"?*

1. *The Role of Geography*

North Carolina's District 12 is certainly not the first, nor the only, oddly-shaped district in the United States. *Shaw* is, however, the first case which recognizes a constitutional claim based on the appearance of a legislative district.¹⁵⁶ The challenge is determining when districts cross from being a "regular" shape to being "bizarre" enough to trigger a strict scrutiny analysis. Should Justice Stewart's definition for obscenity, "I know it when I see it,"¹⁵⁷ be applied to determine whether a district is bizarre or, at the other extreme, should precise mathematical solutions be employed?¹⁵⁸

2. *State Solutions*

Several states have attempted to prevent gerrymandering by requiring compact districting.¹⁵⁹ Some states employ tools such as independent districting commissions and computer-automated redistricting in order to remove redistricting from the political process.¹⁶⁰ A prospective benefit of such a system used to redraw district lines is that race could be

156. *Shaw v. Reno*, 113 S. Ct. 2816, 2845 (1993) (Souter, J., dissenting).

157. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

158. See discussion *infra* part IV.C.5.

159. Bernard Grofman, *Criteria for Redistricting: A Social Science Perspective*, 33 U.C.L.A. L. REV. 77, 85 (1985).

160. The goal of each of these approaches is to create an objective standard for districting. However, as Pamela Karlan points out, there is no such thing as a truly objective process. For example, persons on a commission are bound to have political views. Karlan, *supra* note 26, at 253-54. Additionally, computer programs can "create" nearly any type of district depending on what values the programmers give greater weight to. This computer-generated approach has been criticized as well:

The available alternatives for a districting plan are virtually endless, and with current computer technology enabling one to "revise a boundary line and receive instant readouts of the voting behavior, racial composition, and other . . . characteristics [of the] district," (footnote omitted) a contest to see who could come up with the best district would not only be unwieldy, but unwinnable as well.

Ripley Eagles Rand, Note, *The Fancied Line: Shaw v. Reno and the Chimeral Racial Gerrymander*, 72 N.C. L. REV. 725, 751 (1994).

Computer technology has been held accountable for creating problematic districts, as census data allows "nearly exact knowledge of the racial makeup of every inhabited block of land in the state . . . worthy of Orwell's Big Brother."

included as a mandatory factor, although not the sole required factor, and still comply with *Shaw*.¹⁶¹ Montana, for example, provides for a five-person commission appointed by the minority and majority leaders of each house (fifth person appointed by commission).¹⁶² The Montana commission is permitted to consider governmental boundaries, geographic boundaries, communities of interest, existing district boundaries, and must attempt to stay within five percent deviation from the ideal district population.¹⁶³ Further, the states which employed administrative redistricting in the 1980's have remained unchallenged.¹⁶⁴ In New Jersey, state legislative redistricting by a panel was not challenged. However, congressional districting, done by the state legislature, was challenged and ultimately struck down.¹⁶⁵

Twenty-eight states have some requirement for compact legislative districts.¹⁶⁶ Most of these states express such requirements in qualitative or "descriptive" terms. For example, the Illinois Constitution requires that districts be "compact, contiguous, and substantially equal in population."¹⁶⁷ Two states, Iowa and Colorado, require specific quantitative formulas. Iowa employs a ratio based on a comparison of the population of the district's population center to the population of the geographic center of the district.¹⁶⁸ Colorado requires a measurement of the perimeters of district boundaries in order to determine compactness.¹⁶⁹ The two states which require districting compactness based on quantitative measures have had more litigation than those with qualitative standards, and as a result, have more compact districts than other states.¹⁷⁰ Those with quantitative standards,

Vera v. Richards, C.A. No. H-94-0277, 1994 U.S. Dist. LEXIS 12368, at *4 (S.D. Tex. Aug. 17, 1994).

161. Aleinikoff & Issacharoff, *supra* note 12, at 625.

162. MONT. CONST. art. V, § 14.

163. *Id.* See, e.g., McBride v. Mahoney, 573 F. Supp. 913, 915 (D. Mont. 1983).

164. Aleinikoff & Issacharoff, *supra* note 12, at 625.

165. *Id.* at 625-26 (citing Karcher v. Daggett, 462 U.S. 725 (1983)).

166. Rand, *supra* note 160, at 754 n.244. North Carolina imposes a compactness requirement for its state legislative districts, but not its congressional districts. N.C. CONST. art. II, §§ 3, 5.

167. ILL. CONST. art. IV, § 3(a).

168. IOWA CODE ANN. § 42.4(4)(c) (West 1991).

169. COLO. CONST. art. V, § 47.

170. Pildes & Niemi, *supra* note 58, at 529-30. In an extensive analysis of compactness, Pildes and Niemi found that "redistricting bodies do not take com-

however, have had no more compact districts than states that do not legally require compactness.¹⁷¹

B. *The Problem of Compactness*

The problem with regard to district compactness is the lack of a consistent standard. An ongoing concern is whether there is any such thing as a manageable standard.¹⁷² Indeed, *Shaw* and its progeny have failed to establish what "too ugly" looks like.¹⁷³ Because District 12 met the pre-clearance standard of the Department of Justice under the provisions of the Voting Rights Act, yet could not pass constitutional muster, no consistent standard for compactness has been established. Prong one of the *Gingles* test,¹⁷⁴ that a minority community be "sufficiently large and geographically compact to constitute a majority in a single-member district,"¹⁷⁵ purports to give a "bright-line" rule as compared to the "totality of the circumstances" requirement of section 2. If District 12 in *Shaw* could pass the compactness requirement of *Gingles*, but could not withstand analysis under the Equal Protection Clause, the result in *Shaw* implicitly recognizes a problem with the *Gingles* standard.¹⁷⁶ The central challenge, therefore, is to establish a standard that distinguishes between those districts which appear "normal enough" and those which, by virtue of their shape, trigger a constitutional strict scrutiny analysis.

1. *Evaluating Ideals*

Plato's recognition of the difference between an ideal republic and a "best" republic¹⁷⁷ is reflected in the history of

pactness into account any more when it is legally required, and that courts have not been willing to enforce such requirements in ways that affect outcomes." *Id.* at 531.

171. *Id.* at 531.

172. *Davis v. Bandemer*, 478 U.S. 109, 149 (1986) (O'Connor, J., concurring).

173. Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652, 652 (1993). See discussion *infra* part IV.D.

174. See discussion *supra* part II.B.3.

175. *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

176. On *Shaw*'s remand, Chief Judge Voorhees pointed out that if District 12 is allowed under the Voting Rights Act, virtually any district must be upheld. *Shaw v. Hunt*, No. 92-202-CIV-5-BR, 1994 U.S. Dist. LEXIS 11102, at *238-39 (E.D.N.C. Aug. 1, 1994) (Voorhees, C.J., dissenting in part).

177. In an "ideal" republic, philosopher-kings would rule without the possibility of corruption. The "best" republic, on the other hand, recognizes that

voting rights jurisprudence and legislation. While the Fourteenth Amendment, at least as interpreted by the current Court, envisions a colorblind ideal, the Voting Rights Act recognizes the ongoing problems presented by race and attempts to create the "best" solution to those problems.¹⁷⁸ The ideal of a colorblind society and the protection of minorities clash directly in *Shaw*.¹⁷⁹

Even within the process of districting itself, there exists a substantial problem of arranging values.¹⁸⁰ Can the values associated with redistricting be "ranked" in any way? The Voting Rights Act and Equal Protection jurisprudence require that equal population and prevention of minority-vote dilution be achieved in every district.¹⁸¹ Beyond these two goals, both redistricting bodies, and reviewing courts truly enter the "political thicket" warned of by Justice Frankfurter.¹⁸² The design of any district includes many decisions regarding the part of a town, neighborhood, or street that should be included in a district.¹⁸³ When combined with the fact that there is an unlimited range of districting alternatives, compromises, and deals that "create" a final plan, it is nearly impossible to ascertain whether any one cause is determinative of a district's shape.¹⁸⁴ While recognition of this infinite range of choices diminishes the hope for a standard by which districting can be guided, the *Shaw* decision suggests some factors that the Court considers legitimate.

The *Shaw* decision expressed concern that:

[a] reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political

power corrupts and that the best system of government is one which takes into consideration the desire for power, and institutes safeguards against it. See generally PLATO, *THE REPUBLIC* bk. VIII, at 235-61; bk. IX, at 262-84. (Richard W. Sterling & William C. Scott, trans., 1985).

178. Grofman, *Vince Lombardi*, *supra* note 5, at 1275.

179. Justice O'Connor, writing for the majority in *Shaw*, implicitly adopts the view that the ideal of the Fourteenth Amendment is colorblindness. *Shaw v. Reno*, 113 S. Ct. 2816, 2829 (1993).

180. Pildes & Niemi, *supra* note 58, at 585.

181. *Shaw*, 113 S. Ct. at 2829 (quoting United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 168 (1976) (opinion of White, J., joined by Stevens & Rehnquist, JJ.)).

182. *Colgrove v. Green*, 328 U.S. 549, 556 (1946).

183. Pildes & Niemi, *supra* note 58, at 586-87. See *Vera v. Richards*, C.A. No. H-94-0277, 1994 U.S. Dist. LEXIS 12368, at *104 (S.D. Tex. Aug. 17, 1994).

184. Pildes & Niemi, *supra* note 58, at 586-87.

boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which the[y] live—think alike, share the same political interests, and will prefer the same candidates at the polls.¹⁸⁵

In its obvious concern with race as a sole districting consideration, the Court recognized several legitimate considerations in the redistricting process. It first implied that geographical and political boundaries represent bases for making demarcations of voting districts. It also compiled something of a laundry list which included such factors as age, education, economic status, and the community in which voters live.¹⁸⁶ It is important to recognize, again, that race is not irrelevant to the determination of voting district lines, though it may not be the dominant factor.¹⁸⁷ Secondly, it appears that the Supreme Court had no intention of “ranking” these values, but simply included them all as relevant factors. However, one distinction can be made. Geographical and political boundaries refer to lines tied to land. Age, education, economic status, and community refer to the characteristics of people. The Court therefore implicitly recognized both the classification of land and people in redistricting as opposed to adopting one view over the other. Thus, the Supreme Court recognized the legitimacy of geographic districting in the American voting system.¹⁸⁸

2. *Should Compactness be Used as a Standard?*

Representation based on geographically defined districts is central to the American political system.¹⁸⁹ The benefits of such a system are based in part on communication. Historically, such benefits included the ability of a representative to campaign and organize door-to-door, and access to common media such as newspapers, radio, and television.¹⁹⁰ The continuing justification for the geographic basis of districts relies

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

186. *Id.*

187. *Id.* at 2832.

188. See discussion *supra* part II.D.

189. Grofman, *Vince Lombardi*, *supra* note 5, at 1262.

190. *Id.*

on enhanced communication between representatives and constituents, as well as "greater voter knowledge of their representatives and of their political 'neighbors'; and greater trust in the legitimacy of a political system in which districts appear 'fairly' shaped—or, at least, not obviously unfairly shaped."¹⁹¹ The justifications for the geographic districting system also relate to ideas of political accountability by increasing ties between the representative and constituents.¹⁹² Representation interests are served by compact districts which have some degree of common needs and interests.¹⁹³

This view is not without its detractors. Professor Lani Guinier argues that territorial districting does not reflect the group nature of political representation.¹⁹⁴ She points out that "the geographic unit is not necessarily politically homogeneous or of one mind as to who should represent it."¹⁹⁵ Another commentator, Professor Bruce Cain, has been a proponent of the idea that traditional districting concerns are largely outdated. He argues that technological advances such as telephones, highways, and fax machines undermine the rationale that there is a meaningful relationship between compactness and effective communication.¹⁹⁶

Despite such legitimate criticism, "communication still often takes place in group contexts, with legislators meeting all manner of boards, committees, organizations, governmental bodies, and so on."¹⁹⁷ It is equally important that "[p]eople's lives are organized and lived in places. Where one lives, works, shops, where one's children go to school, the

191. Pildes & Niemi, *supra* note 58, at 538 n.177.

192. *Id.* at 537.

193. *Id.* at 501. See also *Prosser v. Elections Bd.*, 793 F. Supp. 859, 863 (W.D. Wis. 1992) (three-judge court) (per curiam): "The objections to bizarre-looking reapportionment maps are not aesthetic (except for those who prefer Mondrian to Pollack)."

194. Lani Guinier, *Symposium: The Electoral Process: Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1602-08 (1993) [hereinafter, Guinier, *A Case of the Emperor's Clothes*].

195. *Id.* at 1606.

196. See generally BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE* (1984). Cf. *Reynolds v. Sims*, 377 U.S. 533 (1964). "[P]eople, not land or trees or pastures, vote. Modern developments and improvements in transportation and communication make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations." *Id.* at 580.

197. Pildes & Niemi, *supra* note 58, at 538 n.177.

means of access from place to place . . . all possess a definite territorial element."¹⁹⁸

Non-districted elections have been suggested as a possible solution to concerns of fair representation. One form of such a system, proposed by Professor Guinier, is a modified at-large voting scheme.¹⁹⁹ The main benefit of such a system is that non-districted elections allow voters to align themselves with a particular viewpoint, whether it be based on area or ideological interests.²⁰⁰ The main drawback recognized by Voting Rights Act litigation, however, is that voters can aggregate on the basis of race. The danger of such a system is that a minority may be denied any representation by majority voting.²⁰¹ While voting mechanisms do exist to counteract such tendencies, it seems unlikely that Congress or the Courts would be willing to return to a system (i.e., at-large or multi-member districts) which closely resembles the one which extensive litigation has fought to replace. Furthermore, there remains the strong argument that geographic districting promotes the representation of regional needs and interests, and exercise of political influence.²⁰² While accepting that compactness of districts is a desirable end may answer one question, it raises another concerning the approach which should be taken to achieve this end.

C. *Potential Approaches to Compactness*

1. *Comparative Approach*

Jeffers v. Clinton,²⁰³ an Arkansas redistricting case, held that for the purposes of the Voting Rights Act, minority-controlled districts satisfy the compactness requirement if they "are not materially stranger in shape than at least some of the districts" in the state.²⁰⁴ However, this approach is not an ideal approach. If redistricting bodies continue to contort district lines in order to protect incumbents and party lines,

198. Polsby & Popper, *supra* note 173, at 678.

199. See *supra* note 56. See Guinier, *A Case of the Emperor's Clothes*, *supra* note 194, for a detailed proposal of an alternative voting system.

200. Aleinikoff & Issacharoff, *supra* note 12, at 626.

201. *Id.*

202. See *Davis v. Bandemer*, 478 U.S. 109, 173 (1986) (Powell, J. concurring and dissenting); *Reynolds v. Sims*, 377 U.S. 533, 623-24 (1964) (Harlan, J., dissenting).

203. 730 F. Supp. 196 (E.D. Ark. 1989).

204. *Id.* at 207.

minority districts could be distorted along with them, subjecting such districts to challenge under *Shaw* itself.

2. *Administrative Redistricting*

Use of independent districting commissions that consider race as one mandatory concern in redistricting increases the likelihood of complying with *Shaw*.²⁰⁵ The Montana example,²⁰⁶ in theory, appears to be workable under mandates of the Voting Rights Act and Equal Protection standards. The primary criticism of this approach is that there is no such thing as an apolitical, objective standard to redistricting.²⁰⁷ First, panels have the potential to become political.²⁰⁸ Second, without more, the implementation of administrative redistricting does not solve the problem of setting redistricting standards. Therefore the administrative approach is good for implementation in terms of cost-effectiveness, but still does not solve the problem of the creation of judicially manageable standards for compactness after *Shaw*.

3. *Cognizability*

Professor Bernard Grofman offers another means by which to measure compactness of districting. He argues that districts should be based on cognizability, defined as the "ability to characterize the district boundaries in a manner that can be readily communicated to ordinary citizens of the district in commonsense terms based on geographical referents."²⁰⁹ Such an approach would not be strictly appearance-based because it allows for natural boundaries such as coastlines or non-compact cities.²¹⁰ While this approach certainly has its appeal in terms of recognition of geographic divisions, it is limited to physical considerations, and fails to incorporate concerns such as age, education, economic status, and other measures of "community."²¹¹

205. Aleinikoff & Issacharoff, *supra* note 12, at 625.

206. See discussion *supra* part IV.A.2.

207. Karlan, *supra* note 26, at 253-54.

208. Aleinikoff & Issacharoff, *supra* note 12, at 626.

209. Grofman, Vince Lombardi, *supra* note 5, at 1262.

210. *Id.* at 1263.

211. See discussion *supra* accompanying notes 186-88.

4. *Qualitative Requirements*

The requirement that a district be as contiguous and compact as possible operates as an "anti-gerrymandering" device which can remove the "profit" from gerrymandering in most cases.²¹² Although political map makers can still attempt to draw lines favoring a specific group when districting requirements exist, the requirement for a maximum of compact districts "makes the game many times harder for them to play successfully."²¹³ The problem with a qualitative approach to districting is that it only describes what a district should look like and does not have an easily articulated standard. Such a system has the possibility of creating too much room for inconsistent and unpredictable decisions²¹⁴ as is evidenced by the continuing litigation in the area of voting rights and redistricting.²¹⁵

5. *Quantitative Requirements*

Professors Pildes and Niemi suggest that, based on the inability of courts to define compactness consistently, quantitative measures for assessing shapes may provide the best approach for determining compactness.²¹⁶ In attempting to implement such standards, three "dimensions" which can affect the compactness of a district must be noted. Districts could be judged, first, by how spread out they are ("dispersion"); second, by the regularity of the borders of the district ("perimeter"); or third, how the population is distributed ("distribution").²¹⁷ The *Shaw* decision lends itself to an anal-

212. Polsby & Popper, *supra* note 173, at 677. This assumes the stricture of equal population in each district.

213. *Id.* at 679.

214. Pildes & Niemi, *supra* note 58, at 537.

215. Karlan, *supra* note 26, at 247.

216. Pildes & Niemi, *supra* note 58, at 536.

217. The measurement for dispersion entails measuring the "degree to which a district has a central core and the extent to which all points in the district are relatively close to that core." More simply, it is how "long" versus "wide" a district is. *Id.* at 549. The regularity of perimeters is concerned with how much a district's borders "wander around in contorted ways." Districts with "fingers" protruding from the main body of the district would have low perimeter scores. *Id.* Population measures are concerned with the division of population in a well-defined area. *Id.*

ysis of District 12 with regard to the first two factors, dispersion and perimeter.²¹⁸

A dispersion score is expressed as a ratio comparing the shape of the district to that of a circle. Thus, "[a] long, narrow district, or one with 'fingers' or other extensions, is less compact because it takes a large circle to enclose the entire district, yet much of that circle is empty."²¹⁹ Perimeter scores are expressed as the "ratio of the district area to the area of a circle with the same perimeter."²²⁰ "Smooth" borders receive higher scores because they enclose more area with less "border."²²¹

Using Pildes and Niemi's mathematical data, District 12 has a dispersion score of .05 and a perimeter score of .01.²²² The national means for such scores are .36 and .24, respectively.²²³ District 12 is the least compact of North Carolina's districts according to either measurement.²²⁴ It is second worst in the nation in terms of dispersion alone, and among the worst in terms of perimeter alone.²²⁵ It is also the least compact district in the nation if the two factors are added for a single "score."²²⁶

These findings reveal several important points about District 12 and redistricting in general. While District 12 is certainly not a compact district, it does fall within a continuum of compactness measurements.²²⁷ The practical application of this fact is that the raising or lowering of the numeric value which creates cutoff levels for "normal" versus "bizarre" districts will strongly affect the number of districts that fall

218. The mathematical processes used to evaluate District 12 and other districts throughout the country are beyond the scope of this comment. The numbers used in this comment are therefore based on the research completed by Pildes & Niemi, *supra* note 58, at parts III and IV. For a discussion of the use of computer technology in districting, see generally Arthur J. Anderson & William S. Dahlstrom, *Technological Gerrymandering, How Computers Can Be Used in the Redistricting Process to Comply with Judicial Criteria*, 22 URB. LAW. 59 (1990).

219. Pildes & Niemi, *supra* note 58, at 554.

220. *Id.* at 555.

221. *Id.* at 556.

222. *Id.* at 562 (Table 2).

223. *Id.* at 573 (Table 6).

224. "Whether it is so unique as to be considered an aberration, however, becomes a matter of judgment." *Id.* at 562-63.

225. *Id.* at 566-67.

226. *Id.* at 565.

227. *Id.* at 567-68.

within each category.²²⁸ A quantitative measurement could, therefore, subject only District 12 to constitutional review or could, with relatively little adjustment, make many districts subject to strict scrutiny under *Shaw*. A second important point is that *Shaw* exemplifies the national trend of moving away from using compactness as a factor under the redistricting resulting from the 1990 Census.²²⁹ In light of this trend, the scope of redistricting practices will continue to require judicial resolution, particularly now that the Court has forayed further into the "political thicket" of redistricting.²³⁰

The quantitative approach has appealing aspects. Primarily, a mathematical formula ensures compact districts. Secondly, it appears that such districts are not challenged as frequently as traditionally created districts.²³¹ However, the system's strength is also its weakness.²³² It does not allow any room for geographical or political "naturally bizarre" boundaries. In addition, adjusting the cutoff levels for "normal" versus "bizarre" districts affects the number of districts that would be subject to judicial review.²³³ Finally, a quantitative approach may not allow room for trade-offs among the many goals which are acceptable, and even encouraged, in redistricting.

As an example, Pildes and Niemi's discussion of Florida's "flagpole" district reveals many concerns that are not consid-

228. *Id.* at 568.

229. *Id.* at 573-74. It is interesting to note the "shoestring" district created after Reconstruction in Mississippi. See *supra* notes 42-44 and accompanying text.

230. *Colgrove v. Green*, 328 U.S. 549, 556 (1946). See also *Shaw v. Hunt*, No. 92-202-CIV-5-BR, 1994 U.S. Dist. LEXIS 11102, at *129 (E.D.N.C. Aug. 1, 1994) (arguing that a wide application of *Shaw* will lead to excessive federal judicial interference in redistricting).

231. See discussion *supra* part IV.A.2.

232. *Rand*, *supra* note 160, at 753 n.243 (quoting RICHARD L. MORRILL, *POLITICAL REDISTRICTING AND GEOGRAPHIC THEORY* 22 (1981)).

A too simplistic application of such geographic compactness measures is foolish, especially where the distribution of population is irregular within districts. In many regions, the population is uneven, perhaps strung out along roads or railroads. Travel may be easier and cheaper in some directions than in others, such that an elongated district astride a major transport corridor might in fact be the most compact in the sense of minimum travel time for a representative to travel around the district.

Id.

233. Pildes & Niemi, *supra* note 58, at 568.

ered when using of a mathematical formula.²³⁴ First, this district could be subjected to the *Shaw* analysis, or not, depending on what arbitrary value is set for "compact" versus "bizarre." Second, the shape of the district is affected by the fact that it runs along Florida's coast, causing its dispersion factor to be unchangeably high regardless of legitimate concerns about community. A mathematical districting model may not be able to take into account the fact the district has the largest percentage of over-sixty-five residents of any district in the nation²³⁵—certainly one measure of "community." Although the district appears almost as non-compact as North Carolina's District 12, one should consider the coastal interests, age interests, and economic interests that collectively create a community of interests based on factors other than race.

Each of the proposals discussed above has advantages and drawbacks. The challenge is to choose which values are most important to our political processes, and to create a standard approach to districting from those values. Cases following on the heels of *Shaw* indicate that the courts have not yet determined the appropriate application of the standards set forth in that case.

D. *Subsequent Judicial Treatment*

The impact of *Shaw* has become immediately apparent, as dozens of cases across the nation have incorporated its holdings.²³⁶ Several of these cases have specifically addressed the problem of district appearances, but none have ventured to create a standard for determining what "bizarre" looks like. Furthermore, the remand decision of *Shaw* and a Sixth Circuit case came to opposite conclusions as to whether oddly-shaped districts met the strict scrutiny test under the Fourteenth Amendment.

In *Hays v. Louisiana (Hays I)*,²³⁷ the District Court for the Western District of Louisiana held that Louisiana's redis-

234. Florida's Congressional District 22 is 100 miles long, containing the Barrier Islands and "Gold Coast" areas. *Id.* at 550-51.

235. *Id.*

236. There were over thirty redistricting cases citing to or relying on *Shaw*, in part, at the time of writing. Search of LEXIS, Mega library, Mega file (September 20, 1994).

237. 839 F. Supp. 1188 (W.D. La. 1993). The Supreme Court vacated the judgment in this case and remanded the case to the district court in light of

tricting plan under Act 42 of 1992, and Congressional District 4 specifically, violated the U.S. Constitution under *Shaw*.²³⁸ The *Hays I* court invalidated a district which carved a six-hundred mile "Z" across Louisiana, no more than eighty feet wide at some points.²³⁹ The court rejected the defendants' arguments that District 4 had been drawn, in part, on the bases of partisan/incumbent politics and socioeconomic commonalities, finding instead that the district had been drawn primarily for racial purposes.²⁴⁰ The *Hays I* court based its holding on the rather extreme facts before it, and the clear intent of the legislature to provide a minority-majority district for blacks, as opposed to an articulated standard of compactness.

In *Marylanders for Fair Representation, Inc. v. Schaefer*,²⁴¹ the court upheld a Maryland districting plan which strung together two prominently black population "pockets" with a narrow rural corridor.²⁴² The court in *Marylanders* concluded that "District 54-9's length and width comport with an 'eyeball assessment': put simply, proposed District 54-9 appears somewhat more spread out and jagged than most of the state plan's districts, but not significantly so."²⁴³ It further held that the district showed due regard to criteria other than race, such as equal population, contiguity, natural boundaries, political subdivisions, and effective representation.²⁴⁴ Plaintiffs therefore met the compactness requirement of the *Gingles* test.²⁴⁵ The *Marylanders* court, in using its comparative approach to compactness, did not compare District 54-9 to North Carolina's District 12. Rather, it considered the other districts in Maryland, and made an "eyeball" assessment that it was similar to other districts, and therefore complied with *Shaw*.

Louisiana's repeal of Act 42 and creation of a new voting scheme. *Louisiana v. Hays*, 114 S. Ct. 2731 (1994). The District Court again struck down the redistricting plan as an unconstitutional gerrymander. *Hays v. Louisiana*, No. 92-1522 (W.D. La. 1994).

238. *Hays v. Louisiana (Hays I)*, 839 F. Supp. 1188, 1191, 1209 (W.D. La. 1993).

239. *Id.* at 1199-1200.

240. *Id.* at 1202. The court further held that the district had no commonality of interests, such as religion and ethnicity, economic base, and geography and topography. *Id.* at 1201.

241. 849 F. Supp. 1022 (D. Md. 1994).

242. *Id.* at 1053.

243. *Id.* at 1054 n.41.

244. *Id.* at 1056.

245. *Id.*

A comparative approach to redistricting was also employed in *Clark v. Calhoun City*.²⁴⁶ The plaintiffs, two black registered voters of Calhoun County, Mississippi, challenged a redistricting plan under section 2 of the Voting Rights Act.²⁴⁷ The court held that "the proposed district in this case is not nearly as bizarre as the district under consideration in *Shaw*. We therefore need not decide whether a bizarrely-shaped district which would enable plaintiffs to state a claim under the Equal Protection Clause would necessarily flunk the *Gingles* compactness test."²⁴⁸ The court, therefore, remanded the case to determine whether the plan complied with section 2.²⁴⁹ The *Clark* court managed to avoid applying a standard for compactness by simply stating that the district in question did not compare to that of *Shaw*.

The *Shaw* decision was comprehensively addressed on remand to the Eastern District Court of North Carolina in *Shaw v. Hunt*.²⁵⁰ The district court found that District 12 passes constitutional muster under *Shaw* because "it is narrowly tailored to further the state's compelling interest in complying with the Voting Rights Act."²⁵¹ The court interpreted *Shaw* to require the "narrow tailoring" standard only to ensure that states are not covertly pursuing forbidden ends, not to create aesthetically-pleasing districts.²⁵² The *Hunt* court based this interpretation on three familiar criticisms of the reasoning in *Shaw*.²⁵³

First, the *Hunt* court stated that compactness, contiguity, and respect for political subdivisions have little inherent value because the purpose of redistricting is to ensure "fair and effective representation for all citizens."²⁵⁴ It further stated that no judicially manageable standard for these concerns existed.²⁵⁵ The court finally concluded that redistrict-

246. 21 F.3d 92 (5th Cir. 1994).

247. *Id.* at 93.

248. *Id.* at 95-96 (citation omitted).

249. *Id.* at 97.

250. No. 92-202-CIV-5-BR, 1994 U.S. Dist. LEXIS 11102 (E.D.N.C. Aug. 1, 1994).

251. *Id.* at *3.

252. *Id.* at *123.

253. *Id.*

254. *Id.* at *123 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973)).

255. *Shaw v. Hunt*, No. 92-202-CIV-5-BR, 1994 U.S. Dist. LEXIS 11102, at *126 (E.D.N.C. Aug. 1, 1994) (citing *Davis v. Bandemer*, 478 U.S. 109, 149 (1986)).

ing is within the province of state legislatures.²⁵⁶ Consequently, the court determined that a race-based redistricting plan can only be invalidated if it does not give equal weight to the votes of all individuals, dilutes group voting strength, or does not follow districting principles that ensure that all citizens receive "fair and effective representation."²⁵⁷

The District Court for the Southern District of Texas disagreed with the *Hunt* interpretation of *Shaw* on remand. Applying *Shaw*, the court in *Vera v. Richards*²⁵⁸ struck down a "crazy-quilt of districts that more closely resembles a Modigliani painting than the work of public-spirited representatives."²⁵⁹ The court invalidated three districts because they did not respect neighborhoods, communities, and political subdivisions.²⁶⁰ The *Vera* court further criticized the *Hunt* court's use of contorted boundaries as prima facie evidence of a constitutional violation, as opposed to the essence of the claim.²⁶¹ Most importantly, the *Vera* court stated that the shape of the voting district is relevant even if the district is narrowly tailored to meet a compelling governmental interest.²⁶²

These early cases indicate a lack of cohesion in applying the standard for compactness as required by *Shaw*. This is hardly surprising as the *Shaw* opinion provides no concrete guidelines as to what constitutes a "bizarre" district. Therefore, a uniform standard is needed to both apply the principles of *Shaw*, and to avoid the inconsistent approaches of *Hunt* and *Vera*.

V. PROPOSAL

*All the rest of that day, on those wild screaming beaches,
The Fix-it-Up Chappie kept fixing up Sneetches.
Off again! On again!
In again! Out again!
Through the machines they raced round and about again,
Changing their stars every minute or two.*

256. *Id.* at *129.

257. *Id.* at *135 (citation omitted).

258. C.A. No. H-94-0277, 1994 U.S. Dist. LEXIS 12368 (S.D. Tex. Aug. 17, 1994).

259. *Id.* at *5.

260. *Id.* at *8.

261. *Id.* at *94.

262. *Id.* at *131 n.55.

*They kept paying money. They kept running through
Until neither the Plain nor the Star-Bellies knew
Whether this one was that one . . .
or that one was this one
Or which one was what one . . .
or what one was who.*²⁶³

The Sneetches, in a race to gain the upper hand, keep paying money to run through McBean's machine and either add or subtract stars, depending on which was perceived as the superior body type. Ultimately, the state of confusion leads the Sneetches to abandon their prejudice relating to stars. The current litigation with regard to voting rights resembles the "in again, out again" race by the Sneetches. However, the courts cannot effectively function as Star-Off Machines. Furthermore, the state of confusion which ultimately helped the Sneetches will not solve the problems of persistent litigation in the real world. On the contrary, unless a workable standard is created for voting rights legislation, *Shaw* is likely to add confusion rather than to resolve districting conflicts. Further, if there is to be a meaningful constitutional analysis of voting rights, the Court must create rules which go beyond fact-specific controversies. States must be able to apply the principles of *Shaw*.²⁶⁴ This section suggests a standard by which courts can incorporate the ideals of color-blind politics as envisioned by the Court in *Shaw*, while recognizing the continuing values of the Voting Rights Act.

A. *District Compactness as a Solution*

The Voting Rights Act requires that minorities be accorded a genuine chance to elect representatives of their choice. *Thornburg v. Gingles*²⁶⁵ incorporates the "totality" requirement of section 2(b), and sets forth a three-part test to determine whether a redistricting scheme is valid under the Voting Rights Act.²⁶⁶ In order to prove discrimination under section 2, a plaintiff must first prove that a minority community is "sufficiently large and geographically compact to con-

263. DR. SEUSS, *supra* note 1, at 21.

264. Aleinikoff & Issacharoff, *supra* note 12, at 618.

265. 478 U.S. 30 (1986).

266. See discussion *supra* part II.B.3.

stitute a majority in a single-member district.”²⁶⁷ *Shaw*, on the other hand, recognizes an Equal Protection claim if a reapportionment statute, “though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race.”²⁶⁸ A district compactness requirement which will satisfy the concerns of both of these legal principles is certainly possible, and can most easily be achieved by putting a limit on non-compactness allowed under *Shaw*. Such a standard for compactness would harmonize the requirements for compactness under section 2 of the Voting Rights Act and *Gingles* and the Equal Protection Clause as articulated in *Shaw*.²⁶⁹

The concern with district appearances should be viewed as an “outer constraint on extreme noncompactness.”²⁷⁰ Because District 12 is extremely noncompact, but within the “spectrum” of values calculated to measure compactness, the numerical value of District 12 itself²⁷¹ is a good place to draw a minimum quantitative measurement. One benefit of such a solution would be that states could easily determine compliance with the requirements of *Shaw* using a uniform approach. Because “bizarre” or “compact” districts depend entirely upon where an arbitrary mathematical cutoff is drawn, a “bright line” proposal is to simply employ the numerical value which adds the perimeter score to the dispersion score as the value under which no district may fall.²⁷²

A mathematical approach to redistricting would be fairly simple to apply. By adding the perimeter and dispersion scores,²⁷³ a single score for any district in the nation could be determined. If a hypothetical district has a score above a certain level, it satisfies the requirements for compactness under

267. *Gingles*, 478 U.S. at 50.

268. *Shaw v. Reno*, 113 S. Ct. 2816, 2828 (1993).

269. On remand, Judge Voorhees’ dissent pointed out that an assessment of geographical compactness should not be any more problematic than the vote dilution test articulated in *Gingles*. *Shaw v. Hunt*, No. 92-202-CIV-5-BR, 1994 U.S. Dist. LEXIS 11102, at *277 (E.D.N.C. Aug. 1, 1994) (Voorhees, C.J., dissenting in part).

270. Pildes & Niemi, *supra* note 58, at 586.

271. See discussion *supra* part IV.C.5.

272. See *supra* note 226 and accompanying text.

273. See *supra* notes 222-26. Using the formula described by Pildes and Niemi, the combined score for District 12 is .06, whereas the combined score of the national mean is .60. Pildes & Niemi, *supra* note 58, at 562, 573. A perfect circle would score 2.0.

both the Voting Rights Act (*Gingles* prong one) and Equal Protection (*Shaw*) standards. If the score is lower than that specified number, the district has not met the requirements for compactness.²⁷⁴

The use of the numerical value of District 12 would establish a low standard for compactness. Such a standard has several benefits. First, it creates a bright line rule which districting bodies can employ without a high risk of legal challenge. It also permits wide latitude in the choice of traditional districting values, such as age, education, economic status, and the community in which voters live. Third, a low numerical standard allows for naturally occurring bizarre geographic and political boundaries. Fourth, a low threshold would allow for the continued consideration of traditional, "qualitative" districting concerns, including race. Finally, it gives an operative standard to the *Gingles* requirement that a minority community be compact enough to create a new voting district, which would also comport with the constitutional standard. This quantitative standard does not preclude vote dilution or political gerrymandering claims in any way.

A low quantitative standard is far from being a panacea for the problems of extreme gerrymandering, or even a solution of the dual problems of race and redistricting. It does, however, allow for harmonization of claims brought on the basis of appearance and gives operative meaning to the compactness requirement of *Gingles*.

VI. CONCLUSION

*But McBean was quite wrong. I'm quite happy to say
That the Sneetches got really quite smart on that day,
The day they decided that Sneetches are Sneetches
And no kind of Sneetch is the best on the beaches.
That Day, all the Sneetches forgot about stars
And whether they had one, or not, upon thars.*²⁷⁵

274. Such an approach would operate similarly to the mathematical rule to determine equality of population employed in *Reynolds v. Sims*, 377 U.S. 533 (1964). Such a model would certainly comport with the desire for a "relatively simple and judicially manageable" standard for determining compliance with redistricting requirements. See *Davis v. Bandemer*, 478 U.S. 109, 149 (O'Connor, J., concurring).

275. DR. SEUSS, *supra* note 1, at 24.

It is unfortunate that our present legal system cannot act as a "Star Machine" that solves racial problems as easily as *The Sneetches* did. It is telling, however, that the Star Machine itself did not solve the problems of the Sneetches—it merely created more problems that led the Sneetches to change. *Shaw* may indeed cloud the issue of race in redistricting to such a degree that the courts adopt a single, applicable standard. *Shaw* points out, however, that redistricting is not, and should not be, exclusively about race.²⁷⁶ Redistricting should not allow people to be classified in one dimension whether it be race, age, political affiliation, or even stars on their bellies. *Shaw* represents one attempt to create a "machine" that places race in its proper role in the multitude of redistricting considerations, but ultimately does not succeed.

When viewed in the "tragic choice" perspective,²⁷⁷ *Shaw* may be viewed as a recognition of values that are central to American government. The tragic choice paradigm states that when a society is forced to deal with several fundamental values which come in conflict, policymakers might accommodate certain values up to a point, but stop short of following them to their logical conclusion as a way of signaling respect for countervailing values.²⁷⁸ This approach inevitably preserves the tension between values. *Shaw* reflects a tension between the desire to maintain voting districts which are based on concepts of community and the desire of the Voting Rights Act to ensure fair representation for minorities.

This comment argues that in order for *Shaw* to be implemented in a manner which considers the dual purposes of compactness and race, a quantitative standard should be created. This standard should be relatively low and disallow those districts which are drawn to protect minorities only if they have a compactness value lower than that of *Shaw*. This will allow for traditional districting considerations while creating a manageable judicial standard for compactness. It will also create a standard for the *Gingles* requirement of compact

276. *Shaw v. Reno*, 113 S. Ct. 2816, 2832 (1993).

277. GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* (1978)

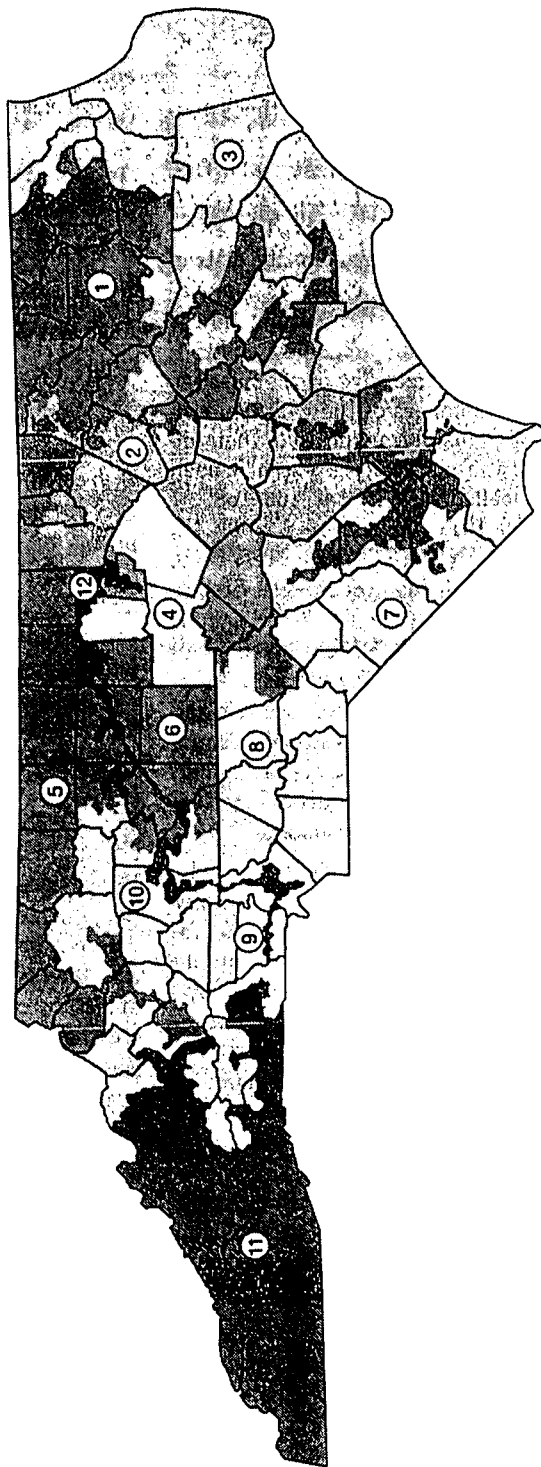
278. *Id.* Professors Calabresi and Bobbitt recognize this solution as one of many possible solutions to value conflict. A society may also decisively choose one value over another, recognize that the conflict is inevitable, or choose alternately between values.

minorities in redistricting under the Voting Rights Act which is harmonized with Equal Protection standards. Such a solution should prevent the creation of "snakes" while recognizing the concerns about appearance as illustrated in *The Sneetches*.

Mark Inbody

APPENDIX 1

NORTH CAROLINA CONGRESSIONAL PLAN CHAPTER 7 OF THE 1991 SESSION LAWS (1991 EXTRA SESSION)



Reproduction taken from *Shaw v. Reno*, 113 S. Ct. 2816, 2833 (1993).

APPENDIX 2

THE VOTING RIGHTS ACT

Section 2 (1965):

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Law of Aug. 6, 1965, Voting Rights Act of 1965, Pub. L. No. 89-110, § 1, 79 Stat. 437, (1965).

Section 2 (1982):

(a) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subdivision (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 1, 96 Stat. 131, (1982).

Section 5:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard,

practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submis-

sion if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

Pub. L. No. 94-73, title II, §§ 204, 206, title IV, § 405, Aug. 6, 1975, 89 Stat. 402, 405.