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Racial Fairness and Traditional Districting Standards: Observations on the Impact of the Voting Rights Act on Geographic Representation

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RACIAL FAIRNESS AND TRADITIONAL DISTRICTING STANDARDS: OBSERVATIONS ON THE IMPACT OF THE VOTING RIGHTS ACT ON GEOGRAPHIC REPRESENTATION*

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* A "note" about footnotes. Case law, legal literature, scholarly literature from other fields, and commentary on the subjects of reapportionment, representation in general, and representation for racial and ethnic minorities in particular would fill a small library. In order to fit this article within the space limitations of this symposium issue, I have assumed a fair degree of knowledge on the part of the reader, not only of these subjects, but of most of the developments to which I necessarily make only summary reference.

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I. INTRODUCTION

The popular conception is that the political fairness of election districts can be measured by the degree to which an elected body reflects the partisan make-up of its electorate.[1] In a similar vein, many imply the "racial fairness" of election districts should be measured by the degree to which legislators mirror the racial and ethnic make-up of the electorate.[2] However, those who expect a rough match between the composition of a legislative body and its electorate ask of our geographically based representational system an outcome it simply is not designed to deliver.[3]

Over the past forty-five years, and particularly since the early 1990s, concerns about "racial fairness"—understandable though they were—have significantly eroded sensibly constructed election districts. For example, to create greater opportunities for the election of African Americans, once compact congressional districts composed of entire counties have been replaced by districts that spread willy-nilly over vast areas of southern states. These distorted districts slice up counties and other political subdivisions, aggregating the necessary population to satisfy one person, one vote in "units" that defy geographic description. State legislative and local election districts have suffered similar fates. Election districts once described in terms of easily identifiable geography (the mountain or coastal district), now often are described in terms of their partisan makeup (the heavily

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1. Under this view, a system is politically fair if Democratic Party candidates receiving forty-five percent of the state-wide vote also secure forty-five percent of the legislative seats. Some distinguished political scientists have made this argument. *See* ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 15–22 (1968); *see also* Gaffney v. Cummings, 412 U.S. 735 (1973) (finding constitutional a districting plan "gerrymandered" to produce districts that would result in a legislature mirroring the popular vote); Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 52–53 & nn.129–36 (1985) (referring to popular and academic views on proportional results).

2. *See* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990, 345 tbl.11.1 (Chandler Davidson & Bernard Grofman eds., 1994) (containing a series of articles on the impact of the Voting Rights Act in individual Southern states, each of which chronicles black progress by comparing the group's percentage of the electorate to it percentage of elected bodies); Katharine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 LA. L. REV. 851, 863–76 (1982) (summarizing early studies measuring black electoral success in municipal election by the degree to which the group had achieved proportional representation); *see also* National Roster of Black Elected Officials, published annually by the Joint Center for Political & Economic Studies from 1970 to 1993) (collecting data on the election of blacks to all levels of public office). These publications routinely include comparisons like the following: "[B]lacks comprise 11.8 percent of the total population of the United States, [but] represent only 4.2 percent of the 7,497 state legislators in America." 10 NATIONAL ROSTER OF BLACK ELECTED OFFICIALS, 1980, at 9 (1981). *See also* ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 129 (1987) (reporting comments made by Dr. Willie Gibson when he was president of the NAACP Conference for South Carolina and by Jessie Jackson to the effect that "'blacks comprise one-third of the South Carolina's population and deserve one-third of its representation'").

3. By "geographic representational system," I mean simply a system in which members of a legislative body are elected from a defined geographic area and consequently represent the people living in the area encompassed by their districts' boundaries.

Democratic district; the Republican leaning district), or their racial and ethnic makeup (a majority Hispanic district; an African American opportunity or influence district).

In the pages that follow, I argue that gradually, and with no input from the public, our system of geographic representation—the system in place since our nation's founding—has been undermined, particularly in states subject to Section 5 of the Voting Rights Act. In those states, grossly geographically distorted districts have imposed de facto "interest group representation" for racial, ethnic, and highly partisan elements of the electorate. The result is that many places no longer have a "functional" geographic representational system, but neither do they have genuine interest group representation. Possibly, we have reached the point as a nation where too few of a voter's political interests are tied to residence for geographic representation to remain viable. If so, however, the solution is to adopt a different system for everyone—not to distort the existing system for all to bestow a perceived benefit on some.

II. BIZARRE DISTRICTS CAPTURE THE ATTENTION OF THE SOMNAMBULISTIC PUBLIC

> [Redistricting] is one of those subjects that tends to cause the eyes of wary citizens to glaze over. Learning that politicians are prone to engage in shady deals when feathering their own nests has all the jarring revelation of informing them that the ancient Greeks spoke Greek. Talk to the average voter about [the techniques of gerrymandering districts] and they will go to sleep.[4]

As the mystery writer Steve Martini suggested, it takes a lot to interest the general public in the drawing of election districts. Districts are most often constructed by those likely to benefit from that construction, overseen by others with their own agendas, and, these days, frequently reconstructed via litigation, where the issues likely to dominate are those raised by those same narrow interests. Such protection as the public's interest in sensible, competitive election districts comes—if at all—from the degree to which line drawers follow "objective (often called traditional) districting standards."

Standards for constructing elections districts, beyond those mandated by federal constitutional and statutory law,[5] vary from jurisdiction to jurisdiction.

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4. STEVE MARTINI, DOUBLE TAP 407 (2005). The reader interested in why this best-selling popular fiction writer mentions redistricting in a murder mystery will simply have to read the book.

5. Since the early 1960s, the Supreme Court has held that the Fourteenth Amendment requires all state and local legislative districts to comply with the principle of one person, one vote. *See* Reynolds v. Sims, 377 U.S. 533 (1964). The Court has also held that Article I, Section 2 of the Constitution imposes a similar requirement on congressional districts. *See* Wesberry v. Sanders, 376 U.S. 1 (1964). Jurisdictions subject to Section 5 of the Voting Rights Act (described *infra* note 9) must obtain federal approval of their districting plans, as well as any other change in their election laws. In addition, all districting plans are subject to challenge under Section 2 of the Voting Rights Act, which prohibits

These standards ostensibly serve three functions. The first is to create geographic representational units such that elements of the electorate within those units can effectively organize for political activity—political activity which, if necessary, can be directed against the incumbent. The second is to increase the likelihood that districts will contain individuals who share sufficient political interests to be effectively represented by the person elected. The third is to limit the degree to which legislators can manipulate district boundaries for personal and partisan purposes. Typical standards include the following: that districts do not unnecessarily divide political subdivisions or, when possible, follow their boundaries; that districts be compact and consist of only contiguous territory; and, when possible and consistent with other standards, that districts be constructed so as to respect communities of interest.[6]

Legislators undoubtably have created election districts that violated these standards in order to advance incumbent and partisan advantages for as long as the process of assigning representatives to districts has existed. Occasionally, they have produced districts sufficiently distorted to ignite at least the momentary outrage of the press. The classic example was the senatorial district included in Massachusetts' 1812 redistricting plan. When embellished by a skilled cartoonist, the district, which resembled a salamander, was quickly dubbed a "Gerrymander" in honor of Governor Elbridge Gerry, who signed the redistricting bill into law.[7] Despite the occasional outrageous example, districts sufficiently distorted to generate interests outside political circles have been relatively rare, at least historically, in relation to the total number of the nation's election districts.

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electoral arrangements that dilute the voting strength of protected minorities. *See infra* notes 69–71 and accompanying text.

6. *See* Shaw v. Reno, 509 U.S. 630, 647 (1993). "Community of interests" is a somewhat vague phrase. Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 87 (1985). The term typically includes defined neighborhoods, other geographically cognizable areas, regions sharing economic interests, and the like. *Id.* The requirement that districts follow natural boundaries is another common criteria. *Id.* at 87–88. A few states require that the district boundaries of the two state legislative houses be coterminous. *Id.* at 88, 177 tbl.3.

7. MARK MONMONIER, BUSHMANDERS & BULLWINKLES 1–2 (2001).

In the early 1990s, the public's usual malaise about the decennial redistrictings following each census was for a short time overcome by the significant press coverage of districts like those depicted below. Legislators drew the contorted boundaries of these districts to make them majority African American or majority Hispanic in response to demands by the United States Department of Justice (DOJ)[8] in its role as administrator of Section 5 of the Voting Rights Act,[9] the so-called preclearance provision.

FIGURE 1.
TEXAS 30TH CONGRESSIONAL DISTRICT, 1992[10]

8. The DOJ's pressure to create the districts in Georgia and Louisiana, depicted in Figure 1 and Figure 4, was discussed by the courts in *Johnson v. Miller*, 864 F. Supp. 1354, 1360–69 (S.D. Ga. 1994), and *Hays v. Louisiana*, 839 F. Supp.1188, 1196 n.21(W.D. La. 1993), *vacated and remanded sub nom.*, United States v. Hays, 515 U.S. 737 (1995) ("[T]he Attorney General's Office (AGO) had let it be known that [Section 5] preclearance would not be forthcoming for any plan that did not include at least *two* 'safe' black districts out of seven."). The DOJ's conduct during the post-1990 round of state-wide redistrictings was the subject of a book by one commentator. *See* MAURICE T. CUNNINGHAM, MAXIMIZATION, WHATEVER THE COST: RACE, REDISTRICTING, AND THE DEPARTMENT OF JUSTICE 1 (2001). In the case of Texas, pressure on the legislature was more indirect—coming mainly from its "'understanding'" that minority districts would be required. Vera v. Richards, 861 F. Supp. 1304, 1324–25 (S.D. Tex. 1994), *aff'd sub nom.* Bush v. Vera, 517 U.S. 952 (1996) (citations omitted).

9. Section 5 requires certain jurisdictions, principally the Deep South states, to obtain prior federal approval before implementing any change in their elections law, including changes in the boundaries of election districts. 42 U.S.C. § 1973c (2000); Georgia v. United States, 411 U.S. 526, 528–35 (1973). Thus, in "covered jurisdictions," the redistrictings mandated by one person, one vote following each census must be submitted for "preclearance," which in virtually all cases is sought from the United States Attorney General. "Preclearance" determinations are made by the Assistant Attorney General for Civil Rights, in most cases in accordance with the recommendations of the DOJ's Voting Section. Preclearance is to be granted only if the covered jurisdiction convinces federal authorities that the change in election law was not adopted for a racially discriminatory purpose and will not have a racially discriminatory effect. The standards for preclearance of redistricting changes are discussed *infra* at notes 62–67 and accompanying text.

10. This district inspired the following description from a federal court: "the configuration of District 30 closely resembles a microscopic view of a new strain of disease, and has been the subject of well-deserved national ridicule as the most gerrymandered district in the United States." Terrazas v. Slage, 789 F. Supp. 828, 834 (W.D. Tex. 1991). Two other Texas congressional districts, Districts 18 and 29, could be similarly described. *See* MONMONIER, *supra* note 7, at 59 fig.4.4.

FIGURE 2.
NORTH CAROLINA MAJORITY-MINORITY DISTRICTS, 1992

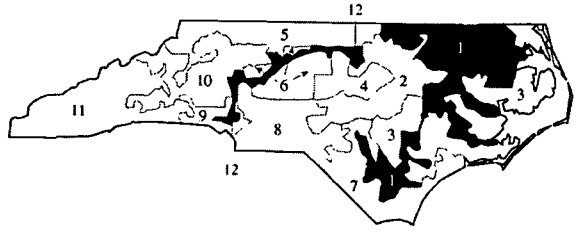


FIGURE 3.
GEORGIA MAJORITY-MINORITY DISTRICTS, 1992

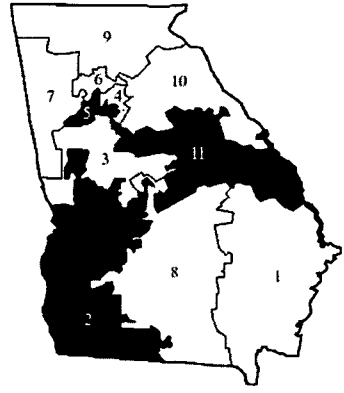
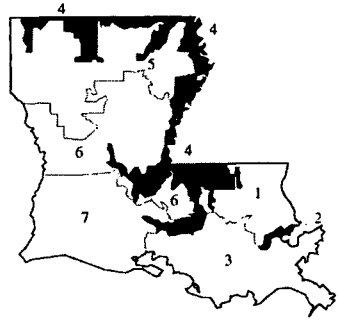


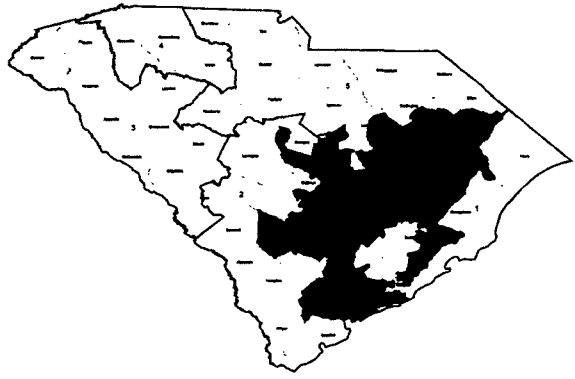
FIGURE 4.
LOUISIANA MAJORITY-MINORITY DISTRICTS, 1992



Even ordinary citizens who normally fell into somnambulism at the first mention of redistricting questioned whether districts resembling a bug splat (Texas's 30th Congressional District), drawn down an interstate (North Carolina's 12th Congressional District), joining the suburbs of Atlanta with neighborhoods in Savannah and Augusta (Georgia's 11th Congressional District), or otherwise defying logic (Louisiana's 4th Congressional District) were sensible geographic units from which to elect the people's representatives.

South Carolina's only slightly less distorted congressional districts did not receive the national attention of those above, most of which were eventually invalidated.[11] Nevertheless, the state's 1992 congressional districts departed sharply from the compact districts of the past, which, pursuant to the state constitution, had been created out of whole counties, modified only when necessary to comply with one person, one vote. Compare the 1992 districts[12] with those from the previous decade:

FIGURE 5.
SOUTH CAROLINA CONGRESSIONAL DISTRICTS, 1992[13]

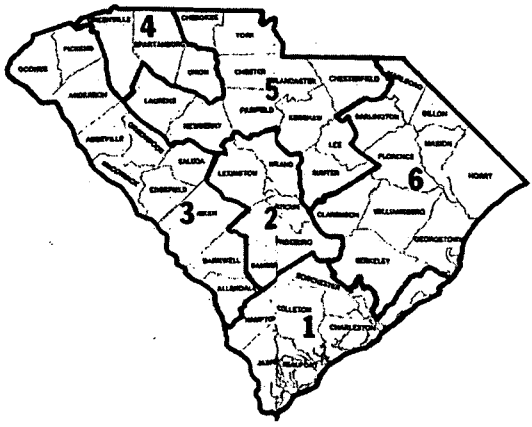


11. See the cases cited *infra* notes 29–30. Georgia's 5th Congressional District and Louisiana's 2nd Congressional District were not challenged. North Carolina's 1st Congressional District was spared because none of the challengers lived in it. *See* Shaw v. Hunt, 517 U.S. 899, 904 (1996).

12. This plan was adopted by a three-judge federal court after the legislature failed to agree upon a plan. All parties to the litigation argued that the court should include a majority-minority district, despite a provision in the South Carolina Constitution indicating a preference that congressional districts be made up of entire counties. *See* S.C. CONST. art. VII, § 13. The absence of opposition influenced the court's decision to create the district. *See* Burton v. Sheheen, 793 F. Supp. 1329, 1357 (D.S.C. 1992).

13. The majority-minority 6th Congressional District is highlighted. In 2002, a federal court again drew the state's congressional districts, this time substantially respecting county boundaries. The 2002 map is available at http://www.scstatehouse.net/man06/ 45_CongDistMap.pdf

FIGURE 6.
SOUTH CAROLINA CONGRESSIONAL DISTRICTS, 1982



Like South Carolina, many states had, by law or tradition, respected political subdivisions' boundaries (particularly county boundaries) when creating congressional and state legislative districts. For example, Georgia, with only rare exceptions, created its congressional districts out of whole counties for as long as single-member districts were used to elect its members of Congress.[14] The 1980 congressional districts of North Carolina, Texas, and Louisiana were composed primarily of whole counties (or parishes in Louisiana).[15] Many states still follow this practice to the extent feasible. See, for example, the post-2000 congressional districts of Minnesota, Ohio, West Virginia, and Iowa.[16]

III. GEOGRAPHIC REPRESENTATION AND TRADITIONAL DISTRICTING STANDARDS: THE TRANSITION FROM DISTRICTS CLOSELY ALIGNED WITH IDENTIFIABLE GEOGRAPHY TO DISTRICTS INCAPABLE OF GEOGRAPHIC DESCRIPTION

While the public's interest in the bizarre districts of the 1990s waned reasonably quickly, their creation, challenge, and eventual invalidation by the Supreme Court led to vehement disagreements among judges, legal scholars,

14. Wesberry v. Vandiver, 206 F. Supp. 276, 280 (N.D. Ga. 1962).

15. Timothy G. O'Rourke, Shaw v. Reno*: The Shape of Things to Come*, 26 RUT. L.J. 723, 762–64 (1995).

16. Maps of these districts can be accessed via the Department of the Interior's National Atlas of the United States website, located at http://www.nationalatlas.gov.

political scientists, and political geographers.[17] Ostensibly, the disagreement was over the importance of traditional districting standards to "fair representation." Supporters of these districts argued that creating majority-minority districts was a higher order good than drawing geographically neat ones.[18] Judicial disagreement fell along these lines:

Judge Phillips wrote the opinion in *Shaw v. Hunt*,[19] one of the opinions written in the long-running challenge to North Carolina's 1992 congressional districts (depicted above). He posited that "compactness, contiguity, and respect for political subdivisions have little inherent value in the districting process. The ultimate purpose of legislative apportionment and redistricting is to ensure 'fair and effective representation for all citizens.'"[20]

Judge Jones wrote the opinion in *Vera v. Richards*,[21] the challenge to Texas's bizarre congressional districts (one of which is depicted above). She had a different view: "Traditional . . . districting criteria are a concomitant part of truly 'representative' single member districting plans."[22] Judge Jones observed that when districts violate these standards, they disrupt grassroots political activity and ultimately undermine "[t]he bedrock principle of self-government, the interdependency of representatives and their constituents."[23]

At the heart of the differing views on the value of traditional districting standards is a disagreement about *what* is to be represented in a system that elects its legislators from geographic districts. If that "what" is the collective interests of identifiable groups, whether racial minorities or Republicans, our geographically based system clearly fails. Our system only coincidentally reflects broad-based political interest groups (Democrats and Republicans) and

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17. *See* Symposium, *Voting Rights After* Shaw v. Reno, 26 RUTGERS L.J. 517 (1995); Symposium, *The Future of Voting Rights After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993); Conference, *The Supreme Court, Racial Politics, and the Right to Vote:* Shaw v. Reno *and the Future of the Voting Rights Act*, 44 AM. U. L. REV. 1 (1994).

18. *See, e.g.*, Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1343 (2005) ("[T]he deliberate creation of majority-nonwhite districts is a central technique for combating the prejudice against discrete and insular minorities to which the third prong of *Carolene Products* was addressed."); *see also* Conference, *supra* note 17 (reporting an edited version of proceedings of the conference which had twenty participants, including law professors, lawyers, social scientists, and politicians). I was the lone participant who agreed with the Court's decision in *Shaw* that violating traditional districting standards to create majority-minority districts caused constitutional problems. Two others expressed reservations about creating bizarre districts (Professors Richard Pildes and Samuel Issacharoff), but most of the remaining participants, to one degree or another, shared the view of civil rights lawyer Anita S. Hodgkiss that "the shape of the district does not impact effective and fair representation." *Id.* at 46.

19. 861 F. Supp. 408 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899 (1996).

20. *Id.* at 451 (quoting Gaffney v. Cummings, 412 U.S. 735, 748 (1973)). Judge Phillips noted these standards were once thought to realize the goal of fair and effective representation "because they link together citizens who are likely to share common needs and interests, reduce the cost of campaigning, and make it easier for legislators to maintain close contact with their constituents," but they are no longer necessary or even appropriate today. *Id.*

21. 861 F. Supp. 1304 (S.D. Tex. 1994), *aff'd sub nom.* Bush v. Vera, 517 U.S. 952 (1996).

22. *Id.* at 1334 n.43.

23. *Id.*

even more rarely mirrors other characteristics of the nation's electorate (race, ethnicity, and gender) that may correlate with political interests.[24]

Traditional districting standards are designed to produce districts that can be effective representational units in a system in which the legislator represents the interests of a population living in a defined area. To be sure, not all of a voter's representational interests correlate with the interests of those in close proximity to him. However, interests that do not correlate with residency logically cannot be considered when designing geographic districts. If our goals are direct interest group representation and legislative bodies more reflective of the partisan and racial make-up of the electorate, the solution is not "bug splat districts" but rather a representational system specifically designed to produce that result.

The vast majority of the world's democracies utilize representational systems that guarantee elected bodies will mirror the popular vote.[25] These interest-group representational systems, also know as proportional representation systems, are organized to directly represent interest groups in rough proportion to their strength in the electorate, regardless of where the

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24. Common sense belies the proposition that proportional partisan representation is a realistic expectation of fairly drawn geographic districts. Only the fact that political party strength is not evenly distributed throughout a jurisdiction prevents the majority party from winning all elected offices. When the Connecticut legislature attempted in 1971 to draw districts that would reflect the popular partisan vote, it had to significantly ignore its own districting standards in an effort produce political equality. *See* Gaffney v. Cummings, 412 U.S. 735, 737–38 (1973). Today, political scientists and other experts are in substantial agreement that geographic districts, drawn pursuant to traditional districting standards, will only coincidentally lead to proportional partisan outcomes. *See* Lowenstein & Steinberg, *supra* note 1, at 52–54 (referring to popular and academic views on proportional results). An expectation of racial proportionality is similarly illogical. Assuming minority status to be a relevant basis for political views, no more reason exists to expect geographic districts to produce "racially proportional" legislative bodies than to expect other arguably politically relevant demographic characteristics to be proportionally represented. A better argument is that residential patterns, often the product of past discrimination, have produced geographic concentrations of minority voters such that some number of "standard" districts will naturally contain a majority of minority citizens. However, it is highly unlikely that standard districts, created without substantial racial manipulation, will result in a proportional number of such districts. Professor Richard H. Pildes expressed the problem nicely when he noted,

> to evaluate territorial districting systems in terms of whether they produce proportional representation is, in a sense, to fail to understand the basic idea behind the very system. . . . [a problem in the voting rights area] now is that we are trying to wedge into this territorial districting systems concerns for proportional representation or fair representation of various interests, and the system is being stretched to the breaking point because it simply isn't designed to accommodate that.

Conference, *supra* note 17, at 84.

25. *See* MONMONIER, *supra* note 7, at 144–46; Grofman, *supra* note 6, at 161–62. *See also* Lani Guinier, *Supreme Democracy:* Bush v. Gore *Redux*, 34 LOY. U. CHI. L.J. 23, 60 (2002) (noting that other than the former colonies of Great Britain, most western democracies use some form of proportional representation).

group members live.[26] If South Carolina had such a system, its African American citizens, if they voted cohesively for a political party organized to represent their interests, could expect to elect a portion of the legislature roughly equal to their portion of the total votes cast. Similarly, any interest group—be it a broad-based political party or one more narrowly focused, such as opponents of abortion—could do the same so long as the group had sufficient electoral support to qualify for a legislative seat.

Obviously, South Carolina and other states, as well as almost all lesser political subdivisions, do not have electoral systems designed for direct interest group representation.[27] Rather, legislators elected from geographic districts are expected to represent all the people of their district—including those not qualified to vote and those who voted for someone else.

Reasonable people can disagree as to what makes a sensible geographic district—particularly from the perspective of effective representation of the citizens residing therein. I suspect that most academics, as well as others with vested interests in the political consequences of the infamous districts of the 1990s, genuinely agree with Judge Phillips—the content of a district is a better indication of whether it is sensible than the contours of its boundaries.[28] Superficially, their position is unassailable. For example, African Americans in the northern tip of North Carolina's interstate district almost certainly viewed themselves as having more political interests in common with African Americans in the district's southern tip than with white residents of their county. It may also be true, however, that whites in the district did not feel any obvious political kinship with either its African American beneficiaries or with its other whites—"filler population" added to the district to satisfy one person, one vote. Moreover, if a district's effectiveness is to be measured by its population content, divorced from the contours of its geography, how can it be

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26. Numerous variations exist in the operations of various proportional representational systems, but their common objective is a legislative body in which political parties are represented in accordance with their proportional share of the vote. Grofman, *supra* note 6, at 161–62. Systems providing some degree of, but less than full proportionality, are often identified as "semiproportional systems." *Id.* at 161. The details of these systems are beyond the scope of this article. *See generally* DOUGLAS W. RAE, THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS (revised ed. 1964) (discussing the relationship between political parties and election laws).

27. One exception was Illinois, which from 1870 to 1980 elected its lower legislative chamber using "cumulative voting," a semiproportional electoral scheme. Grofman, *supra* note 6, at 162–63. In a cumulative voting system, voters are permitted to cast multiple votes for fewer than all of the offices up for election. *Id.* at 163. A relatively small number of local governments, counties, municipalities, and school boards have at times used either cumulative voting or "limited voting," another type of semiproportional system in which voters are limited to casting fewer votes than there are offices up for election. *Id.* at 161–70. Occasionally, local governments have adopted one or the other of these systems to settle Section 2 litigation. Laughlin McDonald, *The 1982 Amendments of Section 2 and Minority Representation*, *in* CONTROVERSIES IN MINORITY VOTING, THE VOTING RIGHTS ACT IN PERSPECTIVE 66, 83–84 (Bernard Grofman & Chandler Davidson eds., 1992) [hereinafter CONTROVERSIES IN MINORITY VOTING] (adopting either limited or cumulative voting in twenty-seven local jurisdictions in Alabama).

28. *See supra* notes 19–20 and accompanying text.

fair to create districts for political groups that can be identified from census data (such as minorities) or from data that can be tied to census geography (such as precinct level political data) but not for other political interest groups whose members cannot be identified sufficiently to be placed in a district? While the public-at-large may not have delved deeply into these issues, the average individual likely has little difficulty seeing districts drawn down interstates and resembling bug splats as not sensible—no matter why they were created.

In a series of cases starting with *Shaw v. Reno*,[29] the Supreme Court concluded North Carolina's 12th Congressional District, Georgia's 2nd and 11th Congressional Districts, and Texas's 18th, 29th, and 30th Congressional Districts were not required by the Voting Rights Act and, furthermore, were unconstitutional as racial gerrymanders.[30] However, believing the Supreme Court's rejection of the state's underlying premise for creating these distortions either mandated or resulted in a return to more "standard" districts would be a gross misperception. As the matters discussed below unfolded, a number of factors, including the basis of the Court's ruling and dicta in its opinions, encouraged even greater abandonment of traditional districting standards.

How did we go from districts consisting of geographically recognizable areas to districts resembling bug splats? Much of the credit for the most extreme distortion goes to Section 5[31] and, to a lesser extent, Section 2[32] of the Voting Rights Act. However, several factors played supporting roles: the Supreme Court's insistence on fairly strict population equality across districts—the so-called one-person, one-vote principle; the Census Bureau's decision in 1990 to provide very location-specific population information, coupled with computer technology sufficient to draw districts no wider than a city block; and finally, legislators' acceptance of the Court's backhanded invitation to gerrymander for any reason except a racial one. I will sketch out these factors and their contribution to the decline of traditional districting standards.

29. 509 U.S. 630 (1993).

30. The remaining cases, hereinafter collectively referred to as "*Shaw* progeny" were (1) challenges to North Carolina's congressional districts: *Shaw v. Hunt*, 517 U.S. 899 (1996), *Hunt v. Cromartie*, 526 U.S. 541 (1999), and *Easley v. Cromartie*, 532 U.S. 234 (2001); (2) a challenge to Georgia's congressional districts: *Miller v. Johnson*, 515 U.S. 900 (1995); and (3) a challenge to Texas's congressional districts: *Bush v. Vera*, 517 U.S. 952 (1996). The Court dismissed the challenge to Louisiana's districts for lack of standing. United States v. Hayes, 515 U.S. 737, 747 (1995). However, new plaintiffs quickly challenged a different and almost as non-sensible district, which the district court declared unconstitutional. *See* Hays v. Louisiana, 936 F. Supp. 360, 371 (W.D. La. 1996).

31. 42 U.S.C. § 1973c (2000).

32. *Id.* § 1973.

A. *One Person, One Vote*

Before *Baker v. Carr*[33]—and here I paint with a very broad brush—representatives in many, perhaps most, state legislative bodies were "apportioned" (allocated) to fixed geographic units—typically counties or other political subdivisions.[34] Often population was loosely taken into account in the apportioning process for one or both legislative bodies by assigning more representatives to heavily populated counties. One common apportionment scheme was the so-called "little federal model." In South Carolina's version, each county, regardless of population, was assigned one senator[35] while seats in the house were assigned to counties on the basis of population.[36] Although there were other variations in how the states used political subdivisions for assigning representatives, political subdivisions played major roles in determining boundaries in almost all states—either directly as actual "units" of representation or as their building blocks.[37]

The reapportionment cases of the early 1960s invalidated any scheme that assigned legislative representatives without regard to population of the represented unit and prescribed strict population equality requirements for districts. After *Reynolds v. Sims*[38] and *Wesberry v. Sanders,*[39] the legislative and congressional representational schemes in virtually every state needed major adjustments.[40]

While the Court recognized some deviation from population equality would be permitted to maintain the integrity of political subdivisions, the degree of

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33. 369 U.S. 186 (1962).

34. *See* Reynolds v. Sims, 377 U.S. 533, 608–610 (1964) (Harlan, J., dissenting) (detailing the provisions of various states from ratification of the Fourteenth Amendment forward). Justice Frankfurter's dissent in *Baker* referenced various state provisions with apportionment not based on population. *Baker*, 369 U.S. at 311–24 (Frankfurter, J., dissenting).

35. S.C. CONST. art. III, § 6.

36. *Id.* § 3.

37. *See* ROBERT B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION app. at 275–458 (1965) (summarizing the original, revised, 1962, and 1965 formulas for apportioning each state's upper and lower legislative chambers).

38. 377 U.S. 533, 561–68, 577 (1964) (setting out the parameters of the Court's one-person, one-vote mandate and holding the Fourteenth Amendment required population to be the basis for assigning representatives for both houses of a bicameral legislative body while recognizing legitimate state interests may justify slight deviations from absolute equality in the ratio of representatives to population).

39. 376 U.S. 1, 7–8 (1964) (holding malapportioned congressional districts violated the command of Article I, Section 2 that representatives be chosen "'by the People of the several States'" (quoting U.S. CONST. art. I, § 2, cl. 1)). The Court eventually would hold only "unavoidable" deviations from population equality would be permitted with respect to congressional districts. Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969).

40. *See* DIXON, *supra* note 1, app. A at 589 ("[S]how[ing] the apportionment position of the states as of January 1962 on the eve of *Baker v. Carr*, and at successive periods until a 'final' reapportionment was achieved"); MCKAY, *supra* note 37, app. at 275–458 (summarizing the original, revised, 1962, and 1965 formulas for apportioning each state's upper and lower legislative chambers).

permissible deviation was relatively small.[41] The vast differences typical in populations of a state's counties made their retention as individual units of representation for either house of a bicameral legislature impractical, effectively eliminating the little federal system. For example, assigning one legislative representative to the least populous county in South Carolina in 1960, McCormick County (population 8,629),[42] would have required the legislative body involved to have a total of 276 members.[43]

Moreover, to continue to use whole counties as the building blocks of districts, legislators had to make significant use of multimember districts[44] and sometimes floterial districts.[45] Even when these devices were available to retain some semblance of county-based representation, the resulting districts were hardly the equivalent of the permanent geographic representational units of the past.[46] Prior to the Court's reapportionment cases, in many states, adjustments were made for population changes by revising the number of

41. *Reynolds*, 377 U.S. at 578–79. The Court has not specifically set an outer limit for the deviation from population equality in state legislative districts that can be justified by a legitimate state interest. It found a deviation of 16.4 percent to be justified in *Mahan v. Howell*, 410 U.S. 315, 319, 333 (1973), but found a deviation of 19.3 percent unacceptable in *Connor v. Finch*, 431 U.S. 407, 418 (1977). A deviation of less than ten percent is prima facie valid in legislative plans. *Connor*, 431 U.S. at 418. The total deviation in a districting scheme is determined by adding together the absolute deviation of the most over-populated and most under-populated districts. For example, in a town of 1,000 with ten single-member districts, an ideal district would contain 100 people. If the most populous district contains 105 (a +5 percent deviation) and the least populous contains 95 (a -5 percent deviation), the total deviation would be 10 percent.

42. SOUTH CAROLINA: POPULATION OF COUNTIES BY DECENNIAL CENSUS: 1900 TO 1990 (1995), http://www.census.gov/population/cencounts/sc190090.txt [hereinafter S.C. POPULATION].

43. South Carolina's 1960 population of 2,382,594 divided by the population supporting one representative for McCormick (8,629) equals 276. *Id.* The South Carolina Constitution provides for one senator per county, which by 1960 numbered forty-six, and for 124 house members. S.C. CONST. art. III, § 6.

44. A multimember district is one from which more than one legislative representative is elected.

45. A floterial district is one "that includes several separate districts or political subdivisions that independently would not be entitled to additional representation, but whose conglomerate population entitles the district to another seat in the legislative body being apportioned." BLACK'S LAW DICTIONARY 510 (8th ed. 2004). For example, District A, electing one representative, is combined with District B, electing two representatives, to form District C (a floterial district), electing one representative.

46. South Carolina's response to *Reynolds v. Sims* was typical of states that had previously used the little federal system or had otherwise used counties as districts. The ideal district size for a senate district based on the state's 1960 population was 51,796, calculated by dividing the total state population of 2,383,594 by forty-six, the number of senators. 1970 SOUTH CAROLINA LEGISLATIVE MANUAL 13 (Inez Watson ed., 1970). To avoid cutting county lines, the legislature adopted a plan for the state senate that was comprised of a mixture of miltimember and single member districts and, when necessary, combined two or more whole counties to form a district. *See id.* at 14–15. For example, Richland County (population 200,102) was a multimember district, assigned four senators, all elected by the county as a whole. *Id.* Darlington County (52,928) had a single senator and thus was a single member district. *Id.* Allendale, Bamberg, and Barnwell Counties (combined populations 45,295) were combined to form a single member district. *See id.* The legislature adopted this plan in 1967 after earlier efforts to produce an acceptable plan failed. *See* Burton v. Sheheen, 793 F. Supp. 1329, 1358–59 (D.S.C. 1992).

representatives assigned to each district following a new census. In other words, the represented unit remained the same, but the number of representatives assigned to each unit changed with population shifts between censuses.[47]

After *Reynolds*, the required degree of population equality frequently meant the particular combination of counties included in a district had to be revised after each census. In addition to these practical problems, political and sometimes legal issues associated with multimember districts led to a decline in their use and almost certainly a near elimination of the practice of apportioning representatives to counties.[48] Without multimember districts, the use of whole counties as the primary building blocks for state legislative districts was also more difficult. Eventually, respect for political subdivision boundaries thus became just one permissible factor to be considered when creating equally populated districts.

If political subdivisions with fixed boundaries were no longer available as representational units, then adjustments to comply with the one-person, one-vote principle would instead be made by changing the boundaries of districts—"redistricting" thus replaced "reapportionment" as the means to take population changes into account in assigning representatives. Standards other than political subdivision boundaries that served to encourage sensible districts and discourage gerrymandering—compactness, contiguity, and respect for communities of interest—were less objective and thus more subject to

47. As any student of politics or constitutional law knows, before *Baker v. Carr*, 369 U.S. 186 (1962), state legislators routinely ignored the provisions of their own constitutions requiring periodic reapportionment of their legislative seats for the body or bodies for which population was a factor. *See* Grofman, *supra* note 6, at 79–80. As a result, by the 1960s gross disparities existed in the representative-to-population ratio between urban and rural areas. In Tennessee (the state involved in *Baker*), for example, one representative district had only 2,340 voters and another had 42,298; each elected a single representative, despite a provision in the Tennessee constitution requiring both legislative bodies to be apportioned to counties or districts on the basis of qualified voters. DIXON, *supra* note 1, at 120. Note, however, that had Tennessee followed its constitution, its apportionment plan would nevertheless have been unconstitutional under *Reynolds*, as "qualified voters" (the state's basis for apportionment) was not an acceptable substitute for actual population.

48. Large multimember districts often submerged political and racial elements of the electorate perhaps could have elected their "own" candidates from single member districts. If the electorate was fairly balanced between the two major parties, each might have preferred single member districts that assured it of some representation, rather than risk losing every seat in an at-large election. Submergence of politically cohesive minority groups in multimember districts is a common basis for a racial vote dilution suit. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986) ("The Court has long recognized that multimember districts may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'" (quoting Burns v. Richardson, 384 U.S. 73, 88 (1966) (alterations in original)); White v. Regester, 412 U.S. 755, 765 (1973) ("[W]e have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups."). Professor Grofman observed in 1985 that the number of multimember districts had been declining for two decades and that multimember districts had been virtually eliminated in Section 5 jurisdictions. Grofman, *supra* note 6, at 78–79 n.7.

manipulation.[49] When no longer constrained by matching districts to existing political subdivisions, legislators no doubt found it easier to justify district boundaries that had no independent significance for the voter.

Still, in most states, traditional districting standards, including respect for political subdivisions, limited outrageous gerrymandering of the sort that would be seen in the 1990s. Even when districting standards lacked the force of law, a number of practical and political considerations encouraged compliance. First, the standards in place were somewhat self-perpetuating in that incumbents generally liked the districts that elected them. Second, obvious and unnecessary deviations from the standards likely drew unpopular media attention and with it a potential political backlash.

Legislators, who were accustomed to "standard" districts and even to advancing personal and partisan interests without seriously deviating from traditional districting standards, had few reasons to draw districts that ran down interstate highways or that otherwise totally departed from the districts that had elected them.[50] Thus, while *Reynolds v. Sims*[51] effectively eliminated the use of "fixed" election districts and lessened reliance of political subdivision boundaries, other objective standards tended to produce acceptable geographic districts. As noted earlier, the 1980 congressional districts of all the states whose bizarre districts appear in Part II were comprised primarily of whole counties.[52] There can be little doubt that outside forces in 1990 compelled these states' legislators to deviate so drastically from past practices and adopt districts that awakened at least the temporary interest of the general public.

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49. Respect for political subdivision lines remained an important districting criterion and, because these boundaries were fixed, was the most objective. "Compactness," "contiguity," and "communities of interests" lacked firm definitions and were not as effective in constraining gerrymandering. A summary of state districting standards, as of 1981, can be found in Grofman, *supra* note 6, at 177–83 tbl.3.

50. Legislators who followed traditional districting standards did not necessarily refrain from manipulating district boundaries for their personal and partisan advantage. Districting standards were sufficiently flexible that the majority party could minimize the minority party's electoral opportunities without creating the grossly distorted districts appearing in the 1990s. Partisan gerrymandering and measures to contain it have been recurring topics for academics and commentators for as long as elections have been held by districts. *See* Symposium, *Gerrymandering and the Courts*, 33 UCLA L. REV. 1 (1985). A new round of articles was spawned by the Court's 2004 decision in Vieth v. Jubelirer, 541 U.S. 267 (2004). At the time of this writing, a search of the Westlaw database for law reviews and journals using the case name and gerrymandering produced eighty-four hits. *See, e.g.*, Symposium, *Electoral Redistricting and the Supreme Court*, 14 CORNELL L.J. & PUB. POL'Y 367 (2005) (discussing partisan gerrymandering and related Supreme Court jurisprudence); *Developments in the Law—Voting and Democracy*, 119 Harv. L. Rev. 1 (2006) (summarizing recent developments in election law). The bizarre districts of the 1990s, however, had far more serious consequences for geographically based representation than the gerrymanders of old, which were less disruptive of grassroots political organizations in their electoral consequences. *See* Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2512–18 (1997) (discussing his findings that districts after 1990 were far more distorted than districts of prior years).

51. 377 U.S. 533 (1964).

52. *See* O'Rourke, *supra* note 15, at 762–64.

B. *The Voting Rights Act*

In jurisdictions subject to Section 5 of the Voting Rights Act (so-called "covered jurisdictions"), coercion came from the DOJ, which insisted on additional majority-minority districts. These districts often could only be created by ignoring traditional districting standards. Section 2 was a major force in all jurisdictions that had a significant concentration of minority voters. As will be seen, the DOJ was not the only culprit. Republicans cynically aided the DOJ in its insistence on majority-minority districts. And when Democrats controlled the redistricting process, they responded to the chaos which abandoning traditional districting standards to create minority districts had wreaked upon their own districts by further gerrymandering.

Congress adopted the Voting Rights Act in 1965 on the heels of the Court's one-person, one-vote decisions.[53] Fairly quickly, the Act substantially accomplished its overriding purpose to end massive disfranchisement of African Americans in the South.[54] When ballot access did not produce the benefits for blacks that were expected to flow from enfranchisement, there was an understandable sentiment that additional steps should be taken to provide blacks "as blacks" with more direct influence over lawmakers. Help would soon be found in Section 5 (the so-called "preclearance provision," which required certain jurisdictions, primarily in the South, to obtain prior federal approval before enacting changes in their elections laws) and later in Section 2 (a provision of general application). Some of the Supreme Court's early Section 5 cases[55] implied that "fair" districts for minorities would be measured by whether they resulted in racial proportional representation—a concept at odds with geographic representation.

In 1971, the Court in *Whitcomb v. Chavis* rejected the position voting rights advocates had hoped for—a constitutional right to proportional representation for a cognizable racial minority group.[56] However, the Court recognized that racial vote dilution could be established upon evidence that the political processes leading to the nomination and election were not equally open to the group, resulting in its members having less opportunity than others in the

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53. *Baker v. Carr*, 369 U.S. 186, 237 (1962), decided in 1962, held that malapportioned districts might present a constitutional problem. But the reapportionment cases, *Reynolds v. Sims*, 377 U.S. 533 (1964), and its companion cases, decided June 1964, set the standards for population equality across districts and thus started the reapportionment revolution. The Voting Rights Act was signed into law in August 1965. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

54. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding the constitutionality of the Act and detailing the dire circumstances that led to its passage).

55. *See* City of Richmond v. United States, 422 U.S. 358, 378 (1975) (implying that fairly drawn districts were ones which provided minorities with rough proportional representation); Perkins v. Matthews, 400 U.S. 379, 388 (1971) (implying that minority voting rights might be seen as diluted if their votes did not translate into proportional representation); Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969) (similar implication).

56. Whitcomb v. Chavis, 403 U.S. 124, 149 (1971).

electorate to elect candidates of their choice.[57] Two years later, *Whitcomb*'s dictum became the holding in *White v. Regester*,[58] thus providing a constitutional basis for a claim of racial vote dilution.[59] In combination with dicta from the early Section 5 cases, these cases seemingly implied that Section 5 preclearance of a districting change would be granted only if the district provided minorities with proportional representation—at least to the extent feasible using single member districts constructed in accordance with race-neutral districting principles.[60]

Perhaps encouraged by these cases, the DOJ insisted that covered jurisdictions make progress toward proportional representation to obtain preclearance of their post-1970 census redistricting plans.[61] However, much to the surprise of almost everyone, when the Supreme Court actually confronted the issue of when new election districts would be entitled to preclearance, it provided a very different standard.

In *Beer v. United States*,[62] a case involving redistricting of New Orleans' city election districts, the Court held a new districting plan had a discriminatory effect within the meaning of Section 5 only if it resulted in retrogression of the minority group's ability to participate in the political process relative to the districting plan it replaced.[63] A plan that improved the group's opportunity to elect candidates of its choice was entitled to preclearance, even if the plan as a whole remained discriminatory. In the case of New Orleans, the Court concluded the plan was "ameliorative" in that none of the districts in the prior plan were majority black, whereas the city's new plan had one district with a majority black population and another district in which blacks were also a majority of the voters.[64]

Given *Beer*'s facts and the Court's conclusion that the new plan was not retrogressive, the most logical interpretation of the case was that a covered jurisdiction could not adopt a redistricting plan with *fewer* majority-minority districts than its prior plan, but neither was the covered jurisdiction required to

57. *Id.*

58. 412 U.S. 755 (1973).

59. *Id.* at 759.

60. Given that past discrimination and present racism could be presumed to exist in jurisdictions subject to Section 5, the implication was that minorities were entitled to some number of "majority-minority" single member districts to overcome the inability of candidates favored by the group to garner white support. Racially segregated housing meant that in areas with substantial black populations, simply drawing "standard" single member districts would inevitably result in some number of those districts containing African Amercian majorities.

61. Early on, it is likely that the DOJ pushed only for the adoption of standard majority-minority districts—meaning districts that could be created with modest deviations from the state's race-neutral traditional districting standards or by elevating one standard over another—by, for example, elevating consideration of communities of interest over respect for political subdivision boundaries.

62. 425 U.S. 130 (1976).

63. *Id.* at 141.

64. *Id.* at 141–42.

create additional ones.[65] Maintaining the existing number of minority districts, without more, would have required most jurisdictions to deviate at times from their traditional districting standards simply because normal population shifts among districts from one census to the next make it difficult to both satisfy one person, one vote and avoid decreasing the number of minority districts.[66]

However, any natural impact the retrogression standard might have had on traditional districting standards would be difficult to evaluate because the DOJ never limited its objections to those permitted by *Beer*. Despite *Beer*'s explicit standard, the Justices continued to require covered jurisdictions to create majority-minority districts beyond those needed to avoid retrogression, even in situations indistinguishable from *Beer*. Covered jurisdictions almost never challenged the DOJ's objections.[67] Rather, legislators created the number of minority districts necessary to satisfy the DOJ and then adjusted other district lines to preserve incumbents to the extent possible.[68] Traditional districting standards again suffered. Once a minority district became part of a covered jurisdiction's districting plan, its elimination in the next round of redistricting would be "retrogressive."

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65. While the Court spoke of retrogression in the ability of members of a minority group to exercise their elective franchise, the only evidence of that ability the Court discussed in *Beer* was the number of majority-minority districts. For a discussion of the other possible meaning of retrogression in the context of a districting change, see Katharine Inglis Butler, *Redistricting in a Post-*Shaw *Era: A Small Treatise Accompanied by Districting Guidelines for Legislators, Litigants, and Courts*, 36 U. RICH. L. REV. 137, 176–91 (2002).

66. The new census population figures in the existing districts determined the existing number of majority-minority districts. *See, e.g.*, Georgia v. Ashcroft, 195 F. Supp. 2d 25, 42–71 (D.D.C. 2002) (setting out the number of majority black districts in the benchmark plans at issue in this Section 5 preclearance action). For example, assume that at the time of its creation the prior districting plan had one majority black district made up of a heavily black county, County A. Now assume that by the time of the next census enough of County A's black population have moved into adjoining County B to make that district also majority black. For retrogression purposes, the benchmark thus would be two majority black districts. Not uncommonly, one or both of districts in a scenario like this would be significantly under-populated in one-person, one-vote terms. To adjust boundaries of these two districts to add population to satisfy one person, one vote and simultaneously maintain a black majority would potentially require ignoring traditional districting standards. In this realistic hypothetical, the legislators would likely ignore its standard of respecting county boundaries. In the prior plan, each county dominated one of the districts. To maintain both districts as majority black, the first step probably would be to put the white parts of both counties into one district and the black parts into another and then make up the remaining population deficit from nearby counties. To be sure, the state did not have to maintain the *specific* majority black districts. It merely had to maintain the *number* of such districts. Nevertheless, in many instances using the black population concentrations in the actual majority black districts was likely to present the best opportunity to avoid retrogression.

67. *Beer* was decided in 1976. Thereafter, the Supreme Court decided a number of Section 5 cases involving the preclearance standard in contexts other than redistricting. However, the Court would not hear another appeal of a case involving the DOJ's denial of preclearance to a redistricting scheme until 2003, when it decided *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

68. The *Shaw* line of cases provides examples of jurisdictions that acquiesced to the DOJ's demands for minority districts that were not necessary to avoid retrogression. For examples from an earlier era, see Katharine Inglis Butler, *Reapportionment, the Courts, and the Voting Rights Act: A Resegregation of the Political Process?*, 56 U. COLO. L. REV. 1, 28–32 (1984).

In 1982, Congress amended Section 2 of the Voting Rights Act to serve as a substitute for *White v. Regester*'s constitutional racial vote dilution claim, which had been crippled by the Court's holding in *City of Mobile v. Bolden*.[69] After the amendment and, particularly, after its interpretation by the Court in *Thornburg v. Gingles*,[70] there was a widespread belief that Section 2 required legislative bodies to be elected from single-member districts that, to the extent possible, were drawn to provide a proportional number of minority districts. Thus, in response to actual or threatened litigation or simply in response to minority voters' demands for legislators directly accountable to them, states with multimember districts and local governments with at-large elections switched to single-member districts.[71] To produce a sufficient number of majority-minority districts while preserving the electoral opportunities of incumbents, traditional districting standards often had to be ignored.

Meanwhile, Section 2's amendment provided the DOJ with another basis to demand additional minority districts before it would grant preclearance. The DOJ took the position that a new districting plan could be denied preclearance, even if not retrogressive, if the plan resulted in a clear violation of Section 2.[72] The Supreme Court eventually disagreed, affirming "that preclearance under § 5 may not be denied" based on the violation of Section 2 alone, but the ruling came fifteen years after the provisions had given the DOJ new coercive powers.[73]

Thus, during the 1980s, many new, all single-member district electoral systems came into existence, almost all of which would have had some number of majority-minority districts. Inevitably, either these districts themselves deviated from traditional districting standards, or deviations were necessary to simultaneously create them and protect incumbents. In Section 5 jurisdictions, the minority districts under *Beer* had to be preserved in the post-1990 redistrictings. In non-Section 5 jurisdictions, ordinary political pressures tended

69. 446 U.S. 55, 70 (1980) (holding minority vote dilution was unconstitutional only if the challenged electoral system had been adopted or maintained for a discriminatory purpose).

70. 478 U.S. 30 (1986). Amended Section 2 prohibits election practices that result in a denial of the right to vote on account of race, with a violation established if, based on the totality of circumstances, the challengers demonstrate the political process is not equally open to participation by minorities, in that they have less opportunity than others "to participate in the political process and to elect representatives of their choice." 42 U.S. C. § 1973 (2000).

71. Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING, *supra* note 27, at 7, 74. Chandler Davidson noted that many Section 2 cases settle before trial, and still other jurisdictions change to single member districts to avoid the threat of litigation. *Id.* at 47. In Section 5 jurisdictions, changes to single member districts had to be submitted for preclearance. In the three years before the amendments to Section 2, fewer than six-hundred Section 5 jurisdictions submitted changes in their method of election. McDonald, *supra* note 27, at 71 (citation omitted). In the three years after 1982, the number more than doubled to 1,354. *Id.*

72. *See* 28 C.F.R § 51.55(b)(2) (1996). This provision was amended in 1998, eliminating a "clear violation of Section 2" as a basis to deny preclearance. 28 C.F.R. § 51.54 (2001).

73. Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 483–85 (1997).

to preserve minority districts. In both circumstances, additional deviation from traditional districting standards would be necessary.

Given the absence of push-back to its policy of insisting that covered jurisdictions adopt minority districts beyond those required by non-retrogression, the DOJ had little reason to change its position in the 1990s. Moreover, the DOJ now had new tools by which to create minority districts where none could have been found before. Similarly, minority groups, emboldened by their success in the 1980s looked for additional seats now available through improved means to identify pockets of minority voters. Partisan politics cannot be blamed for initially causing bizarre districts but was certainly responsible for making them worse and for failing to return to traditional districting standards after *Shaw*.

C. Assistance from the Census Bureau

Efforts in the 1960s through the 1980s to increase the number of minority districts were hampered by the available census data. Before 1990, outside of metropolitan areas, the Census Bureau reported the population only for areas known as enumeration districts (ED).[74] Population information could be obtained for "sub-enumeration" areas only by special request and at some expense. It was not possible to determine from the census where within an ED the reported population was located. So, for example, if the census reported that a particular ED contained one-thousand people, four-hundred of whom were black, the black population could not be "separated out" for inclusion in a district. In 1990, the Bureau exponentially increased the number of small geographic areas for which it routinely published population information. For the 1990 census, the Bureau reported population for every closed polygon in America.[75] Thus, the one-thousand persons reported in our hypothetical ED in 1980 would be reported, with racial identification, block-by-block in 1990. With computer technology available in the early 1990s and precise population to geography data now easily accessible, it was possible for an ordinary legislator to sit at her computer and draw her own dream district, connecting her faithful constituents, if necessary, by strips of geography no wider than the right of way of the interstate.

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74. U.S. CENSUS BUREAU, U.S. DEP'T. OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING GUIDE, PART A. TEXT, at 59, *available at* http://www.census.gov/prod/cen1990/cph-r/cph-r-1a.pdf. In prior censuses, population information was provided for smaller geographic units in densely populated areas.

75. *Id.* In 1980, the census provided data for 2.5 million small areas. In 1990, the number was seven million. *Id.*

D. Republicans and Minorities—A Coalition of Convenience

Minority groups quickly took advantage of the new technology to argue for the creation of additional majority-minority districts. Their efforts were aided not only by the DOJ, which had signaled its intentions to push for additional districts,[76] but also by Republicans. As early as the 1960s, Republican strategists recognized that their Party benefitted from majority black districts because their creation produced more districts that were overwhelmingly white.[77] The Republican National Committee became aggressively involved in the 1990 round of redistrictings, joining minority legislators and leaders in convincing the press and lawmakers in the South that the Voting Rights Act required them to create every majority-minority district possible.[78] White Democrats understood the impact of removing minority voters (the party's most loyal supporters) from their districts on their political futures, but politically they could not object. When they controlled the process, Democrats agreed to create additional minority districts and gerrymandered even more in an effort to hold on to their own seats.[79]

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76. *See* CUNNINGHAM, *supra* note 8, at 104.

77. *Id.* at 104–05.

78. *Id.* at 105; *see also* Adam Pertman, *GOP, Minorities Find Common Ground on House Redistricting,* BOSTON GLOBE, May 26, 1992, at N1 (reporting GOP leaders "seized on the recent changes to the Voting Rights Act" which in their view "mandate[s] that, whenever possible, minorities had to be pulled into districts where they would compose a majority"); Jack Quinn et al., *Redrawing Political Maps: An America of Groups?*, WASH. POST, Mar. 24, 1991, at C1 (reporting GOP support for the Voting Rights Act because "the Republican hope is to product largely minority districts surrounded by largely white districts, with a net gain for the GOP. Since minority voters tend to be Democratic, concentrating them into one district would water down Democratic strength in adjacent districts—thus trading one new minority (and Democratic) district for two or more new white districts that might be more likely to vote Republican"); Abigail M. Thernstrom, *A Republican-Civil Rights Conspiracy: Working Together on Legislative Redistricting*, WASH. POST, Sept. 23, 1991, at A11 ("The Republican Party welcomes radical racial gerrymandering; minority voters concentrated in minority districts further 'whitens' districts that are already majority-white, and overwhelmingly white districts are just what Republican candidates like.").

79. Preserving Democratic incumbents clearly added significantly to the distortions in the Texas districts. The lower court found that there were other more standard options for creating majority, or near majority, black and Hispanic congressional districts, but these alternatives had been rejected because they would have endangered the reelection chances of a few Democratic incumbents. The challenged districts thus were the product of mixed motives—creating minority districts while preserving non-minority incumbents. In each district, however, the Supreme Court affirmed the finding of the lower court that racial concerns predominated. "The record discloses intensive and pervasive use of race both as a proxy to protect the political fortunes of adjacent incumbents, and for its own sake in maximizing the minority population of District 30 regardless of traditional districting principles." Bush v. Vera, 517 U.S. 952, 972–73 (1996). The Court reached similar conclusions about the other two districts (whose boundaries were intertwined like a jigsaw puzzle)—incumbency concerns "were overwhelmed in the determination of the districts' bizarre shapes by the State's efforts to maximize racial divisions." *Id.* at 975; *see also* CUNNINGHAM, *supra* note 8, at 106–07 (detailing the Democratic-dominated legislature's plan for the 12th Congressional District in North Carolina) ; John Hart Ely, *Gerrymanders: The Good, the Bad and the Ugly*, 50 STAN. L. REV. 607, 619 (1998) ("[T]he most bizarre district shapes are seldom caused simply by a desire to create majority-minority districts . . . the zaniness results from a tortured interaction of ethnic and more directly political concerns—that is, from

To the extent that DOJ offered a legal justification for requiring districts for Section 5 preclearance beyond those necessary to avoid retrogression, they pointed to Section 2's incorporation into Section 5.[80] In jurisdictions not covered by Section 5, advocates for additional minority districts also relied on Section 2. Seemingly, the Section 2 argument should only have been available to those groups that were "sufficiently large and geographically compact" to take advantage of a single member district—a prerequisite to a successful Section 2 claim as the Supreme Court said in *Thornburg v. Gingles*.[81] However, the compactness part of the requirement was routinely ignored by the DOJ, by parties eager to settle Section 2 suits without litigation, and by legislators eager to create minority districts at all costs. So long as neither traditional districting standards in general nor compactness in particular mattered, the new census data and technology removed all impediments to stringing together pockets of minority population to create districts, such as those that appear in Part I.

E. Courts Add Their Own Bizarre Districts

Some federal courts proved to be equally eager to go along with creating minority districts "to satisfy Section 2," hardly giving even lip service to the *Gingles*' compactness requirement. In 1991, a federal court in Illinois,[82] with the approval of all parties to the litigation, adopted the district depicted below in order to provide a Hispanic congressional district in the Chicago area. The court itself described the district as resembling a "Rorschach blot turned on its side" and necessarily conceded that some of the well-known gerrymanders of the past looked acceptable by comparison.[83] Like the districts pictured in Part

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the process of creating a district calculated both to elect a minority and *at the same time* to control the damage to the Democrats."); O'Rourke, *supra* note 15, at 756–58 (detailing oddities in the Texas and North Carolina districts produced by efforts to protect Democratic incumbents).

80. CUNNINGHAM, *supra* note 8, at 76. Often the DOJ also argued that the failure to create additional minority districts was the product of a discriminatory purpose, to wit, to prevent the election of additional minorities. *Id.* at 77–78.

81. 478 U.S. 30, 50–51 (1986).

82. Hastert v. State Bd. of Elections, 777 F. Supp. 634 (N.D. Ill. 1991).

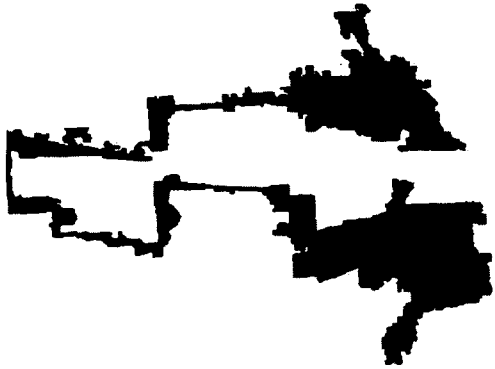
83. *Id.* at 648 n.24. The court noted that "'uncouth'" and "'irregular'" were terms the court used to describe the well-known racial gerrymander. *Id.* (quoting Gomillion v. Lightfoot, 364 U.S. 339, 340–41 (1960)). The Court then described the proposed district as follows:

> The Chicago Hispanic community resides principally in two dense enclaves, one on Chicago's near northwest side and one on the near southwest side [separated by the 7th congressional district]. . . . [The proposed] plans connect the northwest and southwest side Hispanic enclaves by running a narrow corridor around the western end of the 7th Congressional District, creating a C-shaped configuration. To ensure a sufficient Hispanic concentration within the proposed district, both maps shoot rays out from the northwest and southwest enclaves to capture additional Hispanic population. In sum, the district looks not unlike a Rorschach blot turned on its side. Few districts have quite so an extraordinary appearance.

Id.

I, this one defied geographic description. Nevertheless, the court concluded the Hispanic population was geographically compact.

FIGURE 8.
ILLINOIS 4TH CONGRESSIONAL DISTRICT, 1991



In 1992, a federal court in Florida adopted the minority districts depicted below on the theory that the new districts would "overall substantially increase[] the level of political participation and electoral representation for members of minority groups in Florida."[84] In adopting these districts, the Court stated:

> [T]he proper focus of any geographic compactness analysis is on the size and relative concentration of the minority population, rather than upon the size or shape of the district. Additionally, although respecting traditional county boundaries is a desirable approach, this aesthetic requirement should not undercut the primary goal of creating minority districts.[85]

84. DeGrandy v. Wetherell, 794 F. Supp. 1076, 1088 (N.D. Fla. 1992).
85. *Id.* at 1085.

FIGURE 9.
FLORIDA 3RD CONGRESSIONAL DISTRICT, 1992

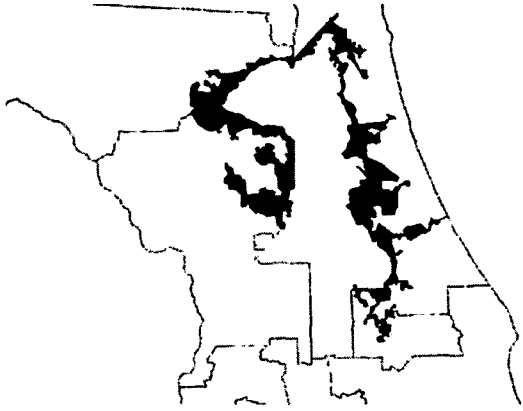
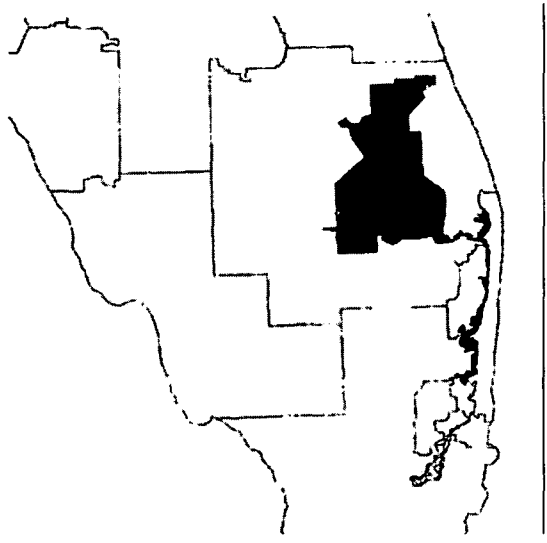


FIGURE 10.
FLORIDA 23RD CONGRESSIONAL DISTRICT, 1992



The DOJ's Section 5 demands undoubtably exceeded the impact the courts had on traditional districting standards under the guise of complying with Section 2. The minority districts depicted in Part II are representative of those the DOJ routinely extracted from Section 5 jurisdictions at all levels as the price of preclearance.

IV. DESPITE THE COURT'S RULING IN *SHAW V. RENO* AND RELATED CASES, DISTRICTS CREATED IN VIOLATION OF TRADITIONAL DISTRICTING STANDARDS STILL DOMINATE IN MANY SECTION 5 JURISDICTIONS

As briefly discussed earlier, although private citizens successfully challenged many of the districts distorted to obtain Section 5 preclearance, and despite the safe harbor from federal litigation that legislators might have secured by following traditional districting standards,[86] very few of the challenged districts were redrawn in a manner that comported with traditional districting standards. Moreover, the distorted districts actually challenged were likely only a small sample of those created during the 1990s. The redistrictings after the 2000 census not only carried over the distorted districts from the 1990s, but additional distortions were added in many jurisdictions.

I suggest three primary explanations for the minimal impact of the *Shaw* line of cases on restoring traditional districting standards. First, the Supreme Court's basis for holding the districts unconstitutional only indirectly implicated their gross deviation from traditional districting standards. Second, while the Court's *Shaw* line of cases seemingly foreclosed the direct use of race to construct districts, in a back-handed manner they legitimized gerrymandering for any other reason. Third, in most cases, elections had been held under the plans containing the challenged districts and political forces had come to rest, so to speak. Newly elected legislators were not anxious to redraw the challenged districts in a manner that would require substantial changes in their own districts.

A. Shaw *and Progeny: Good News, Bad News for Sensible Districts*

The possible good news of the *Shaw* line of cases was that legislators could no longer be compelled by legal or political forces to create majority-minority districts if those districts could only be created by significant deviations from

86. In *Bush v. Vera*, a challenge to the Texas districts depicted above, Justice O'Connor noted:

> Under our cases, the States retain a flexibility that federal courts enforcing § 2 lack, both insofar as they may avoid strict scrutiny altogether by respecting their own traditional districting principles . . . . And nothing that we say today should be read as limiting 'a State's discretion to apply traditional districting principles' in majority-minority, as in other, districts.

517 U.S. 952, 978 (1996) (quoting Bush v. Vera, 517 U.S. 952, 1046 (1996) (Souter, J., dissenting) (citations omitted)).

traditional districting standards.[87] The bad news for sensible districts was that these cases had no impact on the legitimacy of bizarre districts created for non-racial reasons. While the Supreme Court resoundingly rejected the underlying rationale for these districts having been created—namely to comply with either Section 5 or Section 2 of the Voting Rights Act—the key to their unconstitutionality was solely that they were racial gerrymanders. The district lines were driven by racial concerns, triggering strict scrutiny. The states failed to put forth a compelling state interest that could justify the use of race as the primary basis to assign citizens to election districts, at least not if the resulting districts violated traditional districting standards. The Court in *Shaw* emphasized that traditional districting standards (other than one person, one vote) were not mandated by the Constitution.[88]

The critical point for the future of sensible districts was that to trigger strict scrutiny, the challenger must demonstrate that race, rather than politics, drove the legislature's districting choices. Writing for the majority in the last of the *Shaw* progeny cases, Justice Breyer summarized the challenger's burden as follows:

> The Court has specified that those who claim that a legislature has improperly used race as a criterion, in order, for example, to create a majority-minority district, must show at a minimum that the "legislature subordinated traditional race-neutral districting principles . . . to racial considerations." Race must not simply have been "*a* motivation for the drawing of amajority-minority district," but "the '*predominant* factor' motivating the legislature's districting decision[.]" Plaintiffs must show that a facially neutral law "'is "unexplainable on grounds other than race."'"[89]

Challengers in *Shaw*'s progeny cases had experienced little difficulty satisfying this standard because legislators and others promoting these districts basically had convinced lawmakers and the public that the Voting Rights Act required the creation of majority-minority districts by any means available. Once legislators were educated, however, challengers would have more difficulty demonstrating that race was "the '*predominant* factor' motivating the legislature's districting decision."[90] In *Easley v. Cromartie*,[91] the Court

87. It should be noted that *Shaw* does not hamper legislators' ability to create majority-minority districts that comply with traditional districting standards even if they intentionally elevate one standard above another for that purpose (e.g., electing to accommodate a community of interest rather than following political subdivisions' boundaries).

88. *See* Shaw v. Reno, 509 U.S. 630, 647 (1993).

89. Easley v. Cromartie, 532 U.S. 234, 241–42 (2001) (citations omitted) (ellipsis in original) (quoting Hunt v. Cromartie, 526 U.S. 541, 546, 547 (1999); Bush v. Vera, 517 U.S. 952, 959 (1996)).

90. *Id.* at 241.

91. 532 U.S. 234 (2001).

reviewed North Carolina's post-1990 congressional districts for the fourth time. This time, however, the legislature had produced the plan with full knowledge that it was limited in the use it could make of race. The Court, by a five to four vote, reversed the lower court's determination that race, rather than politics, had been the predominate factor in revising (very modestly revising, it should be noted) the state's invalidated 12th Congressional District.[92]

Thus, the end result of the Court's eight affirmative racial gerrymandering decisions was that legislators could continue to create majority-minority districts without complying with traditional districting standards, so long as they provided credible political, rather than racial, reasons for their non-conformance. Far more significantly than the means *Cromartie* provided to evade charges of race-based districting was the Court's emphasis that gerrymandering for purely political purposes—including to advance partisan agendas or to protect incumbents, no matter how bizarre the districts—did not trigger strict scrutiny. Anyone challenging bizarre districts on grounds other than race would have the burden of establishing not only political gerrymandering (a discriminatory intent) but also partisan dilution (a discriminatory impact).[93]

As critics of the Court's *Shaw* line of cases pointed out, some white majority districts, like those below, were equally distorted for nonracial reasons but were not subject to strict scrutiny and thus were likely to survive a constitutional challenge.[94]

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92. *Id.* at 243.

93. In *Davis v. Bandemer*, 478 U.S. 109 (1986), the Court held political gerrymandering presented a justiciable issue. *Id.* at 127. The challengers could establish an Equal Protection claim if they were able to show that a districting plan had been adopted with the intent to discriminate against an identifiable political group, and that the plan actually had a discriminatory effect on the group. *Id.* However, the Court's standard set a seemingly impossible burden to establish discriminatory impact ("the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole"). *Id.* at 132. Political gerrymandering was before the Court again in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). In *Vieth*, the Supreme Court affirmed the decision of the three-judge district court, finding insufficient evidence of a discriminatory impact to support a partisan gerrymandering claim. *Vieth*, 541 U.S. at 305–06. Four of the Justices (Rehnquist, Scalia, O'Connor, and Thomas) concluded that political gerrymandering claims were non-justiciable. *Id.* at 281. Justice Kennedy (who provided the fifth vote for affirmation) disagreed. *Id.* at 306–17 (Kennedy, J., concurring). Justice Kennedy agreed that no acceptable standards assessing partisan gerrymandering claims under the Constitution had been proposed by the four dissenting Justices, however, he remained open to the possibility that standards might someday be devised to adjudicate claims of extreme partisan gerrymandering. *Id.* at 316–17.

94. *See* Bush v. Vera, 517 U.S. 952, 1003–04 (1996) (Stevens, J., dissenting).

FIGURE 11.
MAJORITY-WHITE TEXAS CONGRESSIONAL DISTRICTS
LEFT UNCHALLENGED IN *BUSH V. VERA* (SCALE VARIES)[95]

In most circumstances, districts such as those above were a by-product of having created majority-minority districts, which could not be created by following traditional districting standards.[96] "But for" the majority-minority districts, legislators generally would not have needed to resort to extreme

95. Maps courtesy of Mark Monmonier, Professor of Geography, Maxwell School of Citizenship and Public Affairs, Syracuse University.

96. Majority-white Texas Districts 3 and 25, for example, were distorted in part because they were adjacent to a contorted minority district. *Id.* at 1019 n.18. The ripple effect of the three distorted minority districts on others was evidenced in part by the fact that when the lower court redrew those districts, it also had to redraw portions of ten other districts (including the three majority white districts depicted above). Of course, it is possible that compact minority districts could have been produced, but not without undermining the reelection of certain Democratic incumbents—which essentially was the argument Texas made on appeal. Indeed, credible arguments were made by Justice Stevens, dissenting in *Bush v. Vera*, as well as by commentators, that protecting Democratic incumbents, rather than racial concerns, produced Texas's distorted districts (which, had these arguments prevailed, would have avoided the application of strict scrutiny). *See id.* at 1004; Ely, *supra* note 79, at 613. The district court acknowledged that Texas's redistricting plan as a whole was a substantial partisan gerrymander:

> It is important to realize that as enacted in Texas in 1991, many incumbent protection boundaries sabotaged traditional redistricting principles as they routinely divided counties, cities, neighborhoods, and regions. For the sake of maintaining or winning seats in the House of Representatives, Congressmen or would-be Congressmen shed hostile groups and potential opponents by fencing them out of their districts. The Legislature obligingly carved out districts of apparent supporters of incumbents, as suggested by the incumbents, and then added appendages to connect their residences to those districts.

Vera v. Richards, 861 F. Supp. 1304, 1334 (S.D.Tex. 1994) (citations omitted). Nevertheless, the Court agreed with the lower court's conclusion that the districts were unconstitutional racial gerrymanders, finding "ample bases on which to conclude both that racially motivated gerrymandering had a qualitatively greater influence on the drawing of district lines than politically motivated gerrymandering, [which was itself] . . . accomplished in large part by the use of race as a proxy." Bush v. Vera, 517 U.S. 952, 969 (1996).

gerrymandering to further other interests.[97] The critics are correct, however, in noting the irony of invalidating bizarre minority districts while leaving untouched bizarre districts created for other reasons. A race-based district often would satisfy one basis for a sensible district—namely that its inhabitants (at least that portion of its inhabitants for which it was created) have sufficient common political interests to be represented effectively by the district's legislator.

B. The Politics of Distorted Districts

One might believe that after *Shaw* seemingly lessened the ability of the DOJ and others to extract gerrymandering under the Voting Rights Act, states would return to their traditional districting standards. A casual perusal of the congressional and legislative districts in the Section 5 states—most of which can be viewed online—should convince the reader otherwise.[98] I suggest the explanation for continued, perhaps even greater, deviation from traditional districting standards is a combination of "politics," "politics with compassion," and "politics with a vengeance."

1. Politics

All of a jurisdiction's districts are connected to some degree. The geographic distortions necessary to create minority districts or to help incumbents displaced by those districts necessarily rippled though a state's entire districting plan, indirectly producing additional "non-standard" districts. The only distorted districts required to be redrawn by *Shaw*-type cases were those in which the distortions were primarily attributable to racial sorting. The only remedy required was to redraw the race-based districts without an impermissible reliance on race.[99]

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97. Democrats controlled the post-1990 redistricting in North Carolina, Georgia, and Texas. Partisan make-up of legislative houses and congressional delegations is available online: FairVote, North Carolina Redistricting 2000, http://www.fairvote.org/?page=323; FairVote, Georgia Redistricting 2000, http://www.fairvote.org/?page=300; and FairVote, Texas Redistricting 2000, http://www.fairvote.org/?page=333. Had these legislators not been under legal and political pressure to create minority districts, they surely would have been able to preserve their reelection opportunities, as they had in the past, with minimal deviations from traditional districting principles.

98. Maps of these districts can be accessed via the Department of the Interior's National Atlas of the United States website, located at http://www.nationalatlas.gov. Various state legislative district maps can also be located online: Alabama, http://www.legislature.state.al.us; Arizona, http://www.azredistricting.org; Georgia, http://www.georgiareapportionment.uga.edu; Louisiana, http://www.legis.state.la.us; Mississippi, http://www.msjrc.state.ms.us; North Carolina, http://www.ncleg.net/GIS/Redistricting/District_Plans/Current_Plans.html; South Carolina, http://www.scstatehouse.net/ man06/manual06.html;Texas, http://www.tlc.state.tx.us/redist/ availablemaps.htm; Virginia, http://www.dlsgis.state.va.us/default.htm.

99. *See, e.g.*, Vera v. Bush, 933 F. Supp. 1341 (S.D. Tex. 1996) (the Texas racial gerrymandering case on remand). In deference to the legislature, the district court's remedial plan was limited to revising the districts found to be unconstitutional racial gerrymanders and those districts whose boundaries were

In most cases, elections had been held in the race-based districts before they were ruled unconstitutional. Those elected no doubt believed the boundaries of their districts, even if distorted, were just fine. When legislators eventually produced remedial districts, they would be inclined to make as few modifications to the invalid ones as possible to lessen the ripple effect on the remaining districts.[100] Thus, the natural self-preservation instincts of incumbents would result in redrawn districts changing only enough to remedy the racial gerrymandering. Indeed, they may simply have followed the example set by North Carolina, which substituted "political data" for "racial data," to convert its racially gerrymandered 12th Congressional District into an unassailable Democratic gerrymander, with little increase in its compliance with traditional districting standards.[101]

2. *Politics with Compassion (Maybe)*

Notwithstanding the means by which they got there, minority incumbents enjoyed the consideration legislators often afforded their own members. Even in an era of seemingly virulent partisanship, particularly in redistricting, minority incumbents, including very junior ones, got "byes" from both parties.[102] Some legislators were undoubtably motivated by compassion for the new incumbents and others by a genuine belief in the importance of diversity in the legislative body and still others by the perception that, in an era of political correctness, failure to affirmatively support the retention of minority

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necessarily affected. *Id.* at 1342. Roughly a third of all voters in Texas lived in an affected district, which was "an inevitable consequence of the magnitude and brazenness of the gerrymandering in which the Legislature engaged." *Id.* at 1349. The district court recognized that there were other distorted districts, but indicated it had "no remedial mandate so broad as to address any other districts aside from those found unconstitutional." *Id.* at 1352 n.16. *But see* Johnson v. Miller, 922 F. Supp. 1556, 1560–61 (S.D. Ga. 1995), *aff'd sub nom.*, Abrams v. Johnson, 521 U.S. 74 (1997) (concluding the court was not bound by the usual rule of deference to legislative policy when drawing a remedial plan because the districting plan at issue was not the product of true legislative intent but rather of improper DOJ coercion).

100. Unlike a federal court, whose "redrawing" of election districts is limited to remedying the constitutional violation, the legislature would be free to produce an entirely new plan, unless there were state law restrictions on its redistricting powers.

101. The state redrew the district using as building blocks precincts that had voted overwhelmingly for Democratic candidates, which to no one's surprise were also heavily black precincts. The revised district, which was only slightly less bizarre than its predecessor, can be viewed on line. North Carolina General Assembly, Information Systems Division, North Carolina Congressional Districts—Percent Above and Below Ideal Population (April 3, 2002), http://www.ncga.state.nc.us/Redistricting/Archives/Thematic_Maps/Ideal_Population/Congress_Ideal.pdf.

102. When North Carolina redrew the 12th Congressional District, part of its "political explanation" for making virtually no changes in the district was to protect its incumbent, Democrat Mel Watts, an African American. Easley v. Cromartie, 532 U.S. 234, 247–48 (2001). The state alleged that pitting Watts against a Republican incumbent would have been the unavoidable result of adopting a more "standard" district. *Id.* Similarly, when the new Republican majority in Georgia's legislature redrew the state's congressional districts in 2005, it appears to have preserved the reelection opportunities of the state's four African American congressmen (all Democrats).

districts carried certain political risks. Moreover, *Shaw* notwithstanding, covered jurisdictions still had to comply with Section 5's non-retrogression standard and all jurisdictions had to guard against Section 2 liability. Because of increased geographic dispersion of African Americans by 2000, retaining the number of majority, or near-majority black districts that had been added during the 1990s would be difficult without further erosion of districting standards.

3. Politics with a Vengeance

Before *Shaw*, Republicans used the Voting Rights Act to insist upon the creation of additional minority districts (seldom conceding the political benefits they expected to reap from "bleached" districts left behind). Democrats used the Voting Rights Act's "requirement" that those districts be created as an explanation for why so many of the state's districting standards had been ignored (seldom conceding that some portion of the geographic distortion in the post-1990s districts was motivated by their desire to be reelected). After *Shaw* and its companion cases made clear that traditional districting standards were not mandated by the constitution and that gerrymandering for nonracial reasons did not trigger usually fatal strict scrutiny, the parties had less need to "rely" on the Voting Rights Act to cover up partisan agendas.

When it was time to redistrict again following the 2000 Census, many legislators had been elected in geographically distorted districts to which they were understandably attached. Once legislators were hooked on the personal and partisan advantages of districts drawn without regard to traditional districting standards, it was easy to draw more districts with even less regard for standards. As three distinguished voting rights scholars recently noted:

> In earlier decades, respect for these principles imposed tacit constraints on the extent to which self-interested redistricters could manipulate district design to insulate preferred incumbents and candidates from political competition and electoral accountability. As with other tacit constraints, once these informal, generally accepted limitations on unmediated pursuit of political self-interest begin to break down, a race to the bottom quickly ensures the virtual elimination of these traditional constraints altogether.[103]

103. Brief of Samuel Issacharoff, Burt Neuborne, and Richard H. Pildes as Amici Curiae in Support of Appellants 26, League of United Latin Am. Citizens v. Perry, No. 05-204; Travis County v. Perry, No. 05-254; Eddie Jackson v. Perry, No. 05-276; GI Forum of Texas v. Perry, No. 05-439 (U.S. Jan. 10, 2006).

Georgia's 2000 redistricting plans provide an example of the Democratic strategy after *Shaw*. Democrats controlled the state legislature at the time.[104] On an almost strict party-line vote, the legislature passed a plan for the state senate that maintained the number of districts with majority black voting age populations and also accomplished its sponsors' expressed purpose to increase the number of Democrats in the Senate.[105] The DOJ refused to preclear three of the districts because the plan "retrogressed from the 1992 plan."[106] Georgia was unsuccessful in overturning the objection in the district court.[107] However, the Supreme Court reversed, thus rejecting the DOJ's position and, in the process, adopted a highly subjective definition of when a districting plan is "retrogressive."[108] Without going into detail, the Court's new definition of retrogression allowed the state to place greater reliance on the presence of minority "influence" and "coalitional" districts, as well as on "the comparative position of legislative leadership, influence, and power for representatives of the [existing] majority-minority districts" to maintain the minority group's ability to participate in the political process.[109]

Picking the most grossly distorted districts created following the 2000 census would be difficult. However, the congressional districts that Georgia's Democrats adopted in 2002 would have to be in the running. The districts were so distorted that the representation of the state-wide plan provided below does not fully reveal the degree to which it violates traditional districting standards.[110] The most bizarre district is the 13th Congressional District, a new

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104. *See* FairVote, Georgia Redistricting 2000, http://www.fairvote.org/?page=300 (providing breakdown of partisan composition of the Georgia Legislature in 1991 and 2001). Democrats were still in control but clearly had lost ground. The state was unable to produce a new congressional districting plan after its 1992 plan was thrown out in *Miller v. Johnson*, 515 U.S. 900 (1995) (one of the *Shaw* progeny cases), and thus congressional elections in 1996, 1998, and 2000 were held under a court-drawn plan. *Abrams*, 521 U.S. at 78. Whether it was because of the new districts or simply because of changing voter sentiment, Democrats went from holding nine congressional seats out of ten in 1991 (under the 1980 apportionment) to only three of eleven in 2001. FairVote, Georgia Redistricting 2000, http://www.fairvote.org/?page=300. The three Democrats were black and the eight Republicans were white. Kevin Sack, *Democrats Face Facts of Redrawing Georgia*, N.Y. TIMES, Aug. 22, 2001, at A14. Democrats faired better in the legislative districts they had drawn themselves. They dropped from 45 to 32 seats of a total of 56 in the senate and from 145 to 105 seats in the house of a total of 180. FairVote, Georgia Redistricting 2000, http://www.fairvote.org/?page=300.

105. Georgia v. Ashcroft, 539 U.S. 461, 469–70 (2003).

106. *Id.* at 467.

107. *Id.* at 468.

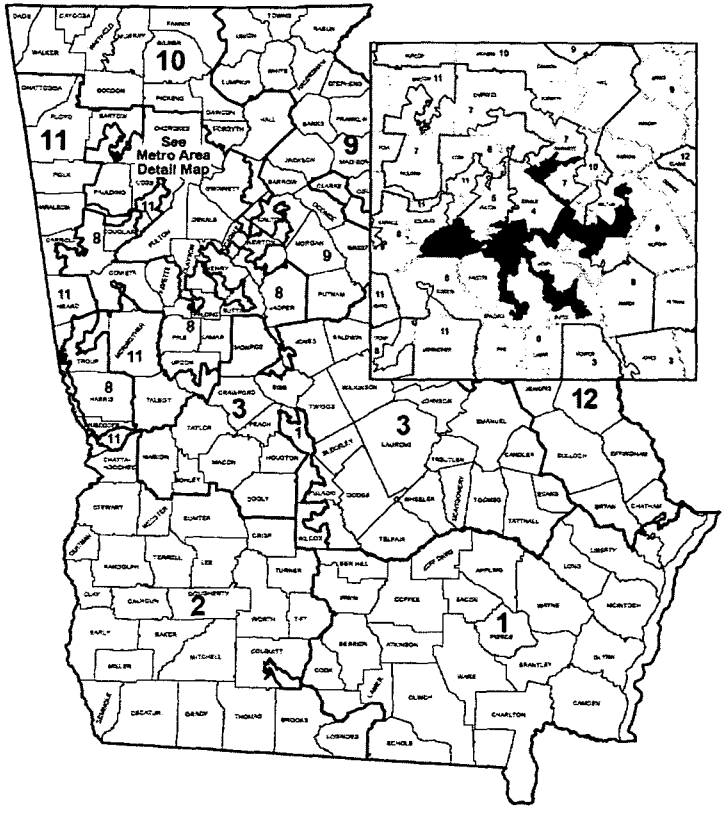
108. *Id.* at 479–85, 491.

109. *Id.* at 483.

110. For a map of Georgia's districts after the 2002 redistricting, visit http://nationalatlas.gov/printable/images/pdf/congdist/pagecgd109_ga2.pdf. The Democrats' Supreme Court victory in *Georgia v. Ashcroft* brought them only a temporary reprieve from the looming presence of a statewide Republican electoral majority. The Supreme Court remanded the case for reconsideration in light of its announced standard. *Id.* at 491. Meanwhile, back in federal court in Georgia, Republicans successfully challenged the modified plan the state adopted to obtain Section 5 preclearance as a violation of one person, one vote. *See* Larios v. Cox, 300 F. Supp. 2d 1320, 1356 (N.D. Ga. 2004). When the legislature failed to produce a new plan, the 2004 elections were held under a plan drawn by

heavily Democratic district created by stringing together pockets of black population and other Democratic strongholds from the suburbs surrounding Atlanta.

FIGURE 12.
GEORGIA CONGRESSIONAL DISTRICTS IN 2002,
EMPHASIZING THE 13TH DISTRICT



the court. Republicans gained control of both houses of the legislature in 2004 and thereafter redrew the congressional districts. The new districts are slightly less geographically distorted (and probably even more favorable to election of Republicans) than the 2002 districts, but still nowhere close to the compact congressional districts of the past composed of entire counties. The new map divides only eighteen counties compared to the prior 2002 plan, which divided thirty-four. However, the 1980 plan divided only three counties (one of which, Fulton, was too large to be contained within a single district).

It is reasonable to assume that Georgia was not alone in its seemingly voluntary abandonment of districting standards. Today, in jurisdictions subject to Section 5, election districts at all levels of government are highly irregular. Mississippi's state legislative districts may take the prize for the most distorted—distortion that cannot be appreciated in black and white. The districts can be found in color online.[111]

V. THE FUTURE OF GEOGRAPHIC REPRESENTATION

Where do grossly distorted districts leave grass roots political activity? Where do they leave would-be challengers? Of course, not everyone agrees that distorted districts—at least majority-minority ones—are grossly "dysfunctional."[112] However, arguments that distorted districts do not disrupt grassroots political activity are a hard sell. Most political groups are organized on the basis of geography—counties, municipalities, neighborhoods. Districts that cut across recognized areas make the efforts of these groups more difficult to coordinate—particularly if they are aimed at the incumbent. Challengers have difficulty locating their potential supporters and finding opportunities to personally address political and civic groups about issues of the district—not to mention figuring out what issues might be of common concern to people in the district, whose primary commonality may have been support of the incumbent's party in past elections.

Assuming these districts are non-functional in a representational system based on geography, what is the solution? One solution is to adopt a different system, one that provides all voters with genuine interest group representation rather than the artificial version currently provided to minority groups and the highly partisan by extreme gerrymandering. Proportional representation systems come in numerous variations and (thankfully) are beyond the scope of this article.[113] Unlike winner-take-all systems, these systems provide a much closer match between the votes cast for various political parties and the make up of the legislative body. Whether this feature of proportional representation is a sufficient basis to prefer it over geographically based representation is highly debatable. What is not debatable, however, is that proportional representation would be a drastic change in the method of representation in

111. Mississippi's state legislative districts can be viewed at http://www.msjrc.state.ms.us.

112. *See* MONMONIER, *supra* note 7, at 154 (arguing North Carolina's interstate district and some of the intricate inner city districts, such as Chicago's 4th Congressional District approved in *Hastert v. State Bd. of Elections*, 777 F. Supp. 634 (N.D. Ill 1991), are more functional than their critics suggest).

113. Recognizing the limitations of single member districts as a means to guarantee "fair" minority representation, many voting rights advocates prefer one of the semiproportional representation systems, such as cumulative voting, limited voting, or a "single transferable vote" system. *See, e.g.*, Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991) (paren); Judith Reed, *Of Boroughs, Boundaries and Bullwinkles: The Limitations of Single-Member Districts in a Multiracial Context*, 19 FORDHAM URB. L.J. 759 (1992) (paren); Richard Engstrom, *The Single Transferable Vote: An Alternative Remedy for Minority Vote Dilution*, 27 U.S.F. L. REV. 781 (1997) (paren).

place since the founding of the nation for Congress, state legislatures, and most local governing bodies. Such a change should not be imposed on any jurisdiction's citizens without their consent.[114]

What are the prospects for restoring sensible geographic districts? The Supreme Court is considering another political gerrymandering case this Term, but nothing in its prior decisions suggests an inclination to find that citizens have a constitutional right to non-bizarre election districts.[115] Even if the Court concludes standards can be devised for partisan gerrymandering, there is no guarantee that more sensible districts will then emerge. Indeed, so long as *Gaffney v. Cummings*[116] remains good law, the "remedy" for partisan gerrymandering might be to gerrymander more to produce partisan balance.

At this point, if relief is to be available for the "outs,"[117] it may be hard to find. Perhaps state courts can be persuaded to take seriously state constitutional or statutory requirements for the creation of districts—when they exist.[118] It seems highly unlikely that legislators elected from distorted districts will see any value in change, particularly if they appreciate the difficulty facing those who would challenge them for their seats.

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114. Perhaps similar logic could serve as a basis to challenge the constitutionality of any purported "district" that bears no resemblance to what passed for an acceptable district prior to 1990. Drawing lines around a sufficient population to satisfy one person, one vote and giving the enclosed area a number should not a district make.

115. League of United Latin Am. Citizens v. Perry, No. 05-204 (argued Mar. 1, 2006) (the Texas Republican gerrymander of Tom Delay fame). Given that *Vieth v. Jubelirer*, 541 U.S. 267 (2004), placed partisan gerrymandering claims on life-support, there has been much speculation as why the Court agreed to hear another case so soon.

116. 412 U.S. 735 (1973) (finding constitutional a districting plan "gerrymandered" to produce districts—many of which violated the state's traditional districting plan—that would result in a legislature that mirrored the popular vote).

117. Here I include among the "outs" that large segment of the electorate that is not highly partisan and thus is likely to vote for an individual candidate with modest or no regard for party, as well as would-be challengers to incumbents.

118. South Carolina's Constitution, as well as those of many other states, mandates a formal connection between counties and members of the legislature. *See* S.C. CONST. art. III, §§ 3, 6. Of course, this connection cannot be recognized when it violates federal law, thus precluding a return to county-based representation. One could argue, however, that a state's constitutional provisions must be followed except to the extent necessary to comply with federal law, thus providing a basis to challenge certain offending districts in state court.