Shaw v. Reno and the Future of Voting Rights*

Bernard Grofman, *University of California, Irvine*

Four key factors affected the initial phase of 1990 congressional and legislative redistricting: (1) the continued insistence by federal courts on strict standards of population equality (especially for congressional districts) that frequently forced state legislatures to cross city and county lines for the purpose of population equalization (Grofman and Handley 1991); (2) the Supreme Court's upholding in 1986 of the constitutionality of the "effects test" language added to Section 2 of the Voting Rights Act of 1965 when the Act was renewed in 1982, and the way in which the Court interpreted the new language of Section 2 to create a dramatically simplified three-pronged test of minority vote dilution (Grofman, Handley, and Niemi 1992); (3) vigorous enforcement by the Civil Rights Division of the Department of Justice of Section 5 of the Voting Rights Act (preclearance provisions that apply to 16 states in whole or part); and (4) the computer revolution, which has made it easy to rapidly draw alternative districting plans whose partisan and racial characteristics can be immediately assessed.

The combination of Section 2 and Section 5 has made the Voting Rights Act "a brooding omnipresence" in the decision calculus of legislators anticipating voting rights challenges to the plans they draw (Grofman 1993, 1263). Fear of voting rights litigation that would delay implementation of new plans and/or leave open the possibility that a plan would be totally redrawn by a court (with unforeseeable consequences for incumbents), as well as the greater black presence in legislative halls due to earlier redistrictings, has led legislatures to draw many more black majority seats in the 1990s than ever before, especially in the South. As a consequence, 1992 saw dramatic gains in black legislative representation in the South, especially at the congressional level. For example, in the South the number of black members of Congress went from 4 to 17. Hispanics, also under special Voting Rights protection, have made legislative gains as well. Handley, Grofman, and Arden (1994) show that black and Hispanic gains in representation in the 1990s, like minority legislative gains in the 1970s and 1980s (Grofman and Handley 1991, 1992), can be attributed almost entirely to the creation of black and Hispanic majority districts.

Computer-drawn districts, built from units as small as census blocks and sometimes even splitting blocks, have raised the potential for gerrymandering to a new level, and given rise to some remarkably creative cartography. Many of the new minority seat gains have occurred in tortuously shaped districts. These districts were carefully crafted to agglomerate enough minority population to assure a seat that a minority member might have a realistic chance to win given patterns of polarized voting. Arguably, standard redistricting criteria such as preservation of city and county boundaries, compactness, and even contiguity, have been given less weight in the 1990s, especially in areas where there was potential for drawing minority districts, than at any time in the past (Pildes and Niemi 1993). While black and Hispanic seats are certainly not the only strange-looking ones, they constitute a disproportionate share of the most egregiously irregular shapes—at least for Congress (Pildes and Niemi 1993). Also, some of the irregularities in non-majority-minority districts can be attributed to borders they share with minority districts.

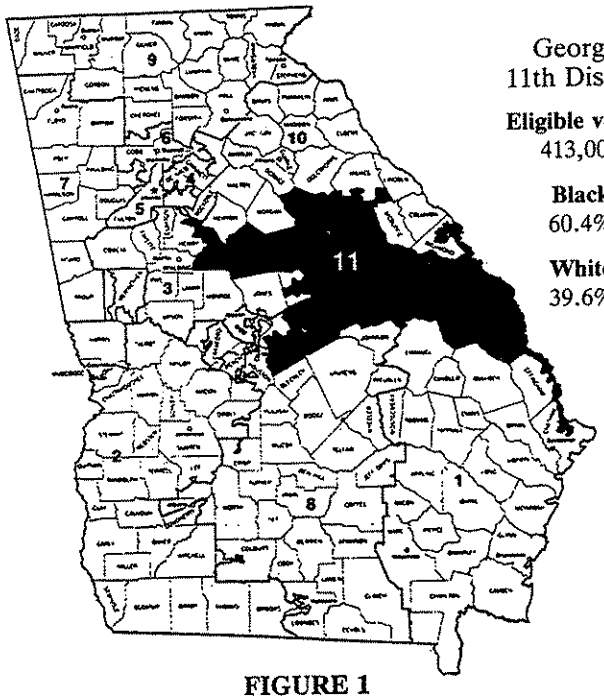
Shaw v. Reno and the Voting Rights Backlash

The peculiar shapes of a number of majority-minority (especially some of the majority-black congressional districts that were drawn in the South; see examples from Georgia, Louisiana and North Carolina in Figures 1–3) have helped trigger a public,[1] scholarly,[2] and legal[3] backlash against the creation of convoluted majority-minority districts and against the judicial and administrative implementation of the Voting Rights Act more generally.

Some critics object to districts like those pictured in the figures above on the grounds that a substantial disregarding of geographic criteria—whether in the interest of creating seats with black or Hispanic majorities or for any other purpose—harms a geographic-based notion of representation. For example, Ehrenhalt (1993, 20) asserts that the "main casualty . . . is the erosion of the geographical community-of-place as the basis for political representation. . . . If a district is nothing more than two pockets of separate white voters strung together. . . , then it is fair to ask whether the notion of a "district" is gradually ceasing to have any geographical meaning at all."[4]

However, it is not district shapes, per se, that are at the root of the concerns expressed by many other critics. These critics would not be mollified even if the shapes of majority-minority districts were less irregular. They would object to *any* use of racial criteria as improper, on the grounds that racially motivated districting inexorably moves us away from a color-blind society to one of separate groups each making its own claim for a proportional part of the pie.

White Democratic legislators in the South have been unhappy with the emphasis on creating black majority seats for yet a different reason. They fear for their own political safety if black voters loyal to the Democratic party are stripped away into heavily black seats (see Brace, Grofman, and Handley



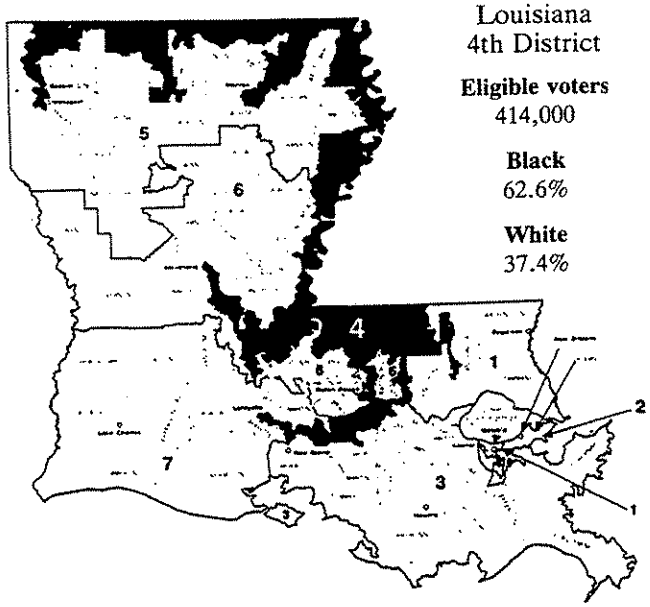
Georgia
11th District

Eligible voters
413,000

Black
60.4%

White
39.6%

FIGURE 1



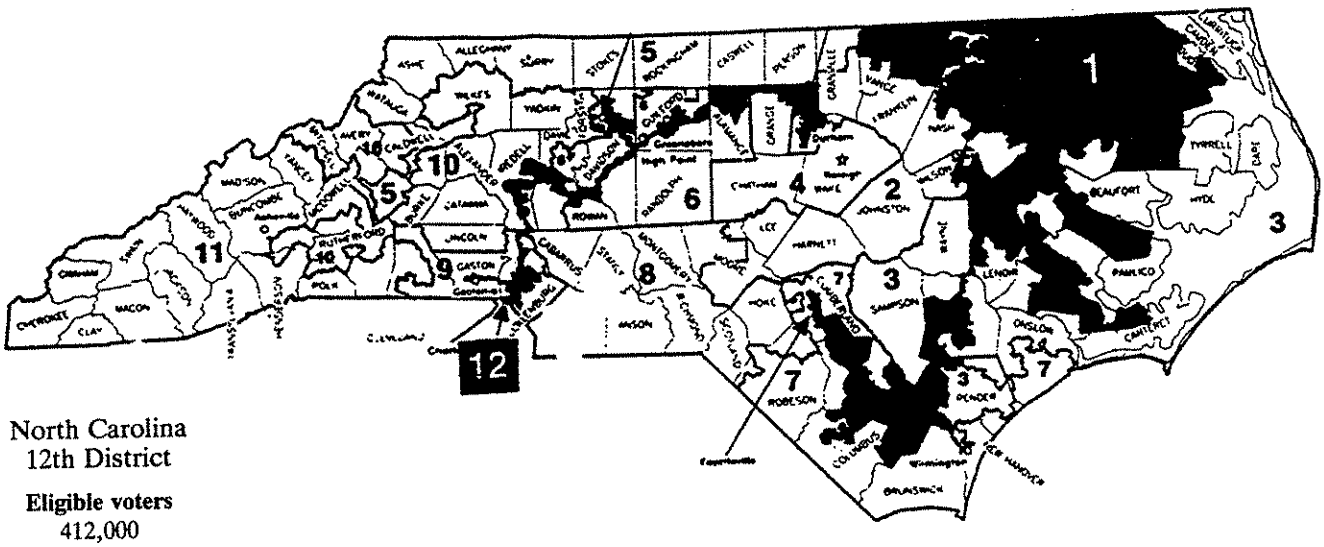
Louisiana
4th District

Eligible voters
414,000

Black
62.6%

White
37.4%

FIGURE 2



North Carolina
12th District

Eligible voters
412,000

Black
53.3%

White
46.7%

Source: U.S. Census Bureau

FIGURE 3

1987). These fears were reinforced by the visible evidence that Republican party officials throughout the South were joining with black Democrats in voting rights lawsuits, and by allegations that the Republican-run Department of Justice in the early 1990s was enforcing Section 5 of the Voting Rights Act in a harsh and unreasonable manner in which "maximizing" the electoral success of black and Hispanic candidates had replaced "equal opportunity" as the prerequisite for a plan's preclearance.[5]

The present battleground for the fight about race-conscious districting is the courts. The opening shot was fired in *Shaw v. Reno*, a challenge to North Carolina's congressional plan, which was brought by white voters on the grounds that the plan unconstitutionally separated voters according to their race.[6] North Carolina is a state the bulk of whose black population is found in counties covered by Section 5 of the Voting Rights Act. In 1990, North Carolina had no black congressional districts and the last black member of Congress elected from that state was during Reconstruction. The congressional plan passed by the North Carolina legislature in 1991 contained one black majority seat. That plan was rejected by the Department of Justice, which indicated that the state had failed to demonstrate that the plan had neither the purpose nor the effect of diluting minority voting strength. The Justice Department suggested that a second black majority district could be drawn in the *southeastern* portion of the state. The state instead proposed a new plan, but with the second black majority district drawn *elsewhere* in the state. As is evident from Figure 3, the lines of that Second District and the elongated and snakelike Twelfth Congressional District are bizarre in the extreme.

The *Shaw* challenge to the North Carolina plan was initially rejected by a three-judge federal district court by a 2-1 vote. That court noted that district compactness was not a federal requirement.[7] An appeal to the Supreme Court led to a 5-4 decision in which the Supreme Court majority enunciated a new test for an equal protection violation. The majority noted that the North Carolina redistricting scheme did not violate white voter's rights because it did not lead to unfairly diluting or canceling out the votes of white voters because white voters were not being underrepresented (ten of the twelve districts had clear white majorities, slightly more than the white proportion of state population), and avowed that lack of compactness, per se, was not a constitutional violation. Nonetheless, they asserted that equal protection can be violated if redistricting legislation "is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling state justification." The Court then remanded *Shaw* back to the district court for a rehearing on the merits based on this new legal test (see *Shaw v. Hunt*).[8]

The Shaw Decision

The Supreme Court's somewhat muddled 1993 majority opinion in *Shaw v. Reno* was written by Justice O'Connor, joined by Justices Renquist, Scalia, Kennedy, and Thomas, and strongly suggests compromises among the views of these justices in forging a majority. There were four separate dissents, one by Justice White joined by Justices Blackmun and Stevens), one by Justice Souter, one by Justice Blackmun, and one by Justice Stevens.

Shaw directly raised what Justice O'Connor refers to as "two of the most complex and sensitive issues this Court has faced in recent years: the meaning of the "right" to vote and the propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups."[9]

Reacting to the contorted shape of North Carolina's Twelfth Congressional District (See Figure 3) Justice O'Connor wrote:

> (W)e believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. . . . For these reasons, we conclude that a plaintiff may challenge a reapportionment statute under the Equal Protection Clause and may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.

While Justice O'Connor's opinion is hostile to race-based classifications, it does not make the use of race-conscious districting per se unconstitutional. Indeed, Justice O'Connor is careful to say that "this Court has never held that race-conscious decision making is impermissible in all circumstances." Rather, her opinion draws on earlier cases making race a suspect classification such that allocations that make use of racial categories will be subject to strict scrutiny and must pass a test of being "narrowly tailored to further a compelling governmental interest."

> Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility. 'Even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race-consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs.' (O'Connor opinion in *Shaw v. Reno*, internal cites to other cases omitted).

The four justices who dissented from the majority opinion in *Shaw* did so for a number of reasons, and did so with vehemence.

The main arguments raised by the dissenters were based on the vagueness of the new equal protection test laid down in *Shaw*, and

the lack of grounding of that test in criteria related to equal protection.

> Given two districts drawn on similar, race-based grounds, the one does not become more injurious than the other simply by virtue of being snake-like, at least so far as the Constitution is concerned and absent any evidence of differential racial impact. (Justice White in dissent, joined by Justices Blackmun and Stevens.)

Justice Souter, similarly, could not understand how a plan could be a violation of equal protection when there was no group whose rights had been violated.

> The Court offers no adequate justification for treating the narrow category of bizarrely shaped district claims differently from other districting claims. . . . I would not respond to the seeming egregiousness of the redistricting now before us by untethering the concept of racial gerrymander in such a case from the concept of harm exemplified by dilution. (Justice Souter in dissent.)

One other important argument raised by the dissenters was the claim that the peculiarities of the North Carolina congressional plan could, in fact, be accounted for, at least in part, in nonracial terms. Justice White in dissent (joined by Justices Blackmun and Stevens) approvingly quoted the views of one political scientist (myself) that "Understanding why the [North Carolina] configurations are shaped as they are requires us to know at least as much about the interests of incumbent Democratic politicians, as it does knowledge of the Voting Rights Act" (Grofman 1993, 1258).[10]

However, we cannot really understand the reasons for the vehemence of the dissenters without understanding both the possible stakes (an end to black gains in representation) and the context of historical injustices against blacks and other minorities.

Misinterpretations of Shaw

Three common misinterpretations of *Shaw* are found with some frequency in the press, and even offered by some academic commentators who ought to know better.

The first misconception is that *Shaw* is a reverse discrimination case, which upheld the rights of white voters to not have their voting strength diluted by the creation of majority-minority districts. To the contrary, Justice O'Connor made it explicit that there was no claim being made by the *Shaw* plaintiffs that white voting strength had been diluted. Plaintiffs, in effect, conceded that the North Carolina plan was fair in racial *outcome* terms.

The second misconception is that Shaw held race-conscious districting to be *prima facie* unconstitutional. *Thornburg v. Gingles* (1986) laid out minimal requirements for what a jurisdiction with geographically concentrated pockets of minority voters must do in the way of race-conscious districting if voting was polarized along racial lines to the point that minority candidates usually lost; i.e., it provides a fact-contingent standard for race-conscious remedies. *Shaw v. Reno*, in contrast, addresses the question of what a jurisdiction may do, i.e., whether a concern for racial fairness can be carried too far in advance of any need shown for a race-conscious remedy. Shaw does not overturn *Thornburg*. And, as mentioned earlier, the O'Connor opinion specifically reasserts that there may be circumstances where race-conscious remedies are constitutionally permissible. Moreover, several previous 1990s redistricting cases that were heard by the Supreme Court reaffirmed the Court's longstanding view that redistricting is primarily a legislative activity in which deference will be given to a legislature's balancing of competing considerations.[11]

The third common error found in discussions of *Shaw* is the claim that North Carolina was compelled to configure the Twelfth District by the Department of Justice, which would otherwise have failed to preclear any plan. It is hard to see how the Justice Department's view that a second majority-minority district be drawn in the southeastern portion of the state compelled the North Carolina legislature to have created a snakelike majority minority district in the northern and central part of the state.[12] Similarly, the Justice Department cannot be blamed for all of the amoeba-like pseudopodia of North Carolina's other black majority district.[13] Moreover, it should be even more obvious that the U.S. Department of Justice's Section 5 enforcement cannot be blamed for the tortuous construction of districts outside the minority areas, such as the virtual noncontiguity of the Sixth District.

Important Questions Raised by *Shaw v. Reno*

(1) How do we operationalize the *Shaw* test?

(a) Compactness versus Contiguity and (Re)cognizability. How do you prove that a district is too bizarre? Is this just a matter of visual inspection? When *Shaw*-related issues have been raised in recent voting rights cases, testimony about district lines by plaintiffs' social science expert witnesses have tended to focus on geometric measures of compactness. While something can be learned from such measures, little weight can be placed on compactness, per se, as the test for a *Shaw* violation. Compactness tests can be used to help pick out districts whose peculiar features seem to require explanation. On the one hand, compactness is a criterion that should be subordinate to the protection of voting rights.[14] On the other hand, some districts may appear ill-compact because they follow natural geographic boundaries (such as coastlines), or use as building blocks whole cities (or whole units of census geography) that are themselves not especially compact, and yet still be readily (re)cognizable to their voters and to their legislators (see Cain, 1984; Butler and Cain, 1991).

Instead of compactness, the criteria of contiguity and of (re)cognizability ought to be emphasized.

"Cognizability" or "recognizability" refers (Grofman 1992, 1993) to the ability of a legislator to define, *in commonsense terms, based on geographical referents*, the characteristics of his or her

geographic constituency. The appropriate test of (re)cognizability is not whether voters know the boundaries of the district in which they reside, but whether those boundaries could, in principle, be explained to them in simple commonsense terms. (Re)cognizability, per se, has not been the subject of previous case law, but egregious violations of the recognizability principle can be identified by making use of standard criteria of districting such as violation of natural geographic boundaries, grossly unnecessary splitting of local subunit boundaries (such as city and county lines), and sunderings of proximate and contiguous natural communities of interests (see Grofman 1985).

Pildes and Niemi (1993) find the North Carolina 12th the most ill-compact congressional district whether we look at perimeter-based or area-based measures of compactness.[16]

With respect to contiguity, satisfaction of that standard must be more than *pro forma* [see Grofman declaration in *Pope v. Blue* 1992].

(b) Narrowly Tailored to Fulfill a Compelling State Interest. Certainly, in any redistricting, race is not the only consideration taken into account by line-drawers. In North Carolina, concern for the fate of Democratic white incumbents in neighboring districts played a key role in shaping the way the Twelfth District was finally drawn,[17] as did concern for population equality across districts. If a violation of *Shaw* requires that race be the *sole* motivating factor, then no plan would ever fail the *Shaw* test. More plausibly, do plaintiffs have to demonstrate that race is the *predominant* factor affecting line-drawing before a district configuration can be overturned as unconstitutional under *Shaw*? Or, is the appropriate standard weaker still? The answer to these questions remains to be seen.

In the first post-*Shaw* case to be decided on the merits, *Hays v. Louisiana*, No 92-CV-1522 (W.D. La., Shreveport Division), the court did not decide the exact evidentiary test, because it held that "(i)f everyone—or nearly everyone—involved in the design and passage of a redistricting plan asserts or concedes that design of the plan was driven by race, then racial gerrymandering may be found without resorting to the inferential approach approved by the court in *Shaw*" (slip op. at p. 13, with internal cites omitted). Moreover, the *Hays* court held that both the shape and the size of the majority population may be no more than what is narrowly required to address voting rights concerns.

On the other hand, in its *amicus* brief in the remand of *Shaw*, the Justice Department is now taking the position that North Carolina had good reason to believe that any plan without a second black district would not be precleared, and it is arguing that the most peculiar features of the North Carolina plan owe more to incumbency preservation considerations than to racial considerations per se. A similar position has been taken by the department in other pending *Shaw*-based challenges. For example, in its *amicus* brief before the Supreme Court in *Hays*, the Justice Department argues that the original Louisiana congressional plan should not be held to be unconstitutional because it was not motivated solely by race and because it was drawn primarily to serve a compelling state purpose, namely satisfying the Voting Rights Act.[18]

If the Justice Department position were to be adopted by the Court, it would make *Shaw* largely a dead letter, since it is a rare plan indeed where no factors other than race are involved or where a Voting Rights defense might not plausibly be raised. But the position taken by the majority in *Hays* would dramatically limit what a legislature might choose to do to remedy previous racial inequities. There can be an appropriate middle ground between these two positions that reconciles *Shaw* and *Thornburg*, while still permitting line-drawers greater latitude in addressing concerns for racial fairness than what might be *required* of them under the Voting Rights Act.

The majority opinion written by Judge Phillips in the remand of *Shaw v. Reno*, now *Shaw v. Hunt*, takes yet a different tack. There, Judge Phillips takes the view that district shape is but an indicator of potential unconstitutionality, and not unconstitutional per se. He argues that, once it can be shown the State of North Carolina had adequate grounds to believe that the Voting Rights Act required it to draw *two* black-majority congressional districts, the State had discretion on how to balance off competing considerations in drawing such districts as long as no group had its voting strength diluted in the process.

(2) Can *Shaw* be Reconciled with *Thornburg* and Subsequent Voting Rights Act Enforcement?

In 1986, in *Thornburg v. Gingles*, in upholding the constitutionality of the new Section 2 language of the Voting Rights Act, the Supreme Court sanctioned Congress's right to require the creation of majority-black districts in situations where black voting strength had been submerged in multimember districts with white majorities, *if* it could be shown that the presence of racially polarized voting minimized or canceled out the potential for black voters to elect candidates of choice of their own race *and* it also could be shown that black population was sufficiently geographically concentrated that a black-majority district could be drawn.[19] While *Shaw* does not overrule *Thornburg*, there is some reason to believe that the two are on a potential collision course. A sentence late in Justice O'Connor's opinion, "(W)e express no view as to whether 'the intentional creation of majority minority districts without more' always gives rise to an equal protection claim," contains a strong hint that some justices (led almost certainly by Scalia and Thomas) would like to revisit the whole question of color-conscious districting and perhaps even the constitutionality of Section 2 of the Voting Rights Act.

Shaw and *Thornburg* can be reconciled with little difficulty. *Thornburg v. Gingles* talks about a remedy for vote dilution being required

if and only if the minority population is sufficiently geographically compact to form the majority in a single district. All the Supreme Court need do is to tighten up slightly[20] on the standards for what is sufficiently geographically compact.[21] However, just as compactness should not be the test for *Shaw*, compactness, per se, should not be used as the test for whether a remedy existed under *Thornburg*. The standard in terms of contiguity and of (re)cognizability in the fashion discussed above captures the spirit of Justice Brennan's discussion of this prong of the *Thornburg* three-pronged test, and it is consistent with the way most federal courts have interpreted this prong (see discussion of relevant case law in Grofman and Handley 1992a).

Evidence that *Gingles* and *Shaw* can be reconciled is found in the ruling by a three-judge panel in the combined cases of *Marylanders for Fair Representation v. Schaefer*, Civ, N. S-92-510 and *NAACP v. Schaefer*, Civ S-92-1409, decided on January 14, 1994. This is a post-*Shaw* redistricting challenge that offers a very commonsensical approach to *Shaw*-like issues. In this case, the Maryland Assembly plan was being challenged, on the one hand, because it allegedly did not go far enough in drawing black districts and, on the other hand, it was being challenged as a partisan gerrymander, although it was also attacked on other grounds, such as alleged inadequate attention to one person, one vote considerations. Space does not permit a full consideration of this decision; suffice it to say that the court rejected most claims but held that plaintiffs had met their burden under *Gingles* in one part of the state and that an additional black-majority district needed to be drawn in the area of the Eastern Shore.

In affirming the need to draw this district, after reviewing case law showing that the *Gingles* requirement of geographical compactness should not be construed rigidly, the court held that the proposed district was geographically compact under *Gingles*. Then it rejected the claim that the proposed district was so ill-compact that it should be rejected under *Shaw*. It compared the shape of the proposed new district to that of other districts in the plan, and concluded that it did not stretch further than that of some other non-majority-minority districts; and that it was not alone in being relatively irregular in shape. "In short, if District 54-9 is not sufficiently compact, then the same can be said of many districts in the State's new legislative districting plan" (slip op. at p. 66). In Maryland, a compactness challenge to the plan as a whole had already been brought in state court on state law grounds, and had been rejected (*Legislative Redistricting Cases*, 331 Md. at 580, 590-92).

In adjudicating the question of whether or not the new district could rationally be understood only "as an effort to classify and separate voters as to race" (*Shaw*, 113 S. Ct. at 2828), the Maryland court found that alternative plans had even higher black populations and concluded that "District 54-9 could not have been merely the result of an effort to maximize the number of black voters and to minimize the number of white voters in the proposed district. Other considerations must have come into play" (slip op. at p. 68). The Court also held that the proposed district did satisfy traditional districting criteria to a substantial extent, e.g., in terms of contiguity, population equality, regard for "natural [geographic] boundaries," and due regard to the "boundaries of political subdivisions," and that it met the state constitutional requirement that Assembly districts be nested inside Senate districts (see slip op. at pp. 69-72). The district court also accepted as credible testimony by legislators that the district was one whose various parts could be traversed by a representative with no particular difficulty and could be effectively represented (slip op. at 73-74).

(3) How Important Is *Shaw*?

What civil rights activists most fear about *Shaw* is that it is the opening wedge to reversal of the great representational gains for blacks and Hispanics brought about by Voting Rights Act-inspired concerns for the drawing of black- and Hispanic-majority districts. Already there have been *Shaw*-like challenges to a number of newly drawn black-majority southern congressional districts. For example, after the first Louisiana congressional plan was struck down, the legislature redrew the lines to create more compact black-majority districts, but then the new lines were rejected by the district court, even though the black-majority district under challenge had been redrawn in a considerably less amoeba-like fashion. Many more challenges at all levels of government are anticipated if plaintiffs are ultimately victorious in some of the cases now pending. Moreover, as I have learned from conversations with voting rights attorneys around the country, *Shaw* has already begun to have an important indirect effect in triggering a greater unwillingness of jurisdictions to settle voting rights cases because they argue that the remedies that are being requested violate *Shaw*.

Nonetheless, while *Shaw* has the potential for totally changing the rules of the redistricting game, I do not view its consequences as being as far-reaching as do some other voting rights experts. First, given the degree of residential segregation in the United States, drawing relatively compact and clearly contiguous minority districts at the local level (or even for most state legislatures) is not that difficult. Only highly populous congressional districts may need to include minority population from considerably more than one city or county in such a fashion that snakes and amoebas would seem required if we wish to craft additional districts with majority-black populations.[22] Second, the votes on the U.S. Supreme Court do not turn back the clock by overturning or substantially limiting *Thornburg*.[23] Third, even when majority-minority districts need to be considerably redrawn because of *Shaw*, many of the redrawn black-majority districts will still elect minority candidates. Finally, the chief impact of *Shaw* will be on the next redistricting

round, and a lot can happen on the Supreme Court between now and then.

(4) Is the Department of Justice Out of Control?

It has been claimed that the Republican-run Department of Justice in the early 1990s was enforcing Section 5 of the Voting Rights Act in a harsh and unreasonable manner in which "maximizing" the electoral success of black and Hispanic candidates had replaced "equal opportunity" as the prerequisite for a plan's preclearance. I find this characterization of Voting Rights enforcement to be almost entirely mistaken, but space limits do not permit me to deal with that controversy here (see Grofman and Davidson 1992; Grofman 1993; Davidson and Grofman 1994). But it is easy to see that the claim that Department of Justice voting rights enforcement under Bush had been a Republican plot to "whiten" districts by pulling off minority population into heavily minority districts for purposes of Republican advantage is undercut by the simple fact that voting rights enforcement policies under Clinton have been virtually indistinguishable from those under Bush.[24]

(5) Do We Really Still Need to Draw Majority-Minority Districts?

Justice O'Connor's opinion in *Shaw* seeks a moral high ground by attacking districts for whites and districts for blacks as tantamount to apartheid. However, if voting is polarized along racial lines and minority candidates usually lose—the preconditions for the Voting Rights Act to apply—then failure to draw a district plan that is fair to both groups perpetuates situations where, for all practical purposes, the districts are only districts for whites, i.e., districts that only whites can be expected to win. Abigail Thernstrom (1987, 1991) and other revisionist scholars (e.g., Swain 1993) argue that whites (even southern whites) now accept qualified black candidates. Virginia is often cited as an example of where the Voting Rights Act has been misapplied. According to Thernstrom (1991), "Virginia's voters have proved beyond a shadow of a doubt that blacks can win in majority-white jurisdictions. . . . L. Douglas Wilder being the proof of that particular pudding."

Taking nothing away from Governor Wilder, to regard his election as indicative of a general ability of blacks to get elected to state legislative office from majority-white areas in the Deep South, or even in Virginia, itself, is to completely disregard the evidence. The number of black state legislators who are elected from majority-white districts in the South can still be counted on one's fingers. Lisa Handley and I (Grofman and Handley 1991; Handley and Grofman 1994) found that, in the 1980s, in every southern state, the percentage of majority-white state legislative districts that elected a black was either zero (in most Deep South states) or near zero. This near complete absence of black electoral success in white-majority districts occurred despite the fact that, even in the Deep South, most blacks lived in white-majority districts. Virginia is 19% black. It had no black members of Congress, and in 1990, no black legislators elected from majority-white districts. In Virginia, the only black ever elected to the state legislature from a white-majority district was Douglas Wilder—and his election (with a plurality) was made possible only because a half dozen white candidates in the Democratic primary split the white vote and Virginia does not have a majority vote requirement.

Handley, Grofman, and Arden (1994) updated earlier findings on the link between non-Hispanic white population proportion and electoral success of black candidates using data from the 1990s districting round. For the 23 states with greatest black and Hispanic population whose 1992 legislative and congressional elections they reviewed, they find that most of the black and Hispanic gains (especially those in Congress) came from new majority-minority districts. They also find that the probability that a black-majority seat would elect a black legislator had gone up slightly; while in the South the likelihood that a minority candidate would be elected from a legislative or congressional district a majority of whose voters were white had not increased from the minuscule probability found in previous decades.

But what about Carol Swain's well-known finding that, as of 1990, 40% of all black members of Congress were elected from non-majority-black districts (Swain 1993)? According to Swain, this shows that blacks can be elected from districts where blacks are in the minority.

A closer look at the cases where blacks are elected to Congress from non-majority-black districts gives us a much more pessimistic picture of the likelihood of black success in white districts than Swain would have one believe. While the 40% figure given by Swain is technically correct, it is also fundamentally misleading.

Twenty-five blacks were elected to Congress in 1990. Of the 10 elected from districts that are not majority black, six are elected from districts that are majority minority, blacks and Hispanics (Grofman and Handley 1992b).[25] That leaves *only four black congressmen elected from districts in which non-Hispanic whites are in the majority*. Of the four black members of Congress who are elected from such districts, one, Rep. Franks (CT) was a Republican conservative who almost certainly *was elected over the opposition of the black members of his district*; one, Rep. Jefferson (LA) is in a district that was 44.5% black and 49% minority using 1980 population figures *but is now 66% black according to 1990 population figures—and he wasn't elected until 1990*; one, Rep. Wheat (MO) *runs with the advantage of incumbency* in a district where he won the Democratic primary which first selected him as the Democratic nominee with only 32% of the vote[26]—a primary where he received almost no white support and which he won only because *whites had divided their vote among seven white candidates*; and the last, Rep. Dellums (CA) *was elected*

from perhaps the most liberal district in the nation, combining blacks in Oakland with the ultra-liberal city of Berkeley.

In short, one of the four exceptions really isn't one using 1990 population figures; one is a black Republican who doesn't enjoy that much black support, and the other two exceptions to the rule that blacks win only in majority-minority districts are unusual cases that cannot be taken as the basis for reasonable expectations for the success of black-endorsed black candidates in majority (non-Hispanic) white districts.[27] Moreover, in 1990 no black member of Congress from the South was elected from a non-black-majority district, and the Mississippi Fourth District—45% black according to 1980 population figures—failed to elect a black candidate.

Referencing the work on the political geography of minority electoral success that Lisa Handley and I have done jointly (Grofman and Handley 1989), Swain (1993) observes that creating additional black-majority districts can have only limited payoffs for gains in the number of blacks elected to Congress because geographical constraints limit the number of such districts that can be drawn. *Black Faces, Black Interests* was written before the results of the 1990 round of districting were known. If Swain were right in her expectations, then we should have seen black congressional gains primarily in non-black-majority districts and we should have seen few black gains in the South. Yet, in the 1992 round of districting there were 13 new black members of Congress, the largest gain in any single redistricting period. All of the 13 new black members were elected from black majority districts. Moreover, all were elected from the South.[28] *Thus, no new black members of Congress came from non-black-majority districts.*[19]

(6) Is *Shaw* Good Law?

Shaw reflects an *activist* conservative judiciary that, when confronted with a relatively minor problem—some bizarrely shaped districts generated by a zeal for racial fairness and/or partisan lust—proceeded to carve out a new "right" that had no clear standard for its enforcement and that opens a can of worms vis à vis its potential threat to recent black (and Hispanic) electoral gains in descriptive representation. Here, the "cure" may be far worse than the disease.

What could the Court have done? It could have decided the case on nonracial grounds, holding that the penumbra of geographic-based representation required districts that were (a) contiguous in more than just a pro forma way, and/or (b) linked to some meaningful sense of place, i.e., (re)cognizable, and/or (c) not forming a crazy quilt lacking rational state purpose. Thus, rather than the exclusive focus on the evils of race-conscious districting found in *Shaw*, the facts in North Carolina would have permitted its congressional plan to have been rejected on any one (or all) of the three tests above.[29] In so doing, since the case facts in *Shaw* are so egregious as to be near unique, especially with respect to contiguity, the Court could have crafted a narrow standard that would protect against excesses without really threatening minority gains in representation. Such a holding would have raised no potential inconsistencies with *Thornburg* and would have permitted *Shaw* to be disposed in a way that did not raise a racial red flag.

In many parts of the country it is very hard for a black to be elected to major public office from a white majority district. The implementation of the Voting Rights Act is the "realistic politics of the second best" (Grofman and Davidson 1992). Its recipes for color-conscious remedies are necessary as long as there are jurisdictions where race is inextricably bound up in voting decisions and strongly linked to housing patterns. In a world of race-conscious voting, race-conscious remedies are needed. But that does not mean we have to like the world in which such remedies are necessary, or fail to appreciate the limitations of such remedies.

We need to steer a course between a premature optimism that will lead to the elimination of safeguards vital to the continuing integration of minorities into American electoral politics, and an unrealistic pessimism that insists we will never get beyond judging people by the color of their skin. The case-specific and fact-contingent approach embodied in pre-*Shaw* voting rights case law has generally steered such a course.

Notes

*I am indebted to Dorothy Gormick and Chau Tran for library assistance.

1. For example, a 1992 editorial in the *Wall Street Journal* (February 4, 1992) refers to North Carolina's congressional plan as "Political Pornography." An editorial in the *Charlotte News and Observer* (January 13, 1992) said that it "plays hell with common sense and community." An editorial in the *Raleigh News and Observer* (January 21, 1992) says: "If a psychiatrist substituted North Carolina's proposed congressional redistricting maps for Rorschach inkblot tests, diagnoses of wackiness would jump dramatically. The maps . . . don't make any sense—to people who have any sense."
2. See, e.g, Pildes and Niemi (1993).
3. See discussion of *Shaw v. Reno* below.
4. *Pope v. Blue* was a challenge to the North Carolina congressional plan that was dismissed by a federal court. The plaintiffs in that case are now intervenors in the remand of *Shaw v. Reno*, now being heard as *Shaw v. Hunt* (see below).
5. For a preliminary evaluation of the truth of such claims see Grofman (1993).
6. An earlier challenge to the North Carolina congressional plan, *Pope v. Blue*, in which I was to have served as an expert witness (Grofman 1992), had been dismissed by a three-judge court for want of a federal question.
7. A compactness requirement for congressional districts was dropped from the decennial congressional apportionment legislation early in this century. Some states have compactness provisions for legislative districts written into their state constitutions (Grofman 1983, Table 2).
8. The case is being heard under the name *Shaw v. Hunt*. As of the date of this writing (November 1994) the case had been heard on remand and the lower court had by a 2-1 vote decided that the plan was constitutional. Almost certainly that decision will be appealed.
9. In my view, the best attempt to provide a clear jurisprudential underpinning to Justice O'Connor's views in *Shaw* is found in Pildes and Niemi (1993), who offer a notion of "expressive harm" that they trace back to *Brown v. Board of Education*. Also see Aleinikoff and Issacharoff (1993).

10. Another quote from my article is found in the majority opinion, wherein Justice O'Connor observes:

> "The district has even inspired poetry: 'Ask not for whom the line is drawn, it is drawn to avoid thee.'" (A Wuffle (personal communication, 1993, with apologies to John Donne), quoted in Grofman 1993, 1258.)

There are at least two elements of this citation that deserve attention. Most importantly, it is very likely that this is the first time poetry (sic!) by a political scientist has ever been quoted by the Supreme Court. (Unfortunately, probably because it is found in a citation internal to my work, Professor Wuffle's name is omitted from the Supreme Court cite.) Also, it is rather rare to have an article by a social scientist quoted in a Supreme Court case in both the majority opinion and in a dissenting opinion.

11. See case discussion in Pildes and Niemi (1993).

12. "(T)he proposed configuration of the district boundary lines in the *south central to southeastern* part of the state appear to minimize minority voting strength given the significant minority population in this area of the state. In general, it appears that the state chose not to give effect to black and Native American voting strength *in this area*, even though it seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration *in this area of the state*" (Dunne letter of December 18, 1991, at p. 5, emphasis added).

13. The Section 5 preclearance denial letter of December 18, 1991 from Assistant Attorney General John Dunne indicated that the configuration of Congressional District 2 (the only black-majority district in the initial congressional submission from North Carolina—subsequently revised somewhat in shape and renumbered District 1) was not required to achieve the purpose of avoiding minority vote dilution. "The *unusually convoluted shape of that district does not appear to have been necessary to create a majority black district* and indeed, at least one alternative configuration was available that would have been more compact" (Dunne letter at p. 4, emphasis added).

14. See further discussion in Grofman (1985), Grofman and Handley (1992b), Niemi, Grofman, Hofeller and Carlucci (1990), and Grofman (1993).

15. My characterization of the Congressional District 12 as a snake with unsightly bulges is mild compared to the way the plan was characterized by North Carolina political observers. My own personal favorite is the description of the district by political columnist Mark Barrett (January 12, 1992, reproduced in Appendix to Wright Affidavit in *Pope v. Blue*). Apparently the initial map showing the plan colored District 12 yellow, leading Barrett to say that "the district resembles the stain that might be left if a giant with yellow blood were stabbed in Charlotte, staggered across the Piedmont and fell to the ground and bled to death on the Virginia line." Of course, as I emphasize below it is not the visual esthetics of the plan, as such, that is at issue, but rather whether: (1) The plan as a whole does not satisfy contiguity requirements, and/or (2) contains districts at least one of which fails any reasonable cognizability test, and/or (3) can be characterized as a crazy quilt lacking rational purpose.

16. For an extensive discussion of the different type of compactness measures see Niemi, Grofman, Hofeller, and Carlucci (1990).

17. The idea of such a district was "borrowed" by Democrats from a plan drawn by a Republican staffer. The likely overall partisan consequences of the Republican-drawn plan were quite different from the plan including the I-85 district that was adopted by the North Carolina legislature.

18. DOJ also makes the pragmatic argument in its *amicus* brief in *State of Louisiana v. Hays* (No 83-1539, April 29, 1994, p. 18) that the standards laid down in *Hays* would be counterproductive because "state and local governments may well opt for litigation if their efforts are so narrowly circumscribed," thus "the ultimate effect could be a serious disincentive to settlements and voluntary compliance with the law."

19. Here we are simplifying the complex legal issues in *Thornburg*. For discussion of how the *Thornburg* three-pronged test for vote dilution under Section 2 of the VRA ((a) a cohesive black vote, (b) usual defeat of black-sponsored candidates as a result of white bloc voting, and (c) a potential for remedy based on the drawing of a single-member-district plan) has been interpreted by federal courts since 1986 and of how it relates to the standards for vote dilution in earlier case law see Grofman, Handley, and Niemi (1992).

20. I use the term "slightly" because I share the view of Karlan (1989) that "a functional approach to Gingles's geographic compactness requirement is best suited to the inclusive spirit of Section 2" (this apt summary of Karlan's central argument is found in *Marylanders For Fair Representation v. Schaefer*, 1994, slip op. at p. 74, where it is quoted approvingly). (see discussion of *Schaefer* above).

21. That would determine what a jurisdiction *must* do in the event of a finding of a voting rights violation. It would still leave open the questions of whether a jurisdiction could choose to go beyond what the Voting Rights Act requires in the way of color-conscious districting, or go as far as what the VRA would require even in the absence of a violation.

22. The situation is somewhat different for Hispanics, who are not as residentially segregated as blacks, but space does not permit a full elaboration.

23. Of course, my crystal ball has been know to have some cracks in it. I thought *Shaw* would go 5-4 or 6-3 the other way.

24. Moreover, just as the DOJ under Bush challenged some plans that created Republican advantage (e.g., that for the Los Angeles County Board of Supervisors), so has the DOJ under Clinton precleared plans that arguably help Republicans (e.g. in South Carolina). For further discussion, see Grofman (1993).

25. In all of these districts blacks make up the plurality of the minority electorate, and in all but one of these districts blacks make up the plurality of the minority population.

26. The state has no runoff requirement.

27. The facts I refer to above are all ones found in Swain (1993), but she fails to draw the proper inferences from them about how special are the circumstances under which blacks are elected to Congress from non-black-majority districts, and how unlikely those circumstances are to be applicable to future black contests in white-majority districts. Swain does provide data on Hispanic population and does discuss these majority-minority districts as a separate category from the other districts where blacks constitute less than half of the population, but her concluding chapter is, in my view, not sufficiently sensitive to the implications of this distinction as a limitation on what we can expect in the way of further black gains in districts where blacks do not constitute the majority. For example, we are unlikely to see many new congressional districts with a black plurality and a combined black plus Hispanic majority in the South!

28. Of course, with blacks a declining share of total U.S. population, virtually all of the black-majority congressional seats that might be drawn have already been created in the 1990s round of districting. Thus, in the long run, the election of substantial numbers of new black members of Congress in succeeding decades can come only from black success in white-majority districts.

29. The pattern repeats in 1994 in the South, although a black Republican is elected elsewhere in the country.

30. Of course, taking this legal tack might have lost Justices Scalia and Thomas and resulted in no majority opinion.

References

Aleinikoff, T. Alexander, and Samuel Issacharoff. 1993. "Race and Redistricting: Drawing Constitutional Lines After *Shaw v. Reno*." *Michigan Law Review* 92:588-650.

Brace, Kimball, Bernard Grofman, and Lisa Handley. 1987. "Does Redistricting Aimed to Help Blacks Necessarily Help Republicans?" *Journal of Politics* 49:143-56.

Butler, David, and Bruce Cain. 1992. *Congressional Redistricting*. New York: MacMillian.

Cain, Bruce. 1984. *The Reapportionment Puzzle*. Berkeley: University of California Press.

Davidson, Chandler, and Bernard Grofman, eds. 1994. *Quiet Revolution in the South: The Impact of the Voting Rights Act*, 1965-1990. Princeton: Princeton University Press.

Ehrenhalt, Alan. 1993. "Redistricting and the Erosion of Community." *Legislative Studies Section Newsletter* (APSA), June: 18, 20.

Grofman, Bernard. 1983. "Measures of Bias and Proportionality in Seats-Votes Relationships." *Political Methodology* 9:295-327.
———. 1985. Criteria for Districting: A Social Science Perspective. UCLA Law Review 33(1):77-184.
———. March 15, 1992. Expert Witness in *Pope v. Blue*, Civ. No. 3: 92CV71-P (W.D., Charlotte Division).
———. 1993. "Would Vince Lombardi Have Been Right if He Had Said, 'When It Comes to Redistricting, Race isn't Everything, It's the Only Thing'?" *Cardozo Law Review* 14:1237-76.
Grofman, Bernard, and Chandler Davidson. 1992. "Postscript: What is the Best Route to Color-Blind Society?" In *Controversies in Minority Voting: The Voting Rights Act in Perspective*, eds. Bernard Grofman and Chandler Davidson. Washington, DC: The Brookings Institution.
Grofman, Bernard, and Lisa Handley. 1989. "Black Representation: Make Sense of Electoral Geography at Different Levels of Government." *Legislative Studies Quarterly* 14:265-79.
———. 1991. "The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures." *Legislative Studies Quarterly* 16:111-27.
———. 1992a. "Identifying and Remedying Racial Gerrymandering." *Journal of Law and Politics* 8:345-404.
———. 1992b. "Minority Population Proportion and Black and Hispanic Congressional Success in the 1970's and 1980's." *American Politics Quarterly* 17:436-45; reprinted in revised and updated form under the title "Preconditions for Black and Hispanic Congressional Success," in *The Election of Women and Minorities*, eds. Wilma Rule and Joseph Zimmerman. New York: Greenwood Press.
Grofman, Bernard, Lisa Handley, and Richard G. Niemi. 1992. *Minority Representation and the Quest for Voting Equality*. New York: Cambridge University Press.
Handley, Lisa, and Bernard Grofman. 1994. "Black Office Holding in Southern State Legislatures and Congressional Delegations." In *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*, eds. Chandler Davidson and Bernard Grofman. Princeton: Princeton University Press.
Handley, Lisa, Bernard Grofman, and Wayne Arden. 1994. "Electing Minority Preferred Candidates to Legislative Office: The Relationship between Minority Percentages in Districts and the Election of Minority Preferred Candidates." Presented at the Hendricks Symposium on Legislative Districting in the 1990's, University of Nebraska.
Karlan, Pamela. 1989. "Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation." *Harvard Civil Rights—Civil Liberties Law Review* 24:173-248.
Niemi, Richard G., Bernard Grofman, Carl Carlucci, and Thomas Hofeller. 1990. "Measuring Compactness and the Role of a Competent Standard in a Test for Partisan and Racial Gerrymandering." *Journal of Politics* 52:1155-1181.
Pildes, Richard H., and Richard G. Niemi. 1993. "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election District Appearances after *Shaw v. Reno*." *Michigan Law Review* 92:483-587.
Swain, Carol. 1993. *Black Faces, Black Interests: The Representation of African Americans in Congress*. Cambridge: Harvard University Press.
Thernstrom, Abigail. 1987. *Whose Votes Count? Affirmative Action and Minority Voting Rights*. Cambridge: Harvard University Press.
———. 1991."Op-Ed: A Republican-Civil Rights Conspiracy." *Washington Post.*

About the Author

Bernard Grofman is professor of political science and social psychology at the University of California, Irvine. He is a specialist in the theory of representation. His major fields of interest are in American politics, comparative election systems, and social choice theory. He has edited a number of books including *Choosing An Electoral System* (coedited with Arend Lijphart), Praeger, 1984; *Electoral Laws and Their Political Consequences* (coedited with Arend Lijphart), Agathon Press, 1986; *Information Pooling and Group Decision Making* (coedited with Guillermo Owen), JAI Press, 1986; the *Federalist Papers and the New Institutionalism* (coedited with Donald Wittman), Agathon Press, 1989; *Political Gerrymandering and the Courts*, Agathon Press, 1990; *Controversies in Minority Voting: The Voting Rights Act in Perspective* (coedited with Chandler Davidson), The Brookings Institution, 1992; *Information, Participation & Choice: An Economic Theory of Democracy in Perspective*, The University of Michigan Press, 1993; *Quiet Revolution: The Impact of the Voting Rights Act in the South, 1965-1990* (coedited with Chandler Davidson), Princeton University Press, 1994.

Shaw v. *Reno* and the *Hunt* for Double Cross-Overs[1]

Timothy G. O'Rourke, *Clemson University*

North Carolina's current congressional map is as shocking to the conscience and as antithetical to the Constitution as Tennessee's 1901 apportionment plan, the "crazy quilt" that led to *Baker* v. *Carr* (1962). Even though the districts vary in population by only a single person, the North Carolina plan is a frontal assault on the letter and spirit of three decades of redistricting case law. In drawing bizarrely shaped districts that frequently breach political subdivision boundaries and even violate contiguity, the North Carolina legislature elevated the pursuit of electoral results, racial and partisan, over the achievement of fair and functional representative districts. In holding that the North Carolina plan could be attacked as a racial gerrymander, *Shaw* v. *Reno* (1993) reaffirmed the reapportionment revolution's fundamental principles—at the core of which is the right of *individual* voters to equality of political access within the context of geographic districting. Furthermore, while *Shaw* v. *Reno* is salutary in itself, it must be extended and amplified in order to preserve the central values of "one person, one vote."

History of the North Carolina Plan

In July 1991, the North Carolina General Assembly enacted a congressional redistricting plan taking into account the results of the 1990 census, which gave the state an additional, 12th seat. The plan provided for one majority-black district, located primarily in the rural, northeastern portion of the state.