Principled Limitations on Racial and Partisan Redistricting

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Three years after recognizing a new cause of action for racial redistricting in *Shaw v. Reno*,¹ the Supreme Court's voting rights jurisprudence still teeters on the brink of legal incoherence and political chaos. Concerned about the new extremes to which self-interested redistricting has been taken in the 1990s—particularly, but not exclusively, for racial purposes—the Court has been struggling to articulate legal principles that might fix acceptable boundaries on the power of politicians to define their constituencies.² But last Term's unsurprising decisions striking down districts in North Carolina and Texas,³ like the previous Term's decision invalidating a Georgia congressional district,⁴ suggest that these principles remain disturbingly elusive.⁵ To be sure, some speculations have been publicly confirmed, most notably that the five-member majority crafting these new constitutional constraints is itself profoundly fragmented.⁶ Yet the precise extent to which election districts can

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

2. See T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 588 (1993) ("Through the process of redistricting, incumbent office holders and their political agents choose what configuration of voters best suits their political agenda.").

3. See *Bush v. Vera*, 116 S. Ct. 1941 (1996) (plurality opinion); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996).

4. See *Miller v. Johnson*, 115 S. Ct. 2475 (1995).

5. As Justice Souter correctly stated in dissent last Term, "a helpful statement of a *Shaw* claim still eludes this Court." *Bush*, 116 S. Ct. at 1998 (Souter, J., dissenting). While Justice Souter offered this concern as a justification for overruling *Shaw*, I invoke it here as a reason to seek a more useful implementation framework for *Shaw*.

6. *Shaw* itself, in the context of other voting rights cases, could be read to intimate such a rift. See, e.g., Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 495 (1993) ("[W]hen this question [of whether race-conscious districting per se triggers strict scrutiny] is confronted directly, the majority in *Shaw* might well divide over this question."). This past Term, these deep divisions within the controlling majority blossomed into full public view. In *Bush*, 116 S. Ct. at 1971–74, Justices Scalia, Kennedy, and Thomas distanced themselves from Justice O'Connor's plurality opinion specifically to assert that all intentional race-conscious districting required strict scrutiny. Meanwhile, Justice O'Connor wrote a separate concurrence under her own name to emphasize that compliance with section 2 of the Voting Rights Act constitutes a compelling interest sufficient to justify race-conscious districting. See *id.* at 1968–70 (O'Connor, J., concurring). Not only did the Justices above refuse to endorse this position, but Chief Justice Rehnquist did not sign this separate statement. Indeed, there is reason to think at least two,

be designed to take race or ethnicity into account remains shrouded in a doctrinal framework that provides scant practical guidance in the most charged setting of all for identity and partisan politics.

The relationship of race to the construction of political institutions is a prominent site in which themes of "Group Conflict and the Constitution," the topic of this Symposium, are currently being played out. In the redistricting arena, the Court now appears to have settled on a doctrinal formula through which it will mediate this particular form of group conflict. In each of the last two Term's cases, the Court has consistently rehearsed this doctrinal principle: Race cannot be "the predominant factor" in the drawing of election district lines.⁷ This approach to racial group conflict in the political realm organizes constitutional inquiry around the motivations of those who control the redistricting process.

This brief Essay seeks to make one narrowly targeted doctrinal point: Whatever the merits of motive-based approaches to mediating group conflicts in other constitutional contexts, in the redistricting arena that approach will not be capable of sustaining constitutional doctrine in a coherent, administrable, or useful form. This is not due to general theoretical concerns about motive-based doctrines, but to pragmatic reasons peculiar to the redistricting context. If the Court's current project of imposing constitutional restraints on race and redistricting is to be given principled legal content, it will have to be through another approach. Toward the close of this Essay, I will suggest the most likely alternative.

With respect to general problems of group conflict and the Constitution, this Essay's discrete concerns might nonetheless suggest a few broader implications. At the most general level, I will argue that the Supreme Court's struggles stem from misguided efforts to assimilate race-conscious districting to the constitutional framework for other race-conscious government policies. The now reigning approach to policing racial redistricting, the motive-based "predominant factor" test, offers the allure of consistency with other areas of constitutional law. By importing *Washington v. Davis*⁸ and *City of Mobile v. Bolden*⁹ into redistricting, the Court has cast the *Shaw* doctrine as continuous

and as many as four, Justices are likely to distinguish or overrule *City of Rome v. United States*, 446 U.S. 156 (1980), and find the results test of amended section 2 unconstitutional.

7. See, e.g., *Miller*, 115 S. Ct. at 2488 (discussing whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district"); *Bush*, 116 S. Ct. at 1951-52 (plurality opinion) (quoting *Miller*'s "predominant factor" standard); *Shaw*, 116 S. Ct. at 1900-02 (same).

8. 426 U.S. 229, 240 (1976) (holding that policies facially neutral with respect to race violate Fourteenth Amendment only when they ultimately rest on "a racially discriminatory purpose"); see *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (holding that discriminatory purpose under *Davis* "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"); *City of Mobile v. Bolden*, 446 U.S. 55, 62-63 (1980) (extending *Davis* test to Fifteenth Amendment).

9. 446 U.S. 55 (1980).

with established Fourteenth and Fifteenth Amendment principles. But this portrait of continuity is an illusion. At least in the area of race, constitutional problems of group conflict cannot be approached effectively in universal terms. Contexts in which issues of race-conscious policy arise turn out to differ in pragmatic, but central, ways. Whatever the merits of more rigidly "consistent" approaches in other institutional arenas—approaches that argue for colorblindness or race-consciousness in all-or-nothing terms—within the legal system, contextual variations must be attended to if courts are to develop coherent, administrable legal doctrines.

Thus, whether or not the intent standard of *Davis* is appropriate for certain contexts, such as public employment, the effort to borrow this standard for redistricting is fundamentally flawed. I will stress three reasons that this is so, though others could be marshalled. First, an intent standard is not properly linked at the conceptual level to the nature of the constitutional harm that the Court's racial-redistricting cases recognize. The injuries *Shaw* makes actionable are expressive harms, as will be described later; such harms focus on the social meaning of, and social perceptions about, government action, rather than on individuated and more material harms to discrete individuals. Once the role of these expressive harms in *Shaw* is appreciated, the predominant motive test can be seen not to be a coherent approach to implementing the decision's underlying theory. Second, an intent standard emerges out of more conventional individual-rights adjudication contexts. But *Shaw* is not best understood as operating within an individual-rights model of the relevant harm. Third, in the redistricting arena, the *Davis* approach will be intractable at the practical level. Sensible doctrine in this area must recognize that carving states into election districts differs in essential ways from choosing one of two applicants for a particular job, or awarding a public construction contract to one of two competing firms, or granting a broadcasting license to one of two bidders. In particular, race and partisan politics are too compounded in redistricting to be separable through motive-based "predominant factor" tests. Whatever precision such tests might have elsewhere, in the redistricting context they can only dissolve into ritualistic, vaporous incantations. Inevitably, this approach will lead to disingenuous judicial decisions; courts simply are not likely to be able or willing to apply such a standard faithfully. Indeed, this evasion of artificial doctrinal formulas is already evident in the Supreme Court itself: The Court has begun to decide cases in ways that cannot be reconciled with a primary emphasis on ferreting out legislative intent.¹⁰

Doctrinal stumbling and confusion about race-conscious districting poisons politics and culture in particularly pathological ways. Under the best of circumstances, the drawing of election districts by politicians is nasty, brutish, and anything but short. Adding race and ethnicity makes the mix even more

10. See *infra* text accompanying note 137.

combustible. Unless the Court quickly brings more principled legal ordering to the framework of racial redistricting, political institutions will become the site for the most divisive racial and ethnic confrontations seen in many years. Already in the aftermath of the Court's recent decisions, several states have become too politically paralyzed to redistrict at all; instead, they have defaulted the task to federal courts.¹¹

This Essay is directed primarily to courts struggling to implement the *Shaw* doctrine. The approach here also differs from what might be called "the ideological turn" that legal scholarship has taken in recent years.¹² Increasingly, legal scholarship has merged into fields like political theory and cultural critique as it has sought to tease out the general systems of beliefs, assumptions, and structures of values embedded within legal decisions. For some purposes, this work has been immensely valuable; yet it necessarily downplays characteristic qualities of legal decisionmaking and more internal styles of legal analysis. Rather than focusing on the fine-grained distinctions between cases and contexts that more conventional legal analysis stresses, for example, ideological critique tends to see cases as raising fundamental choices between competing, broad ideologies.¹³ Rather than seeing legal issues as arising amid specific institutional constraints and within particular complexes of fact, ideological analyses tend to be framed in terms of clashes between competing frameworks of values, often conceived at high levels of abstraction.

Because my aim is limited here to the judicial implementation of *Shaw*, this Essay is more in the nature of internal doctrinal critique. Thus I do not engage in the "fundamental" debate that has preoccupied much academic commentary on the decision: whether race-conscious districting, in the extreme geographic forms *Shaw* condemns, ought to be constitutional. Much of the

11. Following the Supreme Court's 1995 decision striking down Georgia's eleventh congressional district, see *Miller*, 115 S. Ct. at 2475, the Georgia State Legislature was unable to redraw the state's electoral map and adjourned on September 13, 1995, "effectively leaving the task to [the district court]." *Johnson v. Miller*, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995) (three-judge panel). Moreover, following the Supreme Court's June 13, 1996 decisions, neither Texas nor North Carolina has adopted, or will adopt, new redistricting plans. In Texas, Republican Governor George W. Bush refused to call the Democrat-controlled state legislature into a special session, choosing instead to leave the decision of whether to redistrict before the 1996 elections to the district court. See *Vera v. Bush*, 933 F. Supp. 1341, 1344 (S.D. Tex. 1996) (three-judge panel). In North Carolina, while the state's General Assembly had failed to implement a redistricting plan, the district court granted a stay of remedy and gave the General Assembly until April 1, 1997 to submit a constitutional redistricting plan. See *Shaw v. Hunt*, No. 92-202-CIV-5-BR (W.D.N.C. July 30, 1996) (unpublished order, on file with author) (three-judge panel).

12. Cf. *INTERPRETIVE SOCIAL SCIENCE: A SECOND LOOK 1* (Paul Rabinow & William Sullivan eds., 1979) (discussing "the Interpretive turn" in social sciences during 1970s).

13. As Robert W. Gordon puts it in a recent overview of varying styles of legal scholarship, more recent approaches to legal scholarship, of which ideology theory is one manifestation, seek to show that the legal system

has argumentative resources that present varying possibilities for the resolution of every legal issue The opposing arguments often reflect deep conflicts between social visions: divergent views of efficiency, distributive fairness, the obligation we should have to look out for one another, and the meaning of "consent" under conditions of need or subordination.

Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground"*, 91 MICH. L. REV. 2075, 2092 (1993).

response to *Shaw* has predictably, but unproductively, urged that it be overruled.¹⁴ Yet with five cases now decided in the last four Terms, even dissenting Justices have recognized that "the Court seems settled in its conclusion that racial gerrymandering claims such as these may be pursued."¹⁵ I take the principle of *Shaw* to be settled, at least for now, and for implementation purposes seek to understand the doctrine on its own terms.

Part I begins by explaining *Shaw* and then challenges prevalent mythologies concerning racial redistricting and the Voting Rights Act (VRA). I argue, for example, that certain familiar criticisms of *Shaw* misunderstand both the history of the VRA and the present context of redistricting. To address *Shaw* effectively requires understanding it as a specific response to distinct developments in the voting arena. Ironically, however, the specific means the Court invokes fail to recognize what is distinct about the logic of voting rights. Thus Part II seeks to demonstrate that the current "predominant motive" test will necessarily fail as a means of implementing the values *Shaw* is best understood to reflect. Finally, the Essay ends with suggestions on how the realities of the entanglement between race and politics in redistricting can be better recognized through an alternative approach that provides more principled guidance in this highly charged arena.

I. VOTING RIGHTS MYTHOLOGIES

Shaw and subsequent decisions hold that race-conscious election districting will be subject to strict scrutiny and held unconstitutional in certain specific circumstances. Questions abound at each stage of this inquiry: (1) what precise triggering facts bring strict scrutiny into play; (2) what state justifications are sufficiently compelling once strict scrutiny is applied; and (3) what means are the most narrowly tailored forms of districting once strict scrutiny is applied. Although the same issues can arise under more than one of these inquiries, this Essay focuses on the first question as the point of greatest complexity in the current formulation of *Shaw*. To begin unpacking that aspect of *Shaw*, it is perhaps easiest to start with what the decision does *not* hold regarding when strict scrutiny will be applied.

Despite exaggerated claims from both critics and supporters,¹⁶ the *Shaw*

14. See, e.g., Christopher Eisgruber, *Ethnic Segregation by Religion and Race: Reflections on Kiryas Joel and Shaw v. Reno*, 26 CUMB. L. REV. 515 (1995-96); A. Leon Higginbotham et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593 (1994); J. Morgan Kousser, *Shaw v. Reno and the Real World of Redistricting and Representation*, 26 RUTGERS L.J. 625 (1995); Jeffrey Rosen, *Kiryas Joel and Shaw v. Reno: A Text-Based Interpretivist Approach*, 26 CUMB. L. REV. 387 (1995-96).

15. *Bush v. Vera*, 116 S. Ct. 1941, 1977 n.7 (1996) (Stevens, J., dissenting).

16. See, e.g., Andrea Bierstein, *Millennium Approaches: The Future of the Voting Rights Act After Shaw, De Grandy, and Holder*, 46 HASTINGS L.J. 1457, 1459 (1995) (asserting that cases including *Shaw* "may well sound the death knell for race-based districting"); James F. Blumstein, *Shaw v. Reno and Miller v. Johnson: Where We Are and Where We Are Headed*, 26 CUMB. L. REV. 503, 506-08 (1995-96).

doctrine is neither a broad attack on section 2 of the VRA nor an assault on all intentional race-conscious districting. To be sure, some Justices would subject all such districting to strict scrutiny; some have gone further and intimated a willingness to hold the "results" test of section 2 unconstitutional.¹⁷ As an institution, however, the Court has explicitly stated that *Shaw* reflects a judicial effort to distinguish "appropriate and reasonably necessary uses of race from its unjustified and excessive uses."¹⁸ The excessive use of race, not racial classification per se, generates *Shaw* harms. That is the principle that critics and supporters of *Shaw* should be contesting, not the role of race per se in districting. It is also the principle to which courts implementing *Shaw* must give content.

If race-consciousness per se is not harmful except when taken to certain extremes, one may view *Shaw* as a judicial effort to draw the highly contestable line that plagues all civil rights policies, the line between (to use loaded terms) "nondiscrimination" and "affirmative action." As difficult as this line is to define in other contexts, it is even more difficult in the area of voting rights. In contexts like employment policy, it is at least arguable in theory that nondiscrimination can be achieved through the adoption of employment practices that do not themselves require race-consciousness. The VRA addresses the way public electoral structures respond to private voting patterns; public law must first look to whether those patterns reflect racially polarized voting, and then, because private voting behavior cannot itself be directly regulated, reactive public institutions can only respond by themselves adopting race-conscious programs designed to countervail private race-conscious voting. That is what the post-1982 VRA does.

As the Court appears to see it, race-consciousness in redistricting is permissible to ensure evenhandedness; equal rights means that minority voters have similar opportunities as majority voters to elect "representatives of their choice." Section 2 of the VRA bans vote dilution, and thus requires that districting be racially evenhanded; but as the Court construes it, this process of race-conscious districting is permissible when necessary to ensure equal rights. When race-consciousness goes beyond this point, the shadow of strict

(contending that *Shaw*'s condemnation of race-conscious districting must extend beyond oddly shaped districts); Jamie B. Raskin, *Affirmative Action and Racial Reaction*, 38 HOW. L.J. 521, 525-26 (1995) (describing the *Shaw* doctrine as leading "pervasive effort to undermine" and to "ero[de]" the VRA); Rhonda Cook & Mike Christensen, *Ga.'s 11th District Thrown Out: Justices Say Plan Violates White Voters' Rights*, ATLANTA J. & CONST., June 29, 1995, at A1 (quoting Georgia's Attorney General as claiming that *Miller* signified "a major erosion of the Voting Rights Act"); Jan Crawford Greenburg, *Race-Based Districts Banned: Vote Power of Blacks Jeopardized*, CHICAGO TRIB., June 30, 1995, at 1 (quoting President Clinton who termed *Miller*'s doctrine a threat "to undermine the promise of the Voting Rights Act").

17. See *supra* note 6.

18. *Bush*, 116 S. Ct. at 1970 (O'Connor, J., concurring); see also *id.* at 1964 (plurality opinion) (noting Fourteenth Amendment commitment "to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes").

scrutiny falls. All this sounds tautological, of course. The Court gives content to these principles by implicitly comparing what is done when majority and minority districts are being created. When majority-minority districts comply with traditional districting principles, and are drawn to redress racially polarized voting, the Court treats them as constitutionally appropriate because necessary to secure evenhanded treatment. When race-conscious districting goes further, by abandoning the principles typically used to draw other districts, the Court treats race as having been singled out for exceptionally preferential treatment. The *Shaw* Court can be understood, then, as holding that when this point has been crossed, the VRA has been illicitly transformed from a regime of "nondiscrimination" to one of "affirmative action." Moreover, redistricting signals this shift more visibly and publicly than other policies: The maps speak for themselves (the frequency with which editorial page writers and judges reprint them attests to this belief).¹⁹

Seen in this light, *Shaw*'s concern with the "excessive and unjustified" use of race can be seen as cousin to last Term's decision in *Romer v. Evans*,²⁰ as well as other recent, but less controversial, voting-rights cases.²¹ The fact that Colorado's Amendment 2 went beyond depriving homosexuals of "special rights," and so broadly denied legal protections "taken for granted by most people either because they already have them or do not need them," led the Court to conclude both that the Amendment failed the rational basis test and that it rested on an impermissible animus.²² Although *Romer* reaches a result liberals applaud, and *Shaw* one that liberals deride, in both the Court's legal conclusions implicitly require it along the way to give content to the elusive line between "equal rights" and "special preferences." Indeed, that distinction

19. Contrast the view presented here with Richard Briffault, *Race and Representation After Miller v. Johnson*, 1995 U. CHI. LEGAL F. 23, 45 ("If the value vindicated by *Shaw* is racial neutrality, then it is difficult to see why, given the Court's own principles, the concern with racially 'segregated' districts should be cabined to irregularly shaped districts and not expanded to invalidate any intentional use of race in districting . . .").

20. 116 S. Ct. 1620 (1996). In the immediate aftermath of *Shaw*, many scholars, myself included, viewed *Shaw* as the *Bakke* of voting rights. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); Pildes & Niemi, *supra* note 6, at 503-04. While *Bakke*, too, sought to permit race-consciousness while avoiding the excessive use of race, Justice Powell's controlling opinion in *Bakke* is ambiguous about whether "excessive" in the academic admissions context refers to the *form* of an affirmative action program or the *weight* given to race. As to form, it is clear that preferences are permitted, but quotas forbidden. As to weight, it remains more uncertain whether race can be given only as much weight as other "plus" factors or whether in pursuit of educational diversity race can be given more weight. Thus there remains subtle ambiguity as to whether the "excessive" use of race *Bakke* condemns is best characterized as turning on the form or the weight race-consciousness is given.

21. In one such case, the Court stated:

[The district court's reading of section] 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast.

Johnson v. DeGrandy, 114 S. Ct. 2647, 2659-60 (1994). *DeGrandy* is thus similarly constructed around the axis between ensuring "equal rights" and guaranteeing what some might label "special preferences."

22. See *Romer*, 116 S. Ct. at 1624-29.

is now emerging as one of the philosophical touchstones of the current Court's constitutional jurisprudence.

To provide the factual matrix within which this distinction must be assessed in the redistricting context, this Part seeks to undermine several common mythologies prevalent in academic and popular critiques of *Shaw*. In previous work, I have addressed voting rights mythologies typically associated with political conservatives.²³ Here, I note four mythologies typically associated with critics of *Shaw*.

A. Myth #1: Minority-Controlled Districts in the 1990s Are No More Bizarre than Districts Traditionally Have Been

Some charge that the Supreme Court has become worried about "bizarre" districts only now that such districts have emerged to benefit racial and ethnic minorities.²⁴ In a literal sense, this is true: *Shaw* does not condemn "extremely bizarre" districts across the board, only those in which race can be viewed as having played too dominant a role. Should politicians craft highly contorted districts to protect incumbents, the Constitution would not be

23. See Richard H. Pildes, *The Politics of Race: Quiet Revolution in the South*, 108 HARV. L. REV. 1359, 1362-76 (1995) (book review). Pointing to a handful of highly visible elections, critics of racial redistricting often claim that racially polarized voting has diminished in the South and elsewhere; they allege that black candidates can now get elected with some regularity in majority-white electorates. Two of the most prominent proponents of this view are Abigail Thernstrom and Carol Swain, both of whose works have been cited for this proposition by Justice Kennedy. See *id.* at 1366. The most comprehensive statistical studies, however, continue to conclude that only one percent of white-majority jurisdictions elect black candidates—meaning that absent "safe" districts, black candidates will be elected in only token numbers. See *id.* at 1373.

It should be noted, however, that racially polarized voting is not necessarily tantamount to racially discriminatory voting, though the two are often treated as the same. But whether in fact the two should be equated is contestable. As currently defined for legal purposes, findings of polarized voting are based on bivariate regression analysis, which only correlates race of voters and their preferences over candidates. Following Justice Brennan's plurality analysis in *Thornburg v. Gingles*, 478 U.S. 30, 61-74 (1986), most courts have refused to require more complex, multivariate statistical analyses that would try to determine more specifically the causes or reasons for differential candidate preferences among black and white voters. Thus, if 90% of black voters in the Democratic primary prefer Jesse Jackson, but only 10% of white voters do, this would be a stark illustration of racially polarized voting as the VRA defines it. For a full analysis of racial polarization issues, see Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992). Whether such a pattern should be treated as evidence of "racially discriminatory" voting requires further argument and analysis. Black voters and Jesse Jackson might be ideologically much further to the left of the party than the median Democratic voter; at that point, issues of race and political ideology become sufficiently intertwined that whether differences in manifested preferences over candidates should be treated as equivalent to racially discriminatory preferences raises more complex issues. As defined by the current bivariate-regression approach, there should be little question that patterns of polarized voting remain prevalent, at least in the South. "Safe" minority districts do generally remain necessary to the election of black candidates. For further statistical insight, see *infra* note 99.

24. See Stanley A. Halpin, Jr., *Waves and Backwashes in Voting Rights Law: Recognition Without Implementation of a New Principle Opposing Gerrymandering*, 22 S.U. L. REV. 255, 255-56 (1995); Pamela S. Karlan, *Voting Rights and the Court: End of the Second Reconstruction?*, NATION, May 23, 1994, at 698, 698-700; Raskin, *supra* note 16, at 527-28.

implicated;²⁵ should politicians do so for partisan reasons, the Constitution is only implicated in theory, not in practice.²⁶ Some critics go so far as to view this as a "racial double standard": Bizarre minority-majority districts are subject to constitutional challenge, while bizarre white-majority districts are not.²⁷

In the redistricting context, at least, this rhetorically forceful charge ignores dramatic recent developments evidenced in the 1990s round of redistricting. For several reasons, the creation of bizarrely configured districts exploded in the 1990s. Much of this development is directly attributable to race-conscious districting. Even where it is not, there is reason to believe that such districting indirectly influenced the rise of bizarre districting through its effects on the culture, as opposed to the formal law, of redistricting. To the extent minority-controlled districts are far more extreme in shape than other districts, or to the extent that the VRA and race-conscious districting is a significant cause of whatever new extremes might be found in white-majority districts, *Shaw* needs to be assessed as a response to genuinely novel developments. The evidence does indeed establish that this is the case.

One means of documenting these changes is to quantify the rise of "highly bizarre" congressional districts in the 1990s. This can be done through numerical techniques that assess district shapes.²⁸ For purposes of *Shaw*, one relevant measure focuses on the perimeter of districts, assaying the extent to which borders meander to include selected voters. A second relevant measure focuses on the dispersion of districts, testing how efficiently a district encompasses its territory. Both measures start from the baseline of a circle as the ideal district shape. At this stage, we need not ask the normative question

25. For criticism of this result, see Sally Dworak-Fisher, *Drawing the Line on Incumbency Protection*, 2 MICH. J. RACE & L. 131 (1996).

26. Thus *Davis v. Bandemer*, 478 U.S. 109 (1986), has never been applied by a lower court to strike down any districting plan for a legislative body at any level of governance.

27. See J. Morgan Kousser, *Shaw v. Reno and the Real World of Redistricting and Representation*, 26 RUTGERS L.J. 625, 652-53 (1995) (contending that in implementing *Shaw*, Court cannot avoid invoking racial double standard); Laughlin McDonald, *Can Minority Voting Rights Survive Miller v. Johnson?*, 1 MICH. J. RACE & L. 119, 150-53 (1996) ("*Shaw* and *Miller* are fairly open to the charge that they embody an impermissible double standard."); Conference, *The Supreme Court, Racial Politics, and the Right to Vote: Shaw v. Reno and the Future of the Voting Rights Act*, 44 AM. L. REV. 1, 17 (1994) (comments of Brenda Wright); Jamie B. Raskin, *Gerrymander Hypocrisy: The Supreme Court's Double Standard*, NATION, Feb. 6, 1995, at 167 ("Racial double standards are nothing new in American law, but the Supreme Court's voting rights jurisprudence has turned farcical.").

28. There are numerous measures of compactness in the academic literature, and these measures can produce conflicting results. See MICHAEL ALTMAN, WHAT ARE JUDICIALLY MANAGEABLE STANDARDS FOR REDISTRICTING? EVIDENCE FROM HISTORY (Cal. Inst. of Tech. Social Science Working Paper No. 976, Aug. 1996). Nonetheless, for purposes of applying *Shaw*, the point is not to rank order all districts, but to identify some threshold of extreme bizarreness in compactness. Various measures of compactness tend to converge in extreme cases, see *id.* at 10, and *Shaw* is designed to deal with only such cases. Second, which measures to use depends on the purpose to which the measurement is being put; for reasons explained in Pildes & Niemi, *supra* note 6, at 557-59, the perimeter, dispersion, and possibly population measures appear most tailored to the kinds of concerns *Shaw* addresses. Given that the doctrine deals only with extreme districts, the choice of particular measures might in any event matter less here than in a general analysis of compactness.

of what values reasonably compact districts might serve, nor what the ideal baseline for assessing compactness ought to be. The aim initially is to see whether we can identify significant recent changes in districting practices before turning to the possible legal implications.

Using these measures, I have compared the compactness of congressional districts in the 1980s and 1990s on a state-by-state basis as well as nationwide in the aggregate. The results are reproduced in Appendix I. Nationwide, substantially more congressional districts in the 1990s than in the 1980s can be considered "highly bizarre."²⁹ With respect to district perimeters, taking an arbitrarily selected threshold, there were only sixteen districts below this level in the 1980s, while in the 1990s there were fifty districts—more than three times as many. Similarly, using an arbitrary threshold for the dispersion measure, there were twenty-five districts in the 1980s spread out more diffusely than this level, while there were forty in the 1990s. In other words, congressional districts became dramatically more bizarre in the 1990s than they were in the 1980s. Moreover, these aggregate nationwide data obscure even more remarkable changes in states that created new minority congressional districts in the 1990s. Using the perimeter measure, in North Carolina, the average compactness of congressional districts fell a dramatic 70% in the 1990s; in Louisiana, it fell 62%; in Texas, 50%; in Virginia, 43%; in Georgia, 35%. In four states, Florida, North Carolina, South Carolina, and Texas, dispersion scores dropped at least 20%. In states with new minority districts, therefore, the average compactness of all districts plummeted.

This transformation in the pattern of districting can be documented in another way. We can compare the frequency with which political subdivisions, such as counties, cities, and towns, were divided across multiple congressional districts in the 1990s compared to the 1980s. From judicial findings and documents discovered in litigation, Professor Timothy O'Rourke has collected such information; the results parallel those in the compactness studies.³⁰ In North Carolina, congressional lines had largely adhered to county boundaries in preceding decades. In the 1980s plan, only four of the state's hundred counties had been split. In the state's original plan for the 1990s, subsequently invalidated in the *Shaw* litigation, forty-four counties were split; indeed, seven counties were fragmented into three congressional districts. Not only were counties split, but "a large number of divided precincts" also emerged in the 1990s.³¹ In Texas, the 1990s redistricting plan, since struck down, split thirty-

29. For technical definitions of these measures, see Pildes & Niemi, *supra* note 6, at 554–56.

30. The data in this paragraph are taken from Timothy G. O'Rourke, *Shaw v. Reno: The Shape of Things to Come*, 26 RUTGERS L.J. 723, 762–64 (1995).

31. *Id.* at 763–64 & n.181 (quoting Memorandum to Members of the North Carolina General Assembly from Gerry F. Cohen, Director of Legislative Drafting, North Carolina General Assembly, 1992 Congressional Base Plan #10: Split Precincts (Jan. 23, 1992)). This memorandum goes on to say that these precincts were divided for the specific purpose of achieving desired levels of black population in the two black-majority districts this plan created.

five counties and more than 160 cities, while the 1980s plan had fractured only ten counties. In Georgia, the 1980s plan had divided three counties, while the 1990s plan, also invalidated, split twenty-six counties. Yet another since-invalidated 1990s redistricting plan, Louisiana's, fragmented twenty-eight of the state's sixty-four parishes; that state's 1980s plan had divided only seven parishes. Recent judicial findings from Virginia reveal that that state's 1980s districting plan had split three counties and two cities between districts; the 1990s plan divided eight cities, all split by the one majority-black district (the Third Congressional District) the state created in the 1990s.³² Of the seventeen localities comprising this district, eleven were split between two congressional districts, with the borders closely tied to racial demographics.³³

To be sure, partisan aims have driven gerrymandering as long as districted elections have existed, and on occasion, have generated similar tactics.³⁴ And thus far, the available data enable relatively easy systematic comparisons only of congressional districts between the 1980s and 1990s.³⁵ Nonetheless, it is clear that the 1990s have witnessed a precipitous and systematic decline in the regularity of congressional districts.

To what extent are the VRA and race-conscious districting responsible for this proliferation of extreme district shapes? Appendix II lists the twenty-eight most bizarrely shaped congressional districts in the immediate aftermath of the 1990s redistricting; certain of these districts were later judicially invalidated under *Shaw*. Of these twenty-eight districts, thirteen were minority-dominated districts. Of the remaining fifteen, between five and eight shared substantial borders with one of these contorted minority districts and were therefore necessarily contorted as well. Of the remaining seven to ten districts, two reflect the contorted geography of the unusual terrain they encompass: District 36 in California is noncompact because it includes two islands, and District 10 in Massachusetts includes Cape Cod and nearby islands. Thus, as few as five and as many as eight of the twenty-eight most bizarre districts were white districts neither mapping onto contorted natural geography nor adjoining oddly shaped minority districts.³⁶ Put another way, the *direct* effect of race-conscious districting on the general pattern of declining compactness appears

32. See *Moon v. Meadows*, No. 3:95CV942, 1997 WL 57432, at *4-6 (E.D. Va. 1997).

33. See *id.*

34. Perhaps the most notable example was during the aftermath of Reconstruction. As the first step toward black disenfranchisement in the wake of Northern withdrawal from the South, southern legislatures drew certain exceptionally tortured congressional districts, designed to dilute black electoral power by packing black voters into particular districts and eliminating their role elsewhere. This process has been brilliantly documented in the work of Morgan Kousser. See, e.g., J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in *CONTROVERSIES IN MINORITY VOTING* 135 (Bernard Grofman & Chandler Davidson eds., 1992).

35. Before then, the data are not available in a digitized form that facilitates relatively easy statistical analysis. Only in recent years has the United States Census Bureau digitized geographical information.

36. These extremely bizarre white majority districts are FLA CD 22, MA CD 3, NY CD 5, NY CD 9, TN CD 4, and arguably NY CD 8, NC CD 5, and TX CD 6. See Appendix II.

quite substantial. But there is a more subtle and indirect way that the VRA and racial redistricting in recent years might have contributed even to those few extremely bizarre white-majority districts not adjoining minority ones.

Although it would be difficult to prove conclusively, I suspect that race-conscious districting has intersected in the 1990s with other developments that together have brought about a general decline in *tacit* constraints that previously constrained interest group politics, including pursuit of partisan self-interest, during the intensely political process of districting. Three factors changed during the 1980s that account for this transformation: technology improved; constitutional doctrine shifted in the reapportionment area; and statutory obligations to avoid minority-vote dilution under the VRA were substantially enhanced. Taken together, these factors have facilitated gerrymandering on a new scale. In assessing *Shaw*, it is tempting to try to isolate the distinct and direct contribution to the proliferation of bizarre districts of recent race-conscious districting under the VRA. After all, *Shaw* is not a comprehensive antigerrymandering doctrine; it is directly targeted at racial gerrymandering alone. Thus if *Shaw* is to be justified as a response to the general new context of redistricting, it seems appropriate to ask how much the particular factor *Shaw* addresses—race-conscious districting—has contributed to this general phenomenon. Yet the effort to isolate the independent contribution of each of the three new factors might well be mistaken. In practice, these contributing factors are probably not independent, but synergistic. Each has enhanced the role of the other in fostering more aggressive gerrymandering in general.

For example, the statewide data in Appendix I are striking in that every state in which perimeter or dispersion measures plunged dramatically (including those involving far more pervasive splitting of counties) had created at least one new minority district in the 1990s under the pressure of the post-1982 VRA. Redistricting is ugly and nasty precisely because, for political parties and incumbents, self-interest and even survival is so strongly at stake. Given the incentives, the question is why should any constraints check the process at all? My speculation is that, like many public processes, redistricting was structured not only by formal legal requirements regarding what is permitted and prohibited, but also by a set of taken-for-granted background cultural norms.³⁷ Collective understandings accepted on all sides, some explicit, some tacit, constrained to some extent the crassest forms of the pursuit of political self-interest. In some states, such as North Carolina, there

37. For the argument that informal norms are as important as formal legal rules in structuring various collective interactions, see Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055 (1996). For the view that policymakers must attend to the cultural consequences of public policies, as well as more direct and tangible consequences, see Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy*, 89 MICH. L. REV. 936 (1991); and Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

were strong presumptions against dividing counties. In others, certain districts were so irregularly shaped that were they proposed, they would immediately have been laughed off the table.

Apart from its direct effects, the VRA in the 1980s might have influenced this general culture of redistricting. Once it became permissible to violate various traditional tacit norms such as compactness to comply with the VRA, these tacit understandings might have eroded more generally. Texas, for example, was aggressively and successfully gerrymandered for partisan purposes in the 1990s, including several extremely bizarre white districts whose contorted shapes were not necessary to accommodate minority districts.³⁸ The VRA was not the only source of attack on the tacit norms of the prior redistricting culture. The sharp drop in general compactness in those states that created new minority districts might reflect, in part, the indirect effect of the VRA on these important, previously assumed constraints.³⁹ Finally, as discussed later,⁴⁰ a new constitutional doctrine created in the 1980s and technological advances also encouraged and facilitated the recent rise of bizarre districts.

The principal point is that redistricting in the 1990s cannot be portrayed as business as usual. Untangling the precise causal contribution of the factors driving the radical decline in district compactness is not easy, particularly if some of these factors are interdependent. But the creation of safe minority districts certainly played a significant direct role in these developments, and perhaps a more subtle, indirect one as well. *Shaw* thus needs to be appraised as a response to specific developments in redistricting in the 1990s. The failure to do so renders critique unresponsive to concerns that might motivate or justify *Shaw*.⁴¹

38. Thus, on a scale that runs from 0 to 1, the average perimeter for the Texas districts measured 0.26 in the 1980s and 0.13 in the 1990s. See Appendix I. For additional discussion of the general presence of highly contorted districts in Texas, see *Bush v. Vera*, 116 S. Ct. 1941, 1982 & n.18 (1996) (Stevens, J. dissenting).

39. That at least some judges seem to perceive these dynamic interactions at work between the VRA and other aspects of redistricting culture is testified to by Don Verrilli's description of the reaction of the three-judge panel to the 1990s Florida redistricting plan at issue in *Johnson v. DeGrandy*, 114 S. Ct. 2647 (1994):

[The judges] thought it was an outrageous effort to manipulate lines for partisan reasons, to protect incumbents; districts would be drawn with these little blips in them to make sure that the incumbent's residence was inside the district, and things like that

And that delegitimated the whole enterprise, I thought, in the eyes of the court and made it much more vulnerable ultimately to the Voting Rights Act challenge. There was a sense that this plan wasn't entitled to any real deference as an exercise of democratic politics, that this thing stunk and of course it was a partisan gerrymander and they weren't going to let you use the Voting Rights Act in this way.

Conference, *supra* note 27, at 16 (statement of Donald B. Verrilli, Jr.).

40. See *infra* Part III.

41. Thus, Justice O'Connor herself, writing for the plurality last Term in *Bush*, explained the Court's continued commitment to *Shaw* by suggesting that the doctrine has led legislatures to "reembrace[] the traditional districting practices that were almost universally followed before the 1990 census" *Bush*, 116 S. Ct. at 1964 (plurality opinion).

Thus it is true in constitutional theory (at least for the moment) that bizarre districts can be drawn without constitutional concern for groups not identifiable in racial terms—"farmers, or Republicans in a Democratic region of the state, or gays, for that matter."⁴² In actual practice, such districts do not exist, certainly not in any systematic pattern. While *Shaw* does formally single out race-conscious districting for distinct constitutional treatment, then, the doctrine more closely mirrors the actual political practices of current districting than many critics acknowledge. That does not in itself, of course, justify *Shaw*, but it should frame the terms in which *Shaw* is debated.

B. *Myth #2: The Court Is Effectively Overturning Carefully Considered Congressional Policy Judgments Enacted in the VRA*

Shaw is also sometimes criticized as inappropriate judicial resistance to policy decisions previously, and more appropriately, adopted in Congress.⁴³ On this view, the Department of Justice and state redistricters are engaging in race-conscious districting that Congress has required or authorized; *Shaw* is therefore tantamount to judicial undermining of the VRA. To the extent that civil rights groups won a hard-fought political struggle in the 1982 Amendments, the courts should not interfere with, but rather ought defer to, these legislative policy choices, particularly in such a charged political arena. In effect, this critique portrays *Shaw* as directly colliding with the VRA that Congress adopted.

This view, however, rests on a highly stylized and unrealistic account of the 1982 Amendments. Courts and commentators often portray statutes and legislative intent as if they resolve more than they do. Once the veils of ritualized pieties about congressional intent are pierced, it simply becomes implausible to claim that Congress enacted and the President signed legislation that contemplated, let alone required, the kind of race-conscious districting at issue in the *Shaw* cases. I do not mean that Congress did not contemplate that the 1982 Amendments would require race-conscious districting; the fairest inference from the legislative process is that Congress did understand that some forms of race-conscious districting would be required. But it is the kind of districting at issue in *Shaw*, the use of extremely contorted districts that split counties, towns, and cities so freely, that cannot be claimed to emanate from a deliberative national policy choice. The method of interpreting statutes to imaginatively reconstruct what the enacting legislature would have done with

42. Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 Hous. L. REV. (forthcoming Summer 1997) (manuscript at 40, on file with author).

43. See, e.g., *id.* at 45 ("Nothing in the Court's wrongful districting opinions explains why traditional districting principles—if such there be—are so valuable that the judiciary should step in to reinstate them when the political branches adopt a richer, more inclusionary democratic theory.").

a question it did not confront often cannot yield intelligible answers.⁴⁴ But if any answer is plausible here, it is surely that Congress would have rejected any assertion that the 1982 Amendments required the kind of extremely bizarre race-conscious districting now at issue. Other justifications for these districts might still be offered, but critics of *Shaw* cannot credibly invoke a fictive legislative choice that, realistically, never was made. A brief review of the legislative context in 1982 will reveal why.

First, the principal focal points of vote dilution litigation in 1982 were at-large and multimember election systems.⁴⁵ In this context, a bloc-voting and hostile majority could maintain complete domination of electoral politics through its ability to outvote a vulnerable minority for each and every seat. Vote dilution was tantamount to utter exclusion from political office holding and, most likely, political influence.⁴⁶ The primary objective of litigation was to force the restructuring of these systems into single-member districts in which minorities would be able to control some number of seats. But the emphasis was on how liability would be established when challenges were brought to at-large and multimember systems. The major cases Congress drew upon in 1982 all involved such challenges. Given this priority, little attention was directed toward the question of precisely how single-member districts would be designed once the remedial stage was reached. Moreover, vote dilution challenges to the way districts were arrayed within a single-member districting plan were still largely problems for the coming years. Indeed, only in 1993 did the Supreme Court finally hold that the doctrinal framework developed previously would apply to dilution challenges to redistricting plans.⁴⁷ Precisely how the concept of vote dilution would apply in this distinct context was complex, uncertain, and hardly central, let alone on the agenda, during the 1982 congressional debates. Whereas dilution in at-large and multimember elections sought to replace one form of election with another, challenges to single-member districting plans presented a vast array of potential alternatives for laying out the pattern of districts. And while dilution in at-large and multimember systems might be tantamount to total exclusion, once elections took place through individual districts, the questions of dilution and effective minority influence became more subtle.⁴⁸

The 1982 Amendments incorporated a "results" test into section 2 of the VRA, which bars any voting practice that "results in a denial or abridgement

44. See Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U CHI. L. REV. 800, 810–11 (1983) (endorsing such method).

45. For the relevant history of this period, see generally BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* (1992).

46. This insight comes from Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 880 (1995) ("Under such circumstances, 'dilution' was a functional proxy for exclusion, plain and simple.").

47. See *Grove v. Emison*, 507 U.S. 25, 40–42 (1993).

48. See *infra* note 95 and accompanying text.

of the right of any citizen of the United States to vote," even without proof of discriminatory purpose.⁴⁹ It is essentially this provision that the Department of Justice and state redistricters, as well as critics of *Shaw*, invoke to claim that the VRA required or supported the extremely bizarre race-conscious districts at issue.⁵⁰ When Congress amended section 2 this way, we can say for certain that Congress intended to reject the Supreme Court's holding in *Mobile v. Bolden*. There, in a challenge to at-large city council elections, the Court held that the Fifteenth Amendment as well as the then-existing version of section 2 required proof of discriminatory purpose. The decision provoked an immediate outcry from voting rights lawyers and civil rights organizations; they argued that the decision reversed Court precedents of the previous decade and would bring vote dilution litigation to a halt.

In response, Congress did agree to make vote dilution litigation easier and to reject *Mobile*. But what Congress understood itself to be erecting in the place of *Mobile*—what it understood the "results" test to mean—is far less certain. One possibility, probably the best description of a plausible collective understanding to attribute, is that Congress conceived itself to be restoring the pre-*Mobile* judicial status quo. The Court's prior decisions, primarily in *Whitcomb v. Chavis*⁵¹ and *White v. Regester*,⁵² defined that prior legal status quo; Congress repeatedly described the amendments as "codifying the leading pre-*Bolden* vote dilution case[s]."⁵³ The problem, though, was that these earlier cases themselves had not worked out a coherent conception of vote dilution. *Regester* had employed two quite different theories to strike down multimember districts in two different Texas counties,⁵⁴ while *Whitcomb* had

49. 42 U.S.C. § 1973(a) (1994).

50. Section 5 requires "covered" jurisdictions to obtain from the Attorney General, or from the United States District Court for the District of Columbia, preclearance for new redistricting plans. Under section 5, the Attorney General must deny preclearance to any new plan that has the purpose or effect of "denying or abridging the right to vote on account of race." *Id.* § 1973(c). Because section 2 bars voting practices that abridge the right to vote on account of race, the Department of Justice maintains that this similar language requires it to refuse preclearance to any plan that would violate section 2. *See* 28 C.F.R. § 51.55(b)(2) (1996) (detailing Department of Justice's incorporation of section 2 into section 5).

The United States District Court for the District of Columbia has consistently refused to incorporate section 2 into section 5's preclearance requirement. *See, e.g., Arizona v. Reno*, 887 F. Supp. 318, 320–22 (D.D.C. 1995); *Georgia v. Reno*, 881 F. Supp. 7, 13–14 (D.D.C. 1995); *New York v. United States*, 874 F. Supp. 394, 400 (D.D.C. 1994). The Supreme Court thus far has declined to address the issue directly, but may do so in one case before it this Term. *See Bossier Parish Sch. Bd. v. Reno*, 907 F. Supp. 434, 440–45 (D.D.C. 1995) (holding that section 2 does not incorporate section 5), *prob. juris. noted*, 116 S. Ct. 1874 (1996).

51. 403 U.S. 124 (1971).

52. 412 U.S. 755 (1973).

53. *See, e.g., S. REP. NO. 97-417*, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 179.

54. In finding the voting power of African-American voters to be diluted in Dallas County, the Court emphasized several specific electoral features internal to the electoral structure. Thus the Court focused on majority-vote requirements, "place" rules, and the powerful slating role of a white-dominated political organization, the Dallas Committee for Responsible Government (recalling the series of White Primary cases from Texas). The Court also noted racial appeals in recent political campaigns, along with Texas's past history of racial discrimination in voting. With respect to Mexican-American voters in Bexar County, the Court's finding of vote dilution centered on almost none of these specific, internal features of the

rejected a vote dilution challenge to a multimember Indiana district in circumstances not easy to distinguish from those in Texas. Given the political attractions of ambiguity⁵⁵ and shifting of responsibility,⁵⁶ the very uncertainty of these cases, which recognized that lines had to be drawn between permissible and impermissible vote dilution claims but which left those lines murky, perhaps made congressional incorporation-by-reference of the cases all the more politically attractive.

A second plausible possibility is that Congress simply had no clear conception in mind of what vote dilution or the "results" test would mean. That is, Congress might well have had neither a clear conceptual sense of vote dilution, nor a well-developed practical understanding of what the results test would mean in application. Remarkably, in light of the dramatic transformations that section 2 would soon effect, there was little substantive discussion of this aspect of the 1982 Amendments in the House; debate there centered on other proposed amendments considered more important and controversial.⁵⁷ Only in the Senate did sustained and focused debate on the meaning of section 2 begin to emerge. Those debates generate little confidence that supporters of the section 2 Amendments had a coherent conception of vote dilution in mind, certainly not at the margins of vote dilution at which the *Shaw* problem arises. Whether Congress had a consensus on the concept of vote dilution with respect to single-member districts even in core or paradigmatic contexts is not critical for present purposes. Even if it had, Congress surely did not endorse and had no policy in mind at all concerning the subsidiary questions at issue in *Shaw*: whether race-conscious districts that departed in dramatic and highly visible ways from other districts, such as being "extremely bizarre" in shape, were appropriate or required to avoid illegal vote dilution.

On the general concept of vote dilution, all purported to agree that section 2 would not require proportional representation along racial lines. Yet when asked how a "results" test could mean anything else, proponents referred to a vague "totality of the circumstances" inquiry that prior cases were correctly said to have adopted. When the Senate Report attempted to specify these circumstances, it listed seven typical factors, suggested at least two other

electoral arrangements. Instead the Court emphasized factors external to the practice of voting itself, such as the "cultural and economic realities" of this community within Bexar County. While the Court referred to the vote dilution inquiry as one that focuses on "the totality of the circumstances," it emphasized very different kinds of circumstances in striking down the multimember districts in the two counties

55. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE. A CRITICAL INTRODUCTION* (1991).

56. See generally Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* 175, 183-94 (Roger G. Noll ed., 1985).

57. For a detailed and balanced recounting of the legislative process and history leading to the enactment of section 2, with a specific focus on what Congress understood vote dilution and the results test to mean, see Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983).

additional factors, noted that in some cases yet "other factors," left unspecified, would be relevant, and then observed that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other."⁵⁸ A statutory standard that relies on the "totality of the circumstances" and a laundry list of potentially relevant factors often signals the absence of clear consensus on the core concept involved. Moreover, in practice, courts applying such a standard will almost inevitably gravitate toward one of two alternatives: distilling this range of factors into a few deemed most essential to enable more rule-like implementation of the standard, or invoking different factors in different cases in a necessarily more ad hoc approach. The Supreme Court, as discussed in a moment, almost immediately opted for the former.

The critical theme here is that the starting point of the section 2 amendments, the "results" test, was from its inception unusually cloudy. This test was even less clear for challenges to single-member districting plans than for at-large and multimember elections. The legislative history that would confirm this cannot be recounted in detail here, but to get a sense of its tenor, consider the following typical colloquy in the Senate Judiciary Subcommittee hearing, where most of the section 2 discussion took place. The exchange is between a Republican supporter of amended section 2, Senator Charles Mathias of Maryland, and a Senate Judiciary Subcommittee chair and a skeptic, Senator Orrin Hatch of Utah:

SENATOR MATHIAS: The purpose of this bill is to provide for fair and just access to the electoral process.

SENATOR HATCH: Is [it] the most fair and just means to achieve access—if 55 percent of Baltimore is black then 55 percent ought to be black majority districts?

SENATOR MATHIAS: A fair and just operation of the electoral process is to give all citizens equal access to vote, run, or otherwise participate in the process.

SENATOR HATCH: What does "equal access" mean, Senator Mathias?

SENATOR MATHIAS: You are well aware of what it means.

SENATOR HATCH: I want to know what you think it means, because I know what it means under the effects test in section 5. I think it means, as does the Attorney General of the United States, proportional representation.

SENATOR MATHIAS: You look at the totality of circumstances; that is what we have been doing.

SENATOR HATCH: That is what we do under the intents standard.

. . . .

58. S. REP. NO. 97-417, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207.

... I am quite confused as to the relevance of the circumstances that you are considering in their totality.

....

I do not understand what the question is that the court asks itself in evaluating the totality of circumstances under the results test. What precisely does the court ask itself after it has looked at the totality of the circumstances? What is the standard for evaluation under the results test?

SENATOR MATHIAS: Look at the results.

SENATOR HATCH: That is all? You are saying that if there was absolutely no intent to discriminate, as the Court found in the *Mobile* case, yet the results were the election of disproportionately few minority candidates, that a case would be established?⁵⁹

This brief excursus into the congressional history of section 2 returns us to the Court's effort to maintain what it seems to view as the distinction between "nondiscrimination" and "affirmative action" in VRA enforcement. One way to reflect on the Court's concern is to set it in the broader context of the history of civil rights policymaking. As policymaking in this arena has matured, this distinction has paradoxically become increasingly important yet increasingly blurred. The distinction appears important to public support for civil rights; support for policies that can be framed as "nondiscrimination" ones has always been higher than for those characterized as affirmative action.⁶⁰ Scholars have recently argued that the lesson of thirty years of civil rights enforcement is that institutional dynamics make it difficult for administering agencies to maintain this distinction. Thus, John Skrentny has recently asserted that the pressures of "administrative pragmatism"⁶¹ almost immediately channelled the enforcement of Title VII toward more extensive race-consciousness and an emphasis on bottom-line numbers than its original proponents would have endorsed.⁶² In his account, internal administrative forces pressed policy in this direction long before political pressures or

59. *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong. 200-01 (1982)

60. See, e.g., RICHARD KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996) As David Skrentny writes of the era of the 1964 Civil Rights Act, at that time "anything beyond color blindness had a strange, taboo like quality. Advocacy of racial preference was one of those 'third rails' of American politics: Touch it and you die." JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION* 3 (1996). For survey results showing widespread rejection of "preferential treatment" among both whites and, to a lesser extent, blacks, see *id.* at 4-5.

61. Administrative pragmatism is the need of organizations, working with often scarce resources, to find the most cost-effective ways of providing documentable evidence that they are achieving their goals. See SKRENTNY, *supra* note 60, at 111.

62. See *id.* at 115 ("Throughout the 1950s and 1960s, agencies in search of a useful tool for fighting discrimination were continually led to the affirmative action approach, monitoring numbers and percentages of African-Americans hired as a measure of discrimination"); see also *id.* at 117-18 (discussing government-coordinated Plans for Progress initiative of large private businesses during Kennedy Administration as another early example that gravitated toward affirmative action model)

ideological justifications for affirmative action arose publicly.⁶³

Other scholars have argued that the distinction between nondiscrimination and affirmative action is itself not conceptually coherent,⁶⁴ or that with the institutionalization of affirmative action, regulatory capture has become as prevalent a phenomenon as traditional economic regulation.⁶⁵ On this view, enforcement entities, public and private, became dominated by the programs' strongest advocates; beneficiary groups are the most effectively mobilized to press their interests; and iron triangles form between administrators, those who stand to gain most, and political supporters. Conceptually, politically, and administratively, the pressures on the boundary between nondiscrimination and affirmative action are powerful. Yet at the same time, rising skepticism that this line would or could be maintained became one factor in a backlash against support for the equal rights model itself.⁶⁶

In the voting rights context, one interpretation of nondiscrimination would be that minorities should be descriptively represented in politics in numbers roughly proportional to their population; this is an outcome-oriented reading that focuses on bottom-line numbers.⁶⁷ An alternative reading is more process-oriented: Minorities are legally entitled to an evenhanded districting

63. As Skrentny puts it:

The point is that a race-conscious society and a reification of difference were not the ideological goals of the mainstream civil rights movement. Race-conscious justice was a tool that emerged when the classical liberal litigation tools failed to achieve the classical liberal goal of nondiscrimination. Whatever the later arguments of philosophers and legal scholars stressing the justice of race-conscious compensatory hiring, the groups which fought for civil rights, and often the courts which ruled, were following merely a pragmatic logic.

Id. at 141. When civil rights enforcement became nationalized through the executive branch in the Equal Employment Opportunity Commission and the Department of Justice, and through the judicial branch in the federal courts, the forces of administrative pragmatism inevitably were accelerated. The rise of EEOC racial reporting form requirements, for example, as well as the rise of disparate-impact litigation, in practice further edged the legislatively endorsed equal rights model toward an affirmative-action model. *See id.* at 127-33, 139-41.

64. *See, e.g.*, ALFRED W. BLUMROSEN, *MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY* 253-55 (1993) (arguing that Title VII is itself necessarily race-conscious); David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 99-100 (asserting conceptual overlap between nondiscrimination and affirmative action).

65. *See, e.g.*, Issacharoff, *supra* note 46, at 871 ("Quite simply, it is increasingly difficult to recognize in the routinized practices of the bureaucratized use of the classifications the aspirations for individual autonomy and equality that gave the civil rights revolution its powerful moral force."). On the complexities of institutionalizing racial classifications, see Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994).

66. Those who currently seek to extend antidiscrimination laws to sexual orientation, in a manner analogous to Title VII's protections for race, run squarely into this problem: No matter how much proponents disclaim seeking special preferences and emphasize only equal rights, opponents can tap popular perceptions about civil rights with considerable success by arguing that such rights will inevitably become "special rights" and "unfair preferences." For a discussion of statewide ballot campaigns in which such arguments have played a role, see Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 289-90 (1994). *See also* Jeffrey S. Byrne, *Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity*, 11 YALE L. & POL'Y REV. 47, 72-74 (1993) (listing examples).

67. For the reasons that even this approach would not necessarily yield proportionality between minority population and representation, see *infra* note 95 and accompanying text.

process, but not to districts drawn according to special principles not generally applicable. It is important to recognize that this tension has arisen only recently in the VRA field, as the force of litigation shifted from dismantling at-large and multimember election systems to challenging the distribution of single-member districts within a districting plan.⁶⁸

Shaw reflects the Court's adoption of one interpretation of nondiscrimination in voting and the Court's conception of itself as the appropriate institution for limiting race-consciousness in districting to this point. Substantively, the Court has rejected the outcome-oriented interpretation of equal rights in redistricting. Institutionally, does the Court's willingness to embrace this role reflect the view that political and administrative institutions have proven over the thirty years of civil rights enforcement unable or unwilling to play this role? When Congress made vote dilution illegal in 1982, it took no responsibility to give dilution very specific or coherent content. As bizarre districts flowered in the 1990s, the Department of Justice disclaimed any role in enforcing any general norms of redistricting;⁶⁹ as long as more minority districts were created, the Department would not object. Indeed, critics charged the Department itself with being the principal force steering the VRA toward a maximization requirement.

In sum, the 1982 Congress cannot realistically be viewed as having determined that extremely bizarre minority-controlled districts were appropriate or required to enhance minority representation. Less expansive understandings of vote dilution and nondiscrimination in voting were controversial at the time and the context of *Shaw* was far off the horizon. Whether *Shaw* is right or not, criticism that the Court is overturning carefully considered congressional judgments is unpersuasive. *Shaw* is better debated in terms of the substantive issues its approach raises, rather than in terms of whether it is consistent with an imagined congressional policy choice.

C. *Myth #3: Shaw Is to the 1990s What Plessy v. Ferguson Was to the 1890s*

The rhetoric used in critiquing *Shaw* has at times been stunningly inflammatory. Some critics directly equate *Shaw* with *Plessy v. Ferguson*,⁷⁰ but if that were not enough, others have gone even further: "Five Supreme Court justices have done to African-Americans in Louisiana what no hooded Ku Klux Klan mobs were able to do in the decade—remove an African-

68. See *supra* notes 45–47 and accompanying text.

69. When confronted with the "convoluted shape" of North Carolina's Twelfth District, for example, the Department of Justice abjured any authority to evaluate its compactness in any manner, concentrating instead only on whether the district had "the purpose or effect of minimizing minority voting strength." *Shaw v. Barr*, 808 F. Supp. 461, 463 n.2 (E.D.N.C. 1992) (quoting Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, to Tiare B. Smiley, Special Deputy Attorney General, State of North Carolina (Dec. 18, 1991)), *rev'd sub nom.* *Shaw v. Reno*, 509 U.S. 630 (1993).

70. 163 U.S. 537 (1896).

American from Congress.”⁷¹ Perhaps this rhetoric reflects what Mark Kelman has recently suggested is characteristic of current forms of identity politics: “[D]emands will not readily be modulated because, unlike traditional pluralist ‘interest’ group demands, each group represents not just one of an individual’s many, often conflicting, material interests, but instead represents a critical aspect of her identity.”⁷² In such a politics, any loss, whatever the justification, is tantamount both to complete loss and to all other earlier losses, whatever their justifications.

To step back a bit from the moment’s turbulent ideological struggles, it is helpful to situate *Shaw* within the judicial history of these issues. The pre-history of *Shaw* has largely been lost in the polarized debates of the present, but it will no doubt surprise some to discover that, from the start of the Court’s encounter with inclusionary race-conscious districting in the 1960s, many Justices have viewed this mix of race and democratic institutions with profound disquiet. Indeed, three of the Court’s “liberal” icons—Justices Douglas, Goldberg, and Brennan—expressed positions not so different from those in today’s *Shaw* decisions. These three Justices viewed race-conscious districting either as unconstitutional in all circumstances, a position far more extreme than Justice O’Connor’s today; as unconstitutional in circumstances comparable to those in *Shaw* itself; or, at a minimum, as raising profound and troubling constitutional questions.

In *Wright v. Rockefeller*,⁷³ an ethnically and racially mixed group of plaintiffs alleged that New York’s congressional districts in the 1960s had “‘segregate[d] eligible voters by race and place of origin’”⁷⁴ for the purpose of creating a safe Harlem district that black and Puerto Rican residents would dominate. A majority of the special three-judge federal court agreed with a version of the theory *Shaw* adopted over thirty years later.⁷⁵ Judge Feinberg, then a district judge and later a respected figure on the Second Circuit, concluded that the Constitution would be violated if plaintiffs could prove that

71. Cleo Fields & A. Leon Higginbotham, Jr., *Why the Anxiety When Blacks Seek Political Power?*, NEW ORLEANS TIMES-PICAYUNE, July 23, 1996, at B5; see also *id.* (“In the recent voting rights cases, the Supreme Court dealt African-Americans a blow almost as cruel as when it issued the ‘separate but equal’ doctrine in *Plessy vs. Ferguson*.”). For similar comments, see Higginbotham et al., *supra* note 14, at 1644 (“Absent a change in direction, . . . *Shaw*, like *Plessy* before it, may have devastating racial consequences.”); Laughlin McDonald, *The Counterrevolution in Minority Voting Rights*, 65 MISS. L.J. 271, 273–74 (1995) (“[T]he Court has launched a counterrevolution which threatens to overthrow the gains in minority office holding so laboriously accumulated over the past 30 years.”); Raskin, *supra* note 16, at 528 (asserting that *Shaw* makes no sense unless one assumes that whites have presumptive right to be in political majority); Frank McCoy, *Under Supreme Attack: High Court Decisions Could Erode Hard-Fought Gains*, BLACK ENTERPRISE, Oct. 1, 1995, at 24 (asserting, in aftermath of *Miller*, that “Black America faces a new Jim Crow era,” and reporting that *Shaw* line of cases signals “that the second Reconstruction is over”).

72. Mark G. Kelman, *Progressive Vacuums*, 48 STAN. L. REV. 975, 991 (1996) (book review).

73. 376 U.S. 52 (1964).

74. *Id.* at 53 (quoting plaintiff’s complaint).

75. See *Wright v. Rockefeller*, 211 F. Supp. 460 (S.D.N.Y. 1962).

the districts' lines had been drawn on a racial basis. In his view, there was no need to prove vote dilution, because "racially drawn districts *per se* would also violate the Equal Protection clause."⁷⁶ Judge Murphy agreed that "plaintiffs are not required to prove any diminution or dilution of their voting rights . . . once they show that the district lines were constituted on a racial basis."⁷⁷ They differed over whether sufficient evidence had been presented of racial/ethnic design for the districts. Had Judge Feinberg found the evidence any stronger, this three-judge federal court in the Second Circuit might have invalidated a congressional district on a *Shaw*-like theory thirty years before *Shaw*.⁷⁸

The Supreme Court circumvented the profound constitutional questions presented on the same narrow and questionable grounds upon which Judge Feinberg relied. Because plaintiffs had not presented any direct proof of legislative intent to engage in race-conscious districting, but had only offered as evidence the shapes of the districts and their demographic patterns, the Court concluded that the plaintiffs had not met their burden of establishing an intent to use race and ethnicity in drawing the districts.⁷⁹ It did so despite the extreme disparities in ethnic populations among adjoining districts and the way the districts' contorted pattern of twists and turns managed to include and exclude the relevant racial and ethnic populations. Through this form of "judicial minimalism,"⁸⁰ the Court managed to avoid confronting the constitutional question plaintiffs had attempted to put squarely before the Court.

In dissent, Justice Douglas made clear his view that "[r]acial boroughs are also at war with democratic standards."⁸¹ Justice Douglas did not take the fanciful view that the Constitution required multiracial election districts; he saw no violation in one racial group's dominating a district (as one necessarily must) as long as such districts reflected genuine neighborhoods. But when a district's architecture could "be explained only in racial terms," Justice Douglas recoiled:

Racial electoral registers, like religious ones, have no place in a society that honors the Lincoln tradition—"of the people, by the people, for the people." Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District

76. *Id.* at 468.

77. *Id.* at 473.

78. The third judge, Judge Moor, intimated that in his view, absent actual vote dilution, race-conscious districting did not violate the Constitution. *See id.* at 467-68.

79. *See Wright*, 376 U.S. at 56-58.

80. For a celebration of such judicial techniques, see Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

81. *Wright*, 376 U.S. at 62 (Douglas, J., dissenting).

C by a Jew, District D by a Catholic, and so on. The racial electoral register system weights votes along one racial line more heavily than it does other votes. That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense. Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines

When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.⁸²

In the same case, Justice Goldberg, also dissenting, endorsed the position that because "racial segregation was a criterion in—or a purpose of—the districting of [an area]," the Equal Protection Clause had been violated.⁸³ This is an even more demanding motive standard than the one *Shaw* and its progeny adopt. The Court now holds that race may be a criterion in or a purpose of districting, as long as it does not become "the predominant factor."⁸⁴

Consider also the words of Justice Brennan, in his exquisitely difficult struggle with race-conscious districting in *United Jewish Organizations v. Carey*.⁸⁵ Justice Brennan distanced himself from a plurality opinion that legitimated race-conscious districting without regard to the legal basis upon which the architects of the redistricting had based their decisions. In contrast, Justice Brennan was prepared to accept such districting only when section 5 of the VRA required it as a remedial response. In those circumstances, Justice Brennan argued, Congress had weighed the reasons for and against race-consciousness, while the Department of Justice would also actively be monitoring the justifications for the use of race and the scope of its use. In those specific circumstances, Justice Brennan argued, the use of race-oriented remedies traced back to "substantial and careful deliberations" in Congress, leading to "an unequivocal and well-defined congressional consensus" that the reasons for and against race-conscious voting systems justified "an activist race-conscious remedial role."⁸⁶ But beyond where specifically licensed through section 5 of the VRA, race-conscious districting raised concerns too

82. *Id.* at 66–68 (Douglas, J., dissenting) (citations and footnote omitted).

83. *Id.* at 74 (Goldberg, J., dissenting).

84. *Bush v. Vera*, 116 S. Ct. 1941, 1951–52 (1996) (plurality opinion). For a fuller discussion, see *infra* Part II.

85. 430 U.S. 144 (1977).

86. *Id.* at 176 (Brennan, J., concurring in part).

troubling for Justice Brennan to endorse. Thus, unlike the plurality, he refused to reach the question of whether the Constitution permitted race-conscious redistricting where section 5 did not require it. In justifying this caution, Justice Brennan observed that race-conscious districting had "the potential for reinvigorating racial partisanship";⁸⁷ raised "serious questions of fairness";⁸⁸ and contained "the potential for arousing race consciousness."⁸⁹ Moreover, Justice Brennan warned, "we cannot well ignore the social reality that even a benign policy of assignment by race is viewed as unjust by many in our society" and creates the "impression of injustice."⁹⁰

Recalling the views of these earlier judges, many of whom occupy the pantheon of judicial liberalism and constitutional racial egalitarianism, might bring some perspective to charges that *Shaw* is the *Plessy* of our time. Principles can change, of course, as judges and others learn more about the complexity and intractability of social problems.⁹¹ The fact that judges from the 1960s until the 1980s expressed constitutional understandings similar to those in *Shaw* does not make those understandings right; it does not even establish that those same judges would hold the same constitutional views today. But *Shaw* has polarized the current Court along preexisting cleavages conventionally identified in politically conservative and liberal terms, and these divisions encourage casting *Shaw* as the site of clashing ideological positions of profound difference. Recovering the historical pattern of continual judicial concerns with race-conscious districting, which led Justices Douglas and Goldberg to take an even more aggressive position than *Shaw* itself adopts, offers a useful reminder that the mix of race and politics at issue in *Shaw* has troubled many judges and Justices, not just the five Justices who make up the current *Shaw* majority.⁹² There is no inherent normative authority in numbers,

87. *Id.* (Brennan, J., concurring in part).

88. *Id.* at 169 (Brennan, J., concurring in part).

89. *Id.* at 172 n.2 (Brennan, J., concurring in part).

90. *Id.* (Brennan, J., concurring in part); see also *id.* at 173 ("[A]n explicit policy of assignment by race may serve to stimulate our society's latent race consciousness . . .") (Brennan, J., concurring in part).

91. The facts of racial redistricting in these earlier cases can also be said to differ from those in the current racial redistricting cases, but not in ways that appear to matter to the general constitutional understandings that these earlier judges expressed. Thus the Harlem district at issue in *Wright v. Rockefeller* had an 86% minority population, see 376 U.S. 52, 54 (1964), whereas most districts before the Court today have minority populations in the 50% to 60% range. But nothing in the constitutional principles these various earlier judges expressed appears to hinge on these kinds of factual differences.

92. Moreover, even some current *Shaw* dissenters, notably Justice Stevens, principally object that *Shaw* is too narrow, not too broad. Justice Stevens is troubled because *Shaw* targets "racial gerrymanders" alone, instead, he would support a more expansive set of universal, *Shaw*-like constraints on all forms of gerrymandering. See, e.g., *Karcher v. Daggett*, 462 U.S. 725, 748-50 (1983) (Stevens, J., concurring). As an incisive and thorough analysis points out, since Justice Stevens's days on the Court of Appeals, and perhaps influenced by his experience with Chicago politics, Justice Stevens has perceived "an inherent entanglement of ethnic and partisan politics." Pamela S. Karlan, *Cousins' Kin: Justice Stevens and Voting Rights*, 27 RUTGERS L.J. 521, 522 (1996). Thus, he has argued that claims of political and racial gerrymandering must be judged by the same standard, and that both are better handled judicially through doctrines that focus on the objective effects of redistricting plans, rather than through efforts to determine their underlying purposes. See *id.* at 523, 539-40. Those views are very much in line with those that this

but perhaps seeing the points of continuity between *Shaw* and prior judicial views will facilitate more tempered analysis and debate. The suggestion that *Shaw* and *Plessy* are kindred cases undermines serious and credible analysis of contemporary racial redistricting.

D. *Myth #4: Absent Vote Dilution, No Meaningful Harms Can Follow from the Use of Extremely Bizarre Districting to Enhance Minority Representation*

A fourth criticism of *Shaw* starts from two factually accurate premises: (1) that certain minority groups, which the VRA protects, are underrepresented in typical legislative bodies compared to their proportion of the population (either voting-age or total population); and (2) that racially polarized voting continues to be prevalent, particularly in the South.⁹³ Therefore, this argument continues, we ought to modify territorial districting to any extent necessary to bring about more racially and ethnically proportional representation.

Note several initial assumptions behind this view. First, it assumes that fair districting and color-blind voting would produce minority political representation roughly proportional to population. But this might be too simple. Districting itself makes proportional representation of various sorts unlikely along almost any single axis (party, race, religion) unless the relevant divisions perfectly map onto the geographic units that form the basis for districting. Second, the ideological preferences of black voters are not distributed randomly; black voters tend to be considerably more liberal than white voters and cluster at one end of the distribution of political preferences.⁹⁴ Whatever weight these two factors, and perhaps others, ultimately ought to carry, they need to be taken into account in constructing an appropriate baseline of "racially fair" representation.⁹⁵ Second, arguments about proportional minority representation implicitly emphasize "descriptive representation,"⁹⁶ or a "politics of presence";⁹⁷ the argument assumes that our primary concern should be with whether a sufficient number of officeholders physically mirror

Essay advocates.

93. See *supra* note 23.

94. Given that the correlation between race and political ideology is so strong, further questions arise as to whether policy ought to distinguish the two, but I will postpone that further complexity. See *infra* Section II.B.

95. The only study I know to attempt to take these factors into account concludes that the current level of black representation in the United States House is "fair." King's figures are 12% for black population and 8.7% for black representation in the House. See Gary King et al., *Racial Fairness in Legislative Redistricting*, in CLASSIFYING BY RACE 85, 107-08 (Paul Peterson ed., 1995). But work of this sort is still primitive.

96. HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 226 (1967).

97. ANNE PHILLIPS, THE POLITICS OF PRESENCE 5 (1995) ("In this major reframing of the problems of democratic equality, the separation between 'who' and 'what' is to be represented, and the subordination of the first to the second, is very much up for question. The politics of ideas is being challenged by an alternative politics of presence.").

the electorate. Public policy might instead put primary emphasis on "substantive representation" of minority interests, that is, whether the policies minorities favor are "adequately" given voice, pursued, and adopted. While descriptive representation might in theory enhance the likelihood of substantive representation,⁹⁸ as a practical matter in the American redistricting context, more proportional descriptive representation might be achievable only at the weighty cost of declining substantive representation.⁹⁹

For now, however, assume that descriptive representation ideally ought to be roughly proportional. Given that commitment, there are two versions of the argument against allowing compactness to stand in the way of enhanced minority representation. The first asserts that bizarrely drawn districts do not impose harms unless they are a means of diluting the voting power of some cognizable group; departures from compact districting ought not be troubling because compactness itself does not reflect important substantive values.¹⁰⁰ A more subtle version acknowledges the genuine social costs of the kind of districting at issue in *Shaw*, but considers those costs trumped by the benefits of enhanced minority political representation.¹⁰¹

The first version argues that the values associated with geographically compact districts have become anachronistic. Technology, media markets, and campaign methods now minimize any direct connection between the ability of representatives and constituents to communicate and the geographic

98. For the most incisive analysis of this argument, see *id.* at 1-57, 145-67.

99. See Pildes, *supra* note 23, at 1376-91. The most recent and technically sophisticated study of congressional elections is Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794 (1996). With respect to descriptive representation, or the election of black candidates, this study concludes that to get to the 50% probability level of electing a black Democratic congressional candidate, districts in the South need a black voting-age population (BVAP) of 40.3%; in the Northwest, a BVAP of 47.3%; and in the Northeast, a BVAP of 28.3%. Thus this study suggests that, "[i]t is rarely necessary for minority voters to be a clear majority within a district to have a good chance of electing a minority representative, and the 65% rule enforced by the courts certainly seems excessive." *Id.* at 804.

Even more interesting are the results on the tradeoff between descriptive and substantive representation. Substantive representation is measured by votes on civil rights legislation. Again, regional variation is crucial. Outside the South, the best circumstance for maximizing the political influence of black voters is when black voters are distributed equally across all districts. That is, two districts with 25% BVAP will be better, in terms of influence on civil rights legislation, than one district that is 50% BVAP and one that is 0% BVAP. See *id.* at 807-08 ("Majority-minority districts make little sense in this context, unless they confer significant nonpolicy benefits, as they create greater possibilities for electing Republicans in other districts.").

Within the South, this study confirms that the relationship between BVAP and political influence is more complex. While representatives are generally more liberal as the BVAP of their districts goes up, this responsiveness flattens out when the BVAP is between 25% and 35%. Above those levels, significant improvements in responsiveness do occur. In terms of influence on policy, there is no reason to construct districts with BVAP between 25% and 35%. Putting these effects together, the study concludes that in the South, the approach that maximizes the influence of black voters is to construct as many districts as possible that are around 47% black, with the remaining black voters distributed as evenly as possible over other districts.

100. For an extensive critique of geographic compactness along these lines, see the lower court opinion in *Shaw v. Hunt*, 861 F. Supp. 408, 472 n.60 (E.D.N.C. 1994), *rev'd*, 116 S. Ct. 1894 (1996).

101. For one form of this argument, see K. ANTHONY APPIAH & AMY GUTTMAN, *COLOR CONSCIOUS* 161-62 (1996).

compactness of a district.¹⁰² Thus districts can be functionally compact even when geographically diffuse and sprawling.¹⁰³ Others dispute this view, arguing that geographic compactness does continue to facilitate better representative politics and better cultural relations; they offer studies, for example, that show that constituents appear more likely to identify their representatives in compact districts, or they argue more speculatively about the benefits from linking social services and economic development to geography.¹⁰⁴

Whatever the merits of these debates, they are framed around an internal perspective on compactness. But *Shaw* must be understood as concerned with compactness for external reasons as well. That is, while the Court's language has at times suggested concern with how noncompact districts affect tangible relationships specific to the particular district,¹⁰⁵ the cases are better understood as being more focused on how these districts are socially perceived and the messages they seem to convey about the relationship of race and politics. As Justice O'Connor directly put it this Term, these districts "cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial."¹⁰⁶ Both the majority and dissents now

102. See BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE* 32-33 (1984).

103. Bernard Grofman proposed a modification of traditional compactness tests in the form of a "cognizability" standard. This standard also appears to have been concerned primarily with compactness from the internal perspective; it was offered as a means of testing whether a district was functionally compact:

I wish to argue that districts can be so far from cognizable that they violate what we might think of as a due process component of equal protection by damaging the potential for "fair and effective representation." By "cognizability," I mean the ability to characterize the district boundaries in a manner that can be readily communicated to ordinary citizens of the district in commonsense terms based on geographical referents. . . .

. . . .
Egregious violations of the cognizability principle can be identified by making use of standard criteria of districting, such as violation of natural geographic boundaries, grossly unnecessary splittings of local subunit boundaries (such as city and county lines), and Sunderings of proximate and contiguous natural communities of interests.

Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 *CARDOZO L. REV.* 1237, 1262-63 (1993) (citation omitted).

104. On studies of constituent identification, see Pildes & Niemi, *supra* note 6, at 538 n.177. On the importance to social integration of geographically organizing social services, see MICHAEL J. PIORE, *BEYOND INDIVIDUALISM* (1995). Piore argues that:

An increased emphasis upon geographic unity would also serve to enlarge the borderlands and diffuse the tensions associated with emerging social structure. Their impact in this regard could be enhanced by a greater emphasis upon geographically defined units in the delivery of existing social services and in the design of new programs to meet the demands of the emerging identity groups. Ultimately, the geographic organization of social services could provide a way of bridging the gap between the social and economic structures and making economic constraints more salient to those demanding social services.

Id. at 191.

105. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 648 (1993) ("The message that such districting sends to elected representatives" is that "their primary obligation is to represent only the members of that group, rather than their constituency as a whole.").

106. *Bush v. Vera*, 116 S. Ct. 1941, 1962 (1996) (plurality opinion); see also *id.* at 1972 (Kennedy, J., concurring) (endorsing this description of constitutional harm).

describe the injuries *Shaw* acknowledges as “expressive harms.”¹⁰⁷ Thus, compactness now matters constitutionally not only or necessarily intrinsically, but as a means to guard against these expressive harms. Compact districts, in the Court’s view, help constrain state expression of an unconstitutional view regarding the structure of political institutions, the nature of political identity, and the relationship between race and politics.

From this perspective, we are now better positioned to consider the values, if any, that might be reflected in compactness requirements. (I will consider this as a general matter, leaving aside distinct questions about constitutionalizing such a norm.) Even that does not frame the question precisely enough, for the issue is not as much the affirmative values of compactness as the harms associated with extreme departures from it. The two are not the same; even arbitrarily chosen baselines, which reflect no affirmative values except the need to have some baseline, can establish formal landmarks around which social understandings and norms about fair dealing, evenhandedness, reciprocity, and cooperation on terms of mutual respect can come to be organized.¹⁰⁸ Based on the data discussed above, the issue must be refined still more: Whether extreme departures from a baseline like relatively compact districting—*when pursued selectively for particular ends but not others*—should be understood to impose meaningful social costs. A general failure to adhere in fact to laws and practices that are publicly endorsed and legally required might raise concerns about hypocrisy of public policy; the selective failure to do so might raise distinct concerns about manipulation for partial ends.

107. *Id.* at 1964 (plurality opinion) (citing “the nature of the expressive harms with which we are dealing”); *id.* at 2002 (Souter, J., dissenting) (“This injury is probably best understood as an ‘expressive harm,’ that is, one that ‘results from the idea or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about.’”) (quoting Pildes & Niemi, *supra* note 6, at 506–07). For a fuller effort to articulate the expressive harms *Shaw* appears to recognize, see Pildes & Niemi, *supra* note 6:

One can only understand *Shaw*, we believe, in terms of a view that what we call *expressive* harms are constitutionally cognizable. An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about. On this view, the *meaning* of a governmental action is just as important as what that action *does*. Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values. On this unusual conception of constitutional harm, when a governmental action expresses disrespect for such values, it can violate the Constitution.

....

Shaw therefore rests on the principle that, when government appears to use race in the redistricting context in a way that subordinates all other relevant values, the state has impermissibly endorsed too dominant a role for race. The constitutional harm must lie in this endorsement itself: the very expression of this kind of value reductionism becomes the constitutional violation.

Id. at 506–09 (footnote omitted).

108. For a discussion of the relationship between social norms, such as reciprocity, and formal law, see Pildes, *supra* note 37.

The most aggressive challenge to *Shaw* is that bizarre districting for race-conscious ends, unlike vote dilution, does not have palpable or meaningful costs. Of course, even if there are such costs, they would have to be compared against the benefits of selective abandonment of compactness, but *Shaw*'s critics often simply deny that the kinds of costs *Shaw* recognizes can be meaningful. To test this view, consider another traditional districting norm closely related to compactness: contiguity. If concerns for compactness should not constrain at all the pursuit of enhanced minority representation, why not abandon contiguity as well? For example, North Carolina's District 12 connected several major urban areas via the narrow corridor of a highway. For those not troubled by the extreme noncompactness of this district, suppose North Carolina had abandoned the pretense of contiguity altogether¹⁰⁹ and not bothered to connect these islands of urban black populations via the thin highway corridor. Suppose a state simply declared that to enhance minority representation (or for any other purpose), a particular congressional district would consist of certain population *islands* scattered throughout the state. Is selectively abandoning contiguity in this way different in kind from the departure from compactness in *Shaw* itself? It is hard to see why: "Island districting" is the next logical extension of what North Carolina actually did. Indeed, it might simply be more candid, thus minimizing the concerns for hypocrisy: The thin corridors connecting the urban populations in District 12 existed largely as a veneer to maintain the appearance of contiguity. If the image of selective "island districts" in a landscape of contiguous districts gives one pause, what lies behind this resistance will be a sense of genuine social costs associated with selective districting practices employed for particular ends.

If island districting would generate such harms, formally contiguous districts that deviate dramatically from relative compactness would seem to implicate precisely the same harms. There seems little difference in principle, or likely social perceptions, between island districts and extremely bizarre ones; the two differ less in kind than in degree. Yet that no one has seriously proposed (as far as I am aware) a redistricting plan with selective island districts, for racial or other purposes, suggests the force of the norms that keep such districts off limits. The existence of those norms reflects a recognition that there are genuine costs associated with such deviations from the conventional norms of territorial districting. In this respect, island districts and *Shaw* districts do not seem sharply different. Both constitute highly visible abandonments of basic landmarks readily associated with territorial districting. If the reliance on landmarks of this sort seems highly formal,¹¹⁰ much of the

109. Indeed, by some accounts, District 12 was not in fact entirely contiguous. See Grofman, *supra* note 103, at 1263 n.106.

110. For a critique of *Shaw* along these lines, see Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843 (1994).

law and the structure of social norms are organized around just such formalisms.

Compactness does vary in degree, whereas contiguity either exists or is absent. Thus a quantum decrease in compactness might not be as psychologically salient as a complete break in contiguity. While there seems to be some truth to this insight, particularly when dealing with marginal deviations from compactness, the more important point to focus on is whether the rupture of contiguity—especially for selective ends—seems to implicate meaningful concerns. If so, it does not seem difficult to conclude that at least comparably extreme deviations from compactness would raise similar costs. The question then becomes not whether deviations from compactness can impose meaningful harms, but at just what point those harms arise.

Should the prospect of selective island districts still fail to generate a sense of genuine social costs, then consider the next possible variation: “postcard districting.” Suppose a state, to enhance minority representation or for other purposes, mailed postcards identifying the districts into which those with the power to decide had chosen to place various voters.¹¹¹ Suppose most districts were conventionally compact and contiguous, except for this postcard district. Perhaps at this point we reach a form of “districting” that differs in kind, not just degree, from island districting and extremely bizarre geographic districts. Or for some readers, perhaps not. The point is that at one stage or another in the variations in degree on *Shaw*-type districting, one suspects most readers will recognize that the selective and highly visible manipulation of territorial districting norms for particular ends, even worthy ones, does impose genuine social costs. If logical extensions of the redistricting practices on display in *Shaw* make it easier to see that there are meaningful costs at stake, they help reveal that it is too easy to dismiss *Shaw* as addressing only fanciful or imagined harms.

I mean this point to be a minimal one, responsive only to the strongest critiques of *Shaw* on this point. The myth here is that only actual vote dilution is a meaningful and recognizable social and political harm, and that the selective manipulation of territorial districting in highly visible ways simply cannot impose “expressive harms” that are worth taking into account. But the districting at issue in *Shaw* surely has costs as well as benefits, whatever the ultimate calculus might be. The concerns that *Shaw* raises regarding the expressive harms from such practices cannot be dismissed as of no weight.

Further debates about *Shaw*’s concern for expressive harms move into the pragmatic and normative realm where talk of mythologies is no longer appropriate. The more moderate version of the expressive-harms critique

111. When I posed this idea in class, an otherwise quiet white student boiled over with rage and explained that she was a partner in an interracial marriage; she found horribly offensive the idea that the state could place her and her husband in separate voting districts for any purpose, including enhancing minority representation.

recognizes that there might be genuine costs associated with this kind of districting, but treats those costs as worth bearing for the gains in minority representation. This opens an appropriate debate about how the competing values at stake ought to be assessed. Similarly, even if distortions of the districting system at some point do generate the harms *Shaw* identifies, the question remains whether *Shaw* draws the line at the right point. From a pragmatic perspective, further questions arise as to whether courts have the institutional tools to draw and enforce this kind of line, a question this Essay addresses in Part II. From a related, legal perspective, there are questions as to whether enforcement of the norms of territorial districting ought to be pursued through constitutional law as opposed to other means. These are important questions to ask about *Shaw*, but meaningful engagement with them is frustrated rather than furthered by simply dismissing the view that social costs, whatever their weight in an ultimate social calculus, follow from the selective abandonment of conventional districting norms.

To set the issue of “expressive harms” in a broader context, *Shaw* problems arise today because American voting policy currently seeks to accomplish two inconsistent aims through territorial districting. Most western democracies have avoided this inconsistency by opting for systems based principally on proportional representation. By organizing elections around geographic districts, we seek to make representation turn on geographically defined concerns. With the VRA, we seek to define representation in terms of the political interests of specific groups, such as protected minorities. Some accommodation can be made between these two ways of conceiving representation and defining political identity, but the two cannot readily be made congruent. We are currently trying to wedge the concerns of an interest-based approach into a geographically based system; at some point, the tension between the two reaches a breaking point. Criticism of *Shaw* that rests on an assumption that any means necessary to enhance minority representation should be adopted is, ultimately, an argument that concerns for interest representation should completely trump a geographically defined system of representation. Maybe so; but abandoning that geographic system selectively, in only those cases concerning racial and ethnic representation, is quite different from abandoning that system altogether.¹¹²

E. *Understanding the Context of Shaw*

I have offered four points in an effort to understand *Shaw* on its own terms. Neither singly nor jointly do these points justify *Shaw*, nor are they

112. Bernard Grofman, a strong supporter of the VRA, once asked in the title of an article condemning North Carolina District 12 whether race is “the *only* thing.” Grofman, *supra* note 103, at 1237 (quoting and analogizing to Vince Lombardi’s football maxim). That question captures the problem of selectively abandoning geography in extreme ways for selected purposes.

meant to. But they do suggest that seeing *Shaw* in fundamental ideological terms makes critique too easy. First, districts in the 1990s became more bizarrely shaped through a complex of interrelated forces. Second, Congress cannot be portrayed as having made a deliberative decision, or any decision at all, to endorse the kind of districts at issue in cases such as *Shaw*. Third, serious judicial concern with race-conscious districting, particularly in extreme forms, has been a continuous theme of the last thirty years of judicial confrontation with this issue. Fourth, at some point, genuine "expressive harms" might legitimately be thought to arise from the highly visible political manipulation of electoral structures, particularly when done selectively for racial purposes.¹¹³

That *Shaw* is a response to novel circumstances, or that certain criticisms of it are insufficient, does not mean that the specific principles it announces will be easily implemented. Indeed, if some of the Court's critics fail to appreciate the distinctness of redistricting compared to other areas of race-conscious policymaking, *Shaw* itself can be said to make this same mistake when it comes to developing doctrinal principles that address the "expressive harms" with which *Shaw* is concerned. In Part II, I argue that the Court's "predominant motive" test reflects confusion about the extent to which redistricting can be approached through the same legal framework as race-conscious policies in other areas the Court has confronted. The "predominant motive" test turns out to be neither conceptually appropriate nor practically implementable in the context of *Shaw*'s concerns about racial redistricting. In Part III, I suggest the path future implementation of *Shaw* is more likely, explicitly or implicitly, to take.

II. THE FAILINGS OF THE MOTIVE-BASED APPROACH

Last Term's cases more deeply entrench the principle, stated simply at first, that strict scrutiny is required when race has been "the predominant factor motivating the legislature's [redistricting] decision."¹¹⁴ Once this motive threshold is crossed, districts are justified only if narrowly tailored to serve a compelling interest. Currently, all Justices have been willing to assume that compliance with section 2 or 5 of the VRA constitutes a compelling interest, indeed, perhaps the only one.¹¹⁵

113. To take these costs seriously is not to conclude that they outweigh the gains in minority representation.

114. *Bush v. Vera*, 116 S. Ct. 1941, 1951–52 (1996) (plurality opinion) (citation omitted). This principle was announced in *Miller v. Johnson*, 115 S. Ct. 2475, 2490 (1995), the first case to attempt to lend more doctrinal precision to the cause of action recognized in *Shaw*.

115. States might seek to engage in remedial race-conscious districting beyond that which the VRA requires. For an argument that the early *Shaw* cases can be read to permit this, see Briffault, *supra* note 19, at 77–79. In *Bush*, the Court requires any such race-conscious redistricting to meet two standards. (1) the discrimination must be specific and identified; (2) "the State must have had a strong basis in evidence

This simple statement, however, must be further unpacked. The motive test comes in a strong and a weak form. Several Justices have adopted the strong form: Strict scrutiny is required whenever the legislature intentionally creates a majority-minority district that "would not have existed but for the express use of racial classifications."¹¹⁶ Yet the Court as a whole has embraced only a weaker form of the motive test. Justice O'Connor is explicit that a state can intentionally create majority-minority districts and "may otherwise" take race into consideration without triggering strict scrutiny, as long as the state does "not subordinate traditional districting criteria to the use of race for its own sake or as a proxy."¹¹⁷ Thus, on this weak form, intent is critical when the state has subordinated traditional districting criteria; otherwise, intent matters not at all.

From the start, this on-off quality of the intent test should signal something incongruous. In no other constitutional area is intent discontinuously relevant. To implement *Shaw*, I believe, the Court will have to go one step beyond even the weak form of the intent test and abandon giving intent any significant role. In the current cases, the Court exhausts enormous energy in purporting to determine "the predominant motive" behind a majority-minority district, but, as I will show, to no real end. Not only should the Court abandon this primary focus on intent, but it will inevitably have to do so. The "predominant motive" standard: (1) fails to fit the harms at stake to appropriate principles for identifying their occurrence; (2) reflects a continuing misconceived effort to apply individual-rights approaches to expressive harms that necessarily require a different model; and (3) cannot be administered intelligibly because in the redistricting arena the question it asks is fundamentally unanswerable.

to conclude that remedial action was necessary, *before* it embarks on an affirmative action program." 116 S. Ct. at 1962-63 (plurality opinion) (internal quotation marks and citation omitted). The Court then notes that those conditions, as presented by appellants, are tantamount to establishing vote dilution and racially polarized voting—that is, a section 2 violation. *See id.* at 1963 (plurality opinion). Thus the Court says that these concerns are the same as those that underlie section 2, and, the Court further concludes, these concerns are therefore valid only when section 2 would be violated. In light of this analysis, it is not easy to see how race-conscious districting could satisfy strict scrutiny when the VRA is not violated. *See supra* note 19 (discussing Briffault's proposal).

Interestingly, the Court's apparent position is one Justice Brennan suggested in the Court's first confrontation with racial redistricting. Justice Brennan was prepared to find such districting constitutional, but only where Congress had specifically decided upon such a national policy. Thus, unlike the plurality, Justice Brennan was not prepared to express a view about race-conscious districting beyond this point. *Compare* *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977) (plurality opinion), *with id.* at 175 (Brennan, J., concurring) ("However the Court ultimately decides the constitutional legitimacy of 'reverse discrimination' pure and simple, I am convinced that the application of the Voting Rights Act substantially minimizes the objections to preferential treatment, and legitimates the use of even overt, numerical racial devices in electoral redistricting.").

116. *Bush*, 116 S. Ct. at 1973 (Thomas, J., concurring) ("Strict scrutiny applies to all governmental classifications based on race . . . there is no exception for race-based redistricting."). Justice Kennedy has not endorsed this standard quite so directly, but his opinions are easily read to do so. *See generally id.* at 1971 (Kennedy, J., concurring) (intimating that strict scrutiny is required "whenever a State, in redistricting, foreordains that one race be the majority in a certain number of districts or in a certain part of the State").

117. *Id.* at 1969 (O'Connor, J., concurring).

A. *The Mismatch Between Expressive Harms and the "Predominant Motive" Test*

From the conceptual start, the intent test is flawed because it does not fit the kinds of harms that *Shaw* makes actionable. In *Shaw* itself, the Court offered numerous, occasionally conflicting, descriptions of these harms. In some, the harm was portrayed as an injury to the specific individuals or representatives in the particular district;¹¹⁸ in others, the harm lay in the social perceptions and generalized messages that certain districts conveyed.¹¹⁹ Litigators sometimes seized on the former descriptions and sought futilely to prove in subsequent cases that no plaintiff suffered any of these district-specific harms.¹²⁰ Not surprisingly, this strategy failed; the Court has now made clear that the fundamental constitutional problem is that certain districts "convey the message that political identity is, or should be, predominantly racial."¹²¹ As the Court now forthrightly says, *Shaw* addresses expressive harms. *Shaw* is therefore concerned with the social perceptions and understandings conveyed by extreme districting practices. This is a concern with the character of the political culture constructed when race is used in excessive and unjustified ways. This point is critical to understanding *Shaw*: The doctrine does not address violations of individual rights in any traditional sense, but rather addresses the political culture itself.¹²²

If social messages and perceptions are the concern of *Shaw*, how should *Shaw* be applied? The weak form of the intent test requires judges to engage

118. See *Shaw v. Reno*, 509 U.S. 630, 648 (1993) (describing pernicious message that racially gerrymandered districts send to representatives and finding racial gerrymanders harmful because, in voting, "the individual is important, not his race") (quoting *Wright v. Rockefeller*, 376 U.S. 52, 66 (1963) (Douglas, J., dissenting)).

119. See *id.* at 647 ("[Racial gerrymandering] reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls."); see also *id.* at 650 (describing harm in terms of how it is "understood" and message it "reinforces").

120. See *Shaw v. Hunt*, 861 F. Supp. 408, 471-72 & n.59 (E.D.N.C. 1994) (rejecting evidence as irrelevant), *rev'd on other grounds*, 116 S. Ct. 1894 (1996); Pamela S. Karlan, *Sull Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 295-96 (1996).

121. *Bush*, 116 S. Ct. at 1961 (plurality opinion).

122. For a further analysis of this point, see Richard H. Pildes, *Two Conceptions of Rights in Cases of Political "Rights"*, 34 HOUS. L. REV. (forthcoming Summer 1997). If this seems at all odd, consider a state policy to ration gas, as in prior energy crises, in which black drivers would have access to gas on some days, white drivers on others. I assume this explicit but noninvidious racial classification would be unconstitutional because administrative convenience would not be a sufficiently compelling state interest. If so, equal protection doctrine here would similarly be concerned with the character of political culture, and not with deprivations of individual rights. See, e.g., Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 439-63.

For these reasons, the standing rules that attach to *Shaw* claims, which permit only those within bizarrely shaped race-conscious districts to sue, are difficult to justify. See Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Cases*, 1 MICH. J. RACE & L. 47 (1996); Karlan, *supra* note 120, at 289-300; Pildes & Niemi, *supra* note 6, at 513-16. Given the expressive harms recognized, a more apt standing principle would grant standing to any resident of the state, or perhaps to anyone at all. That a standing rule of this breadth might appear unorthodox only confirms that the kinds of harms *Shaw* recognizes are themselves constitutionally less familiar.

in exquisitely detailed inquiries into the multitude of motivations behind the creation of a bizarrely shaped minority district. The ultimate touchstone, supposedly, is whether race was the "predominant factor" among these various motivations. Even assuming this an intelligible question, which it is not, what reason exists to believe an answer would be relevant to the social perceptions that trouble *Shaw*? I suggest there are none.

The redistricting process includes many steps that take place off the public stage. Not until litigation discovery and days of trial testimony do the details of the process become known. Even then, it takes trial judges lengthy hearings and extensive findings to purport to reach conclusions on "the predominant motive" for a district. When these cases reach the Supreme Court, the Justices spend inordinate amounts of energy debating the question, only to come to opposing conclusions. In ordinary intent cases, none of this matters because the doctrine is concerned with distinguishing actions genuinely motivated by different reasons. In employment cases, for example, the Court must determine whether an employee was fired for racial reasons or reasons going to job performance. Because *Shaw* is fundamentally concerned with social perceptions, the public dimensions of redistricting must be doctrinally central in ways not relevant to ordinary intent cases. Yet these social perceptions cannot possibly turn on whether, at the end of this litigative process, race can be said to have been "the predominant factor." Because *Shaw* is not concerned with traditional individual rights, but with social messages and perceptions, the doctrine needs to be tailored to the factors most central to constructing those social perceptions.

Judicial opinions in these cases, as well as editorial pages, reprint maps of the districts, not transcripts of political processes, for a reason.¹²³ Social perceptions about the "excessive" role of race are more likely attuned to objective characteristics of districts, such as their shapes, rather than the mysteries of intent. As Justice O'Connor has said, bizarre shape "is not merely evidentially significant; it is part of the constitutional problem insofar as it disrupts nonracial bases of political identity and thus intensifies the emphasis on race."¹²⁴ That statement is well-suited to the kind of constitutional injuries *Shaw*, rightly or wrongly, recognizes. Highly bizarre districts are the problem, not intent, because it is objective circumstances such as district shapes, if anything, that "convey the message that political identity is, or should be, predominantly racial."¹²⁵

The Court would do better to acknowledge this directly, abandon the "predominant motive" search, and recognize the relatively unimportant role of intent, even in its weaker form, in these cases. What would result? Strict

123. I am indebted to my research assistant, Jeff Fisher, for this way of articulating the point.

124. *Bush*, 116 S. Ct. at 1962 (plurality opinion).

125. *Id.* (plurality opinion).

scrutiny would be triggered simply by majority-minority districts that departed unreasonably from traditional districting practices. (The standards for "unreasonable" and "traditional" must be defined in the Court's current test, so the difficulty of doing so cannot count against this formulation.)¹²⁶ Indeed, some lower courts are already applying essentially this approach; thus, as one three-judge district court concluded in holding that strict scrutiny had to be applied to a black-majority congressional district in Florida, "one does not need to look any further than a map of the Third District to reach the conclusion that race was in fact the predominant motivating factor [of the redistricting body]."¹²⁷ Moreover, as with the weak form of the intent standard that the Court currently employs, majority-minority districts drawn consistently with these traditional practices would not require strict scrutiny, no matter how race-conscious their design. That is, the current doctrine does not lead to the triggering of strict scrutiny even if the redistricting authorities announce in the most public way that their overwhelming motive was to create a minority-controlled district, as long as the means they employ do not subordinate traditional districting practices. Better to make that principle as clear as possible.

In addition to conceptual clarity, relinquishing the pretense of inquiry into intent would have several benefits. First, the Court's formulation sends confused signals to redistricters when clear standards are critical. For example, *Shaw* is going to be applied too broadly to the extent that redistricters mistakenly believe it condemns any race-conscious intent, especially given that self-interested political actors will exploit any ambiguity in the doctrine. Broad language about intent invites such misreadings. It also invites courts to examine individual segments of a district, such as a protruding "arm," to determine whether that particular component was predominantly motivated by a race-conscious decision to bring more minority voters into the district. If the conclusion to that question is yes, courts are likely to conclude that the district as a whole results from these motivations. That result is not necessarily compelled as a logical matter, but as lower-court application of *Shaw* reveals, it is difficult for courts to find specific district components to reflect this motivation without then attributing that aim to the design of the district as a whole. As will be noted in a moment, part of the intractability of attributing predominant motives to election-district designs is that they are the product of hundreds of smaller decisions about where to locate specific lines.¹²⁸ The Court's current language about "predominant motives" is likely to be divorced in application (most predictably by political actors but also perhaps by lower

126. The normative question of the legitimacy of these baselines is more a question of whether *Shaw* itself is right—a question I defer here—than it is an argument as to how best to implement *Shaw*.

127. *Johnson v. Mortham*, 915 F. Supp. 1529, 1550 (N.D. Fla. 1995).

128. For what might be considered one illustration of this phenomenon, see *Moon v. Meadows*, No. 3:95CV942, 1997 WL 57432 (E.D. Va. 1997).

courts) from the Court's qualification that this motive must subordinate traditional districting criteria¹²⁹ before strict scrutiny is triggered. In other words, the Court's weak form of the intent standard might well become transformed in redistricting practice into the strong form of the intent test that the Court has actually rejected. Doctrine that focused more centrally on specifying clear rules about what constituted a departure from traditional districting practices, such that strict scrutiny would be triggered, would be less susceptible to the kind of overbroad application that *Shaw* invites.

Second, as the current cases demonstrate, a doctrinal standard centered on intent necessarily invites prolonged and costly litigation. In and of itself, that would not be so troubling, except for a third problem: At the end of the day, the inquiry into intent is actually pointless. I can envision no case in which a highly bizarre majority-minority district would not trigger strict scrutiny, given the way the Court applies its "predominant motive" test. If so, better to acknowledge that fact directly. That such a district would arise without some degree of race-conscious intent seems unlikely. In an area with a concentrated black population, a reasonably compact, traditionally shaped district could, conceivably, arise without race-conscious design. In one scenario, that intent would be the exclusive motivation for the district; hence, strict scrutiny would apply. In the only other scenario, the more likely one, the motivations would be some mix of partisan-race-incumbent concerns analogous to those in last Term's cases. As I will argue shortly, in such circumstances there is no intelligible way to determine which motive is "predominant." Yet the doctrine requires the Court to purport to do so. This Term, the Court has made clear how it will attribute¹³⁰ a "predominant motive" in these circumstances: by judging whether too extreme a departure from traditional districting practices has taken place. In other words, intent plays no independent role in the analysis: Shape and other attributes of the districts themselves determine attributions of intent. When bizarrely shaped minority districts arise, judicial findings on "intent" and "predominant motive" will necessarily follow from the judgment of whether traditional districting principles have been violated. That much is now clear from last Term's cases. If so, there is no reason not to hold expressly and candidly that it is the violation of those principles that triggers strict scrutiny, not intent. The effort to import intent doctrines from other areas

129. See *supra* note 117 and accompanying text.

130. Below, I argue that there is no intelligible way to weigh internally the roles of race versus partisan versus other motivations. The Court must necessarily assign "predominant" motive on the basis of some external attribution; namely, that when this mix of motives is present, and traditional districting principles are abandoned, the Court will conclude that its intent standard has been violated. In this respect, a "predominant motive" test here is no different from the problems of proximate causation in any other area of law, morals, or policy; conclusions about proximate causation do not inhere in physical facts alone, but depend on external, collective attributions of responsibility. See, e.g., MARION SMILEY, MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY 11 (1992) ("[T]he causal responsibility of an individual for external harm is relative to a variety of social and political considerations over which individuals themselves have no control.").

of equal protection law is confused and unnecessary. Far better, then, to abandon the primary and extensive emphasis on intent and "predominant motives."

To be sure, there is a certain minimal or formal sense of race-consciousness that will have to continue to be an aspect of *Shaw*-type cases. As an interpretation of the Equal Protection clause, *Shaw* addresses only bizarre districting that implicates race. But all minority-controlled districts do so, in the sense that all almost certainly result from a process in which this effect of the districting process is not only foreseeable but intended and desired. Surely there is no current minority-controlled district whose geography is extremely bizarre, the only kind of district to which *Shaw*'s strict scrutiny standard applies, about which this statement is false. My contention is that any further inquiry into intent and predominant motives distracts courts and sends confusing signals to redistricters. Under *Shaw*, those minority districts that subordinate traditional districting practices trigger strict scrutiny, while those that adhere to such practices do not. Rather than organizing judicial analysis around any further search for "predominant motives," courts would do more to further the principled implementation of *Shaw* by working at giving content to the mixed historical and normative issue of "traditional districting practices."

B. *Expressive Harms and the Inapplicability of the Individual-Rights Model*

I have suggested already several reasons why *Shaw* cannot be understood through the lens of traditional individual rights. I will add only one further point here. If the problem with the kind of racial classifications at issue in *Shaw* is that they deprive individuals of rights in the classic sense, this principle ought to apply whenever any individual is affected by a racial classification in redistricting. In the employment context, where the *Davis* standard that *Shaw* imports was developed, any person to whom the state denies a job for racially discriminatory reasons has a valid constitutional claim. If *Shaw* actually means that the mere fact of being classified by race violates individual rights, any individual so classified similarly would have a valid constitutional claim.

Yet we know that *Shaw* does not apply to racial classification per se: It does not apply when, for example, such classifications are used consistently with traditional districting practices. Beyond this, *Shaw* does not seem likely to apply even to all contexts in which nontraditional districting employs explicit racial classifications. For example, suppose race-conscious redistricters decide to increase the black population of an irregular district, but not to the point of creating a majority-black district. The black population of a district might be raised from 15% to 30% "for racial purposes," to increase the electoral influence of the black population, or "for partisan purposes," to enhance Democratic prospects by using race as a proxy. If the *Shaw* doctrine

actually operated within traditional individual rights models, these racial classifications would presumably violate it. With respect to the “rights” of the individuals being classified, both black and white district residents, it should make no difference whether 1 or 300,000 people (roughly the number needed to make a typical district 55% black in population) are affected. As the Court has said, the rights recognized by the Fourteenth Amendment are “guaranteed to the individual” and are “personal rights.”¹³¹

Conceivably, the Court could extend *Shaw* this far, but this seems unlikely.¹³² The *Shaw* doctrine likely will continue to address racial classifications only when they lead to majority-minority districts. What distinguishes these districts from the hypothetical district is not that one involves racial classification and the other does not. Nor is it that one violates individual rights and the other does not. The difference is that only extremely bizarre majority-minority districts are such publicly visible, identifiable symbols, in the Court’s view, of “excessive” uses of race. Once again, the fact that *Shaw* is concerned with social perceptions and expressive harms cannot be avoided. *Shaw* does not recognize any individual right against excessive racial classification, its own language notwithstanding; the expressive harms it does recognize cannot be addressed within doctrinal frameworks anchored in more traditional individual rights frameworks. The Court, however, has not yet fully accepted this conclusion. Given the subtlety and novelty of the “expressive harms” idea, it is perhaps not surprising that the Court should shift back and forth between accepting it on its own terms and trying, instead, to force *Shaw* into the more traditional individual-rights model. However, that model’s inapplicability is another reason to drop the “predominant motive” test. The test reflects the importation into redistricting of a rights-oriented doctrinal approach that badly fits the *Shaw* cause of action.¹³³

131. *Shelley v. Kramer*, 334 U.S. 1, 22 (1948).

132. The Supreme Court has agreed to hear a case this Term in which one of the questions raised does indeed present such a challenge. In the initial redistricting of the Florida Senate, in which both the state legislature and supreme court played a role, one district (Florida Senate District 21) emerged with a majority-minority population in a “region” in which the minority population is substantially less than a majority. In subsequent proceedings, that district was reduced to a black voting-age population of 36.2%. Nonetheless, the appellant has continued to press the challenge that because the relevant “region” has only an 8% black voting-age population, the construction of this 36.2% district violates *Miller*. See Brief for Appellant at i, 13, 41–42, *Scott v. United States Dep’t of Justice*, 920 F. Supp. 1248 (M.D. Fla.), *prob. juris. noted sub nom.* *Lawyer v. United States Dep’t of Justice*, 117 S. Ct. 292 (1996) (No. 95-2024). The Court might avoid reaching this question, however, because the method under which the district was crafted also raises significant constitutional questions; the district court had ordered mediation without finding the original district unconstitutional or seeking approval from the state legislature. See *id.*; *Scott*, 920 F. Supp. at 1250–56 (describing mediation). If the Court rules that the mediation process itself was unconstitutional, the *Shaw* challenge to an “influence” district rather than a minority-controlled district would not need to be addressed.

133. Note the general difficulty that the Court has in accepting that vote dilution and *Shaw* claims do not involve individual rights, but the group distribution of political power. This difficulty is further reflected in the Court’s argument in *Shaw v. Hunt* that any remedy for racial vote dilution under section 2 of the VRA must be confined “to the area” where the injury occurs. See *Shaw v. Hunt*, 116 S. Ct. 1894, 1906 (1996). The Court justifies this conclusion by rejecting the view that the right to an undiluted vote “belongs

C. *The Unintelligibility of the "Predominant Motive" Test*

The final critique of the "predominant motive" test already has been raised in incisive dissenting opinions and academic commentary.¹³⁴ The problem is that this dominant motive question cannot be answered meaningfully in the redistricting context. I want to add one point to what has been said elsewhere.

In the other contexts from which the Court draws the predominant motive test, typically at issue is one specific decision. For example, a job has been denied, a contract has been let to a competing bidder, an application for a zoning variance has been turned down. In contrast, the decision of where to locate the boundaries of an election district implicates literally hundreds of more individualized decisions. Moreover, the mix of partisan and racial considerations, and the further internal interrelationship between the two, makes a predominant motive test that seeks to isolate the contribution of racial considerations all the more unwieldy. This intertwining of race and politics has at least two implications for constraints on redistricting. First, it is often unrealistic to act as if the two aims can be disentangled and one assigned predominance. Second, even if these aims could be distinguished, many of the criticisms of race-consciousness that lead to extreme forms of districting could also be levelled at partisan goals that contribute to such districting. If the Court is going to develop constitutional constraints on excessive manipulations of the districting system, it would be more manageable, more consistent with the way motives mix complexly in this area, and leave the Court less open to charges of selective concern for the integrity of territorial districting were the Court to develop more general and universal constraints on district manipulation. Constraints that took the form of more general principles would necessarily focus less on searching for specific motives and more on specifying objective limitations on how far district manipulation could go, with less concern for judgments about the reasons driving it.

to the minority as a group and not to its individual members. It does not." *Id.* But that effort to recast vote dilution litigation in terms of individual rights simply cannot be sustained analytically. Vote dilution necessarily refers to the ways in which the votes of individuals are aggregated through electoral structures; it necessarily focuses on the distribution of political power between competing groups. Indeed, the concept has been criticized for this very reason. See Larry Alexander, *Lost in the Political Thicket*, 41 FLA. L. REV. 563 (1989). It is black voters as a group that have their voting power diluted vis-à-vis white voters as a group. There might be various reasons to limit state redistricting authorities, responding to Department of Justice objections, to drawing reasonably compact minority districts in the geographic region that forms the basis for the Department's refusal to preclear. But preservation of individual rights of black voters cannot logically be among those reasons.

134. See, e.g., Briffault, *supra* note 19, at 67-71; Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45, 57 ("Unfortunately, by turning to tort-like concepts of causation, the Court is taking a difficult and unresolved area of constitutional law and saddling it with a segment of the common law that has been caustically termed the 'last refuge of muddled thinkers'" (citation omitted), Karlan, *supra* note 120, at 305 (commenting that predominant motive test "is as doctrinally confused as it is confusing"); Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201 (1996).

To appreciate both the intractability of a predominant motive test for redistricting and the way any such test is likely to be applied in practice, assume initially that it is possible with respect to any one specific line-location decision to say that one factor motivated it exclusively. One line was drawn for partisan reasons; another was drawn to protect constituencies of the existing officeholder; still another, to raise the percentage of minority voters; still others, to respect the demands of incumbents in adjoining districts. Even if we could assign a single pure or dominant motive to the drawing of any one particular line, how would we assign a dominant motive to the location of the district as a whole? Should we assign a motive to each discrete line-location decision, then aggregate them quantitatively to see which motivation accounts for the largest number of specific decisions? Or should we try to assess how many people in the district actually were affected by each specific line-location decision, add these up, and then treat as predominant the motive that affected the largest number of residents? Should it be the motive that appeared to be most important to those with political power, that is, the goal they were least willing to compromise? Or should it be the motives chronologically addressed first in the sequence of redistricting, as the cases sometimes seem to suggest?

In other words, even if we could treat each specific line-location decision as resting on one exclusive motive whose role we could know with certainty, there still seems no intelligible way to determine the "predominant motive" for the design of an election district. As Richard Briffault points out, it is unrealistic to treat even discrete line-location decisions as stemming from one exclusive motivation.¹³⁵ Any one decision can itself reflect a complex mix of racial, partisan, and candidate-specific considerations. As soon as the redistricting problem is confronted on its own terms, the intractability of trying to determine the predominant motive for the location of a district becomes readily apparent.

How, then, will the Court determine such questions? Inevitably, the Court will have to attribute a predominant motive based on certain extrinsic circumstances. That is, in actual practice the Court will implicitly define specific extrinsic constraints, the violation of which will be deemed to make racial purposes "the predominant motive." Once again, these extrinsic conditions will include considerations such as how compact the district is; how much it respects preexisting political units; how much its borders track natural geographic boundaries, and the like. Again, the Court would do better to do explicitly what it will necessarily have to do implicitly: focus on giving content to these extrinsic constraints directly.

In sum, the "predominant motive" test fails to identify when the expressive harms with which *Shaw* is concerned actually occur; the test stems from an

135. See Briffault, *supra* note 19, at 51 ("The real difficulty in applying [the Court's] racial-motivation test will be determining what counts as a racial motive.").

individual rights model that is unsuited to addressing the kind of injuries *Shaw* recognizes; and the test cannot be administered intelligibly. Given the principles underlying *Shaw* and the distinction the *Shaw* doctrine tries to maintain between “appropriate and reasonable necessary” and “unjustified and excessive”¹³⁶ uses of race in the context of redistricting, the Court would best implement these principles by abandoning the pretense of inquiry into intent altogether.

Indeed, there is some evidence the Court is already doing exactly this, although without expressly acknowledging so. Thus the Court has affirmed summarily a redistricting plan for California’s state legislative districts that was drawn by a panel of special masters.¹³⁷ The special masters’ report had been explicit that race and ethnicity had been the predominant motive behind the drawing of several districts, but the special masters also asserted that these districts were reasonably compact and otherwise complied with traditional districting principles. The special masters thus interpreted *Shaw* to mean that race-conscious intent was permissible as long as traditional districting principles were otherwise complied with. Should the Court’s summary affirmance turn out to signal acceptance of that approach, it would make clear that the most explicit race-conscious intent in designing districts would not make them unconstitutional, notwithstanding *Miller*’s “predominant motive” principle. This summary affirmance in *DeWitt* might well be the best indication of how the Court will apply *Shaw* in the coming years.

III. THE FUTURE OF *SHAW*

In developing legal constraints on the districting process, courts have only a few options. The most basic divide is between approaches that focus on electoral outcomes versus those that focus on the processes through which districts are created. With respect to concerns about partisan manipulation, for example, an outcome-oriented approach could hinge on whether the number of seats a party received in a state’s overall congressional delegation adequately mirrored that party’s statewide vote total. Such seats/vote ratios put primary emphasis on electoral outcomes. While precise proportionality would be at odds with the concept of districting itself, if Republicans in Massachusetts receive 35% of the statewide vote but no congressional seats, the effects of the districting might be treated as sufficiently egregious as to amount to a partisan gerrymander. With respect to *Shaw*’s concern about race, however, such outcome-oriented measures do not seem available. It would be easy to envision such measures if the goal were ensuring adequate levels of minority officeholding in the sense of descriptive representation; rough

136. See *supra* note 18.

137. See *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *aff’d*, 115 S. Ct. 2637 (1995).

proportionality between representatives and the population they represent would be an obvious baseline. Yet there is no similar baseline centered on election outcomes to enforce *Shaw*'s concern about the "excessive use of race."

Process approaches can be subdivided into at least three distinct forms. The first is the kind of intent-based doctrine reflected in the Court's current "predominant motive" test. For the reasons I have offered, I do not believe such an approach is promising, nor do I believe it best describes what the Court is actually doing in post-*Shaw* cases. A second process approach would focus on requiring redistricters to articulate publicly the factors that will govern the process and the relative weight those factors will be given.¹³⁸ An advantage of this approach is that it requires generality in policymaking that in and of itself can constrain the play of factors like special treatment for powerful incumbents. Once redistricters must precommit to particular policies, their ability to manipulate those policies could be diminished. As a general matter, the problem with such an approach is that the factors relevant to redistricting are typically defined in such general and vague terms, and enough factors are considered legitimate or relevant, that redistricters would be left with just as much discretion as they have already.

Aspects of recent post-*Shaw* cases suggest that Court is partly drawn to this kind of approach. When the Court criticizes the fact that computerized redistricting programs contain more fine-grained data on race than any other variable,¹³⁹ it is suggesting that race not be the kind of criteria, or at least not so "excessively," upon which redistricters can rely publicly. This approach is even more strongly manifested in *Vera*'s thinly developed twist to the *Shaw* doctrine, namely that "race cannot be a proxy" for other considerations (even when the correlation is extremely high). Pushed to its limits, this doctrine would seek to extirpate any direct invocation of race from the process. At least two problems make this form of process constraint seem implausible. First, it might only drive reliance on race underground. Redistricters cannot be denied their prior demographic knowledge—for instance, that congressional districts centered on Detroit will have higher black populations than those in the surrounding northern suburbs. Second, and more importantly, such an approach is difficult to square with *Shaw*'s claim to seek to distinguish appropriate from excessive uses of race. This kind of approach would work best for factors courts would be prepared to hold have no legitimate role in redistricting. Given

138. For the development of such an approach, see Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1698–1702 (1993).

139. For example, as the court noted in *Bush*:

[The computer program used in redistricting Texas' congressional delegation] contained racial data at the block-by-block level, whereas other data, such as party registration and past voting statistics, were only available at the level of voter tabulation districts (which approximate election precincts). The availability and use of block-by-block racial data was unprecedented

Bush v. Vera, 116 S. Ct. 1941, 1953 (1996) (plurality opinion).

the more nuanced line *Shaw* seeks to draw, this approach becomes more problematic.

The third process approach appears the most plausible, in light of *Shaw*'s stated concerns. Judicial doctrine can seek to specify extrinsic and relatively more objective constraints on the design of districts. Rather than focusing on electoral outcomes, intent, or efforts to eliminate one factor from the process altogether, the Court could seek to define the outer boundaries on the ways districts are constitutionally permitted to be manipulated. To be sure, this would be a dramatic change in constitutional doctrine, though perhaps less dramatic than earlier judicial interventions, such as the one-vote, one-person doctrine. Yet once the Court is prepared to police the process of redistricting other than to vindicate palpable harms to individual rights, such interventions might become inevitable.

It is unlikely that the Court will expressly state that *Shaw* is to be implemented through judicial development of constitutionally based extrinsic constraints on district design. Yet in practice, this is the most likely end point as *Shaw* becomes operationalized. The failings of the intent doctrine, and the institutional pressures that push courts to seek judicially administrable doctrines, will propel the courts in practice, if not in formal doctrine, to begin specifying extrinsic, judicially imposed constraints on the creation of majority-minority districts. Justice Souter has rightly argued that this is the only "nonrevolutionary" way to give principled content to *Shaw*.¹⁴⁰ As noted above, there are signs already that this is the way the Court is implementing *Shaw*, even if it does not acknowledge so expressly.

I cannot provide a detailed blueprint here for what those doctrines would look like. In general terms, the courts will give more specific content to requirements focused on the objective circumstances of districting: that districts

140. See *id.* at 2010 (Souter, J., dissenting) ("The Court could give primacy to the principle of compactness and define the limits of tolerance for unorthodox district shape by imposing a measurable limitation on the bizarre . . . calculated on the basis of a district's dispersion, perimeter, and population.") The only other option, Justice Souter argues, is for the Court to eliminate the practice of districting altogether (substituting alternative forms of election, such as proportional or semi-proportional systems) or to require random districting. See *id.* (Souter, J., dissenting).

Prior to this Term's cases, Richard Briffault had suggested a "political motivation" defense as another alternative. See Briffault, *supra* note 19, at 71-79. Briffault argued that when empirical evidence supports the position that race is salient to local politics, government action taking these facts into account does not reflect the stereotypical thinking that *Shaw* condemns; racial classifications used in these circumstances should therefore be understood to be politically, not racially, motivated and hence permissible. To the extent that the political motivation defense endorses the use of race as a proxy for nonracial objectives, such as partisan ones—grouping blacks as blacks (rather than as Democrats) into a district for the purpose of ensuring Democratic control—a second, less significant prong of *Bush* expressly rejects it. *Bush* also holds that, "to the extent race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation." 116 S. Ct. at 1956. Apparently this condemnation of stereotyping holds true no matter how statistically accurate the underlying generalization. Thus even though 97% of black voters in and around Dallas voted Democratic, *Bush* precludes using race in this area as a proxy for political affiliation. See *id.* To the extent that the political motivation defense endorses race-conscious districting beyond where the VRA requires it, last Term's cases raise serious questions about whether the doctrine permits that. See *supra* note 115.

be reasonably compact; that they respect certain preexisting political subdivisions, such as county and city lines; that they reasonably adhere to natural geographic boundaries, such as rivers and lakes; and most generally, that majority-minority districts be drawn in ways consistent with judicially ascribed conventions of districting.¹⁴¹ These conventional practices would not be used to drive all districts toward some uniform national standard, but to define extreme outer boundaries as the districting process comes under greater siege on several fronts. While this is much like what the courts implementing *Shaw* are doing already, that is precisely the point of the earlier arguments: Whether courts acknowledge doing so or not, in practice *Shaw* is going to require that courts focus less on “predominant motives” and more on giving content to “traditional districting practices.”

In addition, I believe some of these constraints would be most administrable if specified in quantitative form; that is particularly so for the criterion *Shaw* emphasizes most strongly, “extremely bizarre” shape.¹⁴² While some areas of constitutional law are perhaps best developed through case-by-case interpretation of open-textured standards, there are specific reasons clear rules are unusually important in this kind of judicial regulation of redistricting. First, litigation typically focuses on an individual district and rarely examines even other districts in the same state, let alone draws comparisons to districts nationwide. Yet I suspect many people, including judges, would be surprised to discover how contorted even the “average” congressional district is today. Left to intuitive and ad hoc assessments of how bizarre a district is, judges are likely to find many districts extreme that, in a statistical sense, are not. Even if the doctrine does not itself get expressed in quantitative form, judicial intuitions are likely to be far removed from the realities of redistricting absent systematic comparisons to tutor those intuitions. Second, these cases are exceptionally charged politically, racially, and ethnically. Leaving implementation to ad hoc judicial assessments of whether districts deviate too much from conventional practices invites both the appearance and reality of judicial manipulation for selective ends. Third, unlike some constitutional doctrines, the initial audience for *Shaw* is not sophisticated legal actors, but politicians engaged in a highly partisan and self-interested task. However subtle the *Shaw* doctrine might be in principle, it will be both misunderstood and wilfully manipulated if expressed in nebulous terms. Finally, clear rules can be the least intrusive judicial approach; once redistricters know the constitutional constraints under which they must operate, they can frame political bargains within the terms of those constraints. Legal uncertainty will encourage some group of political actors to use that uncertainty itself for political ends; if there are vague and unpredictable possibilities that courts will

141. “Conventional” here will inevitably be a mixed empirical and normative standard.

142. For advocacy of such standards, see Pildes & Niemi, *supra* note 6, at 557–59, 587.

strike down a district, those probabilities will themselves influence the terms of political dealmaking. Many of these concerns can be minimized through adopting clearly specified principles as to what makes a district "extremely bizarre"; the means most readily at hand to do so involve developing quantitative norms of compact districting.

To be sure, courts can be predicted to resist turning to quantitative measures and instead cling to more familiar legal categories like "intent," "reasonably compact," and "traditional districting practices." Any such resistance, however, might have less to do with coherent implementation of *Shaw* and more, one suspects, with implicit ideas about the proper forms of legal authority. Put simply, courts are likely to be uncomfortable with social-scientific formulas like compactness, perhaps in part because legal judgments expressed in this form rather than through traditional legal categories are thought to compromise the authority of law.¹⁴³

Framed in terms of the principles that *Shaw* reflects, the point of requiring consistent adherence to specific districting practices would be judicially to enforce the Court's nondiscrimination interpretation of the VRA through distinguishing "excessive" from permitted uses of race. Some might object that specifying objective circumstances beyond which districts could not go, even to enhance minority representation, would inappropriately elevate the importance of conventional districting practices. In its strongest form, the critique might suggest that these practices themselves, such as compactness, are themselves relics of eras in which concerns for representation of racial and ethnic minorities were hardly paramount; or perhaps of a period in which ethnic segregation, at least, was greater and therefore tracked geography more closely. Yet it seems unlikely that conventional criteria, such as compactness, contiguity, and respect for the boundaries of preexisting political units like counties would have been designed to minimize political power of minorities, although at times they have been manipulated to do so in practice. A more plausible version of this critique would be that given how these criteria affect the political influence of particular minority groups today, we ought to reconsider whether those conventional practices ought to be retained.

Challenges to the entire system of single-member territorial districting are likely to become more common in the coming years, and I have raised such challenges myself.¹⁴⁴ There is a difference, however, between wholesale replacement of any electoral structure and selective abandonment of it to serve particular interests. There are social costs to a two-tiered system of districting, one in which most districts meet certain criteria while majority-minority

143. This topic of judicial resistance to relying on quantitative formulas and the construction of legal authority raises interesting questions that cannot be explored here. On legal form and the construction of legal authority, see JOSEPH VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* (1986).

144. See, e.g., Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241.

districts look dramatically different. A second response to the objection to basing constitutional doctrine on conventional districting practices is more mundane. This response frequently appears as a vehicle for challenging *Shaw* itself, rather than a basis for arguing how *Shaw* ought to be implemented. From the pragmatic perspective this Essay takes, the question is the best implementation approach among the plausible alternatives. Between specifying extrinsic constraints on districting and ferreting out "predominant motives," the former is more likely to lead to administrable, consistent doctrine that will do less harm to the districting process.

Nonetheless, *Shaw* would still directly apply these constraints only to minority-controlled districts. In one sense, that result flows from *Shaw* itself and, again, is less a critique of these implementation suggestions than a challenge to the basic principle of *Shaw*. While constitutional constraints limited only to certain districts might nonetheless have broader effects by influencing the culture of districting more generally, another alternative is that *Shaw* will become only the first step in a broader judicial effort to respond to the pressures the territorial districting system is facing more generally. Not only would such a broader effort respond to criticisms that the Court is singling out minority districts; it would also respond to additional forces that will likely further erode the districting system if not addressed.

For example, new constitutional doctrine is another factor in the rise of bizarre districting in the 1990s. The effects of this change are not widely appreciated. In 1983, the Court held in *Karcher v. Daggett*¹⁴⁵ that one person, one vote requires virtually exact mathematical equality in the population of each congressional district within a state, even more exact than the margin of error in the Census data on which the districts are based. *Karcher* thus elevated compliance with one person, one vote to a lexical priority in congressional districting. As a result, states that engaged in congressional districting in the 1990s could no longer rely upon other principles, adherence to preexisting political boundary lines, or desire for compact districts, to justify departures from exact population equality. *Karcher* stands as one of the best exemplars of constitutional doctrine's perverse effects.¹⁴⁶ A principal purpose of the Court's "reapportionment revolution" had been to constrain partisan and interest-group manipulation of districts. By demanding equitable population distributions across districts, the cases constrained legislators from "crazy-quilt" districting.¹⁴⁷ As the Court recognized at the time, these crazy-quilts did not reflect arbitrary patterns, but a system that regularly enhanced the political power of particular groups, such

145. 462 U.S. 725 (1983).

146. Closely related to the counterproductive *Karcher* is *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), which held unconstitutional "a State's preference for pleasingly shaped districts" that yielded districts up to 3.13% above and 2.84% below the ideal population levels. *Id.* at 536.

147. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 568-70 (1964) (condemning crazy-quilt districting).

as rural voters, with distinct political interests.¹⁴⁸ One of the few meaningful constraints on partisan and incumbent gerrymandering was the norm that political subdivision boundaries, such as cities and counties, ought to be respected. *Karcher* required that this constraint be abandoned in pursuit of a "zero tolerance" policy with respect to population deviations. Yet at the very moment *Karcher* was decided, this constraint—population equality—was becoming virtually obsolete as a barrier to gerrymandering.¹⁴⁹ With the sophisticated computer technology available in the 1990s, fashioning districts that comply with one-person, one-vote, while still pursuing the most self-interested partisan ends, became an easy task.

Some of the distortions in current districts, particularly the increase in the splitting of county and city lines, are no doubt attributable to the direct commands of *Karcher*.¹⁵⁰ More indirectly, *Karcher* might also have contributed to the breakdown of the tacit norms of districting noted above.¹⁵¹ As with the VRA, once fragmentation of county and city lines became legitimated for one purpose, it may have become difficult to put the genie back in the bottle. While *Karcher* played a significant role in the decline of the political subdivision constraint, it is unlikely that *Karcher* is the dominant factor in the general decline of compactness. *Karcher* applies nationwide, which cannot explain the disproportionate rise in bizarrely shaped districts precisely in those states that created new minority districts. In conjunction with *Shaw*, if the Court is serious about responding to the extremes of districting in the 1990s that will only get worse after the 2000 Census, the Court ought to reconsider *Karcher* and permit minimal deviations from population equality when justified by respect for preexisting political subdivisions.¹⁵²

The second factor that accounts for recent transformations in redistricting is technological advance in data collection and computer technology. These improvements have enhanced the capacity to gerrymander effectively.¹⁵³ Recent cases now document in microscopic detail the astonishing precision with which redistricters can carve up individual precincts and distribute them

148. See, e.g., *Karcher*, 462 U.S. at 729, 738–39 (noting that partisan politics played key role in population deviations); *Reynolds*, 377 U.S. at 580–81 (rejecting state interest in fortifying representation in sparsely populated areas).

149. A point the dissenters in *Karcher* rightly made. See *Karcher*, 462 U.S. at 775–76 (White, J., dissenting) ("[A] decade of experience . . . has shown that the rule of absolute equality is perfectly compatible with gerrymandering of the worst sort.") (citation and internal quotation marks omitted).

150. For example, in North Carolina, virtually all of Wake County, 423,380 people or 99.8% of the population, was put into the Fourth Congressional District, while the remainder of Wake County—767 persons—was put into the Second District. See O'Rourke, *supra* note 30, at 763 n.177. This kind of county splitting is almost certainly attributable to *Karcher*'s demand for exact mathematical equality.

151. See *supra* Section I.A.

152. One approach would be to apply the same constitutional standards that now govern state districts to congressional districts; the former treat up to 10% variations in district populations as de minimis when justified to preserve other legitimate state aims. See, e.g., *Mahan v. Howell*, 410 U.S. 315 (1973).

153. Kay Butler has reported, from her involvement with South Carolina's 1990s redistricting, on the effects of the more precise form in which Census data now comes. See Conference, *supra* note 27, at 16 (comments of Katharine English Butler).

between districts with confidence concerning the racial and partisan consequences.¹⁵⁴ The new technology not only facilitated naked pursuit of partisan objectives, it also enhanced the ability to pursue these objectives under the guise of complying with *Karcher* and the VRA. For example, in several states, minority districts that could have been compact, had VRA compliance been the sole objective, became more contorted simply because a bizarrely contorted minority district had more desirable ancillary partisan and incumbent-protection consequences.¹⁵⁵

As noted earlier, this practical interplay between political and racial concerns will pose profound problems for the Court's "predominant motive" approach to limiting gerrymandering.¹⁵⁶ The dramatic rise in bizarre districting reflects several factors not readily disentangled; it is the conjunction and synergy between these developments that have eroded the culture of redistricting. One possible though subtle corollary might follow. If synergistic interactions have indeed combined to erode the culture of districting, then establishing formal boundaries on minority districts might restore tacit norms that previously prevailed. Even if *Shaw* does not literally apply universally to all districts, once extremely bizarre districts become unconstitutional in one context, tacit norms regarding shape might be revived that would in practice apply to all districts. *Shaw*-type constraints could well induce more general acceptance of similar boundaries even when not formally required. The cultural consequences of *Shaw*, in other words, might well be broader than its formal legal scope.

Finally, another response to the current difference in constitutional treatment between partisan-conscious and race-conscious districting is for the Court, in light of *Shaw*, to develop similar extrinsic constraints against partisan gerrymandering.¹⁵⁷ While race-conscious districting is a factor in the rise of bizarre districting, it is not the only one. Efforts to distinguish the role of race not only pose epistemological problems of great complexity, they also fail to deal with the broader phenomenon. Despite the Court's reluctance to address

154. See, e.g., *Bush v. Vera*, 116 S. Ct. 1941, 1957-59 (1996) (plurality opinion); *Moon v. Meadows*, No. 3:95CV942, 1997 WL 57432, at *6 n.6 (E.D. Va. 1997); cf. *Diaz v. Silver*, No. 95-CV-2591, 1997 WL 94175, at *7-8 (E.D.N.Y. Feb. 27, 1997) (documenting role of computer data in redistricting plan drawn by state-court appointed referees).

155. See *Bush*, 116 S. Ct. at 1955-56 (plurality opinion) (discussing rejection of proposed "relatively compact 44% African-American district," centered on Dallas County, because of its effects on five incumbent congressmen); *Shaw v. Hunt*, 116 S. Ct. 1894, 1906 (1996) (discussing possibility that geographically compact minority district could have been drawn in south-central to southeastern North Carolina).

156. See *supra* Part II.

157. While the Constitution purportedly constrains partisan gerrymandering, see *Davis v. Bandemer*, 478 U.S. 109 (1986), neither the Supreme Court nor other courts have given this doctrine any teeth at all. Some scholars have called for more aggressive judicial enforcement of this doctrine, particularly in light of *Shaw*. See, e.g., Samuel Issacharoff & Richard Pildes, *No Place of Partisan Gerrymandering*, TEX. LAW., Aug. 5, 1996, at 25 ("[I]n the wake of the recent decisions limiting racial gerrymandering, the court might now feel an obligation to take more seriously the similar problems that political gerrymandering poses.").

partisan gerrymandering, doing so might be the logical implication of the path the Court has embarked on with *Shaw*.

IV. CONCLUSION

The system of territorial districting is under greater pressure today than at any time since Congress first established the requirement of single-member congressional districts in 1842.¹⁵⁸ Technological and informational advances, combined with legal and political pressures for more explicitly interest-based approaches to representation, as reflected in the post-1982 VRA, are raising practical and philosophical challenges to the continued plausibility of territorial districting. The most dramatic response would be to abandon territorial districting and follow the lead of most western democracies by adopting more interest-oriented systems of representation, such as proportional representation;¹⁵⁹ a more modest move in this direction would be greater experimentation with alternative voting systems, such as cumulative voting, limited voting, and preference voting.¹⁶⁰ Although local governments in the United States are making greater use of these alternatives than many people recognize,¹⁶¹ it is unrealistic to view as promising the political prospects for significant change in this direction, particularly at the state and national levels. A second appropriate response might be to develop stronger constraints, including formal legal ones, on the politically self-interested manipulation of the territorial-districting system. These constraints are not likely to emerge through the ordinary political process, given the self-interest of existing office holders who currently control the districting process. As long as we maintain the basic system of territorial districting, pressure to preserve the core of its integrity will likely be channelled toward the courts, which might in turn generate increasing deployments of constitutional doctrine. In retrospect, it should perhaps come as not wholly surprising that in the face of the proliferation of extreme districting of many sorts for many purposes in the 1990s, doctrines like that in *Shaw* have begun to emerge.

If the Supreme Court remains committed to this line of response, two questions will dominate the next phase of these developments. First, can courts develop judicially administrable doctrines and principles to perform this role effectively? This Essay has argued that intent-based approaches to constraining redistricting, such as the recent though erratically adhered to "predominant

158. See Reapportionment Act of 1842, ch. 47, 5 Stat. 491 (1842)

159. In a study of all lower-house elections conducted since 1945 in 27 democracies, only 17% used the Anglo-American system of districting and majority rule. See AREND LUPHART, *ELECTORAL SYSTEMS AND PARTY SYSTEMS: A STUDY OF TWENTY-SEVEN DEMOCRACIES 1945-1990*, at 2, 48 (1994)

160. For discussion of these alternatives, see Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418 (1995); and Pildes & Donoghue, *supra* note 144

161. See Pildes & Donoghue, *supra* note 144, at 259-60

motive" test of *Miller*,¹⁶² are ill-suited for this task. A better, if less traditional, approach would be for courts to focus on specifying extrinsic and more objectively definable legal constraints. Even so, the administrative aspects of *Shaw* will be daunting. Second, will the Court move beyond doctrines that explicitly constrain only race-conscious districting to more general doctrines that confront the multiple fronts on which the system of territorial districting is now under siege?¹⁶³ The failure to do so will not only make the *Shaw* doctrine intractable administratively, given the entanglement of partisan, incumbent-protection, racial, and ethnic considerations in redistricting. It will also leave the Court open to the charge that its concerns for the integrity of the territorial-districting system arise only when the challenges to that system benefit the very groups that the VRA was designed to protect.

162. See *supra* note 7 and accompanying text.

163. In a forthcoming casebook, a chapter devoted to districting approaches partisan and racial gerrymandering as interrelated elements that are best addressed jointly if judicial doctrine is to be developed to constrain the excesses of modern redistricting practices. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL REGULATION OF THE POLITICAL PROCESS* (forthcoming 1998).

APPENDIX I: COMPACTNESS OF 1980S AND 1990S CONGRESSIONAL
DISTRICTS, BY STATE¹⁶⁴

STATE	DISPERSION SCORES			PERIMETER SCORES		
	RANGE	MEAN	#≤.20	RANGE	MEAN	#≤.08
Alabama						
1980s	.28-.71	.44		.23-.46	.33	
1990s	.26-.48	.39		.11-.26	.18	
Arizona						
1980s	.30-.47	.42		.23-.44	.33	
1990s	.30-.57	.41		.15-.47	.25	
Arkansas						
1980s	.37-.54	.44		.21-.34	.28	
1990s	.35-.52	.44		.18-.35	.27	
California						
1980s	.09-.54	.33	4	.06-.39	.20	5
1990s	.04-.57	.39	2	.10-.45	.29	0
Colorado						
1980s	.31-.52	.43		.18-.44	.33	
1990s	.25-.56	.40		.15-.38	.26	
Connecticut						
1980s	.27-.54	.40		.12-.37	.26	
1990s	.27-.55	.41		.20-.39	.32	
Florida						
1980s	.16-.63	.40	1	.13-.56	.36	0
1990s	.03-.56	.31	7	.01-.50	.20	6
Georgia						
1980s	.19-.48	.34	1	.16-.48	.28	0
1990s	.17-.47	.34	1	.07-.32	.18	2
Hawaii						
1980s	.05-.30	.18	1	.11-.41	.26	
1990s	.05-.34	.19	1	.11-.38	.24	
Idaho						
1980s	.21-.54	.38		.21-.36	.28	
1990s	.21-.56	.38		.20-.34	.27	
Illinois						
1980s	.15-.53	.38	1	.14-.55	.30	0
1990s	.19-.56	.34	1	.03-.52	.27	1

164. Originally published in Pildes & Niemi, *supra* note 6, at 571-73 (information provided by Election Data Services, Inc.). States with only one congressional representative are excluded.

STATE	DISPERSION SCORES			PERIMETER SCORES		
	RANGE	MEAN	#≤.20	RANGE	MEAN	#≤.08
Indiana						
1980s	.28-.53	.39		.16-.57	.33	
1990s	.25-.53	.39		.14-.57	.27	
Iowa						
1980s	.31-.56	.42		.33-.46	.38	
1990s	.32-.54	.43		.30-.54	.41	
Kansas						
1980s	.34-.54	.45		.33-.67	.50	
1990s	.35-.50	.44		.24-.51	.39	
Kentucky						
1980s	.26-.51	.41		.22-.42	.29	
1990s	.21-.64	.38		.16-.36	.24	
Louisiana						
1980s	.26-.60	.37	0	.09-.31	.24	0
1990s	.13-.48	.31	2	.01-.23	.09	4
Maine						
1980s	.31-.45	.38		.12-.21	.17	
1990s	.31-.45	.38		.12-.21	.17	
Maryland						
1980s	.18-.57	.39	1	.08-.40	.22	1
1990s	.16-.51	.32	1	.08-.37	.18	1
Massachusetts						
1980s	.17-.51	.32	3	.02-.54	.23	1
1990s	.14-.43	.28	2	.06-.28	.15	3
Michigan						
1980s	.20-.48	.35	1	.07-.51	.29	1
1990s	.20-.63	.43	1	.07-.61	.38	1
Minnesota						
1980s	.35-.54	.40		.26-.56	.37	
1990s	.36-.56	.45		.22-.47	.35	
Mississippi						
1980s	.29-.57	.46		.14-.41	.31	0
1990s	.30-.52	.43		.08-.40	.21	1
Missouri						
1980s	.37-.59	.45		.24-.57	.39	
1990s	.34-.58	.44		.18-.53	.32	

STATE	DISPERSION SCORES			PERIMETER SCORES		
	RANGE	MEAN	#≤.20	RANGE	MEAN	#≤.08
Nebraska						
1980s	.27-.46	.34		.28-.56	.38	
1990s	.33-.45	.40		.26-.49	.39	
Nevada						
1980s	.28-.54	.41		.25-.72	.49	
1990s	.43-.44	.43		.27-.56	.41	
New Hampshire						
1980s	.22-.32	.27		.18-.26	.22	
1990s	.23-.30	.26		.18-.23	.20	
New Jersey						
1980s	.20-.58	.37	1	.10-.39	.21	0
1990s	.11-.51	.33	2	.07-.37	.19	2
New Mexico						
1980s	.25-.48	.35		.26-.40	.34	
1990s	.36-.52	.44		.32-.37	.33	
New York						
1980s	.06-.56	.30	6	.03-.39	.20	7
1990s	.06-.55	.30	8	.02-.45	.20	8
North Carolina						
1980s	.26-.57	.36	0	.22-.46	.30	0
1990s	.05-.44	.28	2	.01-.32	.09	8
Ohio						
1980s	.25-.53	.39	0	.09-.49	.31	
1990s	.20-.61	.38	1	.11-.58	.27	
Oklahoma						
1980s	.23-.52	.37		.18-.27	.23	
1990s	.24-.59	.38		.16-.32	.22	
Oregon						
1980s	.20-.45	.36	1	.23-.43	.30	
1990s	.22-.46	.37	0	.15-.44	.27	
Pennsylvania						
1980s	.25-.55	.40	0	.10-.50	.27	
1990s	.16-.62	.39	1	.11-.45	.26	
Rhode Island						
1980s	.18-.28	.23	1	.06-.21	.14	1
1990s	.22-.46	.34	0	.22-.52	.37	0

STATE	DISPERSION SCORES			PERIMETER SCORES		
	RANGE	MEAN	#≤.20	RANGE	MEAN	#≤.08
South Carolina						
1980s	.23-.50	.40		.22-.39	.31	0
1990s	.22-.39	.31		.08-.29	.16	1
Tennessee						
1980s	.15-.43	.28	2	.13-.38	.26	0
1990s	.12-.42	.30	1	.08-.26	.17	1
Texas						
1980s	.23-.57	.39	0	.12-.52	.26	0
1990s	.19-.54	.31	5	.01-.38	.13	9
Utah						
1980s	.43-.51	.46		.27-.35	.31	
1990s	.32-.55	.46		.33-.40	.36	
Virginia						
1980s	.20-.55	.37	1	.12-.44	.30	0
1990s	.22-.52	.31	0	.06-.29	.17	2
Washington						
1980s	.26-.56	.38	0	.11-.42	.24	
1990s	.20-.53	.38	1	.12-.43	.25	
West Virginia						
1980s	.26-.44	.32	0	.15-.31	.23	
1990s	.20-.39	.28	1	.11-.19	.15	
Wisconsin						
1980s	.24-.51	.38		.19-.45	.30	
1990s	.25-.63	.39		.18-.72	.33	
Nationwide						
1980s	.05-.71	.37	25	.02-.72	.28	16
1990s	.03-.64	.36	40	.01-.72	.24	50

APPENDIX II: 1990s CONGRESSIONAL DISTRICTS WITH LOW DISPERSION OR PERIMETER COMPACTNESS SCORES¹⁶⁵

DISTRICT	DISPERSION SCORE	PERIMETER SCORE	LARGEST POPULATION GROUP	% OF DISTRICT POPULATION
CA36	.04	.10	White	69
FL3	.11	.01	Black	55
FL17	.08	.06	Black	56
FL18	.14	.03	Hispanic	67
FL22	.03	.05	White	83
HI2	.05	.11	Asian	53
IL4	.19	.03	Hispanic	65
LA4	.13	.01	Black	66
LA6	.29	.05	White	82
MA3	.14	.11	White	78
MA10	.15	.06	White	94
NJ13	.11	.07	White	42
NY5	.19	.05	White	79
NY7	.22	.05	White	58
NY8	.06	.03	White	74
NY9	.27	.04	White	82
NY12	.12	.02	Hispanic	58
NC1	.25	.03	Black	57
NC5	.14	.08	White	83
NC7	.29	.05	White	70
NC12	.05	.01	Black	56
TN4	.12	.08	White	95
TX3	.29	.05	White	86
TX6	.21	.02	White	88
TX18	.36	.01	Black	50
TX25	.20	.02	White	53
TX29	.19	.01	Hispanic	61
TX30	.24	.02	Black	49

165. Originally published in Pildes & Niemi, *supra* note 6, at 565 (information provided by Election Data Services, Inc.). Districts shown here are all those with a dispersion score of ≤ 0.15 or a perimeter score of ≤ 0.05 . For the purpose of this Table, "White" means non-Hispanic white; "Black" means non-Hispanic black; and "Asian" means Asian or Pacific Islander. "Hispanics" may be of any race, and "population" refers to total population. Blacks and Hispanics constitute a majority in NJ13 and TX30