2001

Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie as a Case Study

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Challenges to Racial Redistricting in the New Millennium: *Hunt v. Cromartie* as a Case Study

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Introduction

On the eve of the next apportionment, the Supreme Court is caught in the throes of the last. For the fourth time in less than ten years, the North Carolina congressional districts at issue in Shaw v. Reno (Shaw I) are making an appearance before the Supreme Court. Although the cast of characters differs slightly, the interconnected issues presented in Shaw I nevertheless remain the same. First, to what extent may state actors rely on racial demographics while performing their redistricting duty? Second, what is the proper

3. See Cromartie II, slip op. at 29-30 (discussing North Carolina’s Twelfth Congressional District).
doctrinal approach for rooting out ostensibly unconstitutional reliance on race-based redistricting? Third, can the Supreme Court and lower courts consistently distinguish between race consciousness and race motivation?

As an institution, the Court has been unable to answer these questions with any clarity or predictability. Instead, the Court has splintered into three camps. For some members of the Court, any evidence of race consciousness invalidates the infected district absent compelling reasons. On this reading of the Constitution, race consciousness is race motivation. For others, evidence of race consciousness, standing alone, is not nearly enough to implicate the Constitution. For this second faction, redistricting does not violate the Equal Protection Clause "unless the effect of the redistricting plan is to deny a particular group equal access to the political process or to minimize its voting strength unduly." For the remaining members of the Court, particularly Justice O'Connor, it is the excessive reliance on race, something akin to uberrace consciousness — the ostentatious display of race consciousness run amok — that offends the Equal Protection Clause.

These various approaches have borne much doctrinal confusion. On the one hand there is Shaw I's commitment to the bizarre shape test, whereby a district is subject to strict scrutiny review if its shape is bizarre and the process that led to its creation is race conscious. On the other hand, there is Miller v. Johnson's predominant factor test, which focuses instead on whether race was a predominant factor in the ultimate placement of voters within one district or

4. See, e.g., Cromartie I, 526 U.S. at 546 ("Our decisions have established that all laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized."); Bush v. Vera, 517 U.S. 952, 999 (1996) (Thomas, J., concurring) (stating "application of strict scrutiny in this suit was never a close question").

5. Shaw I, 509 U.S. at 676 (Blackmun, J., dissenting). Even within this camp, there are important nuances. Justice Stevens advocated that the state violates the Equal Protection Clause only "when the State creates . . . uncouth district boundaries . . . for the sole purpose of making it more difficult for members of a minority group to win an election." Id. at 677 (Stevens, J., dissenting). For Justice Stevens, "minority" is not solely defined by the adjective "racial." Id. at 678. "Minority" is any "politically weak segment of the community." Karcher v. Daggett, 462 U.S. 725, 748 (Stevens, J., concurring) ("If they serve no purpose other than to favor one segment — whether racial, ethnic, religious, economic, or political — that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection.").


another. On their face, these two approaches stand in direct tension. Despite these doctrinal difficulties, the Court, to its credit, has attempted to blend symbiotically Shaw I and Miller's differing approaches into an interesting evidentiary and doctrinal dialectic. All the same, the initial tension remains. The Court's racial redistricting doctrine is committed to at least two different constitutional tests, two competing ways by which the use of race may offend the Equal Protection Clause.

*Hunt v. Cromartie (Cromartie II)* presents the Court with its first opportunity this millennium to bring some semblance of clarity to this area of law and to resolve the tension created by Shaw I and Miller. Of equal importance, Cromartie II also will test the Court's avowed commitment to maintain a distinction between racial motivation and racial consciousness or awareness in the voting rights context. In so doing, Cromartie II threatens to lay bare the doctrine's vacuity.

*Cromartie II*'s impact is potentially destabilizing because of the manner in which the factual circumstances of the case interact with the Court's wrongful districting doctrine. One specific fact of the case stands out rather conspicuously: While the notoriously ubiquitous Districts 1 and 12 are once again the subject of constitutional scrutiny, unlike their predecessors, these districts are no longer majority-minority districts. Moreover, a reasonable observer may conclude that they are not even bizarre. These facts raise at least three important questions.


10. Miller's intent standard provides Shaw's bizarre shape test with doctrinal legitimacy by anchoring Shaw within the Court's traditional equal protection jurisprudence. And of course, as we noted supra note 9 and accompanying text, Shaw I's focus on shape provides Miller with the evidence necessary to infer intent.

11. 4-96-CV-104-BO(3), slip op. at 2-10 (E.D.N.C. Mar. 7, 2000).

12. *See supra* note 1 (citing cases noting equal protection issue). This is not to say that the Supreme Court has never upheld a race conscious district, for it has done so three previous times. Unlike the process that led to the creation of the challenged District Twelve, however, these upheld districts were either drawn by special masters, *see DeWitt v. Wilson, 515 U.S. 1170 (1995) (mem.), aff'g 856 F. Supp. 1409 (E.D. Cal. 1994), courts, see Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982) (three-judge court), aff'd, 459 U.S. 1166 (1983), or modified and approved by a federal court from its original creation by a state supreme court, *see Lawyer v. Dep't of Justice, 521 U.S. 567, 569-75 (1997) (approving state supreme court's revision of redistricting plan).*

13. We emphasize that the district may be seen as non-bizarre, nothing more. In making this claim, we are aware that the district fails the Pildes/Niemi perimeter and dispersion tests. *See infra* text accompanying notes 226-35. We also note that in *Cromartie I*, Justice Thomas described the district as bizarre. *Cromartie I, 526 U.S. 541, 549 (1999) ("To be sure, appellants did not contest the evidence of District 12's shape (which hardly could be contested."). Much
First, may prospective plaintiffs challenge majority-white districts on Shaw/Miller grounds? In other words, when the Court refers to a "significant number of voters" as the threshold indicating a predominant motive to "segregate," how "significant" is significant? Prior to Cromartie I, one could have interpreted the Court's racial districting doctrine, as some have, to say that only majority-minority districts are subject to strict constitutional scrutiny. After all, and as we argue below, the leading explanation for Shaw I's position—the "expressive harms" theory—loses much of its explanatory power once voters of color represent less than 50% of registered voters in a given district. In Cromartie I, and in light of the extant doctrine, North Carolina's General Assembly may have done the only sensible thing left to do to avoid litigation: It did not draw any district in which voters of color are more than 50% of all registered voters. Nonetheless, the lower court subjected both District 1 and District 12 to strict scrutiny and struck down District 12. This question is thus important because its answer may provide redistricters a safe haven from constitutional attack and shelter the hard-fought political gains of politicians of color from constitutional scrutiny. Districters need to win most of the time and the Court needs to find a way to make that happen.

The second question looks specifically to Miller's "predominant motive" test and asks whether, in light of the myriad and mutually reinforcing "pur-


15. See infra Part IV.B.1.


17. The original Cromartie suit resulted in the grant of a summary judgment motion in favor of the plaintiffs. See generally Cromartie v. Hunt, 34 F. Supp. 2d 1029 (E.D.N.C. 1998). On remand, the three-judge panel proceeded to conduct a trial, only to reach a similar conclusion. See Cromartie II, No. 4-96-CV-104-BO(3), slip op. at 30 (E.D.N.C. Mar. 7, 2000).
poses" involved in a redistricting plan, a bright-line method exists for singling out the "predominant" purpose with relative consistency. Here, the worry is that the Court has failed to consider seriously the interplay of political factors, including racial motivation, in the redistricting process.\(^\text{18}\) Given the flux and variability of political factors and their interaction with racial considerations, what does "predominant factor" in fact mean?

Third and last, what are the implications of subjecting influence districts (i.e., majority-white districts with "significant" populations of color) to strict scrutiny? In other words, is Justice O'Connor correct when she assured us that the Court's doctrine will not subject "the vast majority of the Nation's 435 congressional districts" to constitutional inquiry "even though race may well have been considered in the redistricting process"?\(^\text{19}\) Or, have political losers been given the green light to revisit redistricting battles — lost in state legislatures — in federal court by attacking districts with "significant" populations of color?\(^\text{20}\)

One goal of this Article is to provide answers to some of these difficult questions. We have a second goal as well. In general, commentators agree that the doctrine in this area "teeters on the brink of legal incoherence and political chaos."\(^\text{21}\) We agree with this assessment. As such, we take on the role of a "conscientious district court judge" faced with future Shaw claims. Our second aim is then to suggest some modifications in the doctrine to provide


20. See Thomas B. Edsall, Parties Play Voting Rights Role Reversal, WASH. POST, Feb. 25, 2001, at A04 ("Republicans . . . are gearing up to counter the efforts of Democrats to spread out minority voters. ").

21. Richard H. Pildes, Principled Limitations on Racial and Partisan Redistricting, 106 YALE L.J. 2505, 2505 (1997); see also Samuel Issacharoff & Thomas C. Goldstein, Identifying the Harm in Racial Gerrymandering Claims, 1 MICH. J. RACE & L. 47, 48 (1996) (stating that "almost all students of this 'racial gerrymandering' doctrine agree that the constitutional commands of Shaw and its progeny leave a great deal unresolved"). Pamela S. Karlan, The Fire Next Time: Reapportionment After the 2000 Census, 50 STAN. L. REV. 731, 731 (1998) ("If you tried to plot the Supreme Court's decisions regulating politics on a graph, you couldn't fit a straight line through the points.").

better guidance to lower courts faced with these types of cases. We divide our effort into four Parts. In Part I, we explore the possible interpretations of the Court's wrongful districting cases. In so doing, we seek to illuminate the modern state of the law. In Part II, we provide in-depth background and an account of the facts as presented in Cromartie II. Our aim is to demonstrate vividly the nature of the facts presented in post-Shaw redistricting litigation. In Part III, we argue that political variables, defined to include racial considerations, serve as constraints on the discretion of redistricters. We then apply Andrew Gelman and Gary King's "Judgelt" statistical model to the facts in Cromartie II. Based on our analysis, we conclude that political gerrymandering is the best explanation for North Carolina's 1997 redistricting plan. Finally, in Part IV, we analyze the implications of the likely dispositions of Cromartie II. We argue that the Court should reinterpret Shaw I as establishing a bright-line outer limit on state redistricters' traditional discretion. In this sense, we could read Shaw (and Miller) as a corrective, a strong medicine applicable only in the extreme cases of uber-race consciousness. We offer as a doctrinal guide the political gerrymandering case of Davis v. Bandemer and suggest that Bandemer's standard should govern Shaw-type claims.

23. Gelman and King's statistical methodology is explained in two articles. See Andrew Gelman & Gary King, A Unified Method of Evaluating Electoral Systems and Redistricting Plans, 38 AM. J. POL. SCI. 514, 514-41 (1994) [hereinafter Gelman & King, Unified Method] (describing statistical model to analyze redistricting plans and electoral systems); Andrew Gelman & Gary King, Enhancing Democracy Through Legislative Redistricting, 88 AM. POL. SCI. REV. 541, 544-59 (1994) [hereinafter Gelman & King, Enhancing Democracy] (analyzing redistricting study data in several states using statistical model). Gelman and King wrote a computer program, "Judgelt," to implement the model and calculate better estimates to measure, inter alia, electoral responsiveness, which is the dependent variable that we use for our analysis in Part III.B. Gelman and King's model is useful for understanding an election that has taken place, predicting future elections under a new redistricting plan, and for evaluating past elections. We use "Judgelt" to evaluate the electoral responsiveness, defined in Part III.B, of North Carolina's 1992, 1997, and 1998 Plans.

24. To be clear, we do not take a position on the merits of Shaw I itself. Our aim is to suggest how the Court might render the doctrine more coherent without sacrificing the interests of voters of color.


Before turning to Part I, a word on the issue of mootness is necessary. While the subsequent crafting of electoral districts in light of the 2000 Census may render the specific questions in *Cromartie II* moot, *Cromartie II* is deserving of close attention for two reasons. First, the issues presented in *Cromartie II* will arise again in coming years, as other states will likely follow North Carolina's lead when drafting their own electoral plans. Hence, while *Cromartie II* may become moot, the general issues presented by the case will not. We thus understand *Cromartie II* as the bellwether for the new round of redistricting after the millennial census. We utilize *Cromartie II* in this Article as a very useful case study to explore the questions raised in the previous paragraphs; these are questions that the Court will have to face eventually in either *Cromartie II* or in subsequent cases.

Second, as political insiders readily acknowledge, previous rounds of redistricting often profoundly influence subsequent rounds. Additionally, for preclearance purposes under Section 5, courts use previous rounds as baselines for future evaluation. As such, the constitutional questions raised in *Cromartie II* are important in their own right, independent of the specific issues of the case itself narrowly construed. We do not take a position on whether the issues in *Cromartie II* are precluded from review in light of *Shaw I*, or whether state legislatures may use "bad districts" as baselines when constructing new plans. However, in light of *Whitcomb v. Chavis*, *Reno v. Bossier Parish*, and *Lawyer v. Department of Justice*, we would not be surprised if the Court holds that the issues in *Cromartie II* are not moot and decides the case on its merits.

27. See *Whitcomb v. Chavis*, 403 U.S. 124, 140-41 (1971) (stating that challenge to racially discriminatory multimember district was not moot in view of possibility that "the present litigation would simply reappear for decision").

28. See *Kousser, Colorblind Injustice, supra* note 18, at 248 ("Unless the standards of redistricting, the population distribution, partisan control, or the number of seats in the body shift markedly from one decade to the next, redistricting begins with the status quo and generally ends close to it.").

29. See infra text accompanying notes 40-41.


31. Nor do we take a position on whether a district must be declared unconstitutional before a new district plan is approved. *See Lawyer v. Dep't of Justice*, 521 U.S. 56, 575-787 (1997) (addressing whether court ought to have approved settlement agreement without formally holding redistricting plan unconstitutional).


I. The Doctrine

Most observers agree that the wrongful districting doctrine is an analytical mess.\textsuperscript{35} To be sure, this is partly due to the Court's own uncertainties. But that is not all; the questions raised in this area are difficult. From the perspective of a state engaged in the redistricting process, there are at least three considerations that must be remembered.

First are the statutory demands of the amended Section 2 of the Voting Rights Act of 1965 (VRA).\textsuperscript{36} As interpreted by the Court in Thornburg v. Gingles,\textsuperscript{37} a vote dilution claim is established under Section 2 when a group demonstrates "that it is sufficiently large and geographically compact to constitute a majority in a single-member district," that it is "politically cohesive," and that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."\textsuperscript{38} If a plaintiff establishes a Section 2 violation, the state may consider race conscious remedies.\textsuperscript{39}

The second considerations are the related requirements of Section 5 of the VRA, commonly referred to as the "preclearance" requirements. Certain jurisdictions across the United States are "covered jurisdictions," which means they must obtain prior approval from the Department of Justice before seeking to institute and enforce "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."\textsuperscript{40} The Act also affords jurisdictions a second preclearance path; they may instead seek a declaratory judgment action in the United States District Court for the District of Columbia. The Attorney General has issued an extensive set of administrative regulations to guide the preclearance process.\textsuperscript{41}

Finally, and as the Court in Shaw I made painfully clear, states must be careful not to violate the Constitution, in particular the Fourteenth Amendment. If the Court finds that a district constitutes a racial classification, the Court will strike down the plan unless the state can show that its legislation is "narrowly tailored to further a compelling governmental interest."\textsuperscript{42} In the

\textsuperscript{35} See supra note 21 (describing confusion surrounding wrongful districting doctrine).
\textsuperscript{37} 478 U.S. 30 (1986).
\textsuperscript{40} 42 U.S.C. § 1973(c) (1994).
\textsuperscript{42} Shaw I, 509 U.S. 630, 643 (1993). The Court's doctrine of course raises two fundamental questions with respect to the application of strict scrutiny. First, when does the use of race trigger strict scrutiny? Second, what constitutes a compelling state interest? This Article is primarily concerned with the first question and not very much with the second. Our argument
next Part, we discuss the Equal Protection problems raised by the Court's wrongful districting doctrine, which is the doctrinal road taken by Shaw I and its progeny. We also offer a tentative prognosis of the Shaw/Miller doctrine in light of the approaching round of redistricting.

A. Shaw, Miller, and the Race-Based Redistricting Revolution

1. Shaw and the Shape of Districts to Come

In Shaw I, Justice O'Connor noted that "reapportionment is one area in which appearances do matter" because "[c]lassifying citizens by race... threatens special harms that are not present in" other areas of voting rights jurisprudence. These general premises led to the conclusion that "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race'" is justiciable pursuant to the Equal Protection Clause. In doctrinal terms, Shaw I's focus on "highly irregular" districts has given rise to the bizarre shape test, by which a district violates the Constitution when, in an attempt to pursue greater representation for people of color, its shape becomes too bizarre.

Two terms later, the Court decided Miller v. Johnson, in which the Court invalidated Georgia's Eleventh District on Fourteenth Amendment grounds but pursuant to a different rationale than the one articulated in Shaw I. In Miller, the Court retreated from the pronounced focus on bizarreness and shape reflected in Shaw I to an exclusive focus on motivation and intent. The Court explained that a bizarre shape is not the touchstone of a constitutional violation. Rather, a districting plan violates the Constitution when "race was is essentially that certain types of racially gerrymandered districts should not implicate the Court's Equal Protection jurisprudence.

44. Id. at 647, 649-50.
46. This is another way of saying that only bizarre majority-minority districts will come under constitutional attack. See Pamela S. Karlan, Just Politics? Five Not So Easy Pieces of the 1995 Term, 34 Hous. L. Rev. 289, 309-10 (1997) (claiming that Court has created situation where nonwhites "must achieve a geographically compact district or go home with nothing").
48. Id. at 912. The Court further stated:

Our observation in Shaw of the consequences of racial stereotyping was not meant to suggest that a district must be bizarre on its face before there is a constitutional violation. Nor was our conclusion in Shaw that in certain instances a district's appearance (or, to be more precise, its appearance in combination with certain demographic evidence) can give rise to an equal protection claim.

Id.
the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.\textsuperscript{49} The standard announced in \textit{Miller} is commonly referred to as the predominant factor test.

In order to understand the Court's race-based voting rights jurisprudence, we must read these cases within the larger context provided by the Supreme Court's greater colorblind jurisprudence and the race-conscious/colorblindness battle being waged subtly within, as well as outside, the Court. This framework gives rise to three distinct positions. One position has identified race itself (and therefore race consciousness) as the enemy. A second position considers only certain racially motivated disadvantages as implicating the Constitution. The third position, the O'Connor-Kennedy-Rehnquist triumvirate, splits into two factions. Justices Kennedy and Rehnquist, whose views are closer to the colorblind camp, are suspicious of race and solicitous toward colorblindness as a constitutional ideal.\textsuperscript{50} Justice O'Connor, however, appears willing to tolerate less visible manifestations of race conscious decision-making.

In light of Justice O'Connor's pivotal position in this area,\textsuperscript{51} it is crucial to look carefully at Justice O'Connor's bizarre shape test. She focuses on shape on three levels. First is the evidentiary utilization of shape,\textsuperscript{52} in which the purpose of shape is to provide evidence of race consciousness.\textsuperscript{53} Assuming the supremacy of the predominant factor test, and given the difficulties of disentangling sometimes competing and often mutually reinforcing legislative motives, shape becomes the paramount "objective" evidence of racial influence.\textsuperscript{54} As a consequence, the predominant factor and bizarre shape tests become indistinguishable from one another as a practical matter.

\textsuperscript{49} Id. at 916.

\textsuperscript{50} See Shaw II, 517 U.S. 899, 901-18 (1996) (revealing Chief Justice Rehnquist's suspicion of race); \textit{Miller}, 515 U.S. at 927 (stating that "[a]s a nation, we share the obligation and the aspiration" to end racism).

\textsuperscript{51} See Samuel Issacharoff & Thomas C. Goldstein, \textit{Identifying the Harm in Racial Gerrymandering Claims}, 1 MICH. J. RACE & L. 47, 50 (1996) (reflecting "widely held view that it is Justice O'Connor's vote that will carry the day"). For a thoughtful reason for rejecting this mode of thinking, see Kim Forde-Mazrui, \textit{The Constitutional Implications of Race-Neutral Affirmative Action}, 88 GEO. L.J. 2331, 2337 & n.21 (2000).

\textsuperscript{52} See John Hart Ely, \textit{Gerrymanders: The Good, the Bad, and the Ugly}, 50 STAN. L. REV. 607, 614 (1998) (claiming that bizarre shape test is only relevant to Constitution as "evidentiary reference").

\textsuperscript{53} As we will discuss below, for Justice O'Connor and perhaps Justice Rehnquist, shape triggers the application of the Fourteenth Amendment in addition to providing evidence of race consciousness. This is an obviously important distinction as Justice O'Connor's understanding of the Fourteenth Amendment's purpose within the context of voting rights permits race consciousness, whereas her right-of-center colleagues' understanding does not.

\textsuperscript{54} See \textit{Miller} v. \textit{Johnson}, 515 U.S. 900, 915-17 (1995) (approving district court's reliance on shape as important indicator of racial gerrymandering).
Second, Justice O’Connor’s emphasis on shape must be understood as a compromise between her commitment to the colorblindness ideal and a realist’s view of Southern politics, specifically in terms of the impact of racism – both as past history and present-day reality, particularly in the form of racial bloc voting – on political practices. Foremost among these realist concerns is her respect for the VRA as a legitimate exercise of congressional power and as an effective remedy for racial inequality in politics. Justice O’Connor articulated these concerns in Bush v. Vera. In that case, she declared her commitment to an understanding of the VRA, in particular the more controversial 1982 amendments, as both a legitimate exercise of congressional power under the Reconstruction Amendments and as an effective remedy for both past and present racial discrimination.

Indeed, the VRA is reputed to be the most successful civil rights legislation ever enacted by the United States Congress. When Congress enacted the VRA, there were fewer than 100 black elected officials in the then-seven targeted southern states and fewer than 300 nationwide. By January 1990 there were 3394 black elected officials in the targeted states and 7370 nationwide. Of course, the eradication of discriminatory voting practices such as literacy tests and poll taxes contributed to the increase in the number of black

55. See Bush v. Vera, 517 U.S. 952, 990 (1996) (O’Connor, J., concurring) (stating that "compliance with the results test of § 2 of the Voting Rights Act (VRA) is a compelling state interest").

56. See Vera, 517 U.S. at 991-92 (O’Connor, J., concurring) ("The Supremacy Clause obliges the States to comply with all constitutional exercises of Congress’ power. . . . This conclusion [the constitutionality of § 2 of the VRA] is bolstered by concerns of respect for the authority of Congress under the Reconstruction Amendments."). It is important to underscore that Justice O’Connor has never stated that the VRA is constitutional. Rather, she has written that states should continue to assume its constitutionality. Id. at 992 (O’Connor, J., concurring).


60. Id.
elected officials. In addition, elected officials of color have benefitted from a focus on minority registration and enforcement of civil rights laws. But perhaps the most direct and decisive contributor to the increase in elected officials of color, particularly in the South, has been the creation of majority-minority districts.

Most recently, the 1990 round of redistricting resulted in the creation of an unprecedented number of majority-minority districts. As David Epstein and Sharyn O’Halloran note, "after the 1990's reapportionment, the number of minority representatives jumped 62 percent, from 24 in the 101st congress to 39 in the 104th congress." After the 1992 elections, there were thirteen new black representatives. Voters elected all of them in newly drawn majority-minority districts. In addition, many black legislators, because of the seniority they have acquired in the House of Representatives, are poised to assume chairmanship and leadership positions in many important committees in the House should the Democrats regain a majority after the 2002 elections.

As we noted earlier, all of these gains were made possible by the VRA. The success of the VRA is not lost on Justice O’Connor. From her perspective, however, the Court must temper the pursuit of racial equality with "the complementary commitment of [the] Fourteenth Amendment . . . to eliminate[ing] the unjustified use of racial stereotypes." Thus, Justice O’Connor repeatedly casts the commitment to racial equality against the commitment to colorblindness. Her focus on shape is the embodiment of her commitment to the "twin goals" of racial equality and colorblindness.

61. We recognize that increase in minority elected officials is a contestable measure of success. See, e.g., Katherine Tate, From Protest to Politics: The New Black Voters in American Elections 2 (1993) (commenting on effect that election of black officials has on black society). Ms. Tate stated:

Although the elections of Blacks have led to increases in the numbers of Blacks holding municipal jobs . . . they have not translated into a significantly better way of life for those Blacks at the bottom of society. Pervasive unemployment, entrenched poverty, sub-inferior schools, and urban decay remain critical problems within the Black community.


64. Tate, supra note 61, at 200-01.


66. See id. at 995 (noting potential for conflict in remediying racial inequality with excessive use of racial classifications). "The VRA requires the States and the courts to take action
Justice O'Connor's focus on shape is a compromise between the Court's need to heed the constitutional ideal of colorblind decision-making and the realization that race consciousness is an inevitable reality of redistricting.\(^6\) Hence, Justice O'Connor does not reject colorblindness as a constitutional imperative as some commentators have argued.\(^6\) Indeed, she has explicitly stated that the Fourteenth and Fifteenth Amendments "embody" the colorblind ideal.\(^6\) However, she has also explained that "redistricting differs from other kinds of state decision making in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors."\(^7\) For Justice O'Connor, in contrast to her colleagues on both her political left and right, the issue is not whether colorblindness is a constitutional imperative; the issue is rather how soon the Court can make political practices consistent with the colorblindness ideal.\(^7\) For her colleagues to her left, the question is irrelevant. For the Justices to her right, the answer is "now." As far as they are concerned, colorblindness is racial equality. For Justice O'Connor, the answer appears to be "with all deliberate speed." The challenge for Justice O'Connor's race-based voting rights jurisprudence has been to devise a constitutional theory that permits a modicum of race consciousness while limiting its perceived excesses. Ergo, she focuses on a district's putatively bizarre shape.

The third plane of operationalization is the bizarre shape test itself. The test, with its endemic focus on shape and intent, is offered as the best method of preventing a harm that is even more damaging than simple race consciousness: the ostentatious display of race consciousness run amok.\(^2\) This is what to remedy the reality of racial inequality in our political system, sometimes necessitating race-based action, while the Fourteenth Amendment requires us to look with suspicion on the excessive use of racial considerations by the government." \(^{45}\) See id. at 642; Carol M. Swain, Not "Wrongful" By Any Means: The Court's Decisions in the Redistricting Cases, 34 Hous. L. Rev. 315, 316-17 (1997).


68. See id. at 642; Carol M. Swain, Not "Wrongful" By Any Means: The Court's Decisions in the Redistricting Cases, 34 Hous. L. Rev. 315, 316-17 (1997).

69. Shaw I, 509 U.S. 630, 657 (1993) ("Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters — a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.").

70. Id. at 646.

71. See Ely, supra note 52, at 617-18 (discussing Justice O'Connor's opinion that gerrymandering claims based on partisanship present non-justiciable claims if brought by major political parties).

we refer to as \textit{uber}-race consciousness. Justice O'Connor thinks that race-influenced bizarre districts are in-your-face visual representations of racial interest as raw political power.\textsuperscript{73} Consequently, bizarre shape as a constitutional principle is the constitutionalization of that public manifestation and the constitutional domestication of \textit{uber}-race.

2. Miller and Predominance Factor

In \textit{Miller} v. Johnson, the Court attempted to clarify its earlier \textit{Shaw I} ruling.\textsuperscript{74} Instead, the confusion persisted. The reasons are obvious. In \textit{Miller}, the Court turned away from \textit{Shaw I}'s concerns and brought this "analytically distinct" cause of action within the ambit of traditional equal protection law. Thus, the Court began to speak of intent and purpose as central to the \textit{Shaw} inquiry.\textsuperscript{75} Ultimately, the Court focused on the "predominant factor" test. On its face, this new test raises further difficulties. As we discuss in this Part, three possible interpretations of this test have developed.

\textit{a. Predominance as Overriding Factor}

First, under the conventional reading of this test courts will strike down a districting plan if race is the predominant factor in the redistricters' minds. Thus, one may interpret the phrase literally and conclude that this test aims to divine the dominant purpose out of the myriad purposes of the redistricting process. This is the case, the critics point out, notwithstanding the fact that, while unpacking legislative motivation is usually a difficult task, it is significantly more difficult within the context of redistricting. By all accounts, redistricting plans usually are the product of a number of competing and mutually reinforcing dynamic motivations that sometimes include race.\textsuperscript{76} The use of the predominant factor test immediately signals a keen understanding of the reali-

\textsuperscript{73} As John Ely stated, to look at a bizarre district is to ask: "Is there no length to which they won't go to help Black people?" Ely, supra note 52, at 615.


\textsuperscript{75} See id. at 913 ("We recognized in Shaw that, outside the districting context, statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object.").

\textsuperscript{76} See Aleinikoff & Issacharoff, supra note 67, at 607 ("Redistricting is an area in which classifications of all kinds - most notably partisan, socioeconomic, racial, and ethnic - are the lifeblood of the process."); Gelman & King, \textit{Enhancing Democracy}, supra note 23, at 542 (listing some motivations of districters including incumbent protection, partisan advantage, winning general election, avoiding primary election, inclusion of right political contributors, exclusion of prospective challengers, etc.).
ties of the redistricting process and the many variables that enter into it. Put differently, this test recognizes that many factors—including race—must play a part in the process. Only when race predominates will the plan at issue fail the constitutional test.

Not surprisingly, members of the Court and commentators alike have severely criticized this conventional reading of the predominant factor test. The test raises two primary difficulties. John Hart Ely wrote, for example:

> Drawing a voting district involves an infinity of choices, each of which is similarly likely to be influenced by a number of considerations. The boundaries zig and zag, shuck and jive, sidle like sidewinders. And each spasm has at least one story of its own: How in the name of heaven could one suppose the whole monstrosity to have a "dominant purpose," unless it's to accommodate as many little purposes as possible? How, in other words, will a court divine whether racial considerations predominated in the drawing of a given district? If we take the test at its word, this criticism has much to say for itself.

As a matter of internal doctrinal consistency, critics also argue that the Court has yet to clarify how an individual is harmed when district boundaries are predominantly influenced by racial considerations. To be sure, Shaw I's doctrine explicitly gives rise to a political right "analytically distinct" from the rights the Court recognized in pre-Shaw I decisions. That is, Shaw I is not concerned with traditional voting rights violations, such as withholding the right to vote, vote dilution, or violations of the "one person, one vote" principle, and political gerrymandering. However, the Court does not say what exactly this right is. Until it does, the criticisms will continue.

### b. Predominance as Evidence of Race Consciousness

Second, we could understand the predominant factor test as a strictly evidentiary inquiry. It asks, rather simply: "What is the evidence that the legisla-

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77. See Ely, supra note 52, at 61; Pildes, supra note 21, at 2537-47 (exploring negative aspects of predominant factor test).

78. Ely, supra note 52, at 612.

79. See Issacharoff & Goldstein, supra note 21, at 49-50; Karlan, supra note 21, at 735 (criticizing the Court's "inability to articulate and identify a concrete harm").


81. Or they will shift ground. That is, one may sensibly argue that the individual rights model is ill fitting to this area of the law. See Elizabeth S. Anderson & Richard H. Pildes, Expressive Theories of Law: A General Restatement, 148 U. PA. L. REV. 1503 (2000); Richard H. Pildes, Two Conceptions of Rights in Cases Involving Political "Rights," 34 Hous. L. REV. 323, 329-32 (1997) (questioning whether individual rights are proper justification for Court's decisions in reapportionment cases).
ture intended to create a majority-minority district?" On this reading, it does not matter that the legislature also intended to satisfy other, perhaps even competing, purposes. It only matters that race played a role in the drawing of the district. In this way, we could understand this reading of the test as a traditional equal protection argument; once the intentional utilization of race is uncovered, state action must be subject to strict constitutional scrutiny. From this perspective, the claims borne out of Shaw I are not analytically distinct after all.

Just to be clear, even though both Justice O'Connor and her right-of-center colleagues use the terms "predominant factor" and "subordinat[ing] traditional race-neutral criteria," they do not mean the same thing. As Justice Thomas explained, when a "legislature affirmatively undertakes to create a majority-minority district . . . race-neutral districting principles are necessarily subordinated [to race]," and the legislature has classified the individual on the basis of race. In contrast, Justice O'Connor actually examines the contours of a contested district's boundaries and tries to extract the motivation behind those contours. For Justice Thomas, Shaw I is a relic of the past, a first pass at what appeared to be a very difficult constitutional inquiry. For Justice O'Connor, conversely, the doctrinal language is to be taken seriously.

c. Predominance as Naked Preference

A final way of classifying the harm in Shaw I through Miller's test is to interpret the predominant factor test as a prohibition against the unjustified naked transfer of political power from one racial group to another. The best attempt to make sense out of constitutionalizing colorblindness from that perspective is John Hart Ely's Standing to Challenge Pro-Minority Gerrymanders. Ely argued that the intentional creation of majority-minority districts

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82. In doctrinal legal terms, the predominant factor test, as interpreted from the perspective of the right-of-center jurists, is synonymous with the preponderance of the evidence standard of the Federal Rules of Civil Procedure. The inquiry is whether it is more likely than not that race was a motivating factor in the legislature's decision to create the district. If so, strict scrutiny applies; if not, strict scrutiny does not apply.


84. See id. at 960-61 (discussing motivation behind drawing districts).

85. See Cass R. Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV. 1689, 1689 (1984) (decriying "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want"). This point can also be recast as a variant of Weschler's criticism that Brown v. Board of Education, 347 U.S. 483 (1954), violates the principle of neutrality by preferencing the associational rights of blacks over those of whites. See Herbert Weschler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 34 (1959) (arguing that forced desegregation violates freedom of association and harms whites).

harms white voters because in these districts, assuming racial bloc voting, whites will be unable to elect one of their own: a white representative. According to Ely, just as black voters "gain some psychic satisfaction from being represented by someone . . . whom they regard as one of their own," so do white voters. To intentionally deprive white voters of this "security" or to so disadvantage them is a constitutionally relevant harm.

The most obvious rejoinder to Ely is that the Court has rejected precisely this — racial — method of thinking about representation. The problem with race-influenced districting, the Court explained, is that the resulting districts "convey the message that political identity is, or should be, predominantly racial." Put differently, they "reinforce . . . the perception that members of the same racial group — regardless of their age, education, economic status, or the community in which they live — think alike, share the same political interests, and will prefer the same candidates at the polls." As such, we learned in Shaw I that race-influenced districts must be subject to strict scrutiny and will thus seldom receive judicial approval.

Doctrinally, therefore, the predominant factor test is a constitutional remedy without a theory of harm, unless race consciousness itself (or iber-race consciousness) is the harm. And if race consciousness itself is the harm, then the predominant factor test is limited only by practical — some would argue insurmountable — considerations of divining racial considerations from other considerations. Nevertheless, at the very least race consciousness (or iber-race consciousness) as harm would possess the virtue of doctrinal coherence.

B. The Doctrinal Fate of the Shaw/Miller Test

In light of the previous discussion, a conscientious judge faces many doctrinal questions and possibilities. To name a few: Is bizarre district shape the touchstone of a Shaw violation? Alternatively, is the inquiry here analogous to the constitutional inquiry under traditional equal protection case law? If so, then, is race a permissible redistricting principle? In other words, how much of the discretion traditionally left at the hands of state redistricters remains? For possible answers, we look to Bush v. Vera and Hunt v. Cromartie.

87. Id. at 589-90.
88. See id. (asserting that all voters have right to choose their candidate on any basis they wish).
1. Bush v. Vera and the Predominance of Race

The question in Bush v. Vera was relatively simple: Did race predomi-
nate in the creation of the challenged districts? Vera thus presented the Court
with its first opportunity to clarify its doctrinal position. Vera, however,
raised still more questions.

The Court's plurality opinion, authored by Justice O'Connor, began
rather curiously. It first looked to Shaw I and explained that a challenged
district must be subject to strict scrutiny review "where 'redistricting legisla-
tion . . . is so extremely irregular on its face that it rationally can be viewed
only as an effort to segregate the races for purposes of voting, without regard
for traditional districting principles." Yet, in this same sentence, the
plurality explained that strict scrutiny also applies "where 'race for its own
sake, and not other districting principles, was the legislature's dominant and
controlling rationale in drawing its district lines,' and 'the legislature subordi-
nated traditional race-neutral districting principles . . . to racial consider-
ations.' This is to say that both Shaw I and Miller present constitutionally
relevant principles. This is hardly an encouraging beginning.

The plurality then turned to the crux of the matter. As it explained, race
consciousness alone will not subject the challenged districts to strict scrutiny
review. Thus courts will spare an intentionally created majority-minority
district from strict scrutiny, without more. In order for the Court to take its
most drastic step, the plurality explained, a state actor's district must go beyond
mere race consciousness. Those challenging a district on equal protection
grounds must demonstrate that the redistricters subordinated traditional redis-
tricting principles to race. In other words, strict scrutiny will apply when race
is "the predominant factor motivating the legislature's [redistricting] deci-
sion." Hence, in the plurality's view, Miller appeared to trump Shaw I; the
predominant factor test supercedes the bizarreness test.

When the plurality turned to the facts in question, this initial conclusion
proved to be much too facile. Three facts stood out. First, the plurality
focused on the irregular shape and non-compact nature of the challenged dis-

94. Vera, 517 U.S. at 958 (citing Shaw I, 509 U.S. at 642).
95. Id. (citing Miller v. Johnson, 515 U.S. 900, 913, 916 (1995)).
96. Id. at 959.
97. Id.
98. Id. (citing Miller, 515 U.S. at 916).
99. See id. (rejecting appellant's argument that bizarre shape was based on traditional
    redistricting principles).
districts, as evidenced by the preclearance exchange between the legislature and the Justice Department. Clearly, the State had intended to create majority-minority districts. Finally, the plurality was persuaded that race had played a predominant role due to the "unprecedentedly detailed racial data" at the State’s disposal. On the strength of these facts, the Court concluded that strict scrutiny was the proper constitutional test.

The plurality in *Vera* thus signaled the preeminence of *Miller*'s predominant factor test. It is as part of this general constitutional inquiry that we must understand *Shaw* I’s bizarre shape test. In other words, race predominates in the creating of a districting plan when, inter alia, the challenged district is bizarrely shaped. It appears, then, that a district’s shape plays a secondary role under *Miller*’s test. Or so we thought.

2. *Hunt v. Cromartie* and *Shaw*’s Allure

The Court had a second pass at this issue in *Hunt v. Cromartie* (*Cromartie I*), albeit under a different procedural posture. In *Cromartie I*, the plaintiffs challenged North Carolina’s redrawn District 12 – successfully challenged in *Shaw I* and *II* – on the grounds that the district is the product of "an unconstitutional racial gerrymander." The district court granted the plaintiffs’ motion for summary judgment concluding that the 1997 redistricting plan evidenced the State’s intent to racially gerrymander the 12th District. Justice Thomas, writing for the Court, reversed the district court’s decision on procedural grounds, holding that the case was resolved prematurely because there were disputed issues of material fact. The opinion demonstrates how the Court intends to deal with the limitations of the intent standard and how it intends to blend both the predominant factor and bizarre shape tests.

First, *Cromartie I* illustrates the Court’s commitment to the intent standard announced in *Miller* and applied in *Shaw II*. As part of the Court’s continued attempt to locate wrongful districting cases within its traditional equal protection jurisprudence, the Court stated that its "decisions have established that all laws that classify citizens on the basis of race, including racially

100. *See id.* at 969-70 (detailing use of racial terms in preclearance plan).
101. *Id.* at 962.
104. *Id.* at 545.
105. *Id.* at 549-53.
gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized.\textsuperscript{108} The Court further noted that when "racial classifications are explicit, no inquiry into legislative purpose is necessary.\textsuperscript{109} However, a "facially neutral law . . . warrants strict scrutiny only if it can be proved that the law was 'motivated by a racial purpose or object"\textsuperscript{110} or "it is 'unexplainable on grounds other than race."\textsuperscript{111} The conclusion is inescapable: Discriminatory intent matters.

Second, \textit{Cromartie I} also illustrates the continuing importance of a district's shape. Even though the State improved the new District 12's geographic compactness,\textsuperscript{112} the Court was not impressed with the new district's shape. The Court remarked that the district "retains its basic 'snakelike' shape and continues to track Interstate 85."\textsuperscript{113} In this vein, it is important to underscore the importance of geographic compactness for the Court, even for those members who are committed to the intent standard announced in \textit{Miller}. Here is why.

In \textit{Cromartie I}, the plaintiffs primarily relied on two types of evidence in their motion for summary judgment: demographic evidence and bizarre shape. As the Court conceded, the plaintiffs did not have any direct evidence of racial motivation.\textsuperscript{114} Moreover, the Court acknowledged that the expert testimony of defendants' expert Dr. David Peterson essentially nullified the plaintiffs' demographic evidence. The Court nevertheless concluded approvingly that "[v]iewed in toto, appellees' evidence tends to support an inference that the State drew its district lines with an impermissible racial motive - even though they presented no direct evidence of intent."\textsuperscript{115} The crucial fact for the Court, even at this admittedly preliminary stage, was the district's lack of geographic compactness. Thus, even though the Court repeatedly has stated that geographic compactness is not constitutionally required,\textsuperscript{116} geographic compactness has in effect become a de facto constitutional requirement.

\begin{itemize}
\item \textsuperscript{108} \textit{Cromartie I}, 526 U.S. at 546.
\item \textsuperscript{109} \textit{Id.}
\item \textsuperscript{110} \textit{Id.} (quoting \textit{Miller}, 515 U.S. at 913).
\item \textsuperscript{111} \textit{Id.} (quoting Shaw I, 509 U.S. 630, 644 (1993)).
\item \textsuperscript{112} As demonstrated by comparing Tables 1, 2 and 3, infra, the new District 12 splits only one precinct, six counties as opposed to ten, is shorter, wider, contains less than 70\% its original population, and only 41.6\% of its original geographic area.
\item \textsuperscript{113} \textit{Cromartie I}, 526 U.S. 541, 544 (1999).
\item \textsuperscript{114} \textit{Id.} at 547.
\item \textsuperscript{115} \textit{Id.} at 548-49.
\item \textsuperscript{116} See, e.g., \textit{Bush v. Vera}, 517 U.S. 952, 978 (1996) (recognizing and professing to adhere to Court's "longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan"); \textit{Miller v. Johnson}, 515 U.S. 900, 915 (1995) ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing
Perhaps more important, however, is the Court's use of a district's shape to compensate for the shortcomings of the intent standard. As highlighted by the various dissents and commentators, *Cromartie I* brings to light an important and potentially fatal shortcoming: The intent standard does not have a logical stopping point. In this case, the Court used shape to limit the expansive application of the intent standard. An examination of the manner in which the Court treats the fact that District 12 is a majority-white district in *Cromartie I* best illustrates this point.

One of the underlying issues presented by *Cromartie I* is whether the *Shaw/Miller* doctrine applies to majority-white districts. This was the first time the Court was faced with this question post-*Shaw I*. In the post-*Shaw I* era, the overwhelming majority of academic commentators assumed that the Court's "analytically distinct" doctrine applied only to bizarre majority-minority districts. Following *Miller*, and certainly after *Shaw II*, the Court expanded the set of congressional plans subject to the *Shaw/Miller* doctrine by explaining that this doctrine applied to all intentionally race conscious majority-minority districts. The assumption nevertheless remained that majority-white districts were not subject to strict scrutiny under the *Shaw/Miller* doctrine. In fact, all of the congressional districts that the Court has struck down under the *Shaw/Miller* doctrine have been majority-minority districts. Indeed this is one of the primary, and perhaps most biting, criticisms of the doctrine.

*Cromartie I* rendered this criticism invalid. Rather remarkably, Justice Thomas's opinion makes nothing of the fact that District 12 is a majority-white district. Although the Court noted in passing that African Americans no longer constitute the majority of residents in the district, the Court did not view this fact as relevant to the equal protection analysis. Moreover, the Court appeared to be unfazed by the consequences of subjecting districts that are in fact majority-white to strict scrutiny.


180. As we argue below, this is the only sensible position in light of Justice O'Connor's position. In other words, the "expressive harms" inquiry becomes incoherent if applied to districts with a minority population of under 50%. See infra Part IV.B.1.

181. *See*, e.g., *Karlan*, *supra* note 46, at 309-10.

One unfortunate consequence of this extreme commitment to the intent standard is that all congressional districts with significant populations of color are subject to challenge under the Shaw/Miller doctrine. This observation is particularly alarming in view of the fact that parties primarily challenge districting plans for political reasons. This then leaves to the district courts the Solomonic task of extricating political motivation from racial motivation, two highly correlated concepts.

There is some evidence in Cromartie I that the Court anticipated this problem and attempted to limit the expansiveness of the intent standard by relying upon the bizarre shape test. As the Court stated:

[The fact that African Americans] constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence shows a high correlation between race and party preference.

Of course, neither appellees nor the District Court relied exclusively on appellees' boundary segment evidence, and appellees submitted other evidence tending to show that the General Assembly was motivated by racial considerations in drawing District 12 — most notably, District 12's shape and its lack of compactness.121

In light of this observation, one wonders whether Miller did in fact change Shaw Jr.'s prescription that a district is not subject to strict scrutiny unless the district is both bizarre and race conscious. The Court seemed inclined to presume that a district’s bizarre shape ipso facto indicates an impermissible racial motivation. The majority’s cryptic exchange with Justice Stevens on whether bizarre shape is more probative of racial, as opposed to political, motivation drives this point home. The Court stated:

Justice Stevens asserts that proof of a district’s "bizarre configuration" gives rise equally to an inference that its architects were motivated by politics or race. . . . We do not necessarily quarrel with the proposition that a district’s unusual shape can give rise to an inference of political motivation. But we doubt that a bizarre shape equally supports a political inference and a racial one. Some districts, we have said are "so highly irregular that [they] rationally cannot be understood as anything other than an effort to ‘segregate . . . voters’ on the basis of race."122

Note first that the Court, through Justice Thomas, conceded to the dissent that bizarre shape can give rise to an inference of both a political motivation and a racial motivation. The majority, however, rejected Justice Stevens’s conclu-

121. Id. at 551-52.
122. Id. at 541, 547 & n.3.
sion that when evidence of political motivation coexists with evidence of racial motivation, the evidence rests in equipoise and the Court cannot draw any meaningful conclusions therefrom. At the very least, the majority seemed to imply that the conclusion of racial motivation depends upon the extent of the district's bizarreness. However, it would be plausible to conclude from Justice Thomas's remark that a district's bizarre shape is sufficient to subject the district to strict scrutiny, irrespective of how bizarre the shape or the existence of other constitutionally legitimate considerations.

In view of Cromartie I and to a lesser extent Vera, a district's shape remains relevant to the constitutional inquiry notwithstanding the Court's retreat to the more familiar confines of the intent standard. In light of the continued importance of a district's shape, it is important to inquire into the states' latitude in designing plans in accordance with their traditional state policies. In Reynolds v. Sims Justice Warren explained "reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." In this vein, a necessary question arises: What exactly are the traditional districting principles that states may follow when enacting their own redistricting plans? This inquiry is pertinent because of what it tells us about the issue of redistricting vis-à-vis the Court's constitutional obligation. We are also interested in these principles because of the way in which they illuminate the recent racial gerrymandering controversy.

In Reynolds, the Court offered a number of possibilities. For example: "A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme." Justice O'Connor's majority opinion in Shaw, reflecting the analysis in Reynolds, referred to "traditional districting principles such as compactness, contiguity,

123. See, e.g., Bush v. Vera, 517 U.S. 952, 978 (1996) (recognizing, and professing to adhere to, Court's "longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan"); Miller v. Johnson, 515 U.S. 900, 915 (1995) ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests."); Chapman v. Meier, 420 U.S. 1, 27 (1975) ([R]eapportionment is primarily the duty and responsibility of the State."). But see Vera, 517 U.S. at 1038 (Stevens, J., dissenting) (mourning Court's intrusive stance in Vera, which has thus "guaranteed that federal courts will have a hand - and perhaps the only hand - in the 'abrasive task of drawing district lines'" (citing Wells v. Rockefeller, 394 U.S. 542, 553 (1969) (White, J., dissenting))).


126. Id. at 578.
and respect for political subdivisions.\footnote{127} Earlier reapportionment cases also refer approvingly to the principle of political incumbency.\footnote{128} Finally, the Court also seemed to recognize shape among these principles, going as far as including language that seems to elevate this districting reality to the realm of constitutional mandate.\footnote{129} The Court seems willing to accept all these principles as constitutionally permissible, and this list is not necessarily exhaustive.\footnote{130}

The prominent function these principles play in recent decisions begs what turns out to be a rather simple question: Are these principles constitutionally required?\footnote{131} In other words, must jurisdictions adhere to these redistricting principles in order to pass constitutional scrutiny? The answer is clear: They are not constitutionally required.\footnote{132} Why then does the perception


\footnote{128} See, e.g., White v. Weiser, 412 U.S. 783, 793-97 (1973); Gaffney v. Cummings, 412 U.S. 735, 751-54, 752 n.18 (1973); see also Burns v. Richardson, 384 U.S. 73, 89 n.16 (1966) ("The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness."). In light of the most recent racial gerrymandering cases, the question of whether protecting political incumbents qualifies as a constitutional imperative in need of judicial protection, or a practice that at least may be among those traditional redistricting principles, is an imperative one. See, e.g., Vera v. Richards, 861 F. Supp. 1304, 1334-35 (S. D. Tex. 1994). For discussions of the effectiveness of redistricting in protecting incumbents, see Larry M. Schwab, The Impact of Congressional Reapportionment and Redistricting 153-62 (1988) (concluding that redistricting "is not an important factor in the success or failure of incumbents in most elections"); Charles Bullock, Redistricting and Congressional Stability, 1962-72, 37 J. Pol. 569 (1975) (concluding that redistricting has very small impact in reelection of incumbents).

\footnote{129} See Bush v. Vera, 517 U.S. 952, 980 (1996) ("Significant deviations from traditional districting principles, such as... bizarre shape... cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial."); Shaw I, 509 U.S. at 647 ("[R]eapportionment is one area in which appearances do matter."). But see Vera 517 U.S. at 999 (Kennedy, J., concurring) ("Districts not drawn for impermissible reasons or according to impermissible criteria may take any shape, even a bizarre one."); Miller v. Johnson, 515 U.S. 900, 912 (1995) (downplaying view that "a district must be bizarre on its face before there is a constitutional violation").

\footnote{130} See Grofman, supra note 127, at 174 (Table 1, infra).

\footnote{131} See Shaw I, 509 U.S. 630, 676 (1993) (Stevens, J., dissenting) ("Does the Constitution impose a requirement of contiguity or compactness on how the States may draw their electoral districts?").

\footnote{132} Both the majority in Shaw I and Justice Stevens, in dissent, agree with this view. See Shaw I, 509 U.S. at 647 ("[T]hese criteria are important not because they are constitutionally
exist that courts must apply these principles? Why the perceived need for contiguity, compactness, and the like? At the state level, we suspect that the force of tradition fuels the use of these principles. When under redistricting attack, however, the calculus changes dramatically. In the racial gerrymandering context, for example, the Court explained that these principles play a role because they are "objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines."\textsuperscript{133} They are thus evidentiary tools, nothing more.\textsuperscript{134} Again Cromartie is useful.

Unlike the districts at issue in \textit{Vera}, where the State of Texas admitted that it intended to draw majority-minority districts, the \textit{Cromartie} plaintiffs had no direct evidence of racial motivation.\textsuperscript{135} The plaintiffs could offer only circumstantial evidence limited to size, shape, and compactness to prove a racial classification.\textsuperscript{136} Indeed, the plaintiffs' primary evidence focused on an examination of segments of the district's borderlines themselves and an inquiry into the reasons for extending the border into one direction as opposed to another.\textsuperscript{137} Instructively, although the Court reversed the district court's judgment in favor of the plaintiffs on the ground that the ruling was premature, Justice Thomas, writing for the majority and a proponent of the color-blindness school, nevertheless commented that "viewed in toto, [the plaintiffs'] evidence tends to support an inference that the State drew its district lines with an impermissible racial motive – even though they presented no direct evidence of intent."\textsuperscript{138}

\begin{footnotes}
\footnotetext{133.}{\textit{id.} at 647; \textit{see also} \textit{Bush v. Vera}, 517 U.S. 952, 978 (1996) ("States . . . may avoid strict scrutiny altogether by respecting their own traditional districting principles."). \textit{But see} Grofman, \textit{supra} note 127, at 170-71 ("[S]trict adherence to formal criteria such as equal population and compactness cannot be relied upon to prevent gerrymandering, and acceptance of plans simply because they have low deviations or are highly compact may merely act as a cloak of legitimacy to hide sophisticated gerrymandering from judicial scrutiny."); Daniel H. Lowenstein \\& Jonathan Steinberg, \textit{The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?}, 33 UCLA L. REV. 1, 22 (1985) ("[T]here is no basis for the assumption that oddly shaped districts are signs of "gerrymandering," given that term's usual negative connotation.").

\footnotetext{134.}{When a state's reapportionment plan is challenged in court, the plaintiff carries the burden of proving her case. If the plaintiff is successful, the burden then shifts to the state, which may then point to its traditional districting principles in operation as a pseudo "affirmative defense." \textit{See} Miller v. Johnson, 515 U.S. 900, 916 (1995) (describing plaintiff's burden in redistricting case).


\footnotetext{136.}{\textit{id.}

\footnotetext{137.}{\textit{id.}

\footnotetext{138.}{\textit{See} \textit{id.} at 548-49.}
\end{footnotes}
In contrast, in their concurrences in *Vera*, both Justices Thomas and Kennedy noted that shape is less important, perhaps even irrelevant, when there is direct evidence of racial motivation. Thus, Justice Thomas explained that the fact that Texas admitted that "it intentionally created majority-minority districts and that those districts would not have existed but for its affirmative use of racial demographics," was sufficient to trigger the application of strict scrutiny.\(^\text{139}\) Justice Kennedy similarly remarked "we would no doubt apply strict scrutiny if a State decreed that certain districts had to be at least 50 percent white, and our analysis should be no different if the State so favors minority races."\(^\text{140}\) Shape will continue to occupy a primary evidentiary place as long as plaintiffs continue to challenge the least compact majority-minority districts and until state legislatures learn — as the State of North Carolina in *Cromartie I* apparently had — that they cannot admit that they intended to create majority-minority districts. States must either draw compact districts and hope that Justice O'Connor is true to her word,\(^\text{141}\) mask their intent by pursuing political or community-of-interest districts, or cease creating majority-minority districts altogether except where their redistricting schemes would result in a violation of Section 2 of the VRA.

Soon after *Shaw I*, the Court moved away from that case's specific concerns and towards traditional equal protection grounds.\(^\text{142}\) Despite this purported retreat from bizarreness as a constitutional principle, the Court's subsequent voting rights decisions, in particular *Vera*\(^\text{143}\) and the more recent *Cromartie I*,\(^\text{144}\) make clear that the bizarre shape test is still a constitutionally relevant principle. However, the question remains as to what to make of the fact that the district at issue has a minority population of less than 50%. Should the Court alter the constitutional analysis in any way?


\(^\text{140}\) Id. at 996 (Kennedy, J., concurring).

\(^\text{141}\) See id. at 993 (O'Connor, J., concurring) (outlining framework for states' consideration of race in redistricting).


\(^\text{143}\) See *Vera*, 517 U.S. at 980 (O'Connor, J., concurring) (stating that bizarreness is still relevant constitutional principle because "[s]ignificant deviations from traditional districting principles, such as bizarre shape and noncompactness . . . cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial").

\(^\text{144}\) *Cromartie I*, 526 U.S. 541 (1999).
C. Influence Districts and Equal Protection Law: Cromartie II

Given the traditional doctrinal trend and Miller's shepherding of Shaw I claims within the larger equal protection fold, we look here to the implications of Cromartie II and majority-white districts. What does it mean to think of Miller as a case in which a court is trying to divine predominant racial motive, especially in a majority-white district?

In Miller, the Supreme Court made clear that the constitutional benchmark under the Equal Protection Clause proscribes the "predominant use" of race when drawing district lines. On this language, racial awareness is a permissible redistricting consideration; only those times when the use of race reaches predominant status must the Court strike down the district in question on equal protection grounds. This language hardly forecloses the constitutional inquiry; it merely begins it.

For example, in looking for guidance in Justice O'Connor's opinion in Shaw I, a district court may wonder whether a district must be bizarre on its face in order for race to predominate. Alternatively, state actors may conclude that they can constitutionally draw a facially non-bizarre district even if racial considerations predominate. Following the Court's language in Shaw I, challenged districts must have a majority of minority residents within its borders. Shaw makes little sense otherwise. Recall, for example, the Court's worries that Shaw I-type districts would foster the perception that minorities think alike, behave alike, and prefer the same candidates at the polls. Never mind the racial realities of Southern politics. Instead, consider the logic of the Court's view when reflected against a redistricting canvass with only 40% black residents. The perceptions that so worry the Court are less plausible in such a district. The argument may be that "they won't stop at anything to help Black folk." Yet, the fact that voters of color do not compose a majority of the given district and would not be able to elect representatives of their choice renders this argument inoperative.

This is not to say, however, that courts have completely discarded Shaw I. In Cromartie II, for example, the district court appears to have followed Justice O'Connor's analysis. In other words, District 1, the "less bizarre" and "less irregular" of the two districts under review, and with a black population of 50.27%, is a permissible exercise of legislative politics, whereas District 12, which the court concluded was both more irregular and more bizarre, is not constitutional, even though its black population was well under

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145. See Pildes, supra note 58, at 1367-73 (commenting on racial segregation in Southern politics).
146. See Ely, supra note 52, and language therein (discussing implications of "bizarreness test").
Hence, as Justice O'Connor once admonished, "reapportionment is one area in which appearances do matter." In contrast, and following our doctrinal discontent, we may posit a very strong argument for the view that racial predominance requires at least the creation of a majority-minority district. Presumably, such a requirement is implicit, if dormant, within the Shaw I line of cases. On this view, districts with a minority composition of under 50% — such as Districts 1 and 12 at issue in Cromartie II — do not meet Shaw/Miller's constitutional threshold. The obvious question here is simply, what does it mean to say that race predominates in the creation of a district when voters of color are not a majority of the district's population?

Looking to the facts in Cromartie II, a finding that race may predominate in the creation of a 46%-black district — a view that permeates Justice Thomas's Cromartie I opinion — would lead to further complications. For example, if race could be found to predominate in a district with 46% minority composition, what of a district with 30% minority composition, or 20%? How far, in other words, is the Court willing to go?

Furthermore, the exquisitely nuanced and painstakingly thorough reviews of redistricting records from Shaw I onward would raise a host of complicated and ultimately troubling questions. For example, once we accept the view that courts may inquire into the predominance of race even within those districts that fail to achieve a racial majority, we must further assume that the Court is prepared to challenge any and all redistricting lines (not plans) across the country in order to purge race from the redistricting equation. Justice O'Connor has gone on record as saying that this will not happen. Yet, following Cromartie II to its logical conclusion, there does not seem to be any other alternative. To say that race predominates within a majority white district is to say that race predominates in the creation of some lines within the district, not in the creation of the district as a whole. As such, invalidation

147. Cromartie II, No. 4-96-CV-104-BQ(3), slip op. at 9, 26 (E.D.N.C. March 7, 2000).
149. See, e.g., Cromartie I, 526 U.S. at 548-49 ("Viewed in toto, appellees' evidence tends to support an inference that the State drew its district lines with an impermissible racial motive — even though they presented no direct evidence of intent.").
150. See Miller v. Johnson, 515 U.S. 900, 928-29 (1995) (O'Connor, J., concurring) (stating that "application of the court's standard does not throw into doubt the vast majority of...congressional districts").
151. Put differently, common wisdom presupposes the need for a majority of persons of color within the district in order for them to be able to select a representative of their choice. In response, one may argue that, according to some influential estimates, a district need only be 42% black in order to ensure a safe black seat. See generally Charles Cameron et al., Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?, 90 AM.
necessarily means that any and all lines are subject to constitutional attack. This is not a comforting thought.

For the unpersuaded, a third view remains. Looking at the two districts under constitutional attack, the numbers alone speak volumes. District 12, which the district court struck down, is not a majority-minority district. Additionally, District 1, to which the district court applied strict scrutiny, is 50.27% black and also not a majority-minority district. Hence, these numbers appear to move the issue of influence districts to the constitutional forefront. The first question is simply: What is the North Carolina legislature up to here? In other words, why create a bizarre district that falls short of majority black composition? If the legislature's intent was to draw a majority black district, as in Shaw I, the bizarre shape of the resulting district makes some sense.

One may argue that the analysis should not change whether one creates majority-minority districts or influence districts. Seen through the prism of Shaw I, for example, the harm may be considered the same: The state is going to great lengths to help voters of color at the expense of whites, and therein lies the constitutional offense. On this view, some courts may still consider bizarreness the threshold requirement. The district court in Cromartie II is partial to this view. Similarly, the Miller test also remains unaffected. To the general argument that one may not intentionally create majority-minority districts, one may attach the following addendum: The state may not intentionally create influence districts, either. In other words, the standard is the same. Any evidence of race, from 0 to 100%, demands strict scrutiny review.

Both accounts leave us with a very unsatisfactory conclusion because Justice O'Connor expressly rejected this result. Under the preceding anal-

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152. For reasons discussed infra notes 191-92, District 1 should not be categorized as a majority-black district. See Kimball Brace et al., Does Redistricting Aimed to Help Blacks Necessarily Help Republicans, 49 J. Pol. 169, 174 n.5 (1987) ("Black population and even VAP [voting age population] may not translate well into an estimate of strength at the polls because black registration and turnout are generally different and (usually but not necessarily) lower than that of whites. . . . Black registration is a good indicia of potential voting strength.").

153. This is not to say that the question has not arisen before because it has. See Voinovich v. Quilter, 507 U.S. 146, 149 (1993) (considering whether Ohio districts violated VRA). It is to say instead that the Court, when faced with Cromartie II, will be forced to decide the question on the merits. This is something, to our minds, that Voinovich did not do.

154. Justice O'Connor stated:

I understand the threshold standard the Court adopts – that the "legislature subordinated traditionally race-neutral districting principles . . . to racial consider-
ysis, the state considers race at its own peril. For this reason, we must assume that the Supreme Court accepted certiorari in *Cromartie II* in order to reverse the lower court decision. More specifically, we must also assume that Justice O'Connor will join the four dissenters in holding that *Shaw*-type claims must involve majority-minority districts. Otherwise, *Shaw I* and its progeny would lead to some very troubling conclusions. However, in light of the Court's general equal protection jurisprudence, we are not optimistic.

**II. The Road to Cromartie II**

Redistricters attempting to fulfill their redistricting duties and to comply with the Equal Protection Clause and the VRA are in a bind. Our aim in this Part is thus two-fold. First, we wish to expose the factual realities confronting redistricters and trial courts. Second, we present *Cromartie II* as a specific example of the factual issues encountered by these institutional actors as they attempt to make sense of the Court's doctrinal pronouncements. Consequently, this Part is appropriately fact-intensive. We begin by first providing a short procedural background to *Shaw II*.

**A. North Carolina’s 1992 Plan and Shaw II**

After the 1990 reapportionment, North Carolina was entitled to an additional district, its twelfth overall. In response, the General Assembly eventually enacted a redistricting plan, the 1992 Plan, which created two majority-minority districts, District I and District 12. Table 1 graphically reproduces these districts. The table shows the districts’ total population, the proportion of each district’s population that is white and black, the white voting age population (VAP), the black voting age population (BVAP), the percentage of white registered voters, the percent of black registered voters, and the percent-

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Miller, 515 U.S. at 928-29 (O'Connor, J., concurring).


156. *Id.*
age of voters who are registered Democrats in each district. With the exception of the total population, the table shows everything else as a percentage.

Table 1

<table>
<thead>
<tr>
<th></th>
<th>1st</th>
<th>12th</th>
</tr>
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<tbody>
<tr>
<td>Population</td>
<td>552,386</td>
<td>552,386</td>
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<tr>
<td>White</td>
<td>41.61</td>
<td>41.80</td>
</tr>
<tr>
<td>Black</td>
<td>57.26</td>
<td>56.63</td>
</tr>
<tr>
<td>White VAP</td>
<td>45.49</td>
<td>45.21</td>
</tr>
<tr>
<td>Black VAP</td>
<td>53.40</td>
<td>53.34</td>
</tr>
<tr>
<td>Registered (W)</td>
<td>48.97</td>
<td>45.90</td>
</tr>
<tr>
<td>Registered (B)</td>
<td>50.53</td>
<td>53.54</td>
</tr>
<tr>
<td>Registered (Dem)</td>
<td>87.13</td>
<td>76.65</td>
</tr>
</tbody>
</table>

Soon after the Justice Department pre-cleared the plan, "several white citizens and registered voters of the State of North Carolina" challenged the plan on the legal theory that it was a racial gerrymander in violation of the Equal Protection Clause.\(^{157}\) A three-judge panel of the District Court for the Eastern District of North Carolina dismissed the action, concluding that the plaintiffs failed to state a constitutional claim.\(^{158}\) The Supreme Court reversed in Shaw I stating that the Constitution recognizes the "analytically distinct" claim that "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race, . . . demands the same close scrutiny that we give other state laws that classify citizens by race.'\(^{159}\) The Court remanded to the district court for a determination on the merits of the plaintiffs’ claim.\(^{160}\)

On remand, Judge Phillips concluded that the "General Assembly of North Carolina deliberately created two districts, the First and the Twelfth, that would have narrow, but effective voting majorities of African-American citizens specifically, intending thereby to give the African-American citizens of those districts a reasonable opportunity to elect representatives of their choice."\(^{161}\) The district court noted that the two districts are "highly irregular

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158. Id. at 417.

159. Shaw I, 509 U.S. at 644.

160. Id. at 658.

in their shapes and extreme in their lack of geographical compactness as compared to other districts.\textsuperscript{162} The court explained, however, that the location of the districts and the irregularity of the boundary lines were the product of multiple factors, including the necessity of complying with the one-person one-vote rule, the need for effective representation for African Americans, maintaining communities of interest, and incumbency protection.\textsuperscript{163}

In spite of these various factors, which influenced the shape and location of the districts, the panel nevertheless singled out the state’s admitted racial intent to create two majority-black districts as worthy of special constitutional consideration. This fact alone led the panel to the conclusion that the districting plans warranted strict scrutiny.\textsuperscript{164} Even so, the district court agreed with the state’s assertion that creating the two majority-minority districts was necessary to comply with Sections 2 and 5 of the VRA, which the court agreed was a compelling state interest sufficient to withstand the rigors of strict scrutiny.\textsuperscript{165} In Shaw II, the Supreme Court once again disagreed.\textsuperscript{166}

Chief Justice Rehnquist, writing for the majority, accepted the trial court’s findings that the General Assembly "‘deliberately drew’ District 12 so that it would have an effective voting majority of black citizens."\textsuperscript{167} Chief Justice Rehnquist observed that the trial court record contained both circumstantial evidence of racial motive and direct evidence of the state’s purpose.\textsuperscript{168} As to the first, Chief Justice Rehnquist explained that "the District Court had evidence of the district’s shape and demographics. The court observed ‘the obvious fact’ that the district’s shape is ‘highly irregular and geographically non-compact by any objective standard that can be conceived.’"\textsuperscript{169} Second, the Court remarked that the "District Court also had direct evidence of the legislature’s objective. The State’s submission for preclearance expressly acknowledged that [its] . . . ‘overriding purpose was to . . . create two congressional districts with effective black voting majorities."\textsuperscript{170}

\begin{thebibliography}{99}
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Id.
\item \textsuperscript{164} See \textit{id.} at 473-74 (concluding that state motive to create two majority-minority districts constituted prima facie violation of Equal Protection Clause).
\item \textsuperscript{165} Id. at 474.
\item \textsuperscript{166} See Shaw II, 517 U.S. 899, 904 (1996) (declining to pass upon majority-black District 1, which plaintiffs also challenged, because none of plaintiffs resided in challenged district and therefore did not have requisite standing to challenge District 1).
\item \textsuperscript{167} Id. at 905.
\item \textsuperscript{168} Id. at 905-06.
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id. at 906.
\end{thebibliography}
The Court's next task was to apply its legal standard to the trial court's findings of fact. For guidance, the Court looked to Miller. In Miller, the Court proclaimed the now-familiar pronouncement that strict scrutiny applies if "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." Reiterating Shaw I's distinction between race consciousness, being aware of racial considerations, and motivation, being motivated by racial considerations, the Court in Miller issued two general declarations that purported to instruct lower courts on how to distinguish between these two cognitive states of awareness and motivation. In the first instance, states "must have discretion to exercise the political judgment necessary to balance competing interests." The Court clearly stated that federal courts must respect this discretion and that "until a claimant makes a showing sufficient to support [an] allegation [of racial gerrymandering] the good faith of a state legislature must be presumed." Second, federal courts, as well as states, must pay attention to traditional redistricting criteria. Presumably in lieu of direct evidence of legislative purpose, a plaintiff can prevail on a Shaw/Miller claim if she shows that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Putting these declarations aside for the moment, it is true that Shaw II presented the Court with its second opportunity to apply the predominant factor test in the context of redistricting. More particularly, Shaw II could have served as a vehicle for the Court to explore more concretely the relationship between traditional race-neutral criteria and racial motivation. Yet, in light of the Court's redistricting precedents, Shaw II was an easy call because it possessed all the hallmarks of a constitutionally imperiled redistricting plan in the mold of Shaw I.

171. See Miller v. Johnson, 515 U.S. 900, 916 (1995) (announcing circumstance necessitating strict scrutiny review). The Court clearly rejected the prevailing assumption that bizarreness was a threshold showing to a Shaw violation. Id. at 915. The Court stated: "In sum, we make clear that parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness." Id.

172. See id. at 916 (noting difficulty of distinguishing between legislature's knowledge and motive in creating voting district boundaries).

173. Id. at 915.


175. Id. at 916.

176. Id.
Three salient elements deserve comment. First, the Court had already concluded in *Shaw I* that District 12 was a bizarrely shaped majority-minority district.\(^7\) Second, the Court was convinced that the Justice Department commandeered the State’s redistricting process.\(^8\) Third, and perhaps most fatally, the Court read the record as replete with direct evidence of the State’s impetuous determination to intentionally create two majority-black districts.\(^9\) Given these factors, the Court’s conclusion was unsurprising: "'[W]e fail to see how the District Court could have reached any conclusion other than that race was the predominant factor in drawing [the challenged district]."\(^10\)

**B. The 1997 Plan and the Advent of *Cromartie II***

On July 3, 1996, and less than a month after the Court struck down District 12, a group of plaintiffs (the "*Cromartie plaintiffs") filed suit challenging District 1, also a majority-black district, on equal protection grounds.\(^11\) At this point, all of the proceedings were stayed in view of the certain likelihood that the General Assembly would once again redistrict.\(^12\) The district court permitted the State to hold the 1996 elections under the 1992 Plan, but enjoined further use of the plan in future elections.\(^13\) The General Assembly

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178. *Id.* at 906.

179. *See id.* (noting testimony of Gerry Cohen, districting plan’s primary draftsman, that "creating two majority-black districts was the ‘principal reason’ for creating Districts 1 and 12").

180. *Id.* at 906 (quoting Miller v. Johnson, 515 U.S. 900, 918 (1995)). The Court stated that race "was the criterion that, in the State’s view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play only after the race-based decision had been made." *Id.* at 907. The Court then maintained that District 12 could survive strict scrutiny only if the district was narrowly tailored. *Id.* at 908. The State had argued that complying with Sections 2 and 5 of the VRA and remedying past discrimination were compelling state interests. *Id.* The Court disagreed, noting that, for the purpose of resolving the suit, the Court would assume that compliance with Section 2 could be a compelling state interest, but that the facts of the case did not support the contention that North Carolina neither tried to comply with Section 5 nor attempted to remedy past discrimination. *Id.* at 915-16. The Court then held that the District 12 was not sufficiently narrowly tailored to comply with Section 2 because the district did not meet the *Gingles* requirement of containing a geographically compact population. *Id.* at 915-17. In an interesting observation, to which we will return below, the Court reasoned that the concentration of minority votes that would have given rise to a Section 2 claim does not cover more than 20% of the district. *Id.* at 918.

181. *See Cromartie II*, No. 4-96-CV-104-BO(3), slip op. at 2 (E.D.N.C. Mar. 7, 2000) (summarizing background and procedural history). Three days later, the *Shaw* plaintiffs amended their complaint and added as plaintiffs the *Cromartie plaintiffs* to the *Shaw* action. The same attorney represented both sets of plaintiffs.

182. *Id.*

183. *Id.* at 3.
did redistrict, a fact that served as a catalyst for more lawsuits, namely Cromartie II.

On March 31, 1997, the General Assembly enacted a new congressional districting plan. The General Assembly’s stated purpose in enacting this new plan was to cure the constitutional defects of the 1992 Plan and to preserve the existing partisan balance in the North Carolina congressional delegation. Curing the constitutional defect, as the General Assembly understood its role, entailed enacting a plan that would not divide precincts; that would not divide counties except where necessary to maintain the State’s partisan balance; that would eliminate artificial means of maintaining contiguity; and that would aggregate communities of interests and citizens with similar needs in like districts.

The State’s desire to preserve the existing partisan balance, that is, its explicit acknowledgment of its intent to engage in political gerrymandering, highlights the relationship between political and racial gerrymandering. In order to gain an appreciation of these political factors, all of which played a crucial role in the enactment of the challenged 1997 Plan, it is necessary to look at the local context and the political background. By all accounts, politics in North Carolina are quite polarized. Even though only 34% of the State’s registered voters are registered as Republicans, this statistic belies the extent of the State’s conservatism. Politically, as with the rest of the South, North Carolina is a state that is growing increasingly conservative. While political power in North Carolina appears to be temporarily in equipoise, the State is in the midst of a noticeable shift in political power from the Democrats to the Republicans.

This tension—a rightward trend in the midst of an equal division of political power—is evident in the results of North Carolina’s House races. Looking back to the 1992 election, the first election after the 1990 census, Democrats won eight out of twelve seats. In the 1994 election, Republicans made a comeback, winning eight out of twelve seats. The Democrats evened the score in the 1996 election, capturing six out of twelve seats. In the 1998 election, the

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185. See Cromartie II, slip op. at 3 (analyzing North Carolina redistricting plan).
186. Id. at 9.
187. Id. at 9-10.
189. Id.
Republicans regained their partisan advantage, capturing seven out of twelve seats. These facts are graphically represented in Figure 1.

**Figure 1**
*Partisan Division of Congressional Seats in N.C. (1973-99)*

The State enacted the 1997 Plan at a time when each party held an equal number of congressional seats. The 1998 elections were held pursuant to an interim congressional districting plan enacted by the General Assembly. By legislative enactment, the 1998 Plan ceased to be effective once the Supreme Court, in *Cromartie I*, reversed the district court’s invalidation of the 1997 Plan. Thus, following the Court’s decision in *Cromartie I*, the configurations of North Carolina’s congressional districts reverted to the 1997 Plan.

Without question, the 1997 Plan was the result of political compromise. The necessities for political compromise in North Carolina were manifold. The North Carolina General Assembly was divided politically between a majority-Democrat Senate and a majority-Republican House. Thus, state actors needed a plan that was amenable to both chambers. Also, the State did not want to cede control of the redistricting process to the district court. Further, the incumbents from the 1996 congressional elections wanted to retain the core of their districts. Perhaps most importantly, following the 1996 elections, in which voters elected six Democrats and six Republicans to the U.S. House of Representatives from North Carolina, the state legislature wanted to preserve the "six-six" bipartisan balance.

The 1997 Plan thus created six Democrat districts and six Republican
districts. The 1997 Plan also included one putative majority-black district,
District 1.\textsuperscript{191} As is evident from Table 2, the State can categorize District 1
as a majority-black district by only one measure: the percentage of the total
population of the district that is African American.\textsuperscript{192} Even by that measure,
however, the district is only barely majority-black. Again, Table 2 demonstra-
res as that District 12 is no longer a majority-black district in the General
Assembly’s 1992 Plan. Indeed, as Table 2 illustrates, District 12 is solidly
majority-white, particularly if one considers the percentage of the white voting
age population and the percentage of white registered voters – 55.05% and
54.14%, respectively.

Table 2

<table>
<thead>
<tr>
<th>1997 Plan’s 1st &amp; 12th Districts</th>
<th>1st</th>
<th>12th</th>
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<tbody>
<tr>
<td>Population</td>
<td>552,161</td>
<td>552,043</td>
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<tr>
<td>White</td>
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</tr>
<tr>
<td>Black</td>
<td>50.27</td>
<td>46.67</td>
</tr>
<tr>
<td>White VAP</td>
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<td>Black VAP</td>
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<td>Black Reg.</td>
<td>44.89</td>
<td>45.58</td>
</tr>
<tr>
<td>Dem. Reg.</td>
<td>86.62</td>
<td>71.27</td>
</tr>
</tbody>
</table>

The partisan composition of the 1st and 12th Districts reflects much
starker figures. With respect to party identification, as measured by the per-
cent of the districts’ residents that are registered as Democrats and Republi-
cans, the 1st and 12th Districts created by the 1997 Plan are less Democratic
than the 1st and 12th Districts created by the 1992 Plan. By comparing Table 1

\textsuperscript{191} For reasons we discuss supra note 152, District 1 should not be categorized as a
majority-black district. In the political science literature, a majority-minority district is a district
in which a candidate of color has at least a 50% chance of being elected. Although there is
considerable debate with respect to the percentage of voters of color that redistricters must
include in the district to provide a realistic chance to elect a candidate of color, the most realistic
models assume that the VAP must at least include 55% voters of color.

\textsuperscript{192} Although Table 2 provides the total African American population for each district as
well as the total percent of African Americans registered to vote for each district, it is important
to note that the total voting age population is significant. For example, in establishing whether
a violation of Section 2 of the VRA has occurred, both the Supreme Court and lower courts
have used the total voting age population. See Growe v. Emison, 507 U.S. 25, 38 n.4 (1993)
(employing percentages based upon total population); Thornburg v. Gingles, 478 U.S. 30, 48,
50 (1986) (referring to total voting age population); Romero v. Pomona, 883 F.2d 1418, 1425-
26 & n.13 (9th Cir. 1989) (employing percentages based upon total population).
CHALLENGES TO RACIAL REDISTRICTING

and Table 2, we can see the percentages of registered Democrats in Districts 1 and 12 were 87.13 and 76.65, respectively. Under the 1997 Plan, the percentages of registered Democrats in the 1st and 12th Districts were 86.62 and 71.27, respectively. Nevertheless, both districts remained overwhelmingly Democratic with over 86% of District 1’s total population registered as Democrats and over 70% of District 12’s total population registered as Democrats.

Even though the General Assembly was able to redistrict, its new plan did not provide the State with any respite from litigation. In fact, on October 17, 1997, residents of Districts 1 and 12 again challenged the General Assembly’s 1997 Plan on the very same grounds that they challenged the 1992 Plan—that both districts were still unconstitutional racial gerrymanders. A divided three-judge panel granted the plaintiffs’ motion for summary judgment with respect to District 12, asserting that "District 12 was drawn to collect precincts with high racial identification rather than political identification." The panel also permanently enjoined the State from conducting any elections under the 1997 Plan. On appeal, the State contested the district court’s failure to conduct a trial on the merits. As discussed above, the Court, per Justice Thomas, reversed the district court’s grant of summary judgment and remanded for a new trial on this issue alone.

1. The Plaintiffs’ Case

On remand, the district court conducted a three-day bench trial. After finding that racial considerations predominated in the creation of both districts, the district court subjected both the 1st District and the 12th District to strict scrutiny. The court maintained that the plaintiffs presented "extensive" direct and circumstantial evidence of racial motivation. The court concluded that the combination of the plaintiffs’ direct and circumstantial evi-

194. Id.
196. Id.
197. Cromaritie II, slip op. at 4.
199. Id.
201. See id. at 19-30 (analyzing Districts 1 and 12 under strict scrutiny standard of review).
202. Id. at 24.
idence of racial motivation necessitated a finding that the 1997 Plan evidenced the General Assembly's predominant intent to racially gerrymander with respect to District 12. 203

Although the trial court characterized this evidence as direct evidence of a predominant motive to racially gerrymander District 12, the plaintiffs' proof was suspect at best. 204 The plaintiffs' direct evidence consisted of an electronic mail message from Gerry Cohen, the Director of Bill Drafting and the person in charge of the technical drawing of the 1997 Plan, to Senator Roy Asberry Cooper, III, who served as the Democratic Chair of the Senate Redistricting Committee. 205 The court focused on the part of the message that stated:

By shifting areas in Beaufort, Pitt, Craven, and Jones Counties, I [Cohen] was able to boost the minority percentage in the first district from 48.1% to 49.25%. The district was only plurality white, as the white percentage was 49.67%.

This was all the district could be improved by switching between the 1st and 3rd unless I went into Pasquotank, Perquimans, or Camden. I was able to make the district plurality black by switching precincts between the 1st and 4th.

I have moved Greensboro Black community into the 12th and now need to take bout [sic] 60,000 out of the 12th. I await your direction on this. 206

The court also characterized as direct evidence of the State's intent to racially redistrict the fact that North Carolina's computer system had the "capacity to identify and apportion voters based on race, and to determine the exact racial make-up of each district." 207 The court concluded that the State used this technology to assure that District 12, in particular, was less than 50% black "in order for it not to present a prima facie racial gerrymander." 208 The court considered these facts as "extensive direct" evidence of a predominant racial motivation. 209

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203. See id. (noting that District 12 was drawn to collect precincts with high racial identification rather than mere political identification).
204. Id.
205. Id. at 7.
206. Id.
207. Id. at 23.
208. Id. at 24. Senator Cooper presumably was under the impression that if the district were not majority-black, it would not be subject to review under the Shaw/Miller doctrine. Id. After the plan was created, Senator Cooper argued for its passage before the General Assembly on the grounds that because the 12th District was not a majority-minority district, it would not be subject to strict scrutiny and the Shaw/Miller doctrine. Id.
209. Id.
From the trial record, however, it appears that Mr. Cohen had a perfectly reasonable explanation for his reference to the "Greensboro Black community." The following recounts an exchange at the trial between the plaintiffs' attorney and Mr. Cohen.

Q. Do you recall on or about February 10, 1997, writing . . . an email . . . to Roy Cooper?

A. Yes, I do.

Q. And in that context, in the last sentence or the last two lines, there is a reference to the Greensboro Black community?

A. Yes, sir.

Q. What were you referring to as the "Greensboro Black community" when you wrote that memorandum?

A. Well Senator Cooper had earlier that day or the previous day told me to draw a new plan which would eliminate the problem in the prior plan that Guilford County was in three Congressional Districts, which he said was not acceptable. And there needed to be no county more than two congressional districts in the state. He asked me to make changes in the plan to have Guilford only in two congressional districts. My basic instruction was to include more of the 12th District – excuse me, more of Guilford County in the 12th District for several different factors.

And the first thing I did was extend all the way up into Greensboro including, I think, most of two State House Districts and this was actually one sentence at the end of a longer memorandum that really talked about the First Congressional District. And by mentioning the Greensboro Black community, I talked about the basic part of a larger group in the precincts that I moved in. I think I moved 27 precincts in at that time of which the Greensboro Black community was about 11 of those 27.

I think the total number [of people] actually moved in[to the 12th District] . . . was about 108,000 of which about 52,000 were Black.210

On redirect, Mr. Cooper was asked:

Q. How many precincts were moved when Greensboro was added to District 12?

A. 29

Q. Of those precincts, how many were majority white?

A. 18

Q. One last question. . . . Do you know about why the Greensboro precincts were added to District 12, this particular move we were talking about?

A. So as to not have Guilford County divided into three districts and so as not to waste Democratic votes in the 6th District since that had been designed as a Republican district. Instead use them to improve the Democratic vote in the 12th district.

Q. What’s the source of your information – that’s your belief that that’s why they were moved?
A. Yes.
Q. And why do you believe that?
A. Conversations with Senator Cooper at the time the instructions were given.
Q. So he did not give you an instruction to move the Black community into District 12?
A. No, he instructed me to move more Guilford County precincts that were predominately Democratic into District 12.
Q. And for the reasons you just stated?
A. Yes, ma’am.211

Curiously, the district court did not mention this rebuttal in its opinion. Although the district court focused on the plaintiffs’ "extensive direct" evidence of racial motivation212 the plaintiffs’ proof consisted almost exclusively of the districts’ racial demographics and alleged bizarre shape.213 Because District 12 has prompted more controversy, and because the arguments and demographic evidence presented at trial equally are applicable to both districts, we will focus our discussion on District 12. However, when necessary, our discussion will draw distinctions, both factual and doctrinal, between the two districts.

Table 3

<table>
<thead>
<tr>
<th>County</th>
<th>Total Pop.</th>
<th>Total Black Population</th>
<th>Black Pop. in District 12</th>
<th>% Black in District 12</th>
</tr>
</thead>
<tbody>
<tr>
<td>Davidson</td>
<td>126,677</td>
<td>12,314</td>
<td>9,846</td>
<td>80%</td>
</tr>
<tr>
<td>Forsyth</td>
<td>265,878</td>
<td>66,102</td>
<td>43,105</td>
<td>65%</td>
</tr>
<tr>
<td>Guilford</td>
<td>347,420</td>
<td>91,655</td>
<td>70,114</td>
<td>76%</td>
</tr>
<tr>
<td>Iredell</td>
<td>92,931</td>
<td>14,869</td>
<td>9,343</td>
<td>63%</td>
</tr>
<tr>
<td>Mecklenburg</td>
<td>511,433</td>
<td>134,468</td>
<td>113,442</td>
<td>84%</td>
</tr>
<tr>
<td>Rowan</td>
<td>110,605</td>
<td>17,773</td>
<td>11,794</td>
<td>66%</td>
</tr>
</tbody>
</table>

Table 3 presents a rather stark racial picture of how each county included within District 12 is divided along racial lines. Table 3 shows that District 12 is composed of six counties – Davidson, Forsyth, Guilford, Iredell, Mecklenburg, and Rowan – all of which are divided in the 1997 Plan.214 Table 3

211. Id. at 538-39.
212. Cromartie II, No. 4-96-CV-104-BO(3), slip op. at 24 (E.D.N.C. Mar. 7, 2000).
213. See id. at 5-8 (summarizing testimony of plaintiffs’ witnesses).
214. See id. at 10 (discussing general racial composition of District 12). Davidson County is divided between Districts 6 and 12; Forsyth County between Districts 5 and 12; Guilford
also shows that District 12 consists of substantial African American populations from each of the six counties. For example, 65% of Forsyth County’s African American population and 84% of Mecklenburg County’s African American population are included in District 12. These details did not escape the district court’s attention.

In fact, the court’s opinion in *Cromartie II* focused almost exclusively on these demographic figures. The court particularly underscored the fact that the district contains over 50% of the African American voters of Mecklenburg, Forsyth, and Guilford counties. The remaining three counties – Davidson, Iredell, and Rowan – "have narrow corridors which pick up as many African Americans as needed for the district to reach its ideal size."[217]

Table 4 summarizes the above facts concerning the counties placed in District 12 under the 1997 Plan. In general, the facts show that, even though Forsyth, Guilford, and Mecklenburg counties are 25%, 26%, and 26% African American, respectively, 73% of the population of Forsyth County that is included in District 12 is African American. Similarly, although to a lesser extent, 52% of Guilford and 52% of Mecklenburg’s total populations included in District 12 are of African descent. The district court concluded that these facts were relevant evidence and probative of the State’s racial motivation. In other words, the court found that the State intentionally partitioned these counties along racial lines.[219]

<table>
<thead>
<tr>
<th>Table 4</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Black Population of Counties in 12th District</strong></td>
</tr>
<tr>
<td>County</td>
</tr>
<tr>
<td>Davidson</td>
</tr>
<tr>
<td>Forsyth</td>
</tr>
<tr>
<td>Guilford</td>
</tr>
<tr>
<td>Iredell</td>
</tr>
<tr>
<td>Mecklenburg</td>
</tr>
<tr>
<td>Rowan</td>
</tr>
</tbody>
</table>

County between Districts 6 and 12; Iredell County between Districts 10 and 12; Mecklenburg County between 9 and 12; and Rowan County between 6 and 12.

[215] See *id.* at 10-13 (analyzing voting percentages in District 12 under 1997 Plan).

[216] *Id.* at 10.

[217] *Id.*

[218] *Id.* at 11.

[219] *Id.*
Subsequently, the court conducted a similar analysis with respect to the cities and towns included and divided by District 12.\textsuperscript{220} For example, the court observed that 59.47\% of the City of Charlotte's population assigned to District 12 is African American whereas only 8.12\% of Charlotte's population assigned to neighboring District 9 is African American.\textsuperscript{221} Again, the court considered this evidence relevant to establishing a racial gerrymander in District 12.\textsuperscript{222} From this observation, the court concluded that District 12 divides the City of Charlotte along racial lines.\textsuperscript{223}

However, there was more, at least in the opinion of the district court. Apparently, the court found the plaintiffs' evidence that the State intentionally included predominantly African American voting precincts within District 12 and shepherded predominantly white voting precincts to neighboring districts to be most probative of the General Assembly's racial motivation.\textsuperscript{224} The court maintained that in spite of the availability of a number of surrounding precincts with high percentages of Democratic registration, the State consistently excluded those precincts in favor of precincts with high African American populations.\textsuperscript{225}

Finally, the court also focused on the irregular shape and lack of compactness of District 12.\textsuperscript{226} The court described the district's southern to northern progression, its eastward foray into Guilford County, its northern extension into Forsyth County, and its narrow shape.\textsuperscript{227} The court appeared to be quite influenced by the fact that District 12 — and also District 1 — did not pass muster when subjected to objective evaluations of compactness.\textsuperscript{228}

\begin{itemize}
\item \textsuperscript{220} Id.
\item \textsuperscript{221} Id.
\item \textsuperscript{222} Id.
\item \textsuperscript{223} Id.
\item \textsuperscript{224} Id. at 11-12.
\item \textsuperscript{225} See id. (analyzing precincts immediately surrounding District 12).
\item \textsuperscript{226} See id. at 12 (commenting that District has irregular shape and is "barely contiguous in parts").
\item \textsuperscript{227} See id. at 12-13 (describing irregular shape and lack of compactness of District 12).
\item \textsuperscript{228} The court is explicitly referring to and self-consciously relying on the measures of compactness developed in 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 (1993). In this influential article published after Shaw I, Professors Pildes and Niemi, among other goals, sought to quantify bizarreness through reliance on previously established measures of dispersion and perimeter compactness. *Id.* at 536. In their article, Pildes and Niemi suggested that a dispersion score of .15 or less could be considered a low score and thus would identify a non-compact district. *Id.* at 564, 565 tbl.3. Similarly, and alternatively, a perimeter score of 0.05 or less could also identify a non-compact and by definition a bizarre district. *Id.* Pildes and Niemi, however, were very careful to indicate, repeatedly, that their cutoff points were "somewhat arbitrary." *Id.* at 564, 567, 568. Additionally, they
dispersion,\textsuperscript{229} and perimeter compactness\textsuperscript{230} measures.\textsuperscript{231} Pildes and Niemi informally suggested that a "highly irregular" district is one whose dispersion score is equal to or less than 0.15 and/or whose perimeter score is equal to or less than 0.05.\textsuperscript{232} Under the 1997 Plan, District 12 had a dispersion compactness indicator of 0.109 and a perimeter compactness indicator of 0.041.\textsuperscript{233} In light of the fact that District 12 was below Pildes and Niemi's threshold of compactness, the court concluded:

Thus, it is clear that even after the changes [made to District 12 by the 1997 Plan], the primary characteristic of the Twelfth District is its 'racial archipelago,' stretching, bending and weaving to pick up predominantly African-American regions while avoiding many closer and more obvious regions of high Democratic registration, but low African-American population.\textsuperscript{234}

On this score, a very strong presumption arose about the unconstitutionality of District 12. The ball was now in the State’s court. Reproduced below are the configurations of the 12th District from the three plans. Figure 2 is a graphical representation of the 12th District from the 1992 Plan. Figure 3 is the 12th District under the 1997 Plan. Figure 4 is the 12th District under the 1998 Plan.
Figure 2
12th District in 1992 Plan

Figure 3
12th District in 1997 Plan

Figure 4
12th District in 1998 Plan
2. North Carolina's Rebuttal

The plaintiffs' contention that District 12 divided counties, cities, and precincts along racial lines did not go unchallenged. To be sure, the State conceded that it was aware of North Carolina's racial demographics when it promulgated the 1997 Plan. In light of this fact, however, the State argued that the twin goals of remedying the district's constitutional defects and creating a predominantly Democratic district guided the creation of the 12th District.

It is worth focusing on the redistricters' first goal and their understanding of the Supreme Court's racial districting doctrine. First, it is clear that the doctrinal ambiguities described in Part I of this Article guided state officials in charge of the redistricting process in North Carolina. The record offers much evidence on this point. For example, Senator Cooper testified:

Well, I read the opinion in Shaw versus Hunt, and the first thing that we needed to do was to cure the constitutional defects in the 1992 Plan. So that was the first consideration. And I think in general that meant making the plan look a lot nicer; and secondly, to make certain that race was not the predominating factor in drawing the districts.

It is significant to note that Senator Cooper understood the Court's racial districting doctrine to contain two commands: First, the district had to "look nice;" second, race must not predominate. The testimony quoted above was not atypical. Senator Cooper, who was the primary architect of the 1997 Plan, testified a number of times that his understanding of the Court's command

\[235. \text{ In an affidavit, Senator Cooper testified:} \]

My responsibility as Chairman of the Senate Redistricting Committee was to attempt to develop a new congressional plan that would cure the constitutional defects in the prior plan, and that would have the support of a majority of the members of the Senate, which was controlled by the Democrats, and the support of a majority of the members of the House, which was controlled by the Republicans.

Jurisdictional Statement at 81a, Cromartie II No. 4-96-CV-104-BO(3), slip op. (E.D.N.C. Mar. 7, 2000); see also id. at 82a-83a ("We had two goals for the plan as a whole. The first goal was to cure the constitutional defects in the prior plan by assuring that race was not the predominate factor in constructing any district in the plan and to assure that traditional redistricting criteria were not subordinated to race.").

\[236. \text{ The defendants stated:} \]

Partisan voting patterns, especially Democratic voting strength drove the redistricting process in District 12. Although the summary report for each plan included racial percentages, there was never any intent to reach a particular racial percentage. In addition, although Representative McMahan was looking primarily at election and registration data, he would pass along the racial percentage to African-Americans in the House when he was trying to gauge their support for the plan in the House. The overriding concern was to create a Democratic district.

Id. at 210a-211a.

\[237. \text{ Trial Transcript at 334, Cromartie II, No. 4-96-CV-104-BO(3), slip op. (E.D.N.C. Mar. 7, 2000).} \]
was to make "sure that race was not the predominate factor and making sure [the district] looked nice."238

Second, just as the Supreme Court relied upon the bizarre shape test to give theoretical content to the predominant factor test, the state actors in North Carolina also relied upon the bizarre shape test to give practical content to the predominant factor test. Both the Supreme Court and the state actors in North Carolina blended the two tests symbiotically. Senator Cooper stated his representative definition of a "nice" district as follows:

And in making the districts look a lot nicer, we needed to make sure we didn’t split precincts, try to split fewer counties, make sure you didn’t have one county with three members of Congress. Making sure you didn’t have long narrow corridors where you didn’t have any people. Making sure you didn’t have the double-crossovers and crossovers and point contiguity and all of these concerns that were pointed out by the court.239

Once again, Senator Cooper’s testimony is instructive:

[The] primary concern was to address, as I’ve testified earlier, the constitutional problems that were cited by the Supreme Court in Shaw v. Hunt, so that turned us to the 12th Congressional Districts [sic] because that specifically was the district that was unconstitutional. The Court had real problems with the long narrow corridors without people, splitting of precincts, point contiguity, crossovers, double-crossovers.

We set out to eliminate all of those problems that they had specifically pointed out in the decision. And also we wanted to make certain that race was not the predominate factor, which is what the Court said that we could not do.240

The third observation, which directly relates to the second, is that these state officials were not really sure what racial predominance truly meant. For example, in Senator Cooper’s testimony quoted above, notice how the concept of racial predominance was almost an obligatory add-on or afterthought. In this context, the concept of racial predominance is almost a legal shibboleth.

There is, however, some evidence in the record that the Court’s predominant factor test communicated one message to the North Carolina state officials. Specifically, the state officials understood the Court’s predominance standard to mean that, as long as they did not require fixed racial percentages or racial quotas, they would not run afoul of the Court’s command that race not predominate in the redistricting process. On direct examination, Senator Cooper was asked whether he and the Committee attempted to achieve a set racial percentage in the 12th District. He answered:

238. Id. at 342, 358.
239. Id. at 334; see also Jurisdictional Statement at 83a-84a, Cromartie II, slip op.
240. Jurisdictional Statement at 102a-103a, Cromartie II, slip op.; see also Trial Transcript at 349-50, Cromartie II, slip op. (noting testimony of Representative McMahan concerning importance of drawing compact 1st District).
No, we were not. I would say that the fact that... the number did go up [the number of African Americans in District 12], that was fine with me and that was fine with a lot of people who wanted to support Congressman Watt and wanted to make certain that there was incumbent protection, but that was not the primary motive by far. And we did not have a set percentage that we were looking for specifically because the Court told us not to do that, so we didn’t do that.241

Similarly, state officials in North Carolina appeared convinced that the Court’s predominant factor test was not applicable to districts that were not majority-minority districts. Both Senator Cooper and Representative McMahan argued to their respective chambers that District 12 was constitutional because it was not a majority-minority district.242 In contrast, the trial court was convinced that North Carolina created "a new 12th District with just under a majority-minority in order for it not to present a prima facie racial gerrymander."243

With respect to its second goal for the 1997 Plan, the State maintained that, other than remedying the constitutional defects of the 1992 Plan, the State’s predominant motive was to maintain the six-six bipartisan division in the State’s congressional delegation.244 Preserving the bipartisan division essentially entailed protecting the incumbents of both parties245 and preserving the partisan core of each of the twelve districts.246 Because both the 12th and

241. Trial Transcript at 357, Cromartie II, slip op.
242. Id. at 442, 469-72.
243. Cromartie II, No. 4-96-CV-104-BO(3), slip. op. at 24 (E.D.N.C. (Mar. 7, 2000). Even though the state argued that it did not intentionally keep the African-American population in District 12 under 50% of the District’s total population, Jurisdictional Statement at 128a-129a, Cromartie II, No. 4-96-CV-104-BO(3), slip op. (E.D.N.C. Mar. 7, 2000), the trial court remained quite skeptical notwithstanding the fact that the plaintiffs did not present any evidence on that score except for the numbers themselves. Cromartie II, slip. op. at 24 & n.9.
244. Jurisdictional Statement at 207a, Cromartie II, slip op. ("Maintaining the six-six partisan balance of the state’s congressional delegation was the most important goal in drawing the 1997 Plan.").
245. The State maintained:
Another important consideration was protecting all twelve incumbents. Senator Cooper at one time or another spoke to all incumbents, and Representative McMahan talked with several incumbents or their representatives.... Some of the particular efforts made to protect the incumbents included the following. Each incumbent was put in his or her own district (except Congresswoman Sue Myrick who, at the time, resided in the same neighborhood and census block as Congressman Mel Watt) and each district was designed to favor the political party of the incumbent.
Id.
246. The Defendants stated:
One aspect of protecting incumbents was preserving the territorial, constituent and partisan cores of each district. For Congressman Hefner, all of his home county of Cabarrus was included in his district. In addition, the House had initially looked at running District 12 from Charlotte to Fayetteville, which would have had a significant
the 1st Districts had Democratic incumbents, the redistricters sought to preserve the Democratic core of both.

The plaintiffs did not directly dispute the State's contention that political gerrymandering was one of its motivations. Instead, the plaintiffs sought to show that in the pursuit of a political and/or racial gerrymander, North Carolina unconstitutionally redrew its congressional districts merely by relying upon racial demographic data. The defendants' attempted a two-pronged rebuttal of the plaintiffs' evidence.

First, the defendants attempted to discredit the plaintiffs' evidence, in particular the plaintiffs' proof that the State included within District 12 precincts with large African American populations and excluded precincts with high Democratic registration. More specifically, the defendants countered that voter registration data are not an accurate predictor of actual voting behavior in North Carolina. Table 5 graphically summarizes the State's first argument.

### Table 5

<table>
<thead>
<tr>
<th>County</th>
<th>Dist.</th>
<th>% Reg. Dem.</th>
<th>% Dem. Lieutenant Court of Appeals 1988</th>
<th>% Dem. Senate 1990</th>
</tr>
</thead>
<tbody>
<tr>
<td>Davidson</td>
<td>12</td>
<td>55.57</td>
<td>40.90</td>
<td>40.29</td>
</tr>
<tr>
<td>Davidson</td>
<td>6</td>
<td>51.94</td>
<td>39.05</td>
<td>38.07</td>
</tr>
<tr>
<td>Forsyth</td>
<td>12</td>
<td>88.08</td>
<td>78.65</td>
<td>81.31</td>
</tr>
<tr>
<td>Forsyth</td>
<td>5</td>
<td>55.88</td>
<td>42.62</td>
<td>41.22</td>
</tr>
<tr>
<td>Guilford</td>
<td>12</td>
<td>78.69</td>
<td>68.72</td>
<td>67.39</td>
</tr>
<tr>
<td>Guilford</td>
<td>6</td>
<td>56.59</td>
<td>45.67</td>
<td>39.38</td>
</tr>
<tr>
<td>Iredell</td>
<td>12</td>
<td>65.83</td>
<td>45.71</td>
<td>44.90</td>
</tr>
<tr>
<td>Iredell</td>
<td>10</td>
<td>59.67</td>
<td>37.03</td>
<td>39.47</td>
</tr>
<tr>
<td>Mecklenburg</td>
<td>12</td>
<td>77.73</td>
<td>65.66</td>
<td>65.25</td>
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<tr>
<td>Mecklenburg</td>
<td>9</td>
<td>48.29</td>
<td>39.06</td>
<td>31.07</td>
</tr>
<tr>
<td>Rowan</td>
<td>12</td>
<td>68.09</td>
<td>57.34</td>
<td>56.78</td>
</tr>
<tr>
<td>Rowan</td>
<td>6</td>
<td>50.68</td>
<td>38.73</td>
<td>35.99</td>
</tr>
</tbody>
</table>

effect on Hefner's and other Democratic districts. In deference to the Senate's wishes and acknowledging the need to preserve Hefner's district, the House backed off its proposal. The House also accepted the Charlotte to Greensboro route not only to preserve a Democratic district for Mel Watt, but because going anywhere else would disrupt the Republican districts bordering District 12. Congressmen Burr and Ballenger were interested in having two counties switched between their districts (as best recalled, Davie and Yadkin) as the 1997 Plan was being negotiated.

_Id._ at 208a.
Table 5 demonstrates why Democrat registration is not an accurate predictor of probability of voting for Democrat candidates. The columns represent the following categories from left to right: the counties; the districts in which the counties are located; the percentage of voters that are registered Democrats by corresponding county and precinct; and the percentage of voters who voted for the Democrat candidate in the 1988 Lieutenant Governor election, the 1988 Court of Appeals election, and 1992 United States Senate election, respectively.

Table 5 makes two important things clear. First, for every county segment, the percentage of voters who actually voted in favor of the Democratic candidate in the three elections was significantly less than the percentage of voters who were registered Democrats. For example, Davidson County is split by the 1997 Plan between Districts 12 and 6. The percentage of registered Democrats is roughly equivalent in both counties: 55.57% in Davidson 12 and 51.94% in Davidson 6. However, in both Davidson 12 and Davidson 6, the Democratic candidate fared worse than expected using the registration data as the baseline. In Davison 12, the Democratic candidates received 40.90%, 40.29%, and 36.89% of the votes, much less than the 55.57% expected. Similarly, in Davidson 6, the Democratic candidates received 39.05%, 38.07%, and 30.41% of the vote, much less than the 51.94% expected.

The second observation relates to the second prong of the State’s defense. The State sought to show that, contrary to the plaintiffs’ assertions, the precincts included within the boundaries of District 12 were the highest performing Democrat precincts in the relevant geographic area. Table 5 certainly supports that proposition. Comparing the county segments included within District 12 to those excluded from District 12, one can see that the included segments voted for the Democrat candidate more consistently than the excluded segments. For example, 68.09% of Rowan 12’s population were registered Democrats. In the three elections used as baselines in Table 5, the Democrat candidates received 57.34%, 56.78%, and 54% of the vote. In Rowan 6, 50.68% of the voters were registered Democrats and the Democrat candidates received 38.73%, 35.99%, and 32.25% of the vote.

In addition to the data in Table 5, the State presented the testimony of its expert, Dr. David Peterson. Dr. Peterson testified that political gerrymandering was at least as plausible an explanation for District 12’s configuration as racial gerrymandering. Dr. Peterson presented "boundary seg-

247. This variable is measured by the percent of voters who voted in favor of the Democratic candidate in the 1988 court of appeals election and the 1990 United States Senate elections.

248. The exception to this trend is Davidson County. Neither Davidson 6 nor Davidson 12 are high performing Democrat segments.
ment evidence to support the State’s contention that race did not predominate in the drawing of the district’s boundary lines. He testified in part as follows:

If the boundary of the 12th District were drawn with the purpose of collecting Blacks inside it, one would expect as one travels along the boundary to find consistently that Blacks are more heavily represented inside the boundary than outside. In contrast, if the boundary were drawn with the purpose of collecting Democrats into the 12th District, one would expect as one travels along the boundary to find consistently that Democrats are more heavily represented inside the boundary than outside.

What I found in my study traversing the boundary of the 12th District is that most of the time Blacks are represented more heavily inside the line than out, about 80 percent of the time. I also found that Democrats are represented more heavily inside than out, also about 80 percent of the time. And so the evidence is equally supportive of both hypothesis [sic], that is to say the two are statistically indistinguishable. In particular, neither one dominates the other.

Therefore, the State concluded that the plaintiffs could not establish the predominance of race.

3. The Trial Court’s Decision

The State’s evidence that District 12 was not the product of a racial gerrymander did not persuade the trial court to rule in the State’s favor. The court, relying upon the plaintiffs’ expert Dr. Weber, concluded that "Dr. Peterson’s boundary segment analysis [is] non-traditional, " "unreliable" and "not relevant." The court relied upon the plaintiffs’ evidence, summarized in Table 3 and Table 4 that cities and counties were split along racial lines in the construction of the 12th District. Thus, even though the State presented evidence, summarized in Table 5, that the 12th District is composed of high-performing Democrat precincts containing the region’s most reliable Democrats, who happen to be African Americans, the court was not persuaded. The court concluded that it "is clear that the Twelfth District was drawn to collect precincts with high racial identification rather than political identification."

249. Boundary segments "are those sections along the district’s perimeter that separate outside precincts from inside precincts. [T]he boundary segment is the district borderline itself; for each segment, the relevant comparison is between the inside precinct that touches the segment and the corresponding outside precinct." Cromartie I, 526 U.S. 541, 548 n.5 (1999).

250. Trial Transcript at 486, Cromartie II, No. 4-96-CV-104-BO(3), slip op. (E.D.N.C. Mar. 7, 2000).

251. Id. at 486-87.

252. Cromartie II, No. 4-96-CV-104-BO(3), slip op. at 23 (E.D.N.C. Mar. 7, 2000).

253. Id. at 24.
The trial court also found that racial considerations predominated in the construction of the 1st District. In particular, the court emphasized that Senator Cooper and the redistricting committee maintained that in order to comply with Section 2 of the VRA, the 1st District’s total African American population needed to be over 50%. Thus, the State created a district with a total African American population of 50.27%.

The court then subjected the 12th District to strict scrutiny. The court concluded that the State had not presented sufficient evidence of a compelling state interest. Moreover, the court noted that even if such an interest did exist, the 12th District was not narrowly tailored. Consequently, the court concluded that the "1997 Plan’s District 12 is an impermissible and unconstitutional racial gerrymander in violation of the Equal Protection Clause."

In contrast to the fate of District 12, the court upheld the constitutionality of District 1. First, the court noted that complying with the VRA is a sufficient compelling state interest. Second, the State narrowly tailored District 1’s borders to satisfy the three Gingles preconditions: geographical compactness, political cohesiveness, and racial bloc voting. Consequently, the court concluded that even though race was the predominant factor in the district’s composition, the State satisfied the compelling state interest and narrow tailoring prongs of the analysis.

III. Racial Gerrymandering as Political Constraint

In Part I, we discussed the confusing doctrinal landscape that redistricters and lower courts must navigate. In Part II, we offered Cromartie II as a representative example of the evidentiary actualities that district courts face. In this Part, we consider why the district court’s opinion in Cromartie II is flawed and why the Supreme Court should reverse the district court’s ruling. In so doing, we provide the empirical predicate for our suggestion in Part IV that racial gerrymandering claims should be governed by a looser standard such as that announced in Davis v. Bandemer. Our chief complaint in this

254. Id. at 26; see also Jurisdictional Statement at 130a, Cromartie II, No. 4-96-CV-104-BO(3), slip op. (E.D.N.C. Mar. 7, 2000) (discussing racial composition of District 1 necessary to meet VRA mandates).
255. Cromartie II, slip op. at 25 (noting that District 12 could not survive strict scrutiny review).
256. Id.
257. Cromartie II, slip op. at 25.
258. See supra Part I (discussing doctrine of districting).
259. See supra Part II (analyzing Cromartie II).
Part is that the lower court, and the Supreme Court for that matter, misunderstands the relationship between race and politics.

In general, though we ourselves are somewhat skeptical of the claim, we are willing to assume arguendo that the use of race at issue in the wrongful districting cases is troubling in a constitutionally relevant way. However, the empirical research we present in this Part shows that there is an important trade-off between political and racial gerrymandering that serves as a constraint on racial gerrymandering. This view leads us to the conclusion, which we develop in Part IV, that the Court need not micromanage the process as it unsuccessfully attempted to do in the last decennial apportionment. Perhaps more importantly, our own research leads us to the conclusion that political gerrymandering, not racial gerrymandering, is the best explanation for the composition of Districts 12 and 1 at issue in Cromartie II.

A. Race over Politics

We begin with the basics. As we pore over the voluminous record of the Cromartie litigation, one fact stands out among all others: Incumbents played a key role in ensuring easier electoral campaigns for themselves. This is not a surprising development, of course, for not only is incumbency protection part and parcel of the political process, it also is a legitimate state interest. The racial gerrymandering cases are replete with evidence of exactly this form of influence.

261. See infra Part IV.


263. See White v. Weiser, 412 U.S. 783, 793-97 (1973) (upholding districting plan based on protection of congressional incumbents, which state legislature deemed to be "important interest" of state); Gaffney v. Cummings, 412 U.S. 735, 751-54, 752 n.18 (1973) (noting that political considerations are inevitable and essential parts of districting and apportionment process); Burns v. Richardson, 384 U.S. 73, 89 n.16 (1966) (stating that drawing district boundaries in such manner as to minimize contests between incumbents is not inherently invidious).

264. See Shaw II, 517 U.S. 899, 936 (1996); Miller v. Johnson, 515 U.S. 900, 942 (1995) (Ginsburg, J., dissenting) (examining particular instances where incumbent state legislators influenced districting decisions to their own benefit); Shaw I, 509 U.S. 630, 673 n.10 (1993) (White, J., dissenting) (noting that protection of Democrat incumbent was primary determinant in decision to place majority-minority district in northern rather than southern part of state); see also Vera v. Richards, 861 F. Supp. 1304, 1321 (S.D. Tex. 1994) ("The redistricting process [in Texas in the early 1990s] became a no holds barred political fight, and fangs were out." (quoting Ted Lyon, former member of Texas House and Senate with direct involvement in redistricting controversies of 1980s and 1990s)).
As the statistics we present later in this Part bear out, political incumbency played a key role in the process that produced North Carolina's original Districts 1 and 12. It also is true that racial considerations played a role. Racial awareness is inevitable in the redistricting process. Thus, the difficult question in Shaw I, if any such question existed, was whether any external constraints existed on a redistricter's ability to craft a plan of his or her choice. Prior to Shaw I, the only "constraint" with any significant bite, if one chooses to call it that, was the "one person, one vote" principle. Hence, as far as redistricters were concerned, the political sky was the limit. After all, this was politics.

Shaw I reinterpreted this understanding of the redistricting process and its concomitant constitutional limitations. Much criticism has been directed at the Shaw I opinion.

265. In taking this view, we are aware that it is not universally accepted. See, e.g., ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (1987); James F. Blumstein, Racial Gerrymandering and Vote Dilution: Shaw v. Reno in Doctrinal Context, 26 RUTGERS L.J. 517, 555 (1995) (stating that proposition that race considerations are "nearly always" basis for districting decisions is "probably erroneous"); Katharine Inglis Butler, Affirmative Racial Gerrymandering: Rhetoric and Reality, 26 CUMB. L. REV. 313, 358-363 (1996) (arguing that districts are and should be assigned on basis of geography and not group interest). Of note, it is clear that the lower court in Vera reacted strongly to this very fact. Vera, 861 F. Supp. at 1318-19. The Vera court stated:

If the Legislature intended to allocate voters on the basis of race, [the redistricting software] certainly provided a readily available, efficient means of doing so. In fact, because the software constantly displayed racial and ethnic data on the screen anytime an operator used the system, a would-be map drawer would affirmatively have to ignore the data.

Id. Ignoring racial and ethnic data would be quite hard, the court reasoned, perhaps impossible. The court continued:

But as Chris Sharman, the principal computer technician/map drawer involved in Congressional redistricting, testified: The problem is when you draw on this computer, it tells you the population data, racial data. Every time you make a move, it tabulates right there on the screen. You can't ignore it.

Id. at 1319.

We disagree with this view. As James Blumstein has argued, racial awareness is not enough. While redistricters may be aware of racial data, that fact, standing alone, does not lead to the conclusion that they in fact took the data into account. See Blumstein, supra, at 556 n.224.

266. RICHARD H. PILDES, DIFFUSION OF POLITICAL POWER AND THE VOTING RIGHTS ACT 14-16 (forthcoming).

267. See, e.g., A. Leon Higginbotham, Jr. et al., Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences, 62 FORDHAM L. REV. 1593, 1644 (1994) (arguing that focus on shape and appearance of voting districts in Shaw I was misguided considering history of political racism in North Carolina); Karlan, supra note 142, at 301 (noting that Shaw I's precondition that district not have "bizarre" shape provides courts with "roving warrant to
criticism, and specifically as it relates to the result in *Cromartie II*: the Court's holding that racial considerations, and those alone, must be excised from the redistricting process. This does not make a great deal of sense for two reasons. First, constitutional support for the proscription of race, and only race, is simply non-existent. Neither the text nor the intent of its framers offers much help.

Second, and as exemplified in Part II of this Article, the redistricting process does not work the way the Court envisions it. As Daniel Hays Lowenstein wrote, state legislators "think about politics, including their own individual prospects for reelection or election to higher office, their party's prospects, and the interests of their constituents and other groups with whom they are allied." Thus, race is part of a larger universe of redistricting considerations. Race is often a very small part of this universe, especially from the perspective of the incumbent legislator. On this specific point, the facts in *Vera v. Bush* prove instructive.


269. *See* KOUSSER, *COLORBLIND INJUSTICE*, supra note 18, at 16-20 (indicating that Fifteenth Amendment and Enforcement Acts were intended to give blacks same enfranchisement rights as whites).

270. *See* Jeffrey Rosen, Kiryas Joel and *Shaw v. Reno*: A Text-Bound Interpretivist Approach, 26 CUMB. L. REV. 387, 401-06 (1996) (noting that despite conservative justices' fondness for textual and historical interpretation, they cannot make originalist argument that Fourteenth and Fifteenth Amendments forbid race-conscious districting); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 465 (1997) (arguing suspect-class strict scrutiny was never intended to apply when "no one supposed that there was an ulterior, racially invidious motive"); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 Mich. L. REV. 245, 268 (1997) (stating that legislative history of Equal Protection Clause holds few answers because its framers were not seeking to create coherent legal doctrine, but instead were attempting to solidify support for it as part of plan central to reconstruction of Union); Robin West, Toward and *Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 131-33 (1991) (arguing that dominant interpretations of Fourteenth Amendment are incorrect in that original intent of abolitionists was to "protect each citizen against the threat of both private violence and private violation").

During the 1990s round of redistricting, the Democratic Party in Texas found itself in the enviable position of controlling everything. Governor Ann Richards was one of their own, and both the state House and Senate had clear Democratic majorities. Under such conditions, and without more, the Democrats' redistricting goal was fairly simple. They sought to maximize their partisan advantage. This may not be virtuous or worthy, but is nonetheless true. As we now know, the fruits of their efforts were challenged and ultimately struck down on equal protection grounds. Of specific interest is the following passage in the lower court opinion:

With regard to District 30, we conclude that the policy of incumbent protection, to the extent it motivated the Legislature, was not a countervailing force against racial gerrymandering. Instead, racial gerrymandering was an essential part of incumbency protection, as African-American voters were deliberately segregated on account of their race among several Congressional districts.

As we remarked earlier, the record is replete with evidence that incumbents were overwhelmingly preoccupied, as they often are, with their re-election prospects. They also were aware of racial characteristics at the block level. Without question, these two considerations played a central role during the crafting of the redistricting plan. The incumbents' work also was influenced by the fact that African Americans in Texas side solidly with the Democratic Party, creating a strong motivation on the part of incumbent Democrats to include black voters within their districts.

Most observers would agree that it is difficult to disentangle racial considerations from political considerations. Nevertheless, the lower court concluded that "the contours of Congressional District 30 are unexplainable in terms other than race." For the lower court, race came before politics. This is another way of saying that redistricters in Texas placed minority


273. Id. at 1339.

274. For the district court, this fact made all the difference in the world. See, e.g., Vera, 861 F. Supp. at 1309 ("This insight, worthy of Orwell's Big Brother, was attainable because computer technology, made available since the last decennial census, superimposed at a touch of the keyboard block-by-block racial census statistics upon the detailed local maps vital to the redistricting process."); id. at 1318 (stating that critical feature of redistricting software "is that it allowed the operator to 'split' a [voting precinct] and work on a block-by-block level. Racial/ethnic breakdown was available on a block level on [the software]. By contrast, no election contest information was available at the block level on the REDAPPL software") (citations omitted).

275. See Samuel Issacharoff, The Constitutional Contours of Race and Politics, 1995 SUP. CT. REV. 45, 54-55 (discussing idea espoused in Shaw and Miller that race cannot be assumed detriment of political interest and that racial dimensions of politics are unknown).

276. Id.
interests ahead of their own. Without more – and the district court offers very little on this score – this position is simply implausible. It goes against everything we know about redistricting and legislative behavior. Not surprisingly, nothing we read in the lower court’s opinion in *Vera* leads us to a different view. What we do see is an attitudinalist discomfort with the redistricting process and the use of race. The district court simply disliked the process that led to the districts at issue in *Vera*. Similarly, the Supreme Court, and Justice O’Connor in particular, clearly is bothered by the notion that the practice of race-based districting is not constrained by any limiting principle. As we demonstrate in the succeeding Parts, political practice and available evidence suggest this concern is unwarranted.

**B. Constraints**

The Court’s racial districting doctrine is incoherent. Sometimes *Shaw/Miller* claims are "analytically distinct" voting rights claims. Sometimes they are garden-variety applications of the Court’s traditional equal protection jurisprudence.277 This lack of clarity is due in part to the fact that the Court as an institution is agnostic with respect to whether these cases are about race or whether they are about politics. Our underlying argument in this Part is that these cases are not about race – they are about politics. In other words, racial gerrymanders are a species of the genus of political gerrymanders. As such, the racial gerrymander is subject to the same political constraints as its cousins, the partisan gerrymander or the incumbent gerrymander. Thus, it is difficult to justify the judicial micromanagement spawned by *Shaw I*. Instead, for the Court needs to identify clear but flexible ground rules and to allow the parties to decide political disputes through the political process. Before turning to that argument, we first offer support for the view that the political process, in fact, provides institutional constraints on both political and racial gerrymanders.

277. In putting the point this way, we wish to underscore our displeasure with the Court’s application of strict scrutiny in the *Shaw* line of cases. Unlike the more traditional areas of equal protection law, redistricting law deserves a much more careful approach than the Court has thus far evinced. Plain and simple, voting *is* different and the doctrine must reflect these differences. See Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201 (1996); see also Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 9 MICH. L. REV. 1833 (1992) (explaining that realities of racial bloc voting and rise of "racially defined majority faction" makes voting rights arena different from other areas of constitutional law); cf. Christopher L. Eisgruber, *Ethnic Segregation by Religion and Race: Reflections on Kiryas Joel and Shaw v. Reno*, 26 CUMB. L. REV. 515, 524 n.26 (1995-96) ("A legislative district functions differently from a town, a school district, or a municipal facility. The district does not govern itself or provide services. Instead, it is a means by which interests are voiced and counted. It makes sense only as part of a political process that includes other, differently composed districts.").
1. Political Gerrymandering as Constraint

A number of political considerations constrain redistricters. A host of often-competing variables influence those in charge of drawing the new district lines, none of which is likely to dominate the others. Incumbency protection and partisan advantage serve as two paramount constraints. Nevertheless, redistricters also are relatively constrained by "traditional redistricting principles" such as contiguity, compactness, maintaining communities of interest, and a desire not to split political subdivisions. Furthermore, certain localized constraints also enter into the redistricting equation, such as assuring that the right political contributors are included in a district, that challengers are districted out of the district, and that the incumbent's offspring are districted in the right district. Another constraint is based upon who controls the districting process and whether redistricting is partisan or bipartisan. Finally, there also are legal and constitutional constraints, such as

278. See David Butler & Bruce Cain, Congressional Redistricting: Comparative and Theoretical Perspectives 102 (1992) (suggesting that redistricting controversy typically centers on displacement of incumbents and partisan reconstruction of districts); Dewey M. Clayton, African Americans and the Politics of Congressional Redistricting 133-47 (2000) (detailing established redistricting standards that factor into any plan, including equality of population, compactness, respect for political boundaries, contiguity, and communities of interest); Gelman & King, Enhancing Democracy, supra note 23, at 541-42 (asserting that partisan goals of avoiding party primary contests, insuring incumbent victory in general election, and increasing party representation are key to adequate understanding of redistricting process).

279. See Shaw I, 509 U.S. 630, 639, 642, 647, 651 (1993) (employing traditional redistricting criteria in evaluation of validity of voting districts). Compactness and contiguity are the two leading criteria. See Timothy G. O'Rourke, Shaw v. Reno: The Shape of Things to Come, 26 Rutgers L.J. 723, 758-72 (1995) (evaluating districts at issue in Shaw I using traditional redistricting criteria of continuity, compactness, preserving subdivision boundaries, maintaining communities of interest, insuring regular-looking districts, and guaranteeing that districts constitute identifiable constituencies); Daniel D. Polsby & Robert D. Popper, The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering, 9 Yale L. & Pol'y Rev. 301, 310 (1991) (suggesting that there are no "non-neutral" districting criteria because each criterion always benefits one group over another). This is not to say, to be clear, that these safeguards, standing alone, are as efficient in ferreting out excessive political self-interest as the Court and commentators make them out to be. See supra note 125 (listing sources); see also 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, 1258 (1993) (arguing that more peculiarly shaped districts in 1990s are not majority-minority districts).

280. See Gelman & King, Enhancing Democracy, supra note 23, at 542 (noting that incumbency protection involves potentially conflicting goals of attempting to increase party representation in district to enhance likelihood of success in general election while simultaneously seeking to minimize presence in district of rival factions within party to avoid possible threat in primary).

281. Id. at 543.
compliance with the one-person, one-vote rule, the Fourteenth Amendment generally, the Fifteenth Amendment's prohibition against vote dilution, and the VRA.  

Note that we define all of these considerations as constraints. We do so because these considerations affect the location of a particular district's boundaries. This leads us to our second point: All of these considerations compete with one another and require important tradeoffs. The decision to satisfy one goal necessarily entails sacrificing another goal. An example will underscore this point.

Without question, a redistricter desires both to protect incumbents and to maximize her party's electoral advantage. However, both of these goals cannot be maximized. A desire to maximize incumbency protection would lead to "packing" as many of the incumbent's partisan supporters in the district as possible – particularly if the incumbent is extremely risk-averse. Such an impulse would run counter to the desire to maximize partisan advantage. Maximizing partisan advantage necessitates that partisans be spread out across districts, thus reducing each incumbent's margins of victory and electoral cushion. This is what we refer to as external constraint, when the desire to maximize one objective is inhibited by the motivation to achieve a separate goal.

Some tradeoffs are inherent to the particular consideration itself. This is what we refer to as internal constraints. For example, to the extent that incumbency protection might be a consideration, that goal is itself composed of competing considerations. Incumbents want to avoid primaries, but they also want to win by large margins in the general elections. Avoiding primaries entails assuring that not too many members of the legislator's political party are included in his or her district. Winning the general election entails the


284. *See* Gelman & King, Enhancing Democracy, supra note 23, at 542 (examining competing goals of protecting individual incumbents and expanding party representation in legislature).

285. *See id.* (demonstrating that drawing lines to include greater party representation in district naturally leads to more votes favorable to party in general election).

286. *See id.* (noting that increased party representation in one district necessarily means decreased party representation in neighboring district resulting in lower aggregate competition). The debate over the proper percentage of voters needed to designate a district as having achieved "safe" status must be situated exactly within this discussion. *See infra* note 352 and accompanying text.
exact opposite—assuring that as many partisans are included in the district as possible. Thus, not only is incumbency protection constrained by external motivations, it also is internally constrained when the desire to maximize that consideration demands a trade-off between competing and relatively mutually incompatible means of accomplishing the same objective.

How then must courts and judicial actors understand the different political motivations that constrain the discretion of districters? According to Gelman and King:

"The key to understanding the effects of redistricting is to view redistricters as trying to achieve consensus among—or impose a solution on—incumbents who are operating in an extremely uncertain environment and attempting to reconcile at least three competing goals: to maximize their probability of winning or avoiding a party primary, to win a general election (conditional on winning the primary), and to increase their political party’s seat advantage. The resulting redistricting plan is usually a compromise, heavily influenced by numerous formal and informal constraints, which generally weights the political party’s overall seat advantage most heavily."

This is but a window into what we have come to know as the "pull, haul, and trade" that is politics.

2. Three Justifications for Majority-Minority Districts

Racial gerrymandering also can be a political variable that constrains a redistricter’s political motivation. These twin considerations, racial and political gerrymandering, co-exist in direct tension. Understanding how racial gerrymandering can serve as a constraint on a redistricter’s line-drawing discretion requires an exploration of the justifications for creating majority-minority districts. A number of important assumptions underlie the creation of majority-minority districts. We focus here on three related justifications for drawing districts in which the majority of citizens are of color.

a. Normative Descriptive Justification

First, one may justify majority-minority districts as part of a normative commitment to providing descriptive representation on behalf of voters of color. One can think of a number of presuppositions that might justify this normative conclusion. One such presupposition is that salient political characteristics of the polity ought to be descriptively represented in the relevant representative body. To the extent that race is a salient political characteristic, it then follows that voters of color ought to be descriptively represented. Similarly, one also may believe that representative institutions are less legiti-

287. Gelman & King, Enhancing Democracy, supra note 23, at 542.
mate unless they adequately mirror the physiological characteristics of the polity. In this case, to the extent that legitimacy is an important value, it would follow that voters of color ought to be descriptively represented in the relevant representative institution. Some examples follow.

When members of the Court as well as commentators criticize majority-minority districts because "race for its own sake" is taken into account, their criticism is directed, though perhaps unintentionally, at the normative assumptions of descriptive representation. The claim that race cannot be taken into account for its own sake can be translated as saying that descriptive representation is not a normative good. To paraphrase Carol Swain, drawing majority-minority districts simply for the sake of having more brown and "black faces" is not morally compelling.

Of course, Swain is not the only one who views descriptive representation as a normatively thin justification. Very few people believe that descriptive representation is important in and of itself, and we do not make that argument here. Criticizing descriptive representation on moral grounds is the intellectual equivalent of playground-bullying; the normative claim for descriptive racial representation admittedly is more contestable on moral, philosophical, and constitutional grounds. If it were the sole justification for drawing majority-minority districts, the Court and commentators would be rightly alarmed. However, two other justifications exist.

b. Normative Substantive Justification

A second justification for majority-minority districts may be grounded as part of a normative commitment to providing substantive representation for voters of color. As with descriptive representation, one also can present a number of presuppositions that would justify this normative conclusion. How-

289. See, e.g., Bush v. Vera, 517 U.S. 952, 958 (1996); id. at 972-73 ("The record discloses intensive and pervasive use of race both as a proxy . . . and for its own sake in maximizing the minority population of District 30 regardless of traditional districting principles."); id. at 993 ("First, so long as they do not subordinate traditional districting criteria to the use of race for its own sake . . . . States may intentionally create majority-minority districts . . . ."); Miller v. Johnson, 515 U.S. 900, 913 (1996).

290. CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS 5, 189, 197-206 (1993); see also ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 239 (1987) (questioning link between descriptive representation based on particular demographic characteristics and effectiveness of representation of tangible interests of that group).

ever, one should be sufficient to prove the point. In *Rogers v. Lodge*, Justice Stevens stated that even though there is not a constitutional right to proportional representation, "in a representative democracy, meaningful participation by minority groups in the electoral process is essential to ensure that representative bodies are responsive to the entire electorate." Contrast Justice Stevens's statement with Justice Thomas's concurring opinion in *Holder v. Hall*, a forcefully stated rebuttal to the very idea of substantive racial representation. Justice Thomas wrote:

Under this theory [substantive racial representation], votes that do not control a representative are essentially wasted; those who cast them go unrepresented and are just as surely disenfranchised as if they had been barred from registering. Such conclusions, of course, depend upon a certain theory of the "effective" vote, a theory that is not inherent in the concept of representative democracy itself.

In fact, it should be clear that the assumptions that have guided the Court reflect only one possible understanding of effective exercise of the franchise, an understanding based on the view that voters are "represented" only when they choose a delegate who will mirror their views in the legislative halls. But it is certainly possible to construct a theory of effective political participation that would accord greater importance to voters' ability to influence, rather than control, elections. And especially in a two-party system such as ours, the influence of a potential "swing" group of voters composing 10% to 20% of the electorate in a given district can be considerable. Even such a focus on practical influence, however, is not a necessary component of the definition of the "effective" vote. Some conceptions of representative government may primarily emphasize the formal value of the vote as a mechanism for participation in the electoral process, whether it results in control of a seat or not. Under such a theory, minorities unable to control elected posts would not be considered essentially without a vote; rather, a vote duly cast and counted would be deemed just as "effective" as any other. If a minority group is unable to control seats, that result may plausibly be attributed to the inescapable fact that, in a majoritarian system, numerical minorities lose elections.

Justices Stevens and Thomas are engaged in an indirect debate regarding the normative substantive justifications underlying the construction of majority-minority districts. Justice Stevens presupposed a representative democracy that is legitimate only if representative institutions are responsive to the electorate generally and to voters of color in particular. Justice Thomas envi-

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tioned instead a representative democracy where responsiveness is the right of the majority. Legitimacy is, as a matter of definition, responsiveness to the interest of the majority. In Justice Thomas's constitutional world, the formalistic process of casting a vote and having that vote literally counted easily meets the constitutional command of "effective participation." On this view, the franchise has an "instrumental" function, nothing more.

Both worldviews are problematic in some respects, though not equally so. The complication with Justice Stevens's model and the source of Justice Thomas's ire is the difficulty of defining and guaranteeing "meaningful participation" to voters of color in representative institutions. Justice Thomas averred that the "matters the Court has set out to resolve . . . are questions of political philosophy, not questions of law. As such, they are not readily subject to any judicially manageable standards that can guide courts in attempting to select between competing theories. This is a very powerful and relatively persuasive point. However, Justice Thomas's position also has its weaknesses, and those weaknesses are more troubling on both moral and constitutional grounds than the position that Justice Stevens champions.

Justice Thomas noted that if "a minority group is unable to control seats, that result may plausibly be attributed to the inescapable fact that, in a majoritarian system, numerical minorities lose elections." On its face, and as we asserted above, this position has much to say for itself. However, the fundamental response and concomitant question for Justice Thomas's position is an issue that the Court has struggled with since Giles v. Harris. The question is whether a judicial and constitutional response is warranted in the face of a political defeat by people of color, when the explanation that voters of color are simply political losers is implausible and demonstrably incorrect.

As an institution, the Court has responded in the affirmative. There are times when it seems that the Court is less committed to the promise that voters of color are to be guaranteed "meaningful participation" in the political process. However, the case can nevertheless be made that, historically, the Court has interpreted the Constitution to guarantee voters of color not only a formalistic right to cast a ballot, but also an ancillary and arguably necessary concurrent right to ensure some measure of responsiveness from representative institutions. Moreover, not only is this commitment reflected in the Constitution,
it is also a congressional imperative effected through the aegis of the VRA. These observations lead us to the third justification for majority-minority districts.

c. Normative Remedial Justification

A third justification for drawing majority-minority districts is grounded on remedial grounds. Indeed, this rationale has in fact served as a primary justification for creating these districts under the VRA. The mechanism used by the VRA — though somewhat controversial but less so than the descriptive and substantive justifications noted above — is quite simple: Where white voters vote as a block as part of a political strategy to frustrate the political will of voters of color, voters of color are entitled to a redesign of representative institutions provided that voters of color have different substantive interests than do whites and are sufficiently large and geographically compact.\textsuperscript{300}

Let us return then to Justice Thomas's problem in \textit{Holder v. Hall}. Justice Thomas complained that the constitutional commitment to guarantee "effective participation" by voters of color in the political process is flawed because it embroils the judiciary in disputes of political theory for which it is ill equipped.\textsuperscript{301} For Justice Thomas, the problem is that there is no theory to tell judges "about the number of minority districts to create."\textsuperscript{302} Descriptive, substantive, and remedial justifications may inform judges that "members of a minority are to control seats, but not 'how many' seats they should be allowed to controlled."\textsuperscript{303}

Justice Thomas's assumption, which many members of the Court seem to share, is that political actors left to their own devices will maximize the number of majority-minority districts, will do so in constitutionally and cartographically repugnant ways, and cannot effectively be constrained by any principle unless applied by the Court. On this point the members of the Court may use as evidence the 1990 round of redistricting in which redistricters created an unprecedented amount of majority-minority districts with very little indication that they were constrained in any way.\textsuperscript{304} \textit{Shaw/Miller} and the cases that followed are undoubtedly the Court's constitutional response and reaction to what it perceived to be a very troubling phenomenon.

\begin{itemize}
\item \textsuperscript{300} See Thornburg \textit{v}. Gingles, 478 U.S. 30, 50-51 (1986) (examining factors to consider in determination of whether ability of minority voters to elect representatives of their choice has been impaired).
\item \textsuperscript{301} See \textit{Holder v. Hall}, 512 U.S. 874, 897-903 (1994) (arguing that questions Court has attempted to resolve in determining ability of minorities to control elected seats are questions of political philosophy "beyond the ordinary sphere of federal judges").
\item \textsuperscript{302} \textit{Id.} at 902.
\item \textsuperscript{303} \textit{Id.}
\item \textsuperscript{304} See LUBLIN, supra note 62, at 22-30 (examining in detail increases in black and latino majority districts).
\end{itemize}
3. Political Constraints on Racial Gerrymandering

On this score, we argue that the Court’s reaction is premature at best and ill-guided at worst. Thus, even though we share Justice Thomas’s concern that the Court unwisely has attempted to micromanage the problem of representation, and while we share his solicitousness for easily applicable judicial standards, we think that the answer lies in a better understanding of the political process as opposed to the doctrinal equivalent of a judicial hand-washing. The approach Justice Thomas advocates, as is evident in the underlying Cromartie litigation, will lead courts to more, not less, involvement in the workings of politics. In contrast, the approach we advocate in this Article, permits redistricters to carry out their duties in the shadow of the Constitution— as opposed to in the shadow of litigation. This is because racial gerrymandering compels redistricters to engage in substantial trade-offs and thus serves as a constraint on their discretion. We turn now to that analysis.

We begin by considering the extent to which there is a tradeoff between racial and political gerrymandering. This investigation should have a significant impact on how the Court understands the role that creating majority-minority districts plays in the actual world of political practices. The literature in the social sciences has treated this point extensively. Political scientists Kimball Brace, Bernard Grofman, and Lisa Handley most prominently raised the question in a 1987 inquiry into the relationship between partisan and racial gerrymandering. However, it was not until after the 1990 apportionment that political scientists examined this question in earnest.

In general, the problem is as follows. As African Americans are concentrated into majority-minority districts, their purported influence in surrounding districts diminishes. This problem is exacerbated further by the fact that voters of color, politically liberal voters, are removed from surrounding districts so that districters may pursue the construction of majority-minority districts, the surrounding districts increasingly become conservative and elect conservative representatives. These representatives, having nothing to gain and every

305. See Kimball Brace et al., Does Redistricting Aimed to Help Blacks Necessarily Help Republicans, 49 J. Pol. 169, 183 (1987) (analyzing South Carolina state senate races to conclude that creation of majority-minority districts does not aid Republicans where districts are skillfully gerrymandered, when there is overwhelming Democrat dominance, where white Democrats replace removed black Democrats, or where Republicans are too inexperienced in these areas to capitalize on new redistricting plans).

306. See Lublin, supra note 62, at 36-37 (recognizing that concentration of black voters in majority-minority districts limits their ability to influence elections in surrounding majority white districts); Swain, supra note 290, at 197-200 (same).

307. Lublin explained:

   Racial redistricting in the South usually harms black substantive representation. Contrasting regional residential patterns among African Americans and voting preferences among whites explain the differential impact of racial redistricting in the
thing to lose when considering whether to vote in favor of policies that benefit voters of color, are more concerned with how their votes will play in their districts than in enacting policies benefiting voters of color.\textsuperscript{308} At the very least, these representatives are concerned with enacting conservative policies, which some would argue are inimical to the welfare of voters of color.\textsuperscript{309}

Thus, one of the majoritarian problems that majority-minority districts attempt to resolve simply are replicated on a different plane, the state and national legislatures.\textsuperscript{310} Majority-minority districts may solve the problem of descriptive representation by enabling voters of color to elect representatives of their choice, but result in a similar problem in a different context, representatives of color being frustrated at the legislative level.\textsuperscript{311}

In particular, many scholars estimate that as a result of the 1990 round of districting, the Republican Party picked up between four to six seats in the United States House of Representatives attributable to the creation of majority-minority districts.\textsuperscript{312} For the 1994 election, Lublin estimated that the Democrats lost an additional two to six seats—an addition to the five to six seats they lost in 1992, which he estimated they would have retained in South compared to the North. Individual southern metropolitan areas do not contain enough blacks to support an entire black district, so racial redistricting usually requires connecting several urban centers with rural black areas.

In the South, racial redistricting packs black liberal voters into districts and makes the surrounding districts more white and conservative.

\textsuperscript{308} See \cite{lublin2022}, supra note \textsuperscript{62}, at 93-97.

\textsuperscript{309} Id. at 91-97.

\textsuperscript{310} Id.; see Epstein & O'Halloran, supra note \textsuperscript{63}, at 390-92.

\textsuperscript{311} See \cite{guinier2022}, supra note \textsuperscript{310}, at 74 (asserting that majority-minority districts waste votes of white liberals submerged in surrounding white, conservative districts and thus increases overall levels of minority disenfranchisement in legislature); Lublin, supra note \textsuperscript{62}, at 36-37, 114 (recognizing that increase in majority-minority districts dilutes minority voting strength in surrounding districts); Epstein & O'Halloran, supra note \textsuperscript{63}, at 389-94 (noting that majority-minority districts may simply recreate problem of racial polarization at legislative assembly level instead of providing voters of color with substantive political power).

\textsuperscript{312} See \cite{lublin2022}, supra note \textsuperscript{62}, at 111-12 (estimating five or six seats); Swain, supra note \textsuperscript{290}, at 232 (estimating "no fewer than five seats"); Kevin A. Hill, \textit{Does the Creation of Majority Black Districts Aid Republicans? An Analysis of the 1992 Congressional Elections in Eight Southern States}, \textit{57 J. Pol.}, 384, 391 (1995) (estimating four seats).
1994 – as a result of the creation of majority-minority districts. From these scenarios, some have concluded that the use of majority-minority districts to effect descriptive representative, facilitated by the VRA, has contributed to the decline of the Democratic Party and thereby resulted in an erosion of support for substantive policies favoring people of color.

These facts are not lost on political actors. At the very least, drawing majority-minority districts makes sense only if these districts serve as a mechanism for providing both descriptive representation and substantive representation for citizens of color, who traditionally have been excluded from the body politic. The trade-off between political and racial gerrymandering presents African American, Latino, and Democrat leaders with a tough political choice: They must choose between the substantive electoral interests of citizens of color and the descriptive electoral interests of voters of color. This trade-off serves as an important restraint on racial gerrymandering, which was not quite evident to political actors before the 1990 round of redistricting.

C. Empirical Analysis

The Court’s doctrine in the wrongful districting cases suffers from a failure to appreciate sufficiently the relationship between race and politics. The Court’s doctrine seems to have drawn two ironclad categories: political gerrymandering and racial gerrymandering. The admittedly Everest-like standard of Davis governs the first category, while the still-evolving and admittedly confusing, if not just simply confused, standards of Shaw and Miller govern the latter category.

In this Part, we analyze North Carolina’s 1992, 1997, and 1998 redistricting plans to determine whether racial or political considerations best explain the composition of the plans. Our empirical analysis is not meant to suggest that one should conduct statistical analysis in order to resolve the issues raised by the Court’s wrongful districting jurisprudence. Rather, our analysis is an independent method of confirming our intuition about the doctrine, which is that only extreme cases of racial gerrymandering should be subjected to strict

313. See LUBLIN, supra note 62, at 112-14 and sources cited therein, especially with respect to estimates – ranging from five to twelve – of seats lost in 1994 due to the construction of majority-minority districts. In reviewing the evidence, David Canon similarly concluded that the Democrats lost "somewhere around ten seats" after the 1992 and 1994 elections. CANON, supra note 311, at 237.

314. LUBLIN, supra note 62, at 99 ("The general implication is nevertheless clear. Black majority districts usually conflict with efforts to maximize African-American substantive representation. Doing the utmost to advance black interests necessitates destroying most black majority districts."); id. at 114 ("Racial redistricting has resulted in the election of a Congress less likely to enact liberal measures favored by African Americans and has greatly altered the makeup of Congress."); Epstein & O’Halloran, supra note 63, at 390-94.

CHALLENGES TO RACIAL REDISTRICTING

Our analysis is based upon the social science literature that racial gerrymandering and political gerrymandering cannot both be maximized. From this analysis we conclude that the 1997 redistricting plan was a political gerrymander. To interpret our results, some explanations of our variables are necessary.

We use Gelman and King's computer program "JudgeIt" to measure our dependent variables: electoral responsiveness and partisan bias. Electoral responsiveness represents the change expected in the partisan composition of a legislative body as a consequence of changes in the electorate's voting behavior. Following Gelman and King, we define electoral responsiveness "as the change in the expected seat proportion given a small change in the vote proportion, from slightly more Democratic than the average district vote to slightly more Republican." Following Gelman and King's model, we also use a swing of 1% in each direction from the election outcome. Responsiveness is thus calculated as the average difference of votes divided by the vote swing. From this calculation, a responsiveness value of 1.0 indicates that a 1% increase in the average district vote share for Democrat candidates statewide will produce a 1% increase in the Democrat share of the state legislature. This would, of course, be proportional representation. Similarly, a responsiveness value of 2.0 indicates that a 1% increase in the average district vote share for Democrat candidates statewide will produce a 2% increase in the Democrat share of the state legislature — and so on.

We also operationalize partisan bias using Gelman and King's definition. Partisan bias is determined by measuring the proportion of seats in the relevant legislature that a party receives over the expected baseline. The baseline is defined as a symmetry criterion. "For example," explain Gelman and King, "if one party is able to translate 55% of the average district vote share into seats, this party has a level of bias that is equal to 1.0."

316. This model is not of our own creation but one that has been used previously by other social scientists attempting to acquire some empirical leverage on questions similar to the ones that we are addressing in this Article. See generally Gelman & King, Enhancing Democracy, supra note 23; Hill, supra note 312; Andrew Gelman & Gary King, A Unified Method of Evaluating Electoral Systems and Redistricting Plans, 38 AM. J. POL. SCI. 514 (1994); Andrew Gelman & Gary King, JudgeIt: A Program for Evaluating Electoral Systems and Redistricting Plans, http://gking.harvard.edu/stats.shtml (last visited Mar. 21, 2001).

317. For an explanation of these variables see infra text accompanying notes 326-29.

318. See Gelman & King, Enhancing Democracy, supra note 23, at 542 (defining electoral responsiveness).

319. Id. at 544.

320. Id.

321. Id.

322. Id. at 545.

323. Id.
into 75% of the seats in the legislature, then it would be symmetric for the other party, too, when it receives 55% of the average district vote, to receive 75% of the seats. The bias then is the proportion of seats that a party receives over and above what one would expect based upon this symmetry criterion. As a matter of definition, a positive bias value is indicative of bias in favor of the Democratic Party. Similarly, a negative value is indicative of a bias in favor of the Republican Party. Thus, a partisan bias value of 0.01 indicates that the Democrats received 1% more seats than they should given the symmetry criterion. Conversely, a partisan bias value of -0.01 indicates that the Republicans received 1% more seats than they should.

We use electoral responsiveness and partisan bias to determine which political variable out of the three most likely explanatory variables—incumbency protection, partisan gerrymandering, and racial gerrymandering—best explains North Carolina’s 1992, 1997, and 1998 redistricting plans. In general, a high degree of responsiveness indicates that voter preferences are reflected in representative institutions. A high level of responsiveness is then incompatible with the theories of incumbency protection and partisan gerrymandering. Incumbency protection and partisan gerrymandering are devices for assuring the stability of representative institutions irrespective of the changes in voter preferences. Consequently, the lower the value of responsiveness, the more likely it is that the representative institution is the product of either or both incumbency protection or partisan gerrymandering. In contrast, high levels of responsiveness, in keeping with the trade-off hypothesis, are compatible with a proposition that a representative institution has been racially gerrymandered. This is because racial gerrymanders create high levels of uncertainty, particularly for white Southern Democrats, and uncertainty increases the level of responsiveness. Moreover, racial gerrymandering is consistent with high partisan bias. Again, there is a trade-off.

324. Id.
325. Id.
326. See id. at 548 (finding that "by adding incumbents into the electoral system and redistricting process, the increase in responsiveness that results from redistricting is lessened").
327. See id. (describing interaction between responsiveness and redistricting).
328. Uncertainty is created when redistricters reduce the margins of victory. See Gelman & King, Enhancing Democracy, supra note 23, at 543 (explaining that "when redistricters draw lines by jointly maximizing the advantages to their party and their incumbents, they create additional uncertainty and also produce a direct increase in responsiveness by attempting to gain partisan advantage by creating more districts with smaller likely victory margins"). Thus uncertainty also results in greater responsiveness. Id.
329. See BRUCE CAI, THE REAPPORTIONMENT PUZZLE 154-77 (1984) (discussing partisanship and redistricting plans); KOUSSER, COLORBLIND INJUSTICE, supra note 18, at 409 (arguing that "[p]artisan and racial concerns were intertwined in redistricting in the 1990s. . .").
Consequently, if incumbency protection is the best explanation for one or all of North Carolina's redistricting plans, we expect to see low levels of responsiveness. If partisan gerrymandering is the best explanation, we expect to see high partisan values. If, however, racial gerrymandering is the best explanation, we expect to see high levels of responsiveness and high partisan values.

Our data is district-level demographic data provided by the North Carolina General Assembly. This dataset contains basic demographic information including the voting age population for all voters, the percent of registered voters, and results from three elections -- the 1988 Court of Appeals Election, the 1988 Lieutenant Governor Race, and the 1990 Senate election. These elections are thought to be indicative of "normal partisan balance." Additionally, the parties in the underlying litigation used these elections as appropriate measures of partisan balance.

To compute responsiveness for the 1992 Plan, we first used JudgeIt to calculate responsiveness estimates for each of the three elections that took place under the Plan -- the 1992, 1994, and 1996 elections. We then averaged the responsiveness over those three elections. For the 1997 Plan, we used JudgeIt to predict responsiveness for the 1992, 1994, and 1996 elections as if they had taken place under the 1997 Plan. In other words, using the 1997 Plan, we utilized data from the 1992, 1994, and 1996 elections to predict what would have happened if those elections had taken place under the 1997 Plan. For the 1998 Plan, we used JudgeIt to calculate electoral responsiveness based upon the 1998 elections.

<table>
<thead>
<tr>
<th>Election Year</th>
<th>Responsiveness</th>
<th>Standard Error</th>
</tr>
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<tbody>
<tr>
<td>1992</td>
<td>2.08</td>
<td>.3314</td>
</tr>
<tr>
<td>1994</td>
<td>2.14</td>
<td>.5131</td>
</tr>
<tr>
<td>1996</td>
<td>2.23</td>
<td>.4374</td>
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In Table 6, we present the level of responsiveness under the 1992 Plan for the 1992, 1994, and 1996 elections. Under the 1992 Plan, every 1% increase in the average district vote share for Democrat candidates statewide produces a 2.08% increase in Democrat seats for the 1992 election. Similarly, in the 1994 election, every 1% increase in the average district vote share for Democrat candidates statewide produces a 2.14% increase in Democrat seats.

331. Gronke & Wilson, supra note 188, at 162.
Table 7

<table>
<thead>
<tr>
<th>Plan</th>
<th>Mean Responsiveness</th>
<th>Standard Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>2.15</td>
<td>0.428</td>
</tr>
<tr>
<td>1997</td>
<td>1.68</td>
<td>0.4097</td>
</tr>
<tr>
<td>1998</td>
<td>1.69</td>
<td>0.3846</td>
</tr>
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</table>

Table 7 depicts the mean responsiveness for the three plans. As is evident from Table 7, the 1997 and 1998 Plans are on average less responsive than the 1992 Plan. In other words, in 1997, a 1% increase in the average district vote share for the Democrat candidates statewide would have produced a 1.68% increase in Democrat seats for the Congress. Similarly, in 1998, a 1% increase in the average district vote share for the Democrat candidates statewide would have produced a 1.69% increase in Democrat seats for the Congress.

Table 8

<table>
<thead>
<tr>
<th>Plans</th>
<th>T-statistic</th>
<th>Level of Significance</th>
</tr>
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<tbody>
<tr>
<td>92 v. 97</td>
<td>10.553</td>
<td>.000</td>
</tr>
<tr>
<td>92 v. 98</td>
<td>10.783</td>
<td>.008</td>
</tr>
<tr>
<td>97 v. 98</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>

In Table 8, we conducted paired t-tests for the difference of means between the plans. The 1997 and 1998 Plans are indistinguishable from one another and could not be computed. The 1997 and 1998 Plans are, however, distinguishable from the 1992 Plans. As Table 8 reveals, means reported in Table 8 achieve conventional levels of statistical significance. Therefore, we can confidently assert that the 1997 and 1998 Plans are less responsive than the 1992 Plan.

We also utilized JudgeIt to calculate partisan bias for the 1992, 1997, and 1998 Plans. For the 1992 Plan, we calculated partisan bias estimates for the 1992, 1994, and 1996 elections. We then averaged those estimates to arrive at a mean estimate for 1992. For the 1997 Plan, we used JudgeIt to predict the

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Our parameters are congruent with those of other researchers such as Gelman and King and Kevin Hill. Professor Hill examined eight southern states that created majority-minority districts and found that the average responsiveness for those states was 1.88 and the average partisan bias was 3.3%. Hill, supra note 312, at 393, tbl.2. Gelman and King note that most "states have responsiveness values between 1.0 and 3.0." Gelman & King, Enhancing Democracy, supra note 23, at 545; see id. (finding that partisan bias figures "between 5% favoring the Democrats to 5% favoring the Republicans").
partisan bias of the 1997 Plan using the 1992, 1994, and 1996 elections. We also averaged those estimates to arrive at a mean partisan bias estimate for the 1997 Plan. We calculated the partisan bias for the 1998 Plan using the 1998 elections.

### Table 9

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<tbody>
<tr>
<td>Plans</td>
<td>Bias</td>
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<td></td>
</tr>
<tr>
<td>92</td>
<td>0.0146</td>
</tr>
<tr>
<td>97</td>
<td>-0.0035</td>
</tr>
<tr>
<td>98</td>
<td>0.0031</td>
</tr>
</tbody>
</table>

As is evident from Table 9, the 1992 Plan assured the Democrats 1.5% more seats than they should have received given the symmetry criterion. This measure would be consistent with the racial gerrymandering hypothesis were we confident that our estimate significantly differs from zero. However, given the high standard errors and the low coefficient, we cannot conclude that the 1992 Plan suffered from partisan bias. The 1997 and 1998 Plans do not register any partisan bias. Again, none of these results reach conventional levels of significance.

From the evidence presented here and in light of traditional burdens of proof, the plaintiffs in Cromartie would be hard pressed to prove that racial gerrymandering is the best explanation for the 1997 Plan. The 1997 Plan is clearly less responsive than the 1992 Plan. This finding is inconsistent with the racial gerrymandering hypothesis. Additionally, there is no evidence of partisan bias. The absence of partisan bias in combination with low levels of responsiveness is more indicative of incumbency protection than racial gerrymandering. As we note above, were the 1997 Plan a racial gerrymander, we would expect high levels of responsiveness and high levels of partisan bias; this is exactly what we have for the 1992 Plan.

Our findings are consistent with the trade-off hypothesis. In keeping with the trade-off hypothesis, in 1992, compactness and to some extent contiguity were the political factors that gave way to incumbent protection and racial gerrymandering. However, in 1998, when the 12th District was more compact and contiguous, the Democrats suffered one of their worst losses in three decades. It is not implausible that North Carolina’s Democrats, in enacting the 1997 Plan, would have attempted to minimize their potential losses, which were quite predictable, by institutionalizing the results of the 1996 elections.

We thus conclude that the district court reached the wrong result in holding that the 1997 Plan was not a political gerrymander. In reaching this conclusion, the court failed to appreciate the constraint that political variables have on the redistricting process. In so doing, it concluded that District 12
was unconstitutional by disaggregating that district from the districting plan. However, the evidence is extremely convincing that the 1997 Plan, in contrast with the 1992 Plan, was a political gerrymander. The State attempted to minimize the level of responsiveness in the 1997 Plan, which is a strong indication of a political as opposed to a racial gerrymander.

IV. Back to the Doctrine: Implications

In this final Part, we look to the doctrinal implications of our position. We divide our discussion into two sections. In the first, we reassess the import of Shaw I's analytically distinct claim within its specific procedural context and conclude that Shaw-like claims must be fewer and farther in between. In the second, we then look ahead to the upcoming redistricting season. In light of our general position, we make two further points, one practical, the other doctrinal. The practical point is simply this: The 1990s was a unique decade in terms of redistricting and judicial intervention; as such, we view Shaw I as a unique case. The doctrinal point departs from this premise and argues that Shaw I must thus be located within the larger gerrymandering doctrine, alongside its sure-fire cousin Davis v. Bandemer. Under our revised reading of Shaw I, racial gerrymandering claims gravitate towards their political gerrymandering counterparts. In fact, they become one and the same. Taken together, these two arguments lead us to the view that the nightmare that is North Carolina redistricting in the 1990s should not be repeated.

A. Reassessing Shaw: The Corrective Reading

As a result of the redistricting realities witnessed in North Carolina and Texas, we are led to a more deferential model of judicial review than the Court currently utilizes in racial gerrymandering claims. This is not to say that Shaw I was wrongly decided, for we do not take a view on that specific question. Instead, we make a more general claim. We argue here that in its best light, Shaw I must be seen as a special case, arising under fact-specific circumstances. Seen through this prism, and as we argue below, Cromartie II becomes a fairly easy case.

Our argument in this Part hinges on a clear understanding of the context within which the Shaw litigation arose. Commentators have ably documented this history and we need not duplicate their efforts.333 For our purposes, three facts bear mention at this juncture. First, the Democratic party in North

Carolina approached the 1990s redistricting season with the clear intention of maximizing its short-term electoral power, as reflected in the upcoming round of congressional elections. Having accomplished its goal too well, it submitted the fruits of its labor to the Justice Department.

Second, the Justice Department objected to the original plan, for it only included one majority-minority district. According to the Justice Department, a second majority-minority district could be crafted from the south central to southeast region of the state. This request threatened to unravel the Democrats' plan. The issue thus became, who would bear the cost for the new majority-minority district? In packing black (and predominantly Democratic) voters into districts, the theory went, the Republican party would benefit. The reverse would hold true with the original plan, which only included one minority-minority district and dispersed black voters along Democrat districts.

Third, the Justice Department's request was clearly aimed at the population located in the southeast region of the state. Yet, the Democrats reasoned that this did not mean that they had to draw the second majority-minority district in the southeast region. At the time, this was an open issue, and as it turned out, the answer proved to be crucial. As we know, the state legislature felt free to draw the district wherever it pleased. Put differently, the federal demand for a second majority-minority district needed to be balanced against the still present need for upholding the pre-existing partisan balance in the state's congressional delegation. Thus, the Democrats did all there was left to do: They crafted the now infamous, tortuously contoured District 12. The circumstances, as they apparently understood them, left the Democrats no other choice.

The doctrinal record is now quite familiar. In *Shaw I*, the Supreme Court subjected District 12 to strict constitutional scrutiny. A few years later, in *Shaw v. Hunt (Shaw II)*, the Court overturned the lower court ruling and struck down the district on equal protection grounds. In so doing, the Court simply answered the initial redistricting question, the one question left open after the Justice Department demanded the creation of a second majority-minority district, in the negative. That is, once the Justice Department refused preclearance, the State was not free to create a second majority-minority district anywhere it wished to do so, and by any means necessary. To say that a second majority-minority district could be created in the southeastern region of the state, the Court implicitly answered, is not to say that the district could be created anywhere that the state wished.334

334. *See Shaw II*, 517 U.S. 899, 916-17 (1996). In *Shaw II*, the Court stated: [Appellees] contend that once a legislature has a strong basis in evidence for concluding that a § 2 violation exists in the State, it may draw a majority-minority district anywhere, even if the district is in no way coincident with the compact Gingles
Seen this way, *Shaw I* becomes a very easy case. As we explained earlier, the 1990 redistricting season produced an unprecedented number of majority-minority districts. In light of the Court’s equal protection jurisprudence, these districts raised, at the very least, difficult constitutional questions. Whether or not one agrees that the VRA must be understood to maximize minority representation in the form of minority officeholders, it is still true that the Act was being manipulated for clear partisan reasons. This manipulation was exacting constitutional and political costs. As we see in *Shaw I*, such costs included those of the "expressive harms" variety.

In light of this history, *Shaw I* itself must be seen as a doctrinal corrective. Redistricters in the early 1990s paid very little heed to their constitutional duties. After all, they knew their precedents well. These precedents told them that "reapportionment is primarily the duty and responsibility of the State." Thus, after the demand for a second majority-minority district, the redistricters felt free to draw it any way possible. After all, the constitutionality of the plan was not a predominant concern of the redistricters. Rather, their major concern was partisan advantage, as it must have been.

In offering this reading of *Shaw I*, we must emphasize that we do not take a view on whether *Shaw I* is correct as a matter of constitutional law. Our intentions are somewhat more limited. We read *Shaw I* with the benefit of hindsight and attempt to understand it on its own terms. We read *Shaw I* for the proposition that only extreme cases of racial redistricting will be subject to strict scrutiny and likely invalidation. It is in this manner that *Shaw I* must be understood as a corrective. Justice O’Connor dissipated any skepticism about this reading of *Shaw I* with her concurrence to her plurality opinion in *Bush v. Vera*.

If the view we take here is correct, *Cromartie II* immediately becomes a much easier case. With *Shaw I*, the stakes changed, as well as the doctrinal context. This second time, redistricters knew their limitations (they knew there were limitations!) and may be assumed to have acted accordingly. Thus, when the General Assembly redistricted a second time, in 1997, the original constitutional question whether a second majority-minority district could be district, as long as racially polarized voting exists where the district is ultimately drawn. We find this position singularly unpersuasive.

*Id.* (citations omitted).

335. See Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 Tex. L. Rev. 1705, 1726-37 (1993) (concluding that "the Voting Rights Act is ripe for partisan capture"); Karlan, *supra* note 142, at 297 n.60 (asserting that "disappointed aspirants for elective office use whatever statutory handle is available to challenge the otherwise unreviewable outcomes of the political process").


337. This assumes, of course, that they are rational actors.
drawn anywhere within the state was settled. Instead, the question the second time around was whether the General Assembly, as the rational institution we must assume it to be, read the relevant precedents and acted accordingly. In this vein, it should not be surprising that the 1997 Plan created no majority-minority districts in terms of registered voters. We must assume that the General Assembly learned its constitutional lessons well.

Sam Issacharoff and Alex Aleinikoff have developed — and rejected — a similar reading of Shaw I, which they label the "cueing" reading. They wrote that such a reading is simply "a shot across the bow," a warning to the relevant political actors to pay more careful attention to their constitutional duties. In specific reference to Shaw I, they explained that the Court may be understood as choosing an extreme case in order to "emphasize that at some point the use of race in redistricting decisions had gone too far". However, this is at best an infelicitous reading of the case. They explained:

The possibility that Shaw is a "cueing" case is cause for consternation. Such decisions might be appropriate vehicles for interbranch communications in areas of law unlikely to spawn much litigation — for example, federalism limits on congressional power. But reapportionment cases demand a willingness on the part of the Court to develop and supervise an extensive scheme for review of state districting decisions. Voting-rights cases are numerous, complex, and fact specific. Perhaps more centrally, these cases involve large numbers of interested parties who can be expected to exploit any uncertainty in the law. Therefore, in the voting-rights context, vague norms, especially norms that may not be enforced at all, will produce costly litigation and serious uncertainty about important political events.

They concluded, rather ominously: "Surely the Court is aware of these troubling consequences, and it is unlikely the Court would issue a 'cueing' opinion in this volatile area of the law."

Once again, hindsight comes in handy. Looking to the string of cases from Shaw I to Cromartie II, we know that federal courts have been much too happy to micromanage in this area. In one telling instance, a federal court went so far as to design a redistricting plan even before ruling on the unconstitutionality of the existing plan. A majority of the Supreme Court gave this second

338. Aleinikoff & Issacharoff, supra note 67, at 603-04.
339. Id. at 603.
340. Id. at 604.
341. Id.
342. Id.
343. See Johnson v. Miller, 922 F. Supp. 1556, 1560 (S.D. Ga. 1995) (theorizing that "[b]y virtue of its unconstitutional origin, Georgia's current congressional plan cannot form the basis for the remedy we now construct because it does not represent the goals of Georgia's historic policies nor the state legislature's true intent").
58 WASH. & LEE L. REV. 227 (2001)

plan its blessing. Thus, to say that federal courts should not "issue a 'cueing' opinion in this volatile area of the law" is not to say that the Court has not done so. We would agree, to be clear, that the Court ought not to use Shaw I as such a conduit. The history of the Shaw I litigation, however, points us exactly in this direction. In other words, the concerns Aleinikoff and Issacharoff raised in 1993 are exactly the concerns that have come to pass during the 1990s. To be clear, this is neither right nor wrong; it is just the way it is.


In this final Part, we look to the implications of our position in light of the upcoming redistricting season. Two positions stand out, and we address them individually. The first argument questions whether the expressive harms inquiry must be reserved solely for majority-minority districts, or whether it may be applied, as in Cromartie, to a majority white district. The second argument looks to the gerrymandering doctrine in general and asks whether Shaw I is better understood, in strict doctrinal terms, from the perspective of the more deferential Davis.

1. Expressive Harms and Majority White Districts

In reviewing the facts in the Cromartie litigation, one specific facet of the litigation immediately caught our attention: Neither district under review should be properly considered a majority-minority district. District 1, as we explained earlier, may be considered a majority-minority district only if we use the rather useless measure of total population, and even then barely so. In terms of voting age population and registered voters, the district is majority white. Similarly, District 12 may be considered a majority white district along all three measurements. The question is whether Shaw I's "expressive harms" doctrine should apply to either District 1 or District 12. We argue here that as soon as the districts in question dip below majority-minority status, the "expressive harms" inquiry immediately is rendered incongruous and incoherent.

In making this claim, we begin with a quote from the relevant language of Shaw I. As the Court explained:

Put differently, we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district indi-

345. Aleinikoff & Issacharoff, supra note 67, at 604.
346. See Lowenstein, supra note 271, at 812-19 (arguing that federal courts in redistricting cases have acted with "utter indifference" to autonomy of state political systems).
viduals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group — regardless of their age, education, economic status, or the community in which they live — think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.

This language points us in two related directions. First, and as Aleinikoff and Issacharoff wrote soon after Shaw I, "[w]hen the gerrymander has a visible racial component, the Court implicitly reasons, the districting decision flashes the message: 'RACE, RACE, RACE.' A ‘natural’ compact district sends no such message, even if it has been defined to create a majority-minority district." John Ely has made a similar argument. On this reading, the Court, and specifically Justice O'Connor, is concerned with the excessive reliance on race, which is what we termed earlier uber-race consciousness. Only then does Justice O'Connor's position that "most districts are safe" make any sense.

In order for the Court's language to make any sense, then, the districts at issue must be of the majority-minority variety. That is, in order for a district to convey the messages that the Court imputes to it, the district must in fact be designed with a majority-minority population within it. Otherwise, Shaw I makes very little sense. Imagine it this way: We have a covered jurisdiction and the existence of a racially polarized electorate. Ignore for the moment whether safe district status requires 45 or 50% plus one minority population. Ignore also whether influence districts or majority-minority districts are the best way to effect successful minority representation. As far as

349. See Ely, supra note 52, at 615 (noting that these districts may be interpreted to convey message: "Is there no length to which they won’t go to help Black people?").
350. See supra note 72 and accompanying text (defining "uber-race").
351. See Bush v. Vera, 517 U.S. 952, 991-92 (1996) (explaining that Section 2 is compelling state interest); Miller v. Johnson, 515 U.S. 900, 928-29 (1995) ("Application of the Court's standard does not throw into doubt the vast majority of the nation's 435 congressional districts . . . ."). For a similar reading of Shaw I, see Pildes, supra note 21, at 2510 ("The excessive use of race, not racial classification per se, generates Shaw harms.").
352. Compare LUBLIN, supra note 62, at 133 (arguing that safe seat is reached with only 55% of registered voters), with Cameron et al., supra note 151 (lowering Lublin's figure to 47%).
353. Compare O'Rourke, supra note 279, at 725-28 (arguing that majority-minority districts help Republicans), with Pamela S. Karlan, Loss and Redemption: Voting Rights at the End of the Century, 50 VAND. L. REV. 291, 293 (1997) (disagreeing with claim that "the creation of majority-Black districts has perversely injured the very people they were thought to help").
those living within the district are concerned, the only way that one may get the message that any given group thinks alike, votes alike, and so on, would be when redistricters create bizarre districts with minority populations within them. In order for the "expressive harms" doctrine to make any sense, these two facts must be present simultaneously: The district must be both majority-minority and bizarre.

Justice O'Connor's published opinions lead us to this position. She has stated in no uncertain terms that redistricters may take race into account, and she also has stated that most districts are safe from constitutional scrutiny. Also, in her view, the mere creation of majority-minority districts, without more, will not result in strict judicial scrutiny. From her vantage point, much more is needed.

Thus, at least for the types of claims Shaw I spurred, the creation of majority white districts with a significant minority presence should provide a safe haven for redistricters from overzealous partisans seeking to affect the redistricting process through judicial means. For the coming round of redistricting, state legislators should do as North Carolina's General Assembly did: Bring the numbers of your new districts to about 50% and the Constitution will not be implicated. In contrast, this is not to say that states will feel free to reduce all existing majority-minority districts to under 50% minority population. Doing so would implicate the VRA. In light of the retrogression principle, the unprecedented creation of majority-minority districts after the 1990 reapportionment helps ensure that the next reapportionment will witness a strong contingent of majority-minority districts. Again, we do not take a

In this vein, Paul Peterson argued that "[w]hat emerges from an open political process is likely to be the appropriate balance" between using race some and too much for classificatory purposes. Paul E. Peterson, A Politically Correct Solution to Racial Classification, in CLASSIFYING BY RACE 3, 16 (Paul E. Peterson ed., 1995). For an argument regarding the acknowledged hard question of how much congressional representation is enough, see Gary King et al., Racial Fairness in Legislative Redistricting, in CLASSIFYING BY RACE, supra, at 85, 107-08.

354. See Vera, 517 U.S. at 993 (O'Connor, J., concurring) ("[S]o long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny.").

355. See Miller, 515 U.S. at 928-29 (O'Connor, J., concurring) ("Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may well have been considered in the redistricting process.").

356. See Vera, 517 U.S. at 958 (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts.") (citations omitted).

357. See Lowenstein, supra note 271, at 825 ("[A]lthough section 5 will have to be implemented in accord with the nonretrogression principle, that principle will have teeth for the first
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view about the desirability of these districts. Ours is but a descriptive claim, nothing more.

2. Gerrymandering Claims and the Future of Shaw

Our reading of the Shaw I doctrine raises critical doctrinal questions, especially in light of the upcoming round of reapportionment. In this final Part, we come full circle and offer a prognosis of the racial gerrymandering cause of action spawned by Shaw I. We divide this Part into two subparts. In the first, we depart from the premise that Shaw I and Miller stand in direct doctrinal tension. For the sake of doctrinal clarity, the Court must choose between the two. In the second, we address the implications of our argument that racial and political considerations serve as mutual constraints upon one another. We conclude that the doctrine should better reflect this reality.

The first point begins with the mundane observation that Shaw I and Miller stand on divergent constitutional principles. As we explained earlier, Shaw I requires the presence of a bizarre district, while a Miller violation, conversely, is established when the use of race predominates in the creation of a given district. The Miller Court made vastly clear that plaintiffs could establish such a violation irrespective of shape.\(^{358}\) The question of the proper doctrinal course remains.

In light of the facts at issue in Cromartie and the likelihood that redistricters will follow a similar path after the next reapportionment, we argue that the Court must side with its holding in Shaw I. More specifically, the fact that the districts at issue in Cromartie were majority-white makes all the difference in the world. Any such districts must be subject to Shaw I's bizarre reading, under which only extreme cases will be implicated. For the unconvinced, we look instead to the repercussions that would result from following Miller's predominant factor test. Of specific concern is the fact that doing so would leave the doctrine without a limiting principle. That is, when would the Equal Protection Clause be specifically implicated? What, to put this question differently, will cabin the level of analysis? Will the doctrine be implicated even when one person is moved \textit{qua} a black person from one district to another?

\(^{358}\) See Miller v. Johnson, 515 U.S. 900, 913 (1995) (recognizing that district shape is relevant not because bizarreness is necessary element of constitutional wrong or threshold requirement of proof, but because district shape may be persuasive circumstantial evidence that race, for its own sake, and not other districting principles, was legislature's dominant and controlling rationale in drawing district lines).
another? Were the Court to follow the Miller test under Cromartie's fact scenario, this would be the likely result. This result also would be perverse.

The second point looks to the clear tension between political and racial considerations present in the "racial" gerrymandering cases. It is clear to us that the Court must make a choice. In other words, the Court must decide whether these cases are either political or racial cases. In light of the specific facts at issue in the case law from Shaw I to Cromartie II, we are convinced that this is all about politics. Three specific considerations lead us to this view. First, we rely on plain old common sense. That is – why would redistricters ever care about race? Think back to the North Carolina example and the pressures faced by the General Assembly that led to the redistricting plan challenged in Shaw I. To be sure, redistricters face a number of competing pressures, many of which have a direct effect on the final plan. Yet, why in the world would race be one of these considerations, absent the VRA? Plain and simple, it would not be. It is for this particular reason that Shaw I may make sense in ways that Miller does not. Second, we parse through the record and the opinions in the various cases. The history and context of the cases make it vastly clear that politics played a central role in both the shapes of the districts and even in the original decision to create majority-minority districts. Third, the data we offer in Part III also support this conclusion.

The implications of this conclusion should be obvious. Plain and simple, to conclude that the tension between race and politics should be resolved on the side of politics is to say that the so-called "racial" cases directly implicate the political gerrymandering doctrine as represented by Davis. In light of this view, we conclude that the racial gerrymandering claims must be reconsidered in light of their political counterpart. This shift unquestionably would be determinative.

By all accounts, Davis provides a rather loose standard for establishing a political gerrymandering claim. Some would go as far as to deem its doctrinal bite illusory. The U.S. Reports bear this latter assertion out. Since the time of the Davis decision, plaintiffs have challenged many political gerrymanders in

359. See Kousser, Colorblind Injustice, supra note 18, at 262-70 (describing redistricting process in North Carolina); id. at 409-11 (same).
federal court, yet very few have succeeded.\textsuperscript{362} In contrast, the Shaw I doctrine has witnessed much litigation, and plaintiffs have achieved a very high rate of success. To be sure, the two doctrines stand on divergent paths.

One of the thrusts of our earlier exposition of the lower court record in \textit{Cromartie} is to indicate how little sense these two approaches make. As we argue here, courts should handle the "racial" gerrymandering cases just like the political gerrymandering cases because the race cases are not really about race after all. They are about politics. Thus, the Court should choose the \textit{Davis} path and apply it across the board. On this reading, the lower court opinion in \textit{Cromartie} must be overturned.

Before concluding, we wish to answer what promises to be two leading objections to our position. First, and as we alluded earlier, critics will complain that the \textit{Davis} standard posits such a high burden on litigants that its holding is at best illusory. Second, critics may suggest that our reading will leave racial minorities without their traditional judicial recourse. In other words, this position will lead states to create fewer and fewer majority-minority districts and will ultimately "bleach" our representative arenas. Neither criticism persuades us.

The first criticism we take to be a virtue of our position. To the critics, the Court must do more in the political gerrymandering cases. To us, conversely, the Court must do less under the "analytically distinct" Shaw I cause of action. As we argued earlier, we take the Shaw line of cases to be nothing more than a reshuffling of previously attained political compromises. In their worst light, some of the districting plans in question may be seen as crass political gerrymanders, enacted in the expected furtherance of maximum political gain.\textsuperscript{363} On either view, the judiciary must do less.

The second criticism also falls short. To be sure, we share the general concern about the question of "fair and effective representation."\textsuperscript{364} This is especially true concerning racial minorities, and yet, this area epitomizes our position about the Court’s recent interventionist stance in the name of a color-blind Constitution. That is, we place our faith in the virtues of the VRA and its statutory protections as codified in Sections 2 and 5.\textsuperscript{365} We do not share a


\textsuperscript{363} The North Carolina plan under challenge in Shaw I, for example, and the Texas plan challenged in \textit{Vera} would both fall under this characterization.


\textsuperscript{365} In this vein, the process that led from City of Mobile to the amended Section 2 may be said to encapsulate our approach. That is to say, racial minorities fare sufficiently well within
similar conviction over the virtues of federal judges. In specific reference to
the protection of racial minorities in the voting rights area, we argue that
Section 2 of the VRA should serve as the ultimate benchmark. Absent Section
2 violations, in other words, the challenged redistricting plans should be left
alone.

Conclusion

The central claim running through this Article is that the redistricting
process is necessarily fraught with racial and political dimensions. In pure
doctrinal terms, it may be said that these two considerations stand at opposite
ends of the spectrum. Political considerations are scrutinized under Davis v.
Bandemer’s forgiving standard, while race is subject to Shaw I’s stricter level
of review. The challenge in the wrongful districting cases is not a doctrinal
one, however, but a purely factual one. In other words, the key to these cases
is whether, not to mention how, a fact finder is able to disentangle properly
these two ubiquitous strands.

As we argue in this Article, we are not optimistic. To date, federal courts
have made valiant attempts at doing exactly that and, quite frankly, have been
far from persuasive. We offer the lower court records in both Hunt v. Cro-
martie and Vera v. Bush as proof for this proposition. In the end, federal
courts decide cases while departing from the foregone conclusion that the
plans in question are unconstitutional on the basis of race. Unfortunately, as
we argued earlier, the facts are not always as helpful as the courts would need
them to be.

We thus conclude that it is now time to abandon the expressive harms
enterprise and resort to the much more relaxed Davis standard. Two reasons
lead us to this view. We have already explained the first: Courts simply are
unable to disentangle racial from political considerations. The court records,
common sense, and statistical data all support this assertion. Justice Thomas
provides a foundation for the second. As he wrote in his concurring opinion
in Holder v. Hall: "We would be mighty Platonic guardians indeed if Con-
gress had granted us the authority to determine the best form of local govern-
ment for every county, city, village, and town in America." And yet, he con-
cluded:

the pluralistic bazaar. They do not need the judiciary to do their bidding for them. See
GIRARDRAU SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN
CONTEMPORARY AMERICA 3 (1993) (contemplating that best course of action is for minorities
"to avoid the Supreme Court and to concentrate on ordinary politics as the means for advancing
minority interests"); see also Karlan, supra note 21 (making specific reference to voting rights
arena).

Under our constitutional system, this Court is not a centralized politburo appointed for life to dictate to the provinces the 'correct' theories of democratic representation, the 'best' electoral systems for securing truly 'representative' government, the 'fairest' proportions of minority political influence, or, as respondents would have us hold today, the 'proper' sizes for local governing bodies.\textsuperscript{367}

His point was aimed expressly at the Court's Section 2 jurisprudence. On its own terms, however, it may be extrapolated to the "expressive harms" area. Without question, the Court is acting like the Platonic guardians that Justice Thomas and many others so deride. Worse yet, the Court is sending with these cases, and its racial cases in general, a much more pernicious message:

The Court's decisions, with their heated rhetoric about "political apartheid" and "balkanization" and their potential eviction of half the black members of Congress, are far more likely than race-conscious districting "to carry us further from the goal of a political system in which race no longer matters -- a goal that the Fourteenth and Fifteenth Amendments embody and to which the Nation continues to aspire."\textsuperscript{368}

To our minds, this is an expressive harm of a far more noxious form.\textsuperscript{369} Its time has come.

\textsuperscript{367} Id.

\textsuperscript{368} Karlan, supra note 142, at 287, 311 (citation omitted).

\textsuperscript{369} See Karlan, supra note 142, at 305 ("[T]o tell black citizens, who have organized to lobby for and obtain the districts they prefer, that their common interests are illusory or unworthy of satisfaction is chillingly reminiscent of the assertion that blacks have 'no rights which the white man [is] bound to respect.'") (citations omitted). See generally Higginbotham et al., supra note 267 (calling on Supreme Court to modify Shaw I before it results in decline of recent black political gains).