# UNPACKING AND APPLYING

**SHAW v. RENO**

**THOMAS C. GOLDSTEIN***

**TABLE OF CONTENTS**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Introduction</strong></td>
<td>1136</td>
</tr>
<tr>
<td><strong>I. Background</strong></td>
<td>1138</td>
</tr>
<tr>
<td>A. Racial Classifications and Individual Rights</td>
<td>1138</td>
</tr>
<tr>
<td>1. Explicit classifications:</td>
<td></td>
</tr>
<tr>
<td>City of Richmond v. J.A. Croson Co.</td>
<td>1139</td>
</tr>
<tr>
<td>2. Facially neutral classifications:</td>
<td></td>
</tr>
<tr>
<td>Washington v. Davis</td>
<td>1140</td>
</tr>
<tr>
<td>B. Vote-Dilution and Group Rights</td>
<td>1141</td>
</tr>
<tr>
<td>1. United Jewish Organizations v. Carey</td>
<td>1143</td>
</tr>
<tr>
<td>2. Mobile v. Bolden</td>
<td>1144</td>
</tr>
<tr>
<td>3. The Voting Rights Act</td>
<td>1145</td>
</tr>
<tr>
<td><strong>II. Shaw v. Reno</strong></td>
<td>1147</td>
</tr>
<tr>
<td>A. The Facts</td>
<td>1147</td>
</tr>
<tr>
<td>B. The Supreme Court Decision</td>
<td>1151</td>
</tr>
<tr>
<td>1. The rejection of individual and group rights</td>
<td>1153</td>
</tr>
<tr>
<td>2. The emergence of social rights</td>
<td>1153</td>
</tr>
<tr>
<td><strong>III. How Far Does Shaw v. Reno Extend?</strong></td>
<td>1157</td>
</tr>
<tr>
<td>A. The Limited Holding of Shaw: A Purely</td>
<td>1157</td>
</tr>
<tr>
<td>Objective Inquiry</td>
<td></td>
</tr>
<tr>
<td>B. Question One: Is a Subjective Inquiry Relevant?</td>
<td>1161</td>
</tr>
<tr>
<td>1. The narrow view</td>
<td>1161</td>
</tr>
</tbody>
</table>

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*J.D. Candidate, May 1995, The American University, Washington College of Law; Editor-in-Chief (Volume 44), The American University Law Review; Project Director, Tribute to Justice Harry A. Blackmun. For their crucial general perspectives and support, special thanks to Amy, Francis, Adam (& Jane), Professor Ira Robbins, Nina Totenberg, the Honorable Charles R. Richey, and Ann Hubbard. For invaluable specific assistance, thanks to Professors Herman Schwartz, Tom Sargentich, and Jamin Raskin, as well as two of the experts in Shaw v. Hunt, Dr. Allan Lichtman and Tom Hofeller. Finally, everyone interested in Shaw v. Reno owes a debt of gratitude to the authors in the Michigan Law Review's symposium on Shaw, particularly Professors Richard Pildes and Richard Niemi. To the extent this Note successfully critiques any of their work, it is only because they so quickly and clearly identified the critical issues. 
INTRODUCTION

The Fourteenth Amendment to the U.S. Constitution bars any state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." It has been the critical constitutional weapon in the battle against state-sanctioned racism ever since the

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U.S. Supreme Court’s landmark decision in Brown v. Board of Education. More recently, however, in an effort to extinguish all forms of race-based legislation, the Supreme Court has extended the application of the Fourteenth Amendment to state programs ostensibly designed to combat the effects of racial discrimination.

Shaw v. Reno represents another step in the Court’s effort. In Shaw, a five-Justice majority held that North Carolina may have violated the Fourteenth Amendment by adopting a congressional reapportionment plan that included districts so bizarrely shaped that the plan appeared to be an “obvious pretext” for racial classification. As a result of this holding, voting systems that cannot be explained on grounds other than race are constitutional only where narrowly tailored to fulfill a compelling state interest.

Notably, the Court in Shaw v. Reno shunned precedents limiting the application of the Fourteenth Amendment to state action that deprives individuals of a cognizable individual or group right. Those decisions had presented major barriers to plaintiffs seeking to challenge voting systems designed with race in mind. Therefore, if Shaw eventually is read to condemn not only “obvious pretexts” for racial classification, but also all voting systems in which race is a substantial or motivating consideration, attempts to increase minority representation in state legislatures and the U.S. Congress will be in grave danger. With that concern in mind, this Note attempts to divine the intended scope of Shaw v. Reno and develop a coherent means of implementing the decision.

Part I introduces the legal standards relevant to the case. Part II provides the factual background of Shaw v. Reno and the Supreme Court’s analysis of the case. Part III considers the Court’s holding in detail by addressing three questions concerning the decision’s future application. Finally, Part IV provides a three-stage analysis for implementing Shaw.
I. BACKGROUND

The first sentence of the majority opinion in Shaw v. Reno acknowledges that the decision lies at the intersection of the Fourteenth Amendment's application to racial classification and voting rights.\(^8\) Shaw involved racial classification because the plaintiffs alleged that the lines in North Carolina's congressional redistricting plan were drawn on the basis of race.\(^9\) Alternatively, the case concerned the right to vote because "[a] reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses."\(^10\) The plan therefore determined which ballots were cast in which district, not how the State treated a particular racial group.

Understanding the distinctions between the law applied to voting rights and the law applied to racial classification provides great insight into the issues raised by Shaw v. Reno. While both areas of jurisprudence have roots in the history of discrimination in the United States, they have diverged over time and are now subject to different standards of review. The Court's application of these two areas of law was therefore critical to the outcome in Shaw.

A. Racial Classifications and Individual Rights

De jure discrimination against minorities, the rule for much of American history, initially was legitimated by the Supreme Court.\(^11\) In the 1950s and early 1960s, however, the Court adopted the view that express discrimination on the basis of race violated individual rights inherent in the Fourteenth Amendment's guarantee of equal protection.\(^12\) Measures that are explicitly racially discriminatory thus

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8. Shaw v. Reno, 113 S. Ct. at 2819 (noting that case involved "the meaning of the constitutional 'right' to vote, and the propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups").
9. Id. at 2821.
10. Id. at 2826.
11. See Plessy v. Ferguson, 163 U.S. 537, 548-49 (1896) (declaring constitutional Louisiana statute that required railway companies to provide "equal but separate" accommodations for black and white passengers). It is widely accepted that by upholding the "separate-but-equal" doctrine, the Court in Plessy provided both the doctrinal and constitutional framework for racial segregation. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.5, at 605 (4th ed. 1991).
12. See, e.g., Schiro v. Bynum, 375 U.S. 395, 395 (1964) (stating that public auditorium may not be racially segregated); Johnson v. Virginia, 373 U.S. 61, 62 (1963) (holding that state may no longer constitutionally require segregation of courtroom seating); State Athletic Comm'n v. Dorsey, 359 U.S. 533, 533 (1959) (declaring unconstitutional Athletic Commission rules designed to prevent white and black boxers from competing against each other); Gayle v. Browder, 352 U.S. 903, 903 (1956) (holding that statute permitting segregation on public buses violates Equal Protection Clause); Holmes v. City of Atlanta, 350 U.S. 879, 879 (1955) (declaring rule prohibiting blacks from playing on municipal golf courses unconstitutional); Mayor of
are subject to strict judicial scrutiny and are sustained only where narrowly tailored to fulfill a compelling state interest.\textsuperscript{13}

\textbf{1. Explicit classifications: City of Richmond v. J.A. Croson Co.}

\textit{City of Richmond v. J.A. Croson Co.}\textsuperscript{14} exemplifies the Supreme Court's recent treatment of explicit racial classifications. \textit{Croson} involved a Richmond, Virginia affirmative action program that required the city to subcontract at least thirty percent of all city contracting funds to businesses owned and controlled by minorities.\textsuperscript{15} A white-owned-and-controlled construction firm, which had been awarded a contract but claimed that it was unable to meet the subcontracting requirement,\textsuperscript{16} alleged that the program constituted racial discrimination in violation of the Equal Protection Clause.\textsuperscript{17} The city defended the program as a benign effort to rectify the effects of historical discrimination.\textsuperscript{18}

Five Justices concluded that the Fourteenth Amendment applied to state and local affirmative action programs in the same fashion as it did to the discriminatory classifications considered in the 1950s and 1960s.\textsuperscript{19} The plurality opinion provided three justifications for applying strict scrutiny.\textsuperscript{20} First, just as earlier racially discriminatory practices had violated the individual rights of minorities, the construction preference discriminated against white contractors, who

\begin{itemize}
  \item Baltimore v. Dawson, 350 U.S. 877, 877 (1955) (holding that segregation of public beaches and bathhouses is unconstitutional);
  \item Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (declaring segregated schools unconstitutional by overruling "separate-but-equal" framework of \textit{Plessy v. Ferguson} in school context because "[s]eparate educational facilities are inherently unequal").
  \item Beginning with \textit{Brown}, these cases established that explicit state-instituted racial classifications would be subject to strict scrutiny review.
\end{itemize}


\textsuperscript{14} \textit{488 U.S. 469} (1989).


\textsuperscript{16} \textit{Id. at 482-83}.

\textsuperscript{17} \textit{Id. at 476}.

\textsuperscript{18} \textit{Id. at 498}.

\textsuperscript{19} \textit{Id. at 493} (plurality opinion); \textit{Id. at 520} (Scalia, J., concurring).

\textsuperscript{20} \textit{Id. at 493} (plurality opinion). In contrast to the strict scrutiny standard of review applied to local and state affirmative action programs in \textit{Croson}, the Court in \textit{Metro Broadcasting, Inc. v. FCC}, \textit{497 U.S. 547} (1990), applied the less stringent intermediate standard of review to a federal affirmative action program. \textit{Metro Broadcasting, Inc. v. FCC}, \textit{497 U.S. 547}, \textit{564-65} (1990). At issue in \textit{Metro Broadcasting} were two minority-preference programs designed to promote minority ownership of radio stations. \textit{Id. at 552}. The Court justified the less stringent standard of review because the FCC minority-ownership programs were "approved—indeed, mandated—by Congress." \textit{Id. at 563}. Thus, by upholding the affirmative action program, the Court deferred to Congress, a co-equal branch of government. The Court found that the remedial measures "serve[d] important governmental objectives within the power of Congress and [were] substantially related to achievement of those objectives." \textit{Id. at 564-65}. 
were prevented from competing equally with minority contractors.\textsuperscript{21} Second, the racial classification itself "carr[ied] a danger of stigmatic harm."\textsuperscript{22} Finally, it was not possible to tell whether the program was truly benign without applying the strict scrutiny standard, which would "'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."\textsuperscript{23}

Applying this standard, the Court struck down the Richmond program as violative of the Equal Protection Clause.\textsuperscript{24} While an affirmative action program would fulfill a compelling state interest where there was a "'strong basis in evidence for [the] conclusion that remedial action was necessary,'"\textsuperscript{25} there was no specific evidence of previous discrimination in the Richmond construction industry.\textsuperscript{26} Moreover, because the thirty percent set-aside was based on the "'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population," the Court did not consider the program to be narrowly tailored.\textsuperscript{27}

2. \textit{Facially neutral classifications:} Washington v. Davis

The Supreme Court has also addressed "facially neutral" measures, which, while not expressly mentioning race, nonetheless are alleged to discriminate on the basis of race.\textsuperscript{28} In \textit{Washington v. Davis}, the Court considered a challenge to "Test 21," the District of Columbia Police Department's admissions examination, which black applicants disproportionately failed.\textsuperscript{30} Several black police officer candidates who had failed the exam sued the city alleging that the test violated the Fourteenth Amendment.\textsuperscript{31} The plaintiffs did not provide any direct evidence that the city had purposefully discriminated against

\textsuperscript{21} Croson, 488 U.S. at 493 (plurality opinion).
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id. at 499, 511.
\textsuperscript{25} Id. at 500 (quoting Wygant v. Jackson Bd. of Educ., 477 U.S. 267, 277 (1986)).
\textsuperscript{26} Id. at 499.
\textsuperscript{27} Id. at 507 (quoting Sheet Metal Workers v. EEOC, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)).
\textsuperscript{28} Washington v. Davis, 426 U.S. 229, 241 (1976). In a facially neutral measure, "the necessary discriminatory racial purpose [is not] express[ed] or [does not] appear on the face of the statute." Id.
\textsuperscript{29} 426 U.S. 229 (1976).
\textsuperscript{30} Davis, 426 U.S. at 234-35, 237 (acknowledging that four times as many black candidates as white candidates failed test).
\textsuperscript{31} Id. at 232-33.
blacks, arguing instead that the failure rate itself objectively established that the test was unconstitutionally discriminatory.\textsuperscript{32}

The Supreme Court, by a seven-to-two majority, held that the Fourteenth Amendment forbids only purposeful discrimination.\textsuperscript{33} Additionally, although evidence of disproportionate impact could provide inferential evidence of a discriminatory purpose, it could not alone establish a constitutional violation.\textsuperscript{34} Because the plaintiffs could not prove directly that the test was "a purposeful device to discriminate," their claim was therefore dismissed.\textsuperscript{35} One year later, the Supreme Court expounded on the purpose requirement, holding that the Equal Protection Clause is violated when race is a "substantial" or "motivating" factor in the State's decisionmaking.\textsuperscript{36}

3. Vote-Dilution and Group Rights

Although the right to vote is fundamental,\textsuperscript{37} racial minorities historically have faced substantial obstacles as they tried to exercise the franchise. Until barred from doing so by the Fifteenth Amendment,\textsuperscript{38} States adopted measures that explicitly prevented minorities from voting or, alternatively, granted the franchise only to white males.\textsuperscript{39} After the Fifteenth Amendment was adopted, States

\textsuperscript{32}  Id. at 235.

\textsuperscript{33}  Id. at 242.

\textsuperscript{34}  Id.

\textsuperscript{35}  Id. at 252.


\textsuperscript{37}  See Reynolds v. Sims, 377 U.S. 553, 562 (1964) (describing right to vote as "preservative of other basic civil and political rights").

\textsuperscript{38}  U.S. CONST. amend. XV, § 1 (providing that right to vote may "not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude"). Other constitutional provisions prohibit poll taxes in federal elections, id. amend. XXIV, § 1, and determine that the minimum voting age may not be set above age 18, id., amend. XXVI, § 1. Additionally, the Fourteenth Amendment requires strict scrutiny review of racial classifications that impede access to voting. See Kramer v. Union Free Sch. Dist., 395 U.S. 621, 625-27 (1969) (requiring "exacting examination" of state voting requirements to ensure citizens' effective voice in governmental affairs); Harper v. Virginia State Bd. of Elections, 385 U.S. 663, 666 (1966) (holding that Equal Protection Clause bars invidious discrimination in voting restrictions); Tribe, supra note 2, § 13-10, at 1085 ("The most formidable constitutional obstacle for most franchise restrictions, however, is the Equal Protection Clause."). For example, while all prospective voters may constitutionally be required to pass a literacy test, a government requirement that only blacks take the test would be subject to strict scrutiny. See Louisiana v. United States, 380 U.S. 145, 151-53 (1965) (striking down test requiring voters to engage in constitutional interpretation because registrars used test to exclude black voters); cf. Lane v. Wilson, 307 U.S. 268, 275 (1939) (holding that Fifteenth Amendment "nullifies sophisticated as well as simple-minded" means of preventing blacks from voting).

attempted to preserve the privileged status of whites by adopting various facially neutral means of discrimination, such as poll taxes, literacy tests, and grandfather clauses, that prevented blacks from voting. Additionally, States implemented measures to reduce the likelihood that black candidates would win elections. These "vote-

40. See Higginbotham & Smith, supra note 39, at 1125 (explaining desire of whites to maintain political power).

41. See, e.g., Harper, 383 U.S. at 666 (discussing Virginia's poll taxes, which excluded poor blacks from voting); South Carolina v. Katzenbach, 383 U.S. 301, 310-13 (1966) (recounting how Southern states enacted measures, specifically designed to prevent blacks from voting and structured safeguards so that whites, including those who were illiterate, would not be deprived of right to vote); Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53-54 (1959) (describing literacy tests requiring that all prospective voters be able to read and write any section of North Carolina Constitution); Guinn v. United States, 238 U.S. 347, 350-52 (1915) (discussing grandfather clause that freely granted right to vote to descendants of families that could vote before enactment of Fifteenth Amendment). Although such laws were facially neutral, the Court held that these measures violated the Fourteenth Amendment where they had the purpose and effect of discriminating.

This standard is illustrated by Hunter v. Underwood, 471 U.S. 222 (1985). In that case, Alabama citizens challenged § 182 of the Alabama Constitution, which barred voting by any person convicted of committing a crime "of moral turpitude." ALA. CONST. of 1901, art. VIII, § 2. This class of offenses omitted serious crimes, such as second degree manslaughter, encompassing instead specific misdemeanors disproportionately committed by blacks. Hunter, 471 U.S. at 226-27. The plaintiffs, who were disenfranchised because they had been convicted of passing bad checks, alleged that their Fourteenth Amendment right to equal protection was violated. Id. at 225. Justice Rehnquist, writing for a unanimous Court, applied the standard that "[p]resented with a neutral state law that produces disproportionate effects along racial lines . . . ['p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Id. at 227-28 (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977)). To satisfy this test, the plaintiffs provided evidence that the provision had been adopted with the purpose of fostering white supremacy. See id. at 229. The Court found that race was a "but-for" motivation for the enactment of the provision, notwithstanding the State's claim that the provision was also intended to disenfranchise poor whites. Id. at 232. Additionally, the plaintiffs established that the restriction had the effect of disenfranchising blacks much more often than whites. See id. at 227 (sustaining circuit court's finding that 10 times as many blacks were disenfranchised as whites). Accordingly, the Court struck down the provision as violative of the Fourteenth Amendment. Id. at 233.

42. See Shaw v. Reno, 113 S. Ct. 2816, 2825 (1993) (discussing how guarantee of equal access to polls does not ensure elimination of other racially discriminatory voting practices). The Court in Shaw noted that various vote-dilution techniques, such as multi-member or at-large electoral systems, can be just as detrimental to the minority voting rights as an "absolute prohibition on casting a ballot." Id. (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969)); see also Linda F. Williams, The Constitution and the Civil Rights Movement: The Quest for a More Perfect Union, in VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY: ESSAYS ON THE HISTORY OF VOTING AND VOTING RIGHTS IN AMERICA 97, 100 (Donald W. Rogers ed., 1990) (listing barriers to electoral participation by blacks). Specifically, the barriers include:

(1) minority vote dilution through sophisticated legal and administrative barriers such as at-large electoral systems, racial gerrymandering, unfair candidate slating procedures, and run-off requirements; (2) class barriers to participation such as poverty and lack of education; (3) psychological barriers such as lack of a habit of voting derived from years of exclusion from voting, fear, deference to whites, apathy; and (4) institutional obstacles such as the problem of inadequate information concerning voter registration requirements and procedures, the often inconvenient time and place of registration, and the scarcity of black registration officials, especially in the South.

Williams, supra, at 100.
"dilution" techniques sprang from the recognition that the voting strength of blacks as a group could be manipulated to make it much less likely that a black candidate would win an election.43

1. United Jewish Organizations v. Carey

One vote-dilution technique was “racial gerrymandering,” the manipulation of electoral boundaries along racial lines.44 Racial gerrymandering took several forms: minority communities were “packed” into a single district to decrease their influence across the state,45 “stacked” in a district with an even larger white majority,46 or “cracked” into several districts to minimize their strength in any one district.47

In United Jewish Organizations v. Carey (UJO),48 the Supreme Court considered a challenge to a New York legislative reapportionment49 that “cracked” a white Hasidic community into two districts, thus

43. See Williams, supra note 42, at 102 (explaining that vote-dilution techniques have effect of denying blacks and other minorities opportunity to cast “meaningful” ballot, which, in turn, prevents minorities from electing candidate of their choice).

44. See Shaw v. Reno, 113 S. Ct. at 2823 (defining racial gerrymandering as “the deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes”) (quoting Davis v. Bandemer, 478 U.S. 109, 164 (1986) (Powell, J., concurring in part and dissenting in part) (alterations in original)). Gerrymandering is theoretically possible whenever the boundaries of any political subdivision are altered. See BLACK'S LAW DICTIONARY 687 (6th ed. 1990) (stating that gerrymandering occurs in process of “dividing a state or other territory into the authorized civil or political divisions”). No consensus, however, exists as to how much boundary lines may be manipulated before gerrymandering has occurred. See, e.g., Charles Backstrom et al., Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota, 62 MINN. L. REV. 1121, 1122 n.7 (1978) (applying threshold of “excessive manipulation” of boundaries); Richard L. Engstrom, Post-Census Representational Districting: The Supreme Court, “One Person, One Vote,” and the Gerrymandering Issue, 7 S.U. L. REV. 173, 217 (1981) (describing judiciary’s attempts to measure gerrymandering as very subjective); Bernard Grofman & Harold A. Scarrow, Current Issues in Reapportionment, 4 LAW & POL’Y Q. 435, 454 (1982) (analyzing gerrymandering as “discrimination against” a group of voters).

Not only is it unclear what actions constitute gerrymandering, but any number of motives may be involved. See, e.g., Kirksey v. Board of Superiors, 408 F. Supp. 285, 299 (S.D. Miss. 1979) (discussing racial motivation); Nickel v. School Bd., 61 N.W.2d 566, 575 (Neb. 1953) (referring to unreasonable or “unlawful” purpose); State ex rel. Reynolds v. Zimmerman, 126 N.W.2d 551, 564 (Wis. 1964) (analyzing partisan motivation); State v. Whitford, 11 N.W. 424 (Wis. 1882) (discussing religion, nationality, and “improper” purposes).

Furthermore, attempts to define gerrymandering may be fruitless because they assume that there is some neutral way to draw the boundaries of political subdivisions. See Daniel H. Lowenstein & Jonathan Steinberg, The Question for Legislative Districting in the Public Interest: Elusive or Illusory?, 33 UCLA L. REV. 1, 10-11 (1985) (arguing that there is no way to identify neutral plan because selection criteria used to arrive at plan are necessarily subjective and biased).

45. Shaw v. Reno, 113 S. Ct. at 2840 (White, J., dissenting) (citing Voinovich v. Quilter, 113 S. Ct. 1149, 1155 (1993)).

46. Id. (citing Frank R. Parker, Racial Gerrymandering and Legislative Reapportionment, in MINORITY VOTE DILUTION 85, 92 (C. Davidson ed., 1984)).

47. Id. (citing Connor v. Finch, 431 U.S. 407, 422 (1977)).


raising the proportion of one district's minority population to sixty-five percent.\footnote{Id. at 152. The State initially enacted a plan that assigned the white Hasidic community to a single electoral district. \textit{Id}. The United States Attorney General rejected that plan pursuant to § 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1988), because several districts did not have a sufficiently large minority population. \textit{UJO}, 430 U.S. at 152-53; \textit{see also infra notes 76-78 and accompanying text} (describing operation of § 5).} Representatives of the Hasidic community challenged the New York plan, alleging "that they were assigned to electoral districts solely on the basis of race, and that this racial assignment diluted their voting power."

The Supreme Court rejected the plaintiffs' claims. Two Justices, relying on \textit{Washington v. Davis},\footnote{\textit{UJO}, 430 U.S. at 153.} held that the intentional use of race to increase minority electoral success did not constitute purposeful discrimination against whites.\footnote{\textit{UJO}, 430 U.S. at 179-80 (Stewart, J., concurring).} A separate three-Justice plurality held that the plaintiffs had not established a sufficient discriminatory effect because, while cases such as \textit{Croson} and \textit{Davis} had been grounded in the individual right to be free from racial discrimination, "The individual voter in the district with a nonwhite majority has no constitutional complaint merely because his candidate has lost out at the polls . . . . Some candidate, along with his supporters, always loses."\footnote{\textit{Id}. at 166 (plurality opinion).} The plurality therefore required the plaintiffs to establish a violation of their group right to not be excluded from the political process.\footnote{\textit{Id}.} Because whites constituted sixty-five percent of the county population and remained a majority in seventy percent of the electoral districts, the plurality held that no such discriminatory effect existed.\footnote{\textit{Id}.}

2. \textit{Mobile v. Bolden}

States employed other vote-dilution techniques, such as the use of multi-member and at-large election systems, to ensure that white votes always outnumbered black votes.\footnote{\textit{Shaw v. Reno}, 113 S. Ct. 2816, 2823 (1993) (describing use of multi-member and at-large systems to reduce ability of minority groups to elect candidates of their choice). The genre of single-member districts at issue in \textit{UJO} emerged as a result of courts striking down at-large systems, like the one at issue in \textit{Bolden}, on vote-dilution grounds.} In \textit{Mobile v. Bolden},\footnote{446 U.S. 55 (1980).} the Supreme Court considered the at-large system of electing the three-member city commission of Mobile, Alabama.\footnote{Mobile v. Bolden, 446 U.S. 55, 58 (1980) (plurality opinion).} Under the at-large
system, every voter voted for all three commissioners. Because voting was racially polarized and whites constituted a majority of the population, white candidates always garnered more votes than black candidates. As a result, no black candidate had been elected to the city commission in sixty-five years, despite the fact that blacks constituted slightly more than one-third of the Mobile population. Black voters challenged the system on the grounds that it diluted their voting strength in violation of the Fourteenth and Fifteenth Amendments.

In a six-to-three decision, the Supreme Court rejected the plaintiffs' claims. A four-Justice plurality, applying Washington v. Davis, held that the plaintiffs must prove that the city had engaged in purposeful discrimination. The plurality gauged discriminatory purpose by the same group-rights standard used by the UJO plurality to gauge discriminatory effect: exclusion from the political process. Thus, "legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities." Because the plaintiffs failed to prove that Mobile had adopted the at-large system with the required discriminatory intent, the Court dismissed their claim.

3. The Voting Rights Act

Reacting to voting discrimination, Congress enacted the Voting Rights Act of 1965. The VRA was intended "to banish the blight of racial discrimination in voting which ha[d] infected the electoral process in parts of our country for nearly a century." While its terms encompass a variety of voting rights, sections 2 and 5 of the VRA are particularly relevant to Shaw v. Reno.

As amended in 1982, section 2 codifies the standard that the UJO plurality drew from the Fourteenth Amendment: those voting systems...
that have the effect of excluding a racial group from the political process are unlawful. Unlike Mobile v. Bolden, however, section 2 applies even where no purposeful discrimination occurs. In Thornburg v. Gingles, the Supreme Court held that section 2 applies where three conditions are satisfied: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group must be "politically cohesive"; and (3) the majority must "vote[] sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 

Under section 5, a state with a history of voting discrimination must receive federal approval, or "preclearance," from either the U.S. Attorney General or a special three-judge panel of the U.S. District Court for the District of Columbia before implementing any change in a "standard, practice, or procedure with respect to voting." Section 5 preclearance will be refused if the submitting authority cannot establish that "the submitted change [does not have] the purpose . . . or effect of denying or abridging the right to vote." In this context, discriminatory effect is gauged by whether the change will either lead to a "retrogression" in minority voting strength or constitute a "clear violation" of section 2.

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73. See id. § 1973(b) (applying VRA to circumstances where group members "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice").
75. 478 U.S. 30 (1986).
77. 42 U.S.C. § 1973c (1988). Section 5 coverage may extend over an entire state or be limited to specific counties. See id. § 1973b(a)(1) (noting application "with respect to such [political] subdivision as a separate unit" from state).
78. 28 C.F.R. § 51.52(a) (1993) (assigning burden of proof to submitting authority).
79. Id.
II. SHAW V. RENO

A. The Facts

The 435 seats in the U.S. House of Representatives are distributed among the states on the basis of population.82 A roughly proportionate distribution of seats is maintained by altering the number assigned to each state every ten years according to the results of the U.S. census.83 It was through this process that, in 1990, North Carolina gained a twelfth congressional district.84 With an additional district to fit within the state, the North Carolina General Assembly set out to reapportion its congressional map.

The General Assembly had to consider several factors when it began the reapportionment process. An initial concern was a federal constitutional requirement that all of the state's districts have almost identical populations.85 A second concern for the predominantly Democratic General Assembly was its partisan desire to see members of the Democratic party elected from the state by designing most of the districts to include a majority of Democratic voters.86 The design

85. U.S. CONST. art. 1, § 2; see Karcher, 462 U.S. at 734 (stating that all practicable steps must be taken to avoid even small population variations). This requirement has had a direct impact on district shape. See 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, 574 (1993) (noting that equal population requirement has resulted in compromise of other considerations, including compactness). With an odd-numbered population of 6,628,637, Brief for Federal Appellees at app. D, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-357) [hereinafter Federal Brief], North Carolina could not be divided into 12 exactly equal districts, but it could come very close. The largest district in the State’s final reapportionment plan had a population of 552,387, only one more person than the smallest district. Id.
86. John Hood, Republican Quota Fiasco, REASON, Nov. 1993, at 51, 51; see also Shaw v. Reno, 113 S. Ct. at 2841 n.10 (White, J., dissenting) (discussing influence of partisan factors in design of North Carolina plan). One very effective way of facilitating a political party’s success is to create districts with a majority of voters who favor that party. See Davis v. Bandemer, 478 U.S. 109, 128 (1986) (noting that legislators’ knowledge of “likely political composition” allows design of districts that probably will result in election of particular party’s representative). In 1986, the Supreme Court tried to reduce extreme “partisan gerrymandering” by holding that the Fourteenth Amendment bars reapportionment plans that have both the purpose and effect of discriminating against a political group. Id. at 127. A lawsuit filed before Shaw v. Reno and with different plaintiffs claimed that the North Carolina reapportionment plan constituted an unconstitutional political gerrymander. Pope v. Blue, 809 F. Supp. 392, 397 (W.D.N.C.), aff’d, 113 S. Ct. 3 (1992). The plaintiffs alleged that the General Assembly, in an attempt to protect Democratic incumbents, had not created a majority-black district in the southern part of the state. Id. at 396. Pursuant to the Supreme Court’s decision in Bandemer, a three-judge district court panel dismissed the suit because the state had designed several districts with an electoral majority of Republican voters. Id. at 397. The Supreme Court summarily affirmed. Pope v.
of the State's final reapportionment plan was most notable, however, for the influence of two other factors: race and incumbency.

North Carolina's voting-age population is approximately seventy-eight percent white, twenty percent black, and two percent other minorities. Despite the size of the black population, a black congressional representative had not been elected from the state in this century. The Supreme Court, through decisions such as Mobile v. Bolden, had ruled that electoral systems enacted with the purpose of discriminating on the basis of race were unconstitutional. Section 2 of the Voting Rights Act similarly prohibited electoral systems that resulted in a discriminatory effect. With a voting-age population that is twenty percent black, North Carolina was therefore under both constitutional and statutory pressure to create one or more districts with a majority of black voters (majority-black districts). The crucial issues were how many majority-black districts to create and where to place them.

While the black population of North Carolina is generally dispersed, one major area of concentration lies along the state's coastal plain. Fully aware of this fact, the General Assembly voted to enact a reapportionment plan that included a single majority-black district centered in the northern part of that region. By designing only one of the twelve districts to be majority-black, the State increased the re-election chances of its eleven white incumbent representatives.

Because forty of the state's 100 counties have a history of voting discrimination on the basis of race, North Carolina is subject to section 5 of the VRA. The State accordingly submitted the

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87. Federal Brief, supra note 85, at app. D.
89. 446 U.S. 55 (1979); see also supra Part I-B-2 (discussing Bolden).
90. Mobile v. Bolden, 446 U.S. 55, 62 (1979) (stating that Fifteenth Amendment forbids racial discrimination in regard to voting); see also Rogers v. Lodge, 458 U.S. 613, 616 (1982) (holding that Fourteenth Amendment prohibits multi-member districts intended to discriminate on basis of race); White v. Regester, 412 U.S. 755, 765-66 (1973) (holding that State may not use multi-member districts to dilute voting strength of racial minorities); Allen v. State Bd. of Elections, 399 U.S. 544, 549 (1969) (acknowledging that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot").
92. Shaw v. Reno, 113 S. Ct. at 2820 (citing OLÉ GADE & H. DANIEL STILLWELL, NORTH CAROLINA: PEOPLE AND ENVIRONMENTS 65-68 (1986)).
93. Id.
94. See Pildes & Niemi, supra note 85, at 517 (arguing that incumbency and desire to increase Democratic control resulted in bizarre boundaries of district 12).
95. Shaw v. Reno, 113 S. Ct. at 2820.
reapportionment plan to the U.S. Attorney General. The Attorney General in turn refused to preclear the plan because the State had not established that the reapportionment had been adopted without a discriminatory intent or effect. This refusal was supported by the General Assembly's rejection of alternative plans that would have created a second district in which minorities were a majority of the population (a majority-minority district). Rather than fight the Attorney General's ruling in court, the State went back to the drawing board.

In refusing to preclear the North Carolina reapportionment plan, the Attorney General strongly suggested creating a second majority-minority district in the southern part of the coastal plain. This district would have combined the voting strength of the region's substantial black and native American populations. In considering this possibility, the General Assembly was concerned with the fate of Representatives Rose and Hefner, the white Democratic incumbents from the southern part of the coastal plain. Representative Rose in particular chaired the House subcommittee with jurisdiction over subsidies for tobacco, a critical North Carolina cash crop. His district, district 7, had a high minority population and, as a general rule, minority voters elect a higher proportion of Democrats than do white voters. Thus, if too many minority voters were removed from district 7 and replaced by white voters, Representative Rose might lose to a Republican. On the other hand, if Rose's district were designed to be a majority-minority district, he might lose to a minority candidate.

98. See Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, to Tiare B. Smiley, Special Deputy Attorney General, State of North Carolina (Dec. 18, 1991), appended to Federal Brief, supra note 85, at app. B10a-11a [hereinafter Letter from Dunne] (stating that North Carolina had not sustained its burden of showing that legislative choices did not violate § 5 of VRA).
99. Id.
100. Shaw v. Reno, 113 S. Ct. at 2820.
101. Letter from Dunne, supra note 98, at 10a. The Attorney General suggested that population patterns made "the south-central to southeastern region of the state" particularly well-suited for such a district. Id.
102. Federal Brief, supra note 85, at app. D.
104. See Polsby & Popper, supra note 74, at 653 (noting that race was relevant to North Carolina legislature "only after they had other, more important fish fried," including protection of Representative Rose).
105. Federal Brief, supra note 85, at app. D.
The General Assembly resolved this tension between race and incumbency by leaving the southern coastal plain alone. Still seeking to create a second majority-minority district, the State instead designed a district that connected North Carolina's other major concentrations of black residents, urban neighborhoods in the state's central piedmont region.\(^{107}\) When this revised reapportionment plan (the North Carolina plan) was resubmitted pursuant to section 5, the Attorney General did not object,\(^{108}\) and it became law.\(^{109}\)

In their final form, the two majority-black districts\(^{110}\) are best known for their shapes (see Figure 1). The first, district 1, has been compared to a "bug splattered on a windshield"\(^{111}\) and a "Rorschach ink blot test."\(^{112}\) Though situated primarily in the northern coastal plain, the district extends southward in several bands, absorbing pockets of black populations close to the South Carolina border.\(^{113}\) The even more infamous district 12, stretches approximately 160 miles across the center of the state and at times is no wider than Interstate 85, along which it runs (see Figure 2).\(^{114}\) Justice O'Connor noted:

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107. Shaw v. Reno, 113 S. Ct. 2816, 2820 (1993). The State designed district 12 to draw 80% of its population from cities of 20,000 or more persons. Trial testimony of Gerry Cohen at 331-35, 343-44, Shaw v. Hunt, No. 92-202-CIV-5-BR (E.D.N.C. Raleigh Div. 1994). The primarily rural district 1, in contrast, draws 80% of its population from areas outside cities of 20,000 or more persons. Id.


110. The districts were constructed by including portions of 17 of the 19 North Carolina counties that contained at least 20,000 black residents. Brief for State Appellees at 5, Shaw v. Reno, 113 S. Ct. 2816 (1993) (No. 92-837) [hereinafter State Brief]. In districts 1 and 12, blacks constitute a majority of both the total population and "voting-age population." Id. at 5 n.6. Establishing a majority of the voting-age population is considered essential in redistricting because total population figures are less likely to reflect accurately those individuals who will cast ballots. See Angelo N. Annette & Kathryn K. Imahara, Multi-Ethnic Voting Rights: Redefining Vote Dilution in Communities of Color, 27 U.S.F. L. Rev. 815, 865-66 (1993) (indicating that voting-age population is more accurate determinant of actual voting strength than total population). Minority groups tend to have more persons below the age of 18, so the proportion of minority groups in the total population is greater than their proportion in the voting-age population. See, e.g., McNeil v. Springfield Park Dist., 851 F.2d 937, 944 (7th Cir. 1988) (explaining that while blacks are majority in local population in two single-member districts, they do not have majority voting-age population). Blacks constitute 57.26% of the total population of district 1 but only 53.40% of the voting-age population; for district 12, the figures are 56.63% and 55.34%, respectively. State Brief, supra, at 83A. In district 1, blacks are 52.41% of the registered voters; for district 12, the figure is 54.77%. Stipulations of the Parties, Shaw v. Hunt, No. 92-202-CIV-5-BR (E.D.N.C. Raleigh Div. 1994). Blacks make up no more than 21% of the voting-age population in any other district. State Brief, supra, at 83A. For the state as a whole, blacks constitute approximately 22% of the total population and 20% of the voting-age population. Id. Whites, on the other hand, constitute 76% of the state's total population and 78% of the voting-age population. Id.


114. See id. at 2820-21.
Northbound and southbound drivers on I-85 sometimes find themselves in separate districts in one county, only to "trade" districts when they enter the next county. Of the 10 counties through which District 12 passes, five are cut into three different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing them.\footnote{Id. at 2843 (Blackmun, J., dissenting).}

In the 1992 congressional elections, North Carolina's first black representatives since Reconstruction were elected from district 1 and district 12.\footnote{Id. at 2843 (Blackmun, J., dissenting).}

\textbf{FIGURE 2: NORTH CAROLINA DISTRICT 12}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{nc_district_12.png}
\caption{North Carolina District 12}
\end{figure}

\footnote{Id. at 2821 (citing Brief for Republican National Committee as Amicus Curiae at 14-15).}

\footnote{Id. at 2843 (Blackmun, J., dissenting).}

\footnote{Shaw v. Barr, 808 F. Supp. at 470 (E.D.N.C. 1992), rev'd sub nom. Shaw v. Reno, 113 S. Ct. 2816 (1993). This fact has created substantial confusion as to whether Shaw vindicated the rights of only white voters. Compare, e.g., Bernard Grofman, \textit{High Court Ruling Won't Doom Racial Gerrymandering}, CHI. TRIB., July 9, 1993, at 19 ("Every newspaper story I have read mistakenly talks about Shaw in terms of protecting the 'constitutional rights of white voters.' . . . [T]he white Republicans who brought Shaw did not allege that whites were harmed by the plan and 'did not even claim to be white.'") with James A. Barnes, \textit{Washington Update}, 25 NAT'l J. 1712, 1712 (1993) (contending that Shaw v. Reno held that North Carolina may have abridged rights of white voters). The Supreme Court in Shaw v. Reno, however, unambiguously held that race
reapportionment in federal court, claiming that the plan violated the Equal Protection Clause of the Fourteenth Amendment. A divided three-judge panel of the U.S. District Court for the Eastern District of North Carolina dismissed the case, holding that the plaintiffs had failed to state a cognizable claim. The plaintiffs then appealed to the Supreme Court, which noted probable jurisdiction and reversed.

B. The Supreme Court Decision

In *Shaw v. Reno*, the Supreme Court addressed the plaintiffs' claim that North Carolina had engaged in unconstitutional racial gerrymandering by drawing bizarrely shaped districts along racial lines. In a five-to-four decision, the Court concluded that the plaintiffs had stated a cognizable claim. Writing for the majority, Justice O'Connor stated:

"Today we hold only that appellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate..."

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118. The plaintiffs were five residents of Durham County, North Carolina. *Shaw v. Barr*, 808 F. Supp. at 462. Under the North Carolina plan, three vote in district 12, while two vote in neighboring district 2. *Id.* at 464.

119. *Id.* The plaintiffs sought both declaratory and injunctive relief. *Id.* The equal protection issue was the only claim against the State that the Supreme Court resolved. *See Shaw v. Reno*, 113 S. Ct. at 2892 (explaining that Court did "not decide whether appellants' complaint stated a claim under constitutional provisions other than the Fourteenth Amendment"). Before the district court, the plaintiffs invoked several other constitutional provisions, including the Fifteenth Amendment, the Privileges and Immunities Clause of the Fourteenth Amendment, and Article I, §§ 2 and 4 of the Constitution. *Shaw v. Barr*, 808 F. Supp. at 468. The Article I, § 4 challenge was based on the theory that North Carolina should have created its congressional districts without federal control. *See id.* (citing Complaint at 10-11, 14-15). The district court rejected that claim, holding that Article I does not prevent Congress from exercising the power to validate a redistricting plan through the Voting Rights Act. *See id.*

120. *Id.* at 473.


123. *Id.* at 2824.

124. *Id.* at 2832.
voters into separate voting districts because of their race, and that the separation lacks sufficient justification.\textsuperscript{125} The case was then remanded to the district court to determine if the North Carolina plan could be explained in terms other than race and, if not, whether the plan could satisfy the strict scrutiny standard.\textsuperscript{126}

1. The rejection of individual and group rights

The fundamental barrier to the Shaw v. Reno plaintiffs' claim was that they could not establish that they were the victims of an injury previously held cognizable by the Supreme Court. Even though black candidates had won the elections in districts 1 and 12, an individual-rights claim was not available to the white Shaw v. Reno plaintiffs because the Supreme Court in Mobile v. Bolden had refused to recognize an individual's right to vote for a winning candidate.\textsuperscript{127} The Shaw majority similarly rejected out of hand the plaintiffs' claim that individuals possessed a "constitutional right to participate in a 'color-blind' electoral process."\textsuperscript{128}

In place of an individual rights theory, the Supreme Court in Bolden and UJO had turned to a group's right not to be excluded from the political process.\textsuperscript{129} This theory, however, was similarly unavailable in Shaw. As to intent, the plaintiffs did not allege that North Carolina had purposefully minimized white voting strength.\textsuperscript{130} As to effects, whites constituted eighty percent of the state population but remained a majority in ten of twelve, or eighty-three percent, of its congressional districts.\textsuperscript{131} The plaintiffs, therefore, could not overcome the UJO plurality's conclusion that unconstitutional vote dilution occurs only where a group is denied roughly proportional representation in the political process.\textsuperscript{132}

2. The emergence of social rights

Because the Shaw v. Reno plaintiffs could not state a claim under either an individual rights or a group rights theory, the Supreme

\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Mobile v. Bolden, 446 U.S. 55, 66 (1980) (plurality opinion); see also supra Part I-B-2 (discussing Bolden).
\textsuperscript{128} Shaw v. Reno, 113 S. Ct. at 2824 ("This Court never has held that race-conscious state decisionmaking is impermissible in all circumstances.").
\textsuperscript{129} See supra notes 54-55, 66-68 and accompanying text (recounting use of group rights theory in UJO and Bolden).
\textsuperscript{130} See Shaw v. Reno, 113 S. Ct. at 2838 (White, J., dissenting) (arguing that claim would "strain[] credulity").
\textsuperscript{131} See id. (applying population statistics).
\textsuperscript{132} United Jewish Orgs. v. Carey, 430 U.S. 144, 167 (1977) (plurality opinion).
Court easily could have dismissed the case. The five-Justice majority, however, declined to do so, instead adopting a never before recognized theory of social harms. That theory is best understood by tracing three analytical steps taken by the majority.

First, the majority modified fundamentally, though subtly, the principle underlying the Fourteenth Amendment's bar to racial classifications. Previous decisions had recognized that a State may not discriminate against individuals and groups on the basis of race. In Croson, the white-owned-and-controlled construction firm claimed to be unable to compete fairly with minority firms. In Bolden, blacks claimed that the at-large electoral system excluded them from the political process. Conversely, under any previously recognized theory, the white voters in Shaw v. Reno had not been discriminated against: as just noted, there is no right to vote for a winning candidate and whites as a group were proportionally over-represented under the North Carolina plan.

According to the majority in Shaw, however, the Fourteenth Amendment's "central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race." The State's failure to utilize any salient individual or group characteristic to discriminate against the plaintiffs was therefore irrelevant. If the State adopted a measure "that explicitly distinguish[ed] between individuals on racial grounds," the plaintiff's claim would then "fall within the core of [the Fourteenth Amendment's] prohibition."

The difficulty with applying a bar to explicit classifications in Shaw v. Reno is that the North Carolina reapportionment plan does not

133. See Shaw v. Reno, 113 S. Ct. at 2824 (recharacterizing plaintiffs' colorblindness claim as objection to obvious pretext for racial classification); id. at 2830 (distinguishing vote-dilution precedents as "analytically distinct"). The Court noted that the plaintiffs did not allege that white voting power had been diluted and, in fact, had entirely avoided identifying their race in their complaint. Id. at 2824. Instead, the plaintiffs' claim was that the North Carolina reapportionment plan was itself a racial classification, as evidenced by the district's bizarre boundaries. Id. The facts of UJO were therefore distinguishable because the New York boundaries challenged in that case had been fairly regular in shape. Id. at 2829.

137. Bolden, 446 U.S. at 66 (plurality opinion).
139. Id. at 2824 (emphasis added). In so doing, the Court rejected the rationale of the plurality opinion in UJO, which was based on the State's permissible benign use of race. See supra notes 52-56 and accompanying text. This passage may prove to be the lasting legacy of Shaw. To say that race may not be used to discriminate between, or distinguish, individuals is very close to saying that race may not be used at all.
140. Shaw v. Reno, 113 S. Ct. at 2824.
explicitly mention race, as it includes only geographic data that denotes the boundaries of various districts. As it is facially neutral, he plan presumably would be governed by Washington v. Davis. In its second analytical step, however, the majority in Shaw chose to treat the case as a challenge to an "obvious pretext for racial classification." This distinction is critical for two reasons. First, the Davis standard requires only that race be a substantial or motivating factor in the State's decision, while the significantly more stringent obvious pretext standard requires proof that the State's decision is "unexplainable on grounds other than race." Second, according to the Court, an obvious pretext is the legal equivalent of an explicit

141. See supra Part I-A-2 (discussing Davis).
144. Arlington Heights, 429 U.S. at 266. In applying the obvious-pretext standard, the Shaw v. Reno majority drew primarily on two decisions: Guinn v. United States, 238 U.S. 347 (1915), and Gomillion v. Lightfoot, 364 U.S. 339 (1960). In Guinn, the Supreme Court considered an amendment to the Oklahoma State Constitution that required voters to be able to read and write. Guinn, 238 U.S. at 357. Specifically at issue was a facially neutral "grandfather clause" that exempted from the literacy test those persons entitled to vote before 1866 and their descendants. See id. at 358-59 (noting that amendment did not explicitly discriminate based on race, color, or previous condition of servitude); id. at 364 (explaining that literacy test "contains no word of discrimination"). The test disenfranchised almost exclusively blacks because before 1870, when the Fifteenth Amendment was adopted, only whites and some Indians could vote in Oklahoma. Id. at 357. The Supreme Court unanimously held that the grandfather clause violated the Fifteenth Amendment. Id. at 364-65.

Gomillion concerned a plan to redraw the city boundary of Tuskegee, Alabama. The challenged statute created an "uncouth" 28-sided municipal boundary that "fenced out" 99% of the city's former black voters, but no whites. Gomillion, 364 U.S. at 340-41. The Supreme Court held that black citizens who had been removed from the municipal confines by the plan had a cognizable claim under the Fifteenth Amendment. See id. at 346.

The element common to both Guinn and Gomillion was that the challenged measures, while not explicit racial classifications, operated in such a fashion as to be unexplainable on grounds other than race. See Guinn, 238 U.S. at 363 (concluding that Oklahoma amendment "rest[ed] upon no discernible reason other than the purpose to disregard the prohibitions of the [Fifteenth] Amendment") (emphasis added); Gomillion, 364 U.S. at 346 (holding that when "legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment"). Both the Oklahoma literacy test and the Tuskegee boundary excluded almost exclusively blacks. For that reason, the plaintiffs were not required to prove that they had been subjected to purposeful discrimination. Gomillion, 364 U.S. at 347; Guinn, 238 U.S. at 365.

In discussing Guinn and Gomillion, however, the Shaw v. Reno majority omitted a critical consideration. In both cases the plaintiffs proved that the challenged measures caused individual or group harms to blacks. The Oklahoma amendment prevented blacks from voting, Guinn, 238 U.S. at 357, and the Tuskegee boundary deprived blacks of city services and the ability to vote in municipal elections, Gomillion, 364 U.S. at 341. Such a harm was conspicuously absent in Shaw. See supra notes 127-132 and accompanying text.
racial classification,\textsuperscript{145} and is therefore governed by the standard applied in \textit{City of Richmond v. J.A. Croson Co.}.\textsuperscript{146}

The Court's first two analytical steps still left the fundamental flaw in the \textit{Shaw} plaintiffs' claim unaddressed: What cognizable injury had they suffered? Precluded by precedent from applying either individual or group rights, the majority chose to announce a heretofore unrecognized class of social harms.\textsuperscript{147} Drawing on the statement in \textit{Croson} that racial classifications can cause racial stigmatization,\textsuperscript{148} the Court in \textit{Shaw v. Reno} held that racial classifications are so """"odious to a free people whose institutions are founded upon the doctrine of equality""""\textsuperscript{149} that proof of individual or group harm is not required to state an actionable claim.\textsuperscript{150}

According to the Court, social harms arise from the public's perception that the government is engaging in race-based decisionmaking.\textsuperscript{151} The majority highlighted the distinct nature of this form of injury with its concern that """"obvious[\textsuperscript{152}]") racial gerry-
mandering "signal[s]" and "sends" a "message"\textsuperscript{153} that "immediately offends principles of racial equality,"\textsuperscript{154} the "perception" of which reinforces "stereotype[s]."\textsuperscript{155} It is through such perceptions that "[c]lassifying citizens by race . . . threatens special harms."\textsuperscript{156} This theory of social rights applies to both explicit classifications and obvious pretexts for racial classification.\textsuperscript{157}

The majority in \textit{Shaw v. Reno} found that social effects occur in the reapportionment context when racial gerrymandering is unexplainable on grounds other than race. First, an obvious pretext "bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls."\textsuperscript{158} Second, elected representatives develop the false impression that they should represent only the interests of the racial group for whom the district was designed,\textsuperscript{159} a result that "threatens to undermine our system of representative democracy."\textsuperscript{160}

\section*{III. How Far Does \textit{Shaw v. Reno} Extend?}

\subsection*{A. The Limited Holding of \textit{Shaw}: A Purely Objective Inquiry}

After \textit{City of Richmond v. J.A. Croson Co.}, challenges to racial classifications, whether ostensibly benign or not, generally must proceed directly to the application of strict scrutiny review.\textsuperscript{161} In the racial gerrymandering context, however, before strict scrutiny is applied,\textsuperscript{162} \textit{Shaw v. Reno} requires an involved inquiry into whether the challenged reapportionment actually constitutes a racial classification. Limited to its explicit holding, \textit{Shaw} requires that the inquiry be completely objective.\textsuperscript{163}

\begin{thebibliography}{9}
\item 153. \textit{Id.} at 2827-28.
\item 154. \textit{Id.} at 2829.
\item 155. \textit{Id.} at 2827; \textit{see also id.} at 2824 ("resembles"); \textit{id.} at 2827 ("resemblance").
\item 156. \textit{Id.} at 2828.
\item 157. \textit{See id.} at 2825 (noting that "[t]hese principles apply not only to legislation that contains explicit racial distinctions, but also to" obvious pretexts).
\item 158. \textit{Id.} at 2827; \textit{see also id.} at 2828 (discussing resulting "racial stereotypes").
\item 159. \textit{Id.} at 2827.
\item 160. \textit{Id.} at 2828.
\item 161. \textit{See supra} notes 19-23 and accompanying text (outlining standard applied in \textit{Croson}).
\item 162. \textit{See infra} Part IV-E (discussing application of strict scrutiny in racial gerrymandering context).
The Court applied an objective standard in Shaw because, in theory, objective factors are the lens through which the public perceives the State's subjective intent in designing the reapportionment map. For example, boundaries that mirror a coastline appear to have been drawn by the government in an effort to design a waterfront district. Objective factors thus serve as proxies for direct evidence of intent; through them, intent can be inferred.165

This general notion of inferential proof can be applied to the objective factor most relevant in Shaw itself, shape. The Court was clear that noncompact districts do not themselves cause a constitutionally cognizable injury. Instead, distorted boundaries are relevant for what they represent. Implicit in Shaw is the idea that the public has developed an expectation that congressional districts will be relatively compact. When this expectation is fulfilled, no public suspicions are aroused. On the other hand, when a district is bizarrely shaped, the public realizes that some other consideration has become more important to the legislature than compactness.168

Shaw rests on the theory that the public can in turn determine what consideration has superseded the norm of compactness. As the dissenting Justices acknowledged, bizarre boundaries can be a "helpful indicator" and "powerful evidence of an ulterior purpose behind the shaping of those boundaries." Particularly relevant to Shaw, when the boundaries mirror "racial lines" it becomes apparent that race has become the overriding consideration in the reapportionment process. It is from this public understanding that social harms arise from objective factors.

Harvard Leading Case, supra note 147, at 195 (explaining that Court in Shaw held that "race-based, serpentine cartography gave rise" to Fourteenth Amendment claim) (emphasis added) with id. ("The Court concluded that race-conscious line-drawing itself could violate the Constitution.") (emphasis added).

164. See Jeffers v. Tucker, No. H-L-89-004, 1994 WL 71471, at *12 (E.D. Ark. Mar. 8, 1994) (Eiselle, J., concurring) (treating shape as objective indication of racial motivation); Sperling, supra note 136, at 289-90 (concluding that shape "merely serves the probative function of demonstrating" existence of obvious pretext); see also infra note 232 (describing flaws of using objective evidence as proxy for direct evidence of State's purpose).

166. Shaw v. Reno, 113 S. Ct. at 2827.
167. See Pildes & Niemi, supra note 85, at 502 ("While there may be no 'natural district shapes,' baseline expectations emerge from developed customs and practices.").
170. Id. at 2843 (Stevens, J., dissenting).
171. Cf. Stuart Taylor, Jr., Making a Mess Instead of a Rule for Racial Gerrymanders, RECORDER, July 13, 1993, at 6 (arguing that best explanation of Court's concern with shape is that "some shapes show that race was not merely one of several criteria, but the overriding criterion").
The difficulty with using objective criteria to determine if a reapportionment statute classifies individuals by race is that such measures do not explicitly assign individuals at all. Rather than stating "black citizens vote here, white citizens vote there," a reapportionment identifies and assigns tracts of land.\(^{172}\) In other words, reapportionment statutes are facially neutral.\(^{173}\) The challenge for a court applying Shaw, then, is to isolate those factors that objectively indicate that the State is utilizing race-based decisionmaking.

The objective inquiry begins with a map. In addition to shape, district lines should be examined in light of, among other things, geographic and topographic features, urban/rural divisions, political subdivisions, population concentrations,\(^{174}\) and state boundaries.\(^{175}\) Characteristics of the individuals within the districts are also relevant.\(^{176}\) In addition to race, these include age, economic status, religion, education, and community and political affiliation.\(^{177}\) The variety of criteria is so wide, in fact, that the objective inquiry is best understood by the only factor that it excludes: direct evidence of the State's purpose. As the inquiry is purely objective, the State need not establish that such factors actually motivated a reapportionment's design.\(^{178}\)

\(^{172}\) Shaw v. Reno, 113 S. Ct. at 2826.
\(^{173}\) See supra note 28 and accompanying text (discussing facial neutrality).
\(^{174}\) See infra notes 357-62 and accompanying text (addressing objective factors, including traditional districting principles, relevant to obvious pretext claim). The majority in Shaw referred to such factors in the context of the State's rebuttal of the plaintiffs' prima facie case, Shaw v. Reno, 113 S. Ct. at 2827, but they are just as relevant to the plaintiffs' initial claim of obvious pretext. See Hays v. Louisiana, 839 F. Supp. 1188, 1200 (W.D.LA. 1993), statement of prob. jur. filed, 92 U.S.L.W. 3670 (U.S. Apr. 12, 1994) (No. 93-1539).
\(^{175}\) See, e.g., Maryland congressional district 1; Washington congressional district 2.
\(^{176}\) See Aleinikoff & Issacharoff, supra note 106, at 619 ("[U]nless the map shows demographic data, there is no basis for inferring anything about the racial makeup of the constituency.").
\(^{177}\) See infra notes 357-62 and accompanying text (addressing objective factors, including personal characteristics, relevant to obvious pretext claim).
\(^{178}\) This conclusion is based on (1) the nature of objective inquiries generally, (2) the majority's use of phrases such as "cannot be understood," Shaw v. Reno, 113 S. Ct. at 2828, rather than the straightforward verb "is," and (3) the fact that the plaintiffs' case is premised on the claim that the reapportionment will be perceived publicly as a racial classification and therefore cause social harms: because the perceptions are based on the plan, rather than direct evidence of the factors that led to the plan's construction, any alternative nonracial perception reduces the likelihood of social harms.

That conclusion is debatable, however, in light of the majority's discussion of a district that "concentrated the bulk of the black population in a "shoestring" Congressional district running the length of the Mississippi river" as an example of a racial gerrymander. Shaw v. Reno, 113 S. Ct. at 2823 (quoting ERic FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 590 (1988)). If Shaw permits the State to justify districts based on nonracial factors that it did not even consider, why could this district not be defended as objectively designed to trace the path of the river? It is likely that such a defense would in fact be available under Shaw, but ultimately insufficient to defeat a racial gerrymandering claim for three reasons. First, strong direct evidence of racial motivation was available. See id. at 2823 (noting that district was
It is not enough for the reviewing court to amass the relevant data. A determination must be made whether the reapportionment's design was excessively motivated by racial considerations. More specifically, the court must decide whether the plan is an obvious pretext for racial classification, i.e., whether it is "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race."\(^{179}\)

While the majority in Shaw v. Reno was clear that the obvious pretext standard is exacting,\(^{180}\) it was similarly clear that two burdens are not placed on plaintiffs.\(^{181}\) First, no direct evidence that the State purposefully utilized race is required.\(^{182}\) Second, no evidence of either individual or group harm is required.\(^{183}\) Proof of an obvious pretext both establishes the State's intent and sufficiently triggers the Court's concern for social harms.

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\(^{179}\) Id. at 2832. The district court in Hays v. Louisiana applied this language very differently, concluding that it concerned only the plaintiffs' prima facie effort to create an inference of the State's improper racial motivation. \(^{179}\) Hays, 839 F. Supp. at 1202; cf. infra Part IV-C (outlining elements of plaintiffs' prima facie case). The court in Hays concluded that strict scrutiny review was required when the State used race as a "significant[]" or "important factor." \(^{179}\) Hays, 839 F. Supp. at 1202 n.46; see also id. at 1202 (applying test of whether "plan can be reasonably conceived as the product of nonracial factors"). That approach, which is rejected in Part III-D of this Note, is blatantly contrary to the plain meaning of Shaw. In effect, the court in Hays held that the obvious pretext standard was relevant only as an allegation; the standard was treated neither as a burden of proof for the plaintiffs' prima facie case, nor as a burden of proof for the final resolution of the issue after the State's rebuttal. If relevant only as an unsupported allegation, the obvious pretext standard, which is repeated throughout the majority opinion in Shaw, see infra note 253, is relegated to the status of jurisprudential window dressing.

\(^{180}\) See infra notes 365-68 and accompanying text (discussing difficulty of satisfying obvious pretext standard).

\(^{181}\) These burdens relate to the plaintiffs' prima facie case, see infra Part IV-C. More evidence may be required based on the nature of the State's rebuttal, see infra Part IV-D.

\(^{182}\) See Shaw v. Reno, 113 S. Ct. at 2824-25 (explaining that "[n]o inquiry into legislative purpose" is required for explicit classification and that "[t]hese principles apply . . . also to" obvious pretexts for racial classification).

\(^{183}\) See Sperling, supra note 136, at 284; see also Shaw v. Reno, 113 S. Ct. at 2828 (explaining that classification "threatens special harms"); id. at 2832 ("Racial classifications with respect to voting carry particular dangers."); Pildes & Niemi, supra note 85, at 536 (concluding that courts are not required to evaluate existence of harms discussed in Shaw); supra Part II-B-2 (discussing nature of social harms). But see Calhoun, supra note 147, at 147 n.71 (contending that, on remand, plaintiffs must prove they suffer from harms discussed in Shaw).
The plaintiffs in Washington v. Davis attempted to prove their case with objective evidence: blacks disproportionately failed Test 21.184 The Supreme Court rejected that theory of the case as insufficient to establish purposeful discrimination and required the plaintiffs to come forward with direct evidence of the government’s motivation.185 A similar situation presents itself in the Shaw v. Reno context. If the plaintiffs cannot come forward with sufficient objective evidence of racial gerrymandering, may they rely on direct evidence that the State intended to draw districts along racial lines?186 Unfortunately, no answer is certain because the majority in Shaw explicitly left the question open.187

I. The narrow view

It is possible to limit Shaw v. Reno to its own terms, restricting the racial gerrymandering inquiry exclusively to inferences drawn from objective evidence. Direct evidence of the State’s intention would therefore be beyond the scope of the cause of action. This narrow view would substantially constrain the future application of Shaw by shielding from challenge those districts that generally conform to traditional districting principles, which by definition “could be explained” in nonracial terms.

This interpretation draws heavily on both Justice O’Connor’s admonition that “reapportionment is one area in which appearances do matter”188 and the majority’s frequent references to districts’ shape.189 Additionally, although the majority could have used North...
Carolina’s “avowed purpose”\(^\text{190}\) of complying with the race-based Voting Rights Act as explicit evidence of purposeful classification in Shaw itself, it chose to limit its holding to objective criteria.

2. The expansive view

An alternative interpretation of Shaw v. Reno would make direct evidence of the State’s intention, if not sufficient standing alone,\(^\text{191}\) at least relevant to the racial gerrymandering inquiry. Under this view, facts drawn from the legislative record and other sources of legislative intention, including evidence of efforts to comply with the Voting Rights Act, would weigh in favor of the plaintiffs’ claim that the State sought to construct a racial classification. Districts that are not extremely bizarre in appearance would therefore not be immune from challenge under Shaw. Several factors suggest that the Court will explicitly adopt this more expansive view in future decisions.

Initially, the majority opinion in Shaw v. Reno is not nearly so limited to bizarre shape as it appears at first glance. The Court described the structure of a racial gerrymandering claim in five passages. The two passages that specifically addressed the plaintiffs’ claim mention a requirement of distorted shape.\(^\text{192}\) The three other passages, however, do not discuss shape.\(^\text{193}\) Notably, the Court omitted any discussion of distorted shape when concluding its analysis.\(^\text{194}\)

The Court’s fundamental concern with race, rather than distorted boundaries, also lends substantial support for this more expansive view. In Fourteenth Amendment jurisprudence, racial classifications that any such right exists, Shaw v. Reno, 113 S. Ct. at 2827, suggesting that the Court did not intend such a result.


\(^{191}\) See infra Part III-C (considering whether racial gerrymandering claim may successfully be proven based only on direct evidence of State’s intention).

\(^{192}\) Shaw v. Reno, 113 S. Ct. at 2824 (“extremely irregular on its face”); id. at 2832 (“irrational on its face”).

\(^{193}\) Id. at 2826 (“lines [were] obviously drawn for the purpose of separating voters by race”); id. at 2828 (“rationally cannot be understood as anything other than an effort to separate voters”); id. at 2830 (“rationally cannot be understood as anything other than an effort to segregate citizens”).

\(^{194}\) Id. at 2828. While the Court’s holding speaks explicitly only to objective evidence, other language in the majority opinion suggests that the Court recognized that Shaw would later be extended to accommodate different facts. See id. at 2826 (stating that explicit holding applies only to facts where “proof sometimes will not be difficult at all,” thereby implying that different standard could apply where proof is more difficult). In a later case, the Court could conclude that Shaw v. Reno’s limited holding, which addresses only shape, was articulated in response to the Shaw plaintiffs’ specific claim that the North Carolina plan “contains district boundary lines of dramatically irregular shape,” id. at 2820.
are condemned only where they result from purposeful conduct.\(^{195}\)
This requirement was extended to racial gerrymandering in *Shaw v. Reno*, as the majority directed its holding to "deliberate\(^{196}\) and "purposeful[\]"\(^{197}\) "effort[s]\(^{198}\) of the State. An inquiry limited to objective factors, on the other hand, is directly contrary to the Court's view in *Washington v. Davis* that objective evidence will be insufficient absent direct proof of the government's intention.\(^{199}\)

This view is also consistent with the nature of the objective inquiry. When the State is unable to explain a district's shape, even based on traditional districting principles that were not considered in the reapportionment process, it becomes patent that the State purposefully created a racial classification\(^{200}\). For that reason, the majority asked not whether a district could be understood as anything other than segregation, but whether the district could be understood as anything other than an "effort to segregate."\(^{201}\) Fundamentally, it is "race-based districting by our state legislatures [that] demands close judicial scrutiny,"\(^{202}\) not the resulting districts themselves.

The social effects identified by the majority are consistent with this view that evidence of intention is relevant. While objective factors such as shape and racial composition cause social effects by highlighting the State's racial motivation, the majority's reasoning suggests that a district, if publicly perceived as race based, need not be overwhelmingly distorted to cause such harms. Racial stereotypes stem from the

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195. *Id.* The Court in *Shaw v. Reno* described racial classifications as involving intentional action. See, e.g., *id.* at 2824 ("purposely discriminating between individuals on the basis of race") (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)) (emphasis added); *id.* at 2825 ("polici[es] of assignment by race") (quoting United Jewish Orgs. v. Carey, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part)) (emphasis added); *id.* at 2824 ("[l]aws that explicitly distinguish between individuals on racial grounds") (emphasis added); *id.* at 2826 ("state legislation classifying citizens by race") (emphasis added).

196. *Id.* at 2823 (citing *Davis v. Bandemer*, 478 U.S. 109, 165 (1986) (Powell, J., concurring in part and dissenting in part)).

197. *Id.* at 2824 (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)).

198. *Id.* at 2832; cf. *id.* at 2819 (noting that case involved "race-based state legislation designed to benefit members of historically disadvantaged racial minority groups") (emphasis added); *id.* at 2824 (discussing plaintiffs' allegation that "the State engaged in unconstitutional racial gerrymandering"); *id.* (discussing plaintiffs' allegation of "deliberate segregation") (emphasis added).

199. See supra notes 33-36 and accompanying text (recounting Supreme Court's holding in *Washington v. Davis*).

200. In effect the State is told, "Come up with any excuse you can make up." If no nonracial excuse is forthcoming, then the reapportionment must be race-based. As Holmes instructed Watson, once one has eliminated every alternative, whatever remains, however improbable, is the answer. In this sense, the objective inquiry operates to some degree like strict scrutiny review, which "smoke[s] out" illegitimate uses of race. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).


202. *Id.* at 2832.
assumption that members of a particular racial group share a strict community of interest. Distorted boundaries may highlight these stereotypes, but they do not actually create them. Similarly, when a particular racial group is intentionally made the electoral majority in a district, the elected representative may perceive a mandate to cater to the interests of that group. Again, distorted boundaries may highlight the district's intended design, but the boundaries themselves do not create the design.\textsuperscript{203}

This result occurs because direct evidence of subjective intent can itself be objectively perceived. If the State openly admits that it designed districts in an effort to comply with the Voting Rights Act, such a pronouncement would be in the public eye just as would the districts' final construction.\textsuperscript{204} It is therefore critical that Justice O'Connor declared "appearances do matter,"\textsuperscript{205} a.k.a. the State's motivation must be "apparent,"\textsuperscript{206} not that "shapes matter."\textsuperscript{207}

The foregoing analysis strongly suggests that direct evidence of the State's intent should not be excluded from a racial gerrymandering challenge.\textsuperscript{208} Importantly, such evidence by definition differs from

\textsuperscript{203} The more limited view suggests, incorrectly, see infra notes 274-77, that there is a constitutional right to live in districts with boundaries that are not bizarre.

\textsuperscript{204} See Aleinikoff & Issacharoff, supra note 106, at 641 (concluding that obvious pretext exists "if the state has announced the race consciousness of its plan"). It is conceivable that social harms would not occur in this circumstance because the public would be fully aware that the State's purpose was remedial. See infra note 232 (discussing flaws of Shards reliance on objective factors).

\textsuperscript{205} Shaw v. Reno, 113 S. Ct. at 2827.

\textsuperscript{206} See supra Part II-B-2 (explaining importance of public perceptions to social harms).

\textsuperscript{207} But see Pildes & Niemi, supra note 85, at 536 (treating "appearances" as reference to shape).

\textsuperscript{208} Non-shape related evidence of purpose may also be impossible to exclude from a racial gerrymandering case. In Stage II of the prima facie inquiry, the State is permitted to introduce its own evidence of purpose in an effort to rebut the plaintiffs' claims. This evidence includes a whole range of districting and demographic criteria. See infra notes 357-62 and accompanying text (discussing factors available to State in rebutting inference of obvious pretext). Simple fairness would seem to permit the plaintiffs to introduce evidence, which would not necessarily be related to shape, to refute the State's claims. It may then be impossible to draw the line between the plaintiffs' attempt to disprove claims by the State and advance their own prima facie case.

Assuming that the expansive view is correct, why did the Shaw v. Reno majority fail to explicitly permit the introduction of all evidence of purposeful classification? There are at least two possible answers. First, the majority may simply have wanted to consider the impact of its decision in the lower courts before extending its holding even further. This is a specific application of the doctrine that the Supreme Court will not announce constitutional rules that are not necessary to the question presented in a case. See Gojack v. United States, 384 U.S. 702, 706 (1966) (noting that Court will not issue constitutional decision when question or case is decided on other grounds); Arkansas Louisiana Gas Co. v. Department of Pub. Utils., 304 U.S. 61, 64 (1938) (stating rule of Court that "no Constitutional question will be passed upon unless necessary for disposition of the pending case"). For example, the majority may have been wary of adopting a holding so far from its assertion of probable jurisdiction. See Shaw v. Barr, 113 S. Ct. 653 (1992).
objective proof by encompassing only those factors actually considered by the State in the districting process. This general conclusion, however, leads to another question: May plaintiffs prevail on a racial gerrymandering claim with only direct evidence of the State’s purpose and none of the objective factors discussed in Shaw v. Reno? Or, as Professors Aleinikoff and Issacharoff put the question, “Would geometry serve not only as a sword to condemn . . . but [also] as a shield to protect an otherwise suspect racial classification?” Again, this issue was explicitly left open in Shaw.

C. Question Two: Are There Threshold Objective Requirements?

1. The expansive view

An expansive reading of Shaw v. Reno is that there is no requirement of objective evidence. Under this view, a district that is utterly compact and does not demonstrate an untoward racial composition is still subject to challenge based on direct evidence that the State intended to create a racial classification. As it is di-

A second possible explanation is that omitting the distorted shape requirement would have required overruling United Jewish Orgs. v. Carey, 430 U.S. 144 (1977). The majority in Shaw v. Reno distinguished UJO by limiting it to compact districts. Shaw v. Reno, 113 S. Ct. 2816, 2829 (1993). The Court facilitated a future decision that would abandon the distorted shape requirement, however, by minimizing UJO’s importance and relevance. See id. at 2829-30 (describing UJO as “highly fractured” and concerned with “unconstitutional vote dilution”).

209. Rhetorically, one could describe a claim based purely on direct evidence as a “racial gerrymandering claim,” the verb form, while a purely objective claim would be against a “racial gerrymander,” the noun form. Unfortunately, however, two phrases are used interchangeably in Shaw. Compare, e.g., id. at 2821 (noting plaintiffs’ claim “that the State had created an unconstitutional racial gerrymander”) (emphasis omitted) with id. at 2824 (noting plaintiffs’ claim “that the State engaged in unconstitutional racial gerrymandering”).


211. See Shaw v. Reno, 113 S. Ct. at 2828 (stating Court’s determination to “express no view as to whether the intentional creation of majority-minority districts, without more, always gives rise to an equal protection claim”) (quoting id. at 2839 (White, J., dissenting)); see also id. at 2832 (declining to decide whether reasonably compact alternative to district 12 could be challenged under Fourteenth Amendment).

212. See Sperling, supra note 136, at 286 (arguing that Shaw requires “that courts must subject race-based redistricting to strict scrutiny”). But see id. at 290 n.5 (hypothesizing that majority in Shaw discussed shape in order to avoid applying strict scrutiny to all efforts to comply with Voting Rights Act).

213. See Jeffers v. Tucker, No. H-L-89-004, 1994 WL at 71471, at *12 (E.D. Ark. Mar. 8, 1994) (Eiselle, J., concurring) (“It is my opinion that race-conscious gerrymandering for the purpose of creating majority (or super-majority) legislative districts must meet the strict scrutiny requirements of the equal protection clause, whatever the appearance of the resulting district.”). This was the view adopted incorrectly, see infra Part III-C-3, by the district court in Hays v. Louisiana, 839 F. Supp. 1188, 1195 (W.D.L.A. 1993), statement of prob. jur. filed, 62 U.S.L.W. 3670 (U.S. Apr. 12, 1994) (No. 93-1539) (“Shaw primarily deals with the problem of proving racial gerrymandering indirectly or inferentially. . . But racial gerrymandering may—a fortiori—also be proved by direct evidence that a legislature enacted a districting plan with the specific intent of
vorced from the criteria so critical and unique in Shaw itself, shape and unusual racial composition, this interpretation would dramatically expand the number of redistricting plans that would be found to violate the Equal Protection Clause.

This view of Shaw seems to proceed easily from the previous conclusion that evidence of purpose is relevant. The majority was concerned with purposeful racial classification more than with distorted boundaries. Additionally, Washington v. Davis teaches the importance of directly proving the State's intention. As for the harms discussed by the majority, Justice O'Connor did not state that only the objective evidence presented by the plaintiffs in Shaw would yield a cognizable claim. Instead, the Court's concern was simply that the act of "[c]lassifying citizens by race . . . threatens special harms."216

2. The narrow view

A more narrow interpretation of Shaw is that plaintiffs must rely, at least to some degree, on objective evidence of racial gerrymandering. This reading of the decision begins with the notion that "appearances do matter." While, as noted above, this phrase does not translate into "shape does matter," the language emphasizes that the decision is implicated only where the challenged reapportionment's racial basis is "apparent" or "obvious.

This is no abstract requirement, as appearances relate directly to the majority's theory of social harms. Only when the public perceives decisionmaking as race based do stereotypes and distortions in the democratic process arise. Therefore, while it is true that shape is not the only conceivable trigger for social harms, there must be at least some trigger. When all the available objective evidence suggests that the State was motivated by nonracial considerations, such as compactness, it is very unlikely that the public will perceive the

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214. See supra Part III-B.
215. See supra notes 33-36 and accompanying text (discussing Supreme Court's holding in Davis).
216. Shaw v. Reno, 113 S. Ct. at 2828 (emphasis added); see Aleinikoff & Issacharoff, supra note 106, at 597 (arguing that majority of Supreme Court has concluded that "race-conscious measures warrant strict scrutiny" even absent proof of individual or group harms); id. at 683 ("[I]t is not clear why the same [dignitary] harm is not suffered in race-conscious districting regardless of the shape of the district.").
217. An even narrower view of Shaw is that direct evidence of the State's purpose is not at all relevant. That interpretation of the decision was rejected earlier in this Note. See supra Part III-B.
219. See supra Part II-B-2 (explaining importance of public perceptions to social harms).
programs districts as race based, no matter what direct evidence the plaintiffs can glean from the reapportionment process.220

3. The solution: a full examination of purpose

A strong case is presented by both the expansive and narrow views on whether some threshold level of objective evidence is required. It is certainly true that there must be public perceptions for social harms to occur. On the other hand, the underlying principle of Shaw is the impermissible use of race. In reality, however, these two positions are actually quite similar, and the differences turn on what one means by the State’s purpose.

Speaking broadly, in the Shaw v. Reno context, redistricting can be bifurcated into what Professors Pildes and Niemi refer to as Decision A and Decision B. 221 The reapportionment process begins with a virtually limitless number of possible district designs. 222 Decision A is to create one or more majority-minority districts. 223 Because the possible plans that include majority-minority districts are a limited subset of the larger pool, Decision A narrows the range of available redistricting options. This decision may be motivated by a desire to comply with the Voting Rights Act or any number of other concerns. Decision B is where to place the majority-minority district(s) on the state map and the particular shape(s) to be used, 224 which progressively reduces the range of options until a concrete reapportionment plan emerges.

In Shaw v. Reno, the theory behind the use of objective evidence is that a reapportionment map will publicly reflect the State’s subjective intent in designing the map. 225 For example, the fact that North Carolina districts 1 and 12 are majority-black, while the statewide average is approximately twenty-percent black, 226 reflects the State’s Decision A to intentionally create majority-minority districts and thereby satisfy the Attorney General’s section 5 concerns. Similarly,

220. See Aleinikoff & Issacharoff, supra note 106, at 610 (explaining Supreme Court’s logic that district’s “visible racial component . . . flashes the message: ‘RACE, RACE, RACE’”); id. at 614 (arguing that compact districts are perceived as based on nonracial factors); Harvard Leading Case, supra note 147, at 203 (arguing that without objective trigger, district “appears to be only an accident of geography”).
221. See Pildes & Niemi, supra note 85, at 517.
222. See Aleinikoff & Issacharoff, supra note 106, at 620; Pildes & Niemi, supra note 85, at 489.
223. See Pildes & Niemi, supra note 85, at 517 (contending that Decision A was actually made by Justice Department in requiring creation of second majority-black district).
224. See Pildes & Niemi, supra note 85, at 517.
225. See supra Part II-B-2.
226. Federal Brief, supra note 85, at app. D.
the fact that district 12 connects cities across the state's center reflects a Decision B to link urban areas.

In presenting evidence of intent, the plaintiffs will generally focus on Decision A because it is the choice to create a majority-minority district that is apt to be most race based. It is unquestionable that such evidence is relevant. For example, if the government makes a race-based decision to fire one of ten black police officers, but chooses the specific officer based on which of the ten was least efficient—a nonracial consideration, evidence of the initial decision would certainly be relevant in a discrimination suit. The same is suggested by the majority opinion in Shaw v. Reno, which discusses the State's race-based effort to secure section 5 preclearance.227

Accepting the relevance of Decision A, what of Decision B concerning district placement and design? The difficulty with excluding such evidence is that Decision A has no objective correlate. None of the factors discussed in Shaw v. Reno, such as traditional districting principles and economic status,228 are relevant until the district is actually designed and laid out on a map. Only then can the reapportionment be perceived, or not perceived, as a racial classification.

In contrast to Decision A, it is the State that is likely to rely on evidence of Decision B. This is true because nonracial factors come to the fore during the latter stages of the reapportionment process.229 For example, North Carolina refined its initial decision to create two majority-minority districts by designing district 12 to be predominately urban and by protecting incumbents.230 It is this type of evidence that the State would argue compensates for the race-based Decision A, so as to make the challenged reapportionment, on the whole,231 not an obvious pretext for racial classification.


228. See infra notes 357-62 and accompanying text (outlining factors relevant to State's rebuttal of plaintiffs' prima facie case).

229. See Pildes & Niemi, supra note 85, at 517.

230. See supra notes 85-109 and accompanying text (discussing factors considered by North Carolina in reapportionment process).

231. See infra Part IV-C-2 (setting out totality of circumstances approach to determining existence of racial classification). An extreme example is the threshold requirement that every district must have nearly equal populations. See Karcher v. Daggett, 462 U.S. 725, 738 (1983); Kilpatrick v. Preisler, 394 U.S. 526, 592 (1969). Any perception of the equal-population requirement's effect on district design is overwhelmed by all the other factors considered later.
This discussion clarifies the relationship between objective and subjective evidence. The objective evidence relevant in Shaw reflects the State's subjective intention throughout the reapportionment process. Most objective factors, however, arise as a result of the State's later Decision B concerning district design. When the plaintiffs are unable to identify any objective factors that demonstrate racial classification, it is therefore very likely that the State's Decision B was non-race-based. Accordingly, the narrow view — that the plaintiffs cannot succeed in a racial gerrymandering claim without some objective evidence — is simply the equivalent of requiring the plaintiffs to prove that the State's race-based Decision A has not been made sufficiently race-neutral by factors later considered in Decision B.

Understanding that Shaw v. Reno is premised on the belief that the State's intention, including Decision B, is reflected on the face of the reapportionment map also identifies a fundamental flaw in the decision's logic. What the State affirmatively chooses to do, for in the reapportionment process.

232. See Pildes & Niemi, supra note 85, at 517 ("[T]he case would then actually present a conflict between social perceptions and political realities."); Harvard Leading Case, supra note 147, at 199-200 (arguing that Shaw is "disturbingly rooted in objections to the way things look, rather than the way things are"). There are at least eight flaws in the use of objective evidence as a proxy for direct evidence of the State's purpose. First, objective evidence underestimates the State's use of nonracial factors because the State's race-neutral decision not to do something is not objectively reflected on a reapportionment map. Second, objective evidence overestimates the State's use of race because race-neutral concerns may force the State to select a district that is more obviously race-based than otherwise available alternatives. Third, the public cannot comprehend the vast range of factors the legislature considers in the reapportionment process by looking at the static result, a map. See Pildes & Niemi, supra note 85, at 585 (noting how "the design of even a single district . . . reflects the cumulation of hundreds of small decisions"). Fourth, in the reapportionment context, objective evidence necessarily includes data relating to both the challenged district and the surrounding area, see infra notes 296-97 and accompanying text (setting out rubber-band standard), the complexity of which the public is unlikely to comprehend fully. Fifth, the decision requires an unlikely depth of perception by the public: social harms assume the perception of the State's race-based decisionmaking, but not the State's benign motivation, e.g., rectifying previous voting discrimination, which would presumably mollify public perceptions. Sixth, the public may draw the wrong inference because one objective factor can have multiple possible explanations. For example, the design of a district that includes many urban areas could be based on urban interests generally, racial interests (because urban populations have disproportionately high minority concentrations), or political interests (because Democrats draw political strength from urban areas). Seventh, strictly applied, the objective standard allows the State to put forward justifications for the reapportionment's design that were not even considered in the redistricting process, see supra note 178 and accompanying text, a result contrary to the Court's concern in Washington v. Davis with purposeful discrimination. Eighth, an objective standard fails to identify many instances of gerrymandering. As explained by Justice White in his Shaw dissent, "[A] regularly shaped district can just as effectively effectuate racially discriminatory gerrymandering as an odd-shaped one. By focusing on looks rather than impact, the majority 'immediately casts attention in the wrong direction—toward superficialities of shape and size, rather than toward the political realities of district composition.'" Shaw v. Reno, 113 S. Ct. at 2841 (White, J., dissenting) (quoting Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and
example, create a primarily urban district, is objectively reproduced in the reapportionment plan. What the State chooses not to do, however, has no objective correlate. For example, North Carolina placed district 12 in the state's center in order to protect southern incumbents. While this nonracial consideration was critical to the district's design, no key on the reapportionment map notes that it was considered and it, accordingly, has no impact on the public's perception.

Not only is it therefore possible for the State's use of nonracial factors to be underestimated, but, conversely, the State's reliance on race may be overestimated. The North Carolina General Assembly placed district 12 in the state's central region largely for a nonracial reason, incumbency protection. In doing so, however, the State so substantially limited its options for creating a second majority-black district that the district must wind and twist for 160 miles in order to accumulate a sufficiently large minority population. As each curve in the district's boundary must correlate with race, the district appears to be designed only on the basis of race.

Limiting the racial gerrymandering inquiry to objective evidence and direct evidence of the State's intention in Decision A, but not Decision B, therefore deprives the reviewing court of evidence extraordinarily relevant to the State's defense. This plaintiff-favoring result is directly contrary to the stringent obvious pretext burden of proof applied in Shaw. It is also contrary to the spirit of Washington v. Davis, which suggests a direct inquiry into the State's intent as a means of explaining the plaintiffs' objective evidence.233

The conclusion that follows is that there are threshold objective requirements to a racial gerrymandering claim, in that objective factors are perceived by the public and reflect the State's intention in Decision B.234 That analysis, however, does not answer one remaining question: What standard of proof should courts apply to claims based in part on direct evidence of the State's purpose?

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233. See supra notes 33-36 and accompanying text (discussing Supreme Court's holding in Davis).

234. Cf. Harvard Leading Case, supra note 147, at 200 (concluding that Shaw v. Reno draws "important constitutional distinction between race-conscious line-drawing that results in strange shapes, and race-conscious line-drawing that results in squares and rectangles").
Limited to its explicit holding, *Shaw v. Reno* mandates that objective claims of racial gerrymandering satisfy the stringent obvious pretext standard, which requires that the challenged reapportionment be "unexplainable on grounds other than race." The preceding analysis suggested that the Supreme Court will likely move beyond that holding to permit the introduction of direct evidence of the State's intention in the reapportionment process. In voting-rights law, this is analogous to vote-dilution claims, which are based in part on direct evidence of the State's racial motivation. Importantly, a successful vote-dilution claim requires that race be only a substantial or motivating factor in the State's decisionmaking. The question arises, then, whether a racial gerrymandering claim that involves direct evidence of the State's intention is also to be resolved under the more permissive substantial or motivating factor standard.

That question can be answered by envisioning such a plaintiff's claim as a "hybrid" between a racial gerrymandering and a vote-dilution claim, which would involve the more permissive elements of both kinds of claims. As to purpose, the plaintiffs would prove that race was a substantial or motivating factor, but not the essentially exclusive consideration, utilized by the State; this aspect would resemble a vote-dilution claim. As to effect, the plaintiffs would not prove that they had been excluded from the political process, as required in vote-dilution claims, but instead would rely on the social harms of racial classifications; this aspect would resemble an obvious-pretext claim.

236. *Arlington Heights*, 429 U.S. at 266.
237. See *supra* notes 66-69 and accompanying text (discussing Supreme Court's holding in *Mobile v. Bolden*).
238. The substantial or motivating factor standard was applied to the voting-rights context in *Hunter v. Underwood*, 471 U.S. 228, 232 (1985). While *Hunter* concerned vote deprivation, and not vote dilution, it is likely that the same standard, drawn from *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977), would still apply. No matter what the particular burden of proof, however, the only point relevant here is that the obvious pretext standard is more stringent than that applied to vote-dilution claims.
239. See *Pildes & Niemi*, *supra* note 85, at 576 ("Whether in such situations the enhancement of minority representation must be a motivating factor, the dominant motivating factor, or the exclusive motivating factor remains an open question.").
1. The expansive view

Under one interpretation of *Shaw v. Reno*, such a hybrid claim would be allowed. This view is based on the belief that the Court finds the use of race in designing electoral systems so distasteful that proof of individual or group harm is no longer required, regardless of what standard of proof is applied. Two aspects of the majority's logic combine to support such a view. First, obvious-pretext claims are based on the Fourteenth Amendment's protection from racial discrimination and do not require proof of individual or group harms. Second, the majority held that the Fourteenth Amendment's "central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race." Therefore, whenever the State "purposefully discriminat[es] between individuals," proof of individual or group harms is not required, even where the challenged measure is not so extremely race based as to be an obvious pretext for racial classification.

If such claims were found to be cognizable, the number of successful challenges to electoral systems would increase substantially because the strict elements of vote-dilution and obvious-pretext claims currently present formidable barriers to plaintiffs. The *Shaw v. Reno* majority explicitly noted that obvious pretexts rarely will be established because the challenged measure must be unexplainable on grounds other than race. Similarly, vote-dilution claims are very difficult to prove because few groups can establish that they have been excluded from the political process.

A hybrid standard's impact on attempts to comply with the Voting Rights Act, which explicitly requires the consideration of race,
SHAW V. RENO

would be particularly troubling. States would be subject for trying to comply with the Act by those who felt that the criteria of section 2 did not require action or that the State's plan was not sufficiently narrowly tailored to comply with the Act. Alternatively, if States chose to ignore the Act, they would be subject to suit under the provisions of section 2 itself.\(^\text{246}\)

2. The Narrow View

Although the majority in \textit{Shaw v. Reno} did not explicitly address the issue of hybrid claims, there are substantial indications that the decision's holding will continue to be limited to obvious pretexts. Initially, the existence of a hybrid claim is inconsistent with both the \textit{Shaw} majority's announcement of an obvious-pretext claim and its affirmation of the Court's vote-dilution precedents.\(^\text{247}\) Plaintiffs stating a hybrid claim would establish that race was a substantial or motivating factor utilized by the State\(^\text{248}\) but would not prove any individual or group harm. There would therefore never be any need to plead the \textit{Shaw v. Reno} obvious-pretext claim, which includes the stricter requirement that race was essentially the only factor considered by the State.\(^\text{249}\) Similarly, there would never be any need to plead a vote-dilution claim, which includes the stricter requirement that the plaintiffs' racial group have been excluded from the political process.\(^\text{250}\) By requiring only the more permissive elements of both obvious-pretext and vote-dilution claims, a hybrid claim thus eliminates the constitutional relevance of either.

Furthermore, the harms discussed in \textit{Shaw v. Reno}, which are caused by the social perceptions of the existence of a racial classification,\(^\text{251}\) support the conclusion that a hybrid claim is not cognizable. Public stereotyping on the basis of race is encouraged where an election system is perceived to have been designed based only on race. Similarly, elected officials who perceive that their district was drawn

\(^{246}\) See supra notes 72-75 and accompanying text (discussing § 2 of VRA).

\(^{247}\) See, e.g., \textit{Shaw v. Reno}, 113 S. Ct. at 2825 (noting vote-dilution standard); \textit{id.} at 2828 (discussing and distinguishing vote-dilution decisions); \textit{id.} ("Classifying citizens by race . . . threatens harms that are not present in our vote-dilution cases."); \textit{id.} at 2829 (discussing application of vote-dilution standard in United Jewish Orgs. v. Carey, 430 U.S. 144 (1977)); \textit{id.} at 2829-30 (holding that "\textit{UJO} set forth a standard under which white voters can establish unconstitutional vote dilution").

\(^{248}\) See supra note 238 and accompanying text.

\(^{249}\) The expansive view thus assumes that the Supreme Court, while explicitly reaffirming \textit{UJO} and its other vote-dilution precedents, see supra note 247 and accompanying text, actually intended to \textit{sub silentio} overrule those same decisions. That is, at best, unlikely.

\(^{250}\) See supra notes 54-56 and accompanying text (discussing plurality opinion in \textit{United Jewish Organizations, v. Carey}).

\(^{251}\) See supra Part II-B-2.
to benefit one racial group's interests are more likely to cater to that
group. On the other hand, where no obvious pretext exists, the
challenged measure by definition can be explained, and therefore
perceived, on grounds other than race. 252

Much of the rhetoric utilized by the Court in Shaw also suggests
that hybrid claims will not be recognized in the future. Each time the
majority discussed the structure of a racial gerrymandering claim, it
included the requirement that the reapportionment could be
understood only as an obvious pretext for a racial classification.253
The Court also further restricted the scope of its holding with the
value-laden term "rationally." 254 This indicates that some form of
reasoning review applies, a far cry from a hybrid standard that would
condemn even those election systems in which race was only a
substantial or motivating consideration.

This painstaking attempt to limit the scope of Shaw v. Reno is
apparent throughout the Court's opinion. The majority repeatedly
emphasized that its concern was limited to those circumstances where
the State furthers "only" racial interests.255 Similarly, the Court
condemned legislation that is "race-based," 256 but not that which is
"race conscious."257 Justice O'Connor's rhetoric indicates that Shaw
v. Reno extends only to legislation that "will permit of no other
conclusion" 258 than that the districts were "obviously . . . created
solely" 259 on the basis of race by "disregarding" 250 nonracial
characteristics.

252. See supra Part II-B-2 (discussing relevance of perceptions to social harms).
253. See id. at 2824 ("can be viewed only"); id. at 2826 ("obviously drawn"); id. at 2828, 2830
("cannot be understood as anything other"); id. at 2832 ("can be understood only").
254. Id. at 2824 ("rationally can be viewed only"); id. at 2826, 2828, 2830 ("rationally cannot
be understood as anything other"); id. at 2829 ("rationally could be understood only").
255. Id. at 2824 ("rationally can be viewed only as an effort to segregate"); id. at 2826
("district lines [that] could be explained only in racial terms") (quoting Wright v. Rockefeller,
376 U.S. 52, 56 (1964) (Harlan, J., dissenting)); id. at 2829 ("rationally could be understood only
as an effort to segregate"); id. at 2832 ("reapportionment scheme so irrational on its face that
it can be understood only as an effort to segregate").
256. Ten different phrases similarly emphasized the stringent nature of the inquiry. See id. at 2824 ("rationally can be viewed only");
id. at 2825 ("unexplainable on grounds other"); id. ("could not be explained on grounds
other"); id. at 2826 ("could be explained only"); id. ("permit of no other conclusion"); id. at
2827 ("obviously . . . created solely"); id. at 2828 ("rationally cannot be understood as anything
other"); id. at 2829 ("immediately offends"); id. ("rationally could be understood only"); id. at
2830 ("cannot be understood as anything other"); id. at 2832 ("can be understood only").
257. Id. at 2832.
258. Id. at 2824; see also id. at 2826 ("That sort of race consciousness does not lead inevitably
to impermissible race discrimination.").
259. Id.
260. Id. at 2827.
Other aspects of the majority's opinion also demonstrate that the Court's intolerance for the use of race in the design of voting systems should not be overemphasized. The majority explicitly held that colorblindness is not required in reapportionment.\(^1\) Similarly, the majority clearly recognized the realities of the redistricting process:

[R]edistricting differs from other kinds of state decisionmaking 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. That sort of race consciousness does not lead inevitably to impermissible race discrimination.\(^2\)

This analysis suggests that *Shaw v. Reno* will be limited to obvious-pretext claims and not extended to permit hybrid claims that do not require proof of unconstitutional vote dilution. The decision, therefore, implicates only those election systems that are "unexplainable on grounds other than race."\(^3\) Having determined the scope of *Shaw v. Reno*, Part IV addresses the application of the obvious-pretext standard in practice.

IV. APPLYING THE OBVIOUS-PRETEXT STANDARD:
THE PRIMA FACIE CASE METHOD

In *Shaw v. Reno*, the Supreme Court held that racial gerrymandering claims are to be evaluated through the obvious pretext standard of review.\(^4\) The Court, however, was not explicit about the step-by-step process through which this standard is to be implemented.\(^5\) This section draws on the logic and language of the majority opinion to develop a three-stage inquiry that courts may use to apply *Shaw v. Reno*.

A. The Prima Facie Case Method Explained

The early academic reaction to *Shaw v. Reno* has been that sufficiently distorted boundaries conclusively establish the existence of an obvious pretext. According to Professors Pildes and Niemi, "[D]istrict appearance triggers strict scrutiny, after which jurisdictions must offer sufficient justifications to account for 'highly irregular'
Under this view, distorted boundaries provide such strong evidence of purposeful discrimination that no inquiry need be made into whether the State actually intended to engage in racial gerrymandering. In the strictest sense, this is jurisprudence of the "we know it when we see it" variety.

Support for this interpretation may be drawn from the decision's emphasis on shape. The plaintiffs stressed, and the Court agreed, that North Carolina's reapportioned boundaries appeared to be distorted along racial lines. Under this view, because shape automatically triggers strict scrutiny, all that remains is for North Carolina, on remand, to attempt to prove that the plan is narrowly tailored to further a compelling state interest.

There are two major problems with this "conclusive-proof" interpretation of Shaw v. Reno. Initially, it is inconsistent with the structure of obvious-pretext claims. While the plaintiffs' evidence may establish an inference of purposeful discrimination, the State still has an opportunity to rebut that inference. The strict scrutiny standard is applied only once the reviewing court concludes that the challenged measure "cannot be understood" in nonracial terms.

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266. Pildes & Niemi, supra note 85, at 587; see also Aleinikoff & Issacharoff, supra note 106, at 591 (concluding that Court in Shaw struck down North Carolina plan); id. at 523 ("We are unaware of any comparable example of presumptions of unconstitutionality being created exclusively by a departure from a norm that has no independent constitutional force."); Pildes & Niemi, supra note 85, at 575 ("Under Shaw, noncompactness functions as a trigger for strict scrutiny; once a district crosses a threshold of noncompactness, special burdens of justification apply."); Polsby & Popper, supra note 74, at 692 (contending that Supreme Court rejected North Carolina plan).

267. See Aleinikoff & Issacharoff, supra note 106, at 605 ("The 'bizarre' shape of the North Carolina district allowed the Court to forgo the search for race-dependent intent normally required in a case of a purportedly neutral classification.").

268. Even at this basic level, the conclusive-proof view is in tension with Shaw v. Reno, which disavows such a methodology. See Shaw v. Reno, 113 S. Ct. at 2827 (distancing opinion from "'I know it when I see it'" standard, but agreeing that "'dramatically irregular shapes may have sufficient probative force to call for an explanation'") (quoting Karcher v. Daggett, 462 U.S. 725, 755 (1983) (Stevens, J., concurring)).

269. See supra text accompanying note 123 (discussing plaintiffs' gerrymandering claim).

270. Shaw v. Reno, 113 S. Ct. at 2820 (finding that North Carolina plan "contains district boundary lines of dramatically irregular shape"); Aleinikoff & Issacharoff, supra note 106, at 609 ("The shape of the district seems quite clearly to lie at the core of the Court's judgment.").

271. Pildes & Niemi, supra note 85, at 492.

272. See Julia Lamber et al., The Relevance of Statistics to Prove Discrimination: A Typology, 34 Hastings L.J. 553, 566 (1983) (explaining that under obvious pretext standard "burden shifts to the defendant to . . . negate the inference of pretext by establishing a legitimate purpose").

273. Shaw v. Reno, 113 S. Ct. at 2828; see also infra notes 274-77 and accompanying text (recounting rhetoric in Shaw). In contrast, under the conclusive-proof view, the State's purposeful use of nonracial considerations in the districting process is incorrectly evaluated as a compelling state interest, see, e.g., Pildes & Niemi, supra note 85, at 576, 580; Sean P. Dunn, Comment, Coloring Within the Lines-The New Law Regarding Race-Conscious Reapportionment, 54 Ohio St. L.J. 1481, 1502 (1993) ("[T]he other factors can serve as the compelling government interest required for racial classifications to survive strict scrutiny.")
It is therefore not surprising that the conclusive-proof view finds little support in the Court's opinion. Such an interpretation elevates a requirement of compactness in districting to constitutional stature, a result that the Court explicitly disavowed.  

Similarly, the majority never indicated that distorted boundaries independently cause social harms requiring immediate strict scrutiny review. Instead, the inference drawn from the plaintiffs' evidence has "sufficiently probative force to call for an explanation." Specifically, the State may come forward with "objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." According to the majority, only if "the allegation of racial gerrymandering remains uncontradicted" on remand should the court engage in strict scrutiny review.

This process, whereby the plaintiffs come forward with evidence that is in turn rebutted by the State, is generally applied through the "prima facie case" method. As articulated by the Supreme Court in the Fourteenth Amendment context, this form of analysis occurs in sequential stages. Initially, the plaintiffs must "show[] that the totality of the relevant facts gives rise to an inference" that race was impermissibly used in decisionmaking. If the plaintiffs "make[] the requisite showing, the burden shifts to the State." If the State cannot overcome this inference, the challenged state action must then satisfy strict scrutiny review.

**B. The Prima Facie Case Method Applied to Shaw v. Reno:**

_The Plaintiffs' Allegations_

evidence that no racial classification exists, see infra Part IV-D.

274. Shaw v. Reno, 113 S. Ct. at 2827.


276. Id. (emphasis added); cf., e.g., id. at 2825 ("unexplainable on grounds other"); id. ("could not be explained on grounds other"); id. at 2826 ("could be explained only"). This interpretation was also the understanding of the dissent. Id. at 2840 (White, J., dissenting) ("[I]t is the State that must rebut the allegation that race was taken into account.")

277. Id. at 2832 (emphasis added); see also id. at 2830 (explaining that "if appellants' allegations of a racial gerrymander are not contradicted on remand" strict scrutiny must be applied). The conclusive-proof view must interpret that language as making the procedural point that, because the plaintiffs' claim had been dismissed by the district court for failure to state a claim, all of the facts of the case remained to be established on remand.

278. Batson v. Kentucky, 476 U.S. 79, 94 (1986). The analogy to Batson is not exact, however, because, in the Shaw context, the inference to be drawn is more stringent—the reapportionment is an obvious pretext for racial classification.

279. Id.

The allegations required to establish a racial gerrymandering claim were clearly set out in Shaw v. Reno. The Court held:

[A plaintiff may] state[] a claim under the Equal Protection Clause by alleging that the [State] adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification.\(^2\)

This language divides into a three-stage inquiry.

In Stage I, which has two components, the plaintiffs attempt to establish a prima facie case. The first component concerns the plaintiffs’ allegation that the State engaged in race-based reapportionment.\(^2\) The second component concerns the plaintiffs’ burden of creating the inference that the State’s plan is so racially motivated as to be an “obvious pretext” for racial classification.\(^2\) In Stage II, the State attempts to rebut the inference of purposeful racial classification. If the State fails to rebut this inference, the challenged legislation is deemed to be a racial classification. The inquiry then proceeds to Stage III, where the State attempts to satisfy the strict scrutiny standard.\(^2\)

C. Stage I: The Plaintiffs’ Prima Facie Case

1. Racial motivation: Did the State engage in an effort to segregate?

   a. Direct proof

While the plaintiffs in a racial gerrymandering action must ultimately satisfy the stringent obvious pretext standard, their first burden is to establish that the State used race in the reapportionment process. The discussion in Part III-B established that, although Shaw v. Reno applies explicitly only to objective evidence, direct evidence of the State’s intent is also relevant. In practice, the plaintiffs would bring forward such evidence in their initial prima facie claim of racial motivation. The plaintiffs could introduce, among other things, the legislative record, testimony of legislators and legislative aides, as well as documentation of the State’s effort to comply with sections 2 and 5 of the Voting Rights Act.

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281. Shaw v. Reno, 113 S. Ct. 2816, 2832 (1993); see also Hays, 839 F. Supp. at 1197 (contending that Shaw suggests use of “an evidentiary ‘minuet’”).
282. Shaw v. Reno, 113 S. Ct. at 2832 (noting allegation that persons were assigned to districts “because of their race”).
283. Id. (noting allegation that district “can be understood only as an effort to segregate voters”).
284. See id. (noting allegation that racial classification “lacks sufficient justification”).
b. **Indirect (objective) proof**
   
i. **Racial composition**

   The explicit holding of *Shaw v. Reno* applies to the inferential proof of racial motivation through objective evidence. This method of proof is difficult to apply in the reapportionment context because district lines do not classify individuals. Instead, districts are designed to include and exclude different geographic areas.\(^{285}\)

   In drawing district boundaries, however, legislators are aware of race and may include or exclude certain geographic areas based on the race of the people who live there.\(^{286}\) It is that form of "discriminat[ion] between individuals"\(^{287}\) that concerned the *Shaw v. Reno* majority.\(^{288}\) The relevant inquiry, then, begins with a district's racial composition.

   The voting-age population of North Carolina districts 1 and 12 is approximately fifty-three percent black.\(^{289}\) Taken alone, this information is not very helpful. If blacks constituted fifty-three percent of the voting-age population throughout the state, the composition of districts 1 and 12 would not be startling. On the other hand, if the statewide average was two percent black, these districts would be noteworthy indeed. Thus, to determine whether the State designed a district based on race, one must know not only the racial composition of a district, but also the racial composition of the territory outside the district.

   Strictly speaking, the area excluded from a district is the territory encompassed by every other district in a state. Courts could therefore compare a district's racial composition with the average for all other districts. In North Carolina, blacks constitute twenty percent of the voting-age population statewide.\(^{290}\) This comparison, however, is far too simplistic because housing in the United States generally is not integrated.\(^{291}\) North Carolina is no exception. For example, one

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285. *Id.* at 2826.
286. *Id.*
287. *Id.* at 2824.
288. *See infra* Part IV-C-1-b-iii (discussing majority's concern with correlation of shape and race).
289. Federal Brief, *supra* note 85, at app. D.
290. Federal Brief, *supra* note 85, at app. D.
area in which the state's black population is concentrated is the coastal plain, and any district in that region, even one drawn at random, likely would have a disproportionately large black population in comparison with the state as a whole.

A legitimate comparison of racial composition needs to be more closely related to the area proximate to the allegedly gerrymandered district. For example, courts could compare the figures within a district with those in a fifty-mile radius around the district. This measure would better take into account the racial composition of a region. While such an inquiry would be more accurate than a general comparison with the entire state, it still lacks sophistication.

The Court in *Shaw v. Reno* considered boundaries on the theory that shape, when properly interpreted, can give an indication of which factors were considered in designing a district. By considering the curves in a boundary line, it is possible to discover what has been intentionally included in, and excluded from, a district. For example, a district that resembles the capital form of the letter "U" was likely drawn to include the area within the district, but to exclude the area between the left and right posts of the "U." The most accurate inferential conclusion about the factors considered in the district's design will therefore likely be drawn from a comparison of those two areas.

In reality, district shapes are much more complicated than the letter "U"; as with district 12, a district may appear to wander in a haphazard and tortured fashion across much of a state. An individual district may have hundreds of small U-shaped extensions that capture particular voters and omit others. Notwithstanding such complications, it is possible to apply a statistical device that operationalizes the general principle that districts are drawn to both include and exclude.

The tool that best captures the theory underlying *Shaw* is known as the "rubber-band" measure (see Figure 3), which provides the

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293. *Cf.* Pildes & Niemi, *supra* note 85, at 557 (describing population test gauged by minimum circumscribing circle around district).

294. *See supra* notes 166-71 and accompanying text.

295. *See supra* text accompanying notes 114-15 (describing district 12); Figure 2.

296. Pildes & Niemi, *supra* note 85, at 557. Pildes and Niemi reject the use of the rubber-band test in the *Shaw* context. *Id.* at 558. They do so, however, only by considering whether the rubber band appropriately measures compactness, *id.*, and do not attempt to apply the test to determine racial composition. To the extent that one agrees with the critiques of using objective evidence to determine subjective intention, *see supra* note 232, the rubber-band
composition of "the area that would be inside a rubber band stretched tightly around the district."\textsuperscript{297} The rubber-band measure therefore allows a comparison of a district's racial composition with that of all of the areas that the district was apparently designed to exclude. Data for the relative racial compositions are available by dividing the proportion of the relevant racial group in the rubber-band-enclosed area by the proportion in the challenged district. The closer the quotient is to one, the smaller the indication of racial gerrymandering.

**FIGURE 3: EXAMPLE OF RUBBER-BAND MEASURE**

When a plaintiff challenges the boundaries of a discrete entity, such as a town, an even simpler measure is the "alteration" in populations. This test compares the racial compositions before and after the alleged gerrymander. As with the rubber-band measure, the scale runs from zero to one, with zero representing massive racial gerrymandering. For example, in *Gomillion v. Lightfoot*, the Supreme Court considered a plan that modified the boundaries of Tuskegee, Alabama and thereby excluded 396 of the city's 400 former black voters, but

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\textsuperscript{297} Pildes & Niemi, supra note 85, at 557. In this context, the rubber-band data is the numerator and the district data is the denominator. If, on the other hand, the inquiry was into whether a district had been gerrymandered to exclude racial group, the district data would be the numerator and the rubber-band data would be the denominator.
none of the 600 white voters. The “alteration” in the city’s black population was accordingly massive:

\[
\begin{align*}
\text{Alteration in black voting population (4 / 400)} & \quad 0.01 \\
\text{Alteration in white voting population (600 / 600)} & \quad 1.00 \\
\text{Net alteration (black / white alteration: .01 / 1.00)} & \quad 0.01
\end{align*}
\]

\[\text{ii. Shape and the quantitative v. qualitative debate}\]

Regardless of what measure of a district’s racial composition is used, the information obtained generally will not be sufficient to show that a district was “obviously” drawn on racial lines. This is true even where a district’s black population is much higher than that of the nearby excluded area. The district may have been drawn, for example, to encompass a compact community that is largely black. The majority in Shaw explicitly stated that where a district can be explained in nonracial terms, such as compactness, the decision is not implicated. More evidence of racial classification is therefore needed.

The Court in Shaw turned to evidence of bizarre shape for precisely this reason. The more distorted a district’s shape, the greater the likelihood that it has been purposefully manipulated. More importantly, bizarre shapes make it obvious that the district has been manipulated.

Professors Pildes and Niemi have suggested two statistical measures of shape. "Dispersion" measures how “tightly packed or spread out” a district is by calculating the ratio of the area enclosed by the district to the area of “the smallest circle that completely encloses the district.” A circular district scores a perfect 1.0, closely followed by a square. The more thin extensions a district possesses, the lower its dispersion score.

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301. See supra Part III-C-3 and accompanying text (explaining why some objective evidence of racial gerrymandering is required by Shaw).
302. Pildes & Niemi, supra note 85, at 554.
303. Pildes & Niemi, supra note 85, at 554.
304. Pildes & Niemi, supra note 85, at 554.
A second measure of shape is “perimeter,” which calculates the irregularity of a district’s borders. The perimeter score is the ratio of the area enclosed by the district to “the area of a circle with the same perimeter.” The more a district’s boundaries wind and twist without enclosing much territory, the lower the district’s perimeter score will be. A circle again scores a perfect 1.0.

Professors Pildes and Niemi defend such statistical measures based on the need for “clear and consistent standards for courts and reapportionment bodies to follow.” If courts consider shape without an objective measure, Pildes and Niemi contend, inconsistent determinations of when a district is sufficiently “bizarre” would result. Moreover, “bizarre” is a relative term, and statistics provide a necessary baseline with which to compare a challenged district to others around the state and nation. In the North Carolina plan, districts 1 and 12 score very poorly in terms of both dispersion and perimeter, which, to Pildes and Niemi, suggests that these measures track the concerns of the majority in Shaw v. Reno.

The Court, however, declined to employ any form of statistical measure, a point that Pildes and Niemi concede. According to

305. Pildes & Niemi, supra note 85, at 555.
306. Pildes & Niemi, supra note 85, at 555.
307. Pildes & Niemi, supra note 85, at 556.
309. Pildes & Niemi, supra note 85, at 539. Words such as “irregular” and “irrational” are not self-defining, and the Court did not provide any regular or rational reapportionment plans for comparison. This is problematic, as explained by Professors Lowenstein and Steinberg:

[T]he drawing of lines cannot be characterized as manipulative (in a pejorative sense) unless there is a method of drawing lines that is agreed to be nonmanipulative . . .

The questions are: What, if anything, constitutes a “neutral” districting plan, and how can we recognize a neutral plan when we see one?

Lowenstein & Steinberg, supra note 44, at 10.
310. Pildes & Niemi, supra note 85, at 539.
311. Pildes & Niemi, supra note 85, at 562 tbl. 2.
312. Pildes & Niemi, supra note 85, at 557-58.
313. Pildes & Niemi, supra note 85, at 566 (noting that Shaw v. Reno does not guide interpretation of dispersion or perimeter scores); see Marylanders for Fair Representation, Inc., v. Schaefer, Civ. A. Nos. S-92-510 & S-92-1409, 1994 WL 60894, at *37 (D. Md. Jan. 14, 1994) (Smalkin, J., dissenting) (“The Supreme Court has indicated that a court should make what might be called a ‘geometric’ or ‘eye-ball’ evaluation of the district. That Court’s decisions in Shaw and Growe clearly suggest that a district is not geographically compact if its shape is ‘bizarre’ or ‘dramatically irregular.’”); cf. Lynne Duke, Advocates Say Justices Muddy Voting Rights, WASH. POST, June 30, 1993, at A8 (noting that although many standards of compactness have been developed, “there is no legal standard”). But see Aleinikoff & Issacharoff, supra note 106, at 622 (explaining that Reynolds v. Sanders, 377 U.S. 533 (1964), and later cases, applied statistical formula to claim originally found justiciable in Baker v. Carr, 359 U.S. 186 (1962)). This post-Baker application of statistics to the one-person one-vote area is not as likely to occur in the Shaw context, however, which is not nearly as amenable to mathematical precision.
the majority, gerrymandering is the "deliberate and arbitrary
distortion of district boundaries." The more a district's bound-
daries are distorted, the more likely it is that the district was drawn to
include and exclude some discrete population group and will be
perceived as such. For this reason, shape provides inferential
evidence of the plaintiffs' claim of obvious pretext. Pildes and
Niemi, on the other hand, treat shape as an automatic trigger for
strict scrutiny review, but do not provide a calculable threshold level
of noncompactness. As will be demonstrated below, any search
for such a threshold is fruitless.

Because shape is only one element of the plaintiffs' case, albeit an
important element, and does not automatically trigger strict scrutiny
review, the majority in Shaw v. Reno described gerrymandered districts
with words that suggest a common-sense inquiry into shape:
"dramatically irregular," "extremely irregular," "uncouth," "highly irregular," "bizarre," "irrational," and "tortured." Thus, while statistics can provide quantitative data for
comparison, their importance should not be exaggerated. Courts
should not become so engrossed in statistical measures that they lose
sight of the inquiry into whether the challenged district is an obvious
pretext for racial classification.

164 (1986)).
315. See supra notes 166-71 and accompanying text.
316. See Pildes & Niemi, supra note 85, at 540 (describing determination of unacceptable
level of non-compactness as "political and legal judgment about the appropriate trade-off
between competing values"). Other critiques of Pildes and Niemi's methodology can be made
as well. First, in an effort to identify those districts that may not satisfy the level of compactness
required by Shaw, they draw on data for district 12, id. at 560, while essentially ignoring the
other challenged district, district 1. Second, they rely on rhetoric in the decision to support
their use of the perimeter and dispersion measures, id. at 557, but the majority never indicated
that the passages discussed by Pildes and Niemi were anything other than descriptive of the
particular geometric figures at issue; different districts likely would have evoked different words.
Finally, they do not attempt to correlate the perimeter and dispersion measures with public
perceptions, the critical consideration in determining social harms.
318. Id. at 2824.
319. Id. at 2825 (quoting Gomillion, 364 U.S. 339, 340 (1960)).
320. Id. at 2826.
321. Id. at 2825.
322. Id. at 2829.
323. Id. at 2827.
324. For this reason, the rubber-band measure is suggested as a way of considering the
threshold issue of the State's racial motivation. See supra text accompanying notes 296-97
(describing and applying rubber-band measure).
The required correlation between race and shape

Having discussed the plaintiffs' evidence of both racial composition and shape, it is necessary to understand the relationship between those two factors. The Supreme Court in Shaw v. Reno was not concerned with shape alone. The majority held that compact districts are not constitutionally required. Bizarrely shaped districts drawn for nonracial reasons are therefore not implicated by the decision.

Similarly, the Court was not concerned with racial composition alone. The majority explicitly approved of the inclusion of minority communities in a district that can be explained in nonracial terms, such as compactness. The Court was not even necessarily concerned with those districts that both are bizarrely shaped and have a disproportionately high minority population. For example, a district may encompass a compact minority community and be distorted so as to pack Republicans or Democrats into the district. Such a district is not an obvious pretext for racial classification.

Shaw v. Reno is therefore implicated only where bizarre boundaries correlate with racial housing patterns in such a way that the district appears to have been "drawn on racial lines." Thus, the Court condemned "[a] reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries." Similarly, the Court indicated that racial gerrymandering would be involved where "a State concentrated a dispersed minority population in a single district." In contrast to the examples of "widely separated" persons being "concentrated," the Court found no fault in the concentration of "members of a racial group [who] live together in one community."

This discussion brings together the analysis of the plaintiffs' objective evidence of the State's racial motivation. This inquiry begins

326. See id. at 2844 (Stevens, J., dissenting) (noting that decision does not apply to districts drawn "for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans"); cf. id. at 2828 (distinguishing political gerrymandering from racial gerrymandering, which is "discrimination on the basis of race").
327. Id. at 2826.
328. See id. (noting that reapportionment concentrating members of racial group may "reflect wholly legitimate purposes").
329. Id. (discussing Wright v. Rockefeller, 376 U.S. 52 (1964)).
330. Id. at 2827.
331. Id.
332. Id. at 2826.
with an analysis of racial composition, perhaps through the comparative measure of the rubber-band or alteration test. Shape is also relevant and may be measured either quantitatively or qualitatively. Distorted boundaries, however, are not probative standing alone, but must appear to have been designed to include the relevant racial group. The Shaw v. Reno majority indicated that the necessary factors of racial composition, shape, and correlation between the two existed in district 12, which "winds in snake-like fashion"333 "‘until it gobbles in enough enclaves’"334 "‘of black neighborhoods.’"335

2. When is there an inference of obvious pretext?

A totality of the circumstances approach

The preceding discussion identified the factors relevant to the plaintiffs' claim that the State utilized race in the districting process, which is the first component of Stage I. The second component concerns the requirement that such evidence establish the inference that the challenged reapportionment is an "obvious pretext" for racial classification. A critical question is how direct evidence of the State's racial motivation, as well as indirect evidence, including racial composition, shape, and traditional districting principles, should be weighed.

One can infer a threshold requirement of racial composition from the majority opinion in Shaw v. Reno. The Court discussed "segregation,"336 and "political apartheid,"337 terms that suggest a complete separation of racial groups.338 Such a threshold would not condemn many majority-minority districts, which frequently have slim majorities in minority voting strength.339 This view is supported by the plaintiffs' allegation that the North Carolina plan was purposefully

333. Id. at 2821. This is the shape element.
335. Id. (quoting Shaw v. Barr, 808 F. Supp. at 476-77 (Voorhees, C.J., concurring in part and dissenting in part)). This is the racial composition element.
336. Id. at 2832.
337. Id. at 2827. "A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common . . . but the color of their skin, bears an uncomfortable resemblance to political apartheid." Id.
338. Cf. id. at 2840 n.7 (White, J., dissenting) (arguing that population figures in district 12 do not satisfy definition of "segregation").
339. North Carolina district 12, for example, has a black voting-age population of 53% and a white voting-age population of 47%. Federal Brief, supra note 85, at app. D. States, as defendants in racial gerrymandering cases, would favor such a "segregation" theory because districts that barely have more black voters than white voters can hardly be considered segregated. See Shaw v. Reno, 113 S. Ct. at 2840 n.7 (White, J., dissenting).
designed to create congressional districts based on race and to assure
election of two black representatives to Congress.\textsuperscript{340} In an era when
individuals vote not infrequently across racial and party lines, a fifty-
three percent voting-age population hardly assures the election of any
candidate. This threshold cannot be the one intended by the Court
in \textit{Shaw}, however, because districts 1 and 12 have a black voting age
population only slightly over fifty percent.\textsuperscript{341}

A more moderate threshold standard would apply \textit{Shaw v. Reno} only
to those districts that have a majority population of the relevant racial
group, thereby insulating minority-influence districts. Support for this
view comes from the Court's use of the phrases "majority-black"\textsuperscript{342}
and "majority-minority"\textsuperscript{343} and the statistics for the districts chal-
lenged in \textit{Shaw}. Both this "majority threshold" and the "segregation
threshold" discussed above, however, misread the Court's central
concern.

The majority in \textit{Shaw} was concerned with the perceived impermissi-
ble use of race in decisionmaking, not the particular resulting racial
proportions. For this reason, the Court never identified any threshold
requirement for either racial composition or, as noted above,
geographic compactness. Instead, the relevance of both racial
disparity and shape suggests that proof of an obvious pretext is to be
drawn from the totality of circumstances:\textsuperscript{344} extreme findings in
one element may compensate for insufficiencies in the other.

This view is borne out by the Court's discussion of the uncouth
twenty-eight-sided municipal boundary considered in \textit{Gomillion v. Lightfoot},\textsuperscript{345}
which the majority cited as an example of an obvious
pretext for racial classification.\textsuperscript{346} The difficulty with the example
of \textit{Gomillion}, in light of \textit{Shaw v. Reno}, is that the redrawn boundaries

\textsuperscript{340} \textit{Id.} at 2821.
\textsuperscript{341} \textit{Federal Brief}, \textit{supra} note 85, at app. D.
\textsuperscript{342} \textit{See}, e.g., \textit{Shaw v. Reno}, 113 S. Ct. at 2819 (discussing original North Carolina plan); \textit{id.}
at 2820 (discussing original North Carolina plan in relation to State's geography and
demography); \textit{id.} (discussing second North Carolina plan); \textit{id.} (discussing district 1); \textit{id.}
(discussing district 12); \textit{id.} at 2831 (discussing plaintiffs' claims relating to population
distribution).
\textsuperscript{343} \textit{See}, e.g., \textit{id.} at 2828 (refusing to decide whether creation of majority-minority districts
alone establishes equal protection claim); \textit{id.} at 2830 (discussing compliance with Voting Rights
Act as compelling state interest); \textit{id.} at 2830 (discussing majority-minority district in Beer v.
United States, 425 U.S. 130 (1976), as satisfying § 5 of VRA because it improved status of racial
minorities); \textit{id.} at 2831 (discussing United Jewish Orgs. v. Carey, 430 U.S. 144 (1977), which
upheld majority-minority districts).
\textsuperscript{344} \textit{Cf.} \textit{Washington v. Davis}, 426 U.S. 229, 242 (1976) (applying totality of circumstances
test for racial motivation).
\textsuperscript{345} 364 U.S. 339 (1960).
\textsuperscript{346} \textit{Shaw v. Reno}, 113 S. Ct. at 2825.
of Tuskegee were not particularly distorted (see FIGURE 4). In statistical terms, Professors Pildes and Niemi have calculated that 239 current congressional districts are more gerrymandered according to both perimeter and dispersion measures than was Tuskegee in *Gomillion*. The solution to this dilemma is to concentrate not on the shape of the boundaries in Tuskegee, but on the fact that the challenged statute "fenced out" ninety-nine percent of the city's former black voters, but none of its white voters. In terms of the alteration measure, the area inside the city suddenly became much more "white" than it had been under its former boundaries. Thus, considering the totality of the circumstances, the extreme racial disparity in Tuskegee compensates for the fact that the boundaries were not particularly bizarre.

FIGURE 4: MAP OF TUSKEGEE, ALABAMA FROM GOMILLION

The totality of the circumstances approach can also be applied to the facts of *Shaw v. Reno*. The racial disparity in the North Carolina plan is much less extreme than that in *Gomillion*. The rubber-band measure for districts 1 and 12 would not be nearly as low as the .01

348. Pildes & Niemi, *supra* note 85, at 552 & n.192; see also *id.* at 564 n. 229.
350. See *supra* text accompanying note 298-99 (discussing alteration method).
351. See text accompanying *supra* note 299.
alteration measure for Tuskegee. On the other hand, the North Carolina districts are much more distorted than those in *Gomillion*. In statistical terms, on a scale from 0 to 1.0, the perimeter and dispersion scores for districts 1 and 12 are close to 0,\(^{353}\) while Tuskegee's are close to .5.\(^{354}\)

Thus, although the facts of the two cases are almost reversed, the result is the same (see FIGURE 5). In *Gomillion*, extreme racial disparity and somewhat distorted boundaries created an inference that the challenged statute was an obvious pretext for a racial classification. In *Shaw v. Reno*, on the other hand, more moderate racial disparity and extremely distorted boundaries created the same inference.

**FIGURE 5: ILLUSTRATION OF TOTALITY OF CIRCUMSTANCES**

![Diagram showing the relationship between perimeter and dispersion scores for districts 1, 12, and Tuskegee.](image)

At least two factors not discussed in *Shaw* and *Gomillion* should also be considered as part of the totality of the circumstances inquiry. The first is direct evidence of the State's racial motivation to the extent discernable by the public.\(^{355}\) The second is the social context in which all the other factors operate because "few Americans are likely to be surprised that congressional districts in Harlem or Chicago's

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353. The dispersion scores for districts 1 and 12 are 0.25 and 0.05 respectively. Pildes & Niemi, *supra* note 85, at 562 tbl. 2. The perimeter scores for districts 1 and 12 are 0.03 and 0.01 respectively. *Id.*
355. See *supra* Part III-B (concluding that direct evidence of State's intention is relevant).
south side house largely minority constituencies," but "in Iowa . . . the
‘racial message’ would be clear."\textsuperscript{356}

The totality of the circumstances approach illustrates why any
search for a statistical threshold of noncompactness is fruitless. A
district with a high compactness score may be subject to strict scrutiny
while one with a lower score may not depending on the nature of the
State’s use of race. This result is consistent with the discussion of
social harms in \textit{Shaw}, which is premised on the idea that the public
does not perceive isolated factors in a vacuum, but instead reacts to
the larger message sent by governmental action.

\textbf{D. Stage II: The State’s Rebuttal}

If the plaintiffs’ evidence in Stage I “gives rise to an inference” that
the challenged measure cannot be explained on grounds other than
race, a prima facie case that the State has created a racial classification
is established. Stage II turns to the State’s rebuttal. The State must,
therefore, produce evidence of factors, other than race, that can
explain the challenged reapportionment.\textsuperscript{357} While the majority in
\textit{Shaw v. Reno} did not provide an exhaustive list of acceptable nonracial
factors, the Court did suggest two sets of relevant considerations.

The first set of considerations relates to the characteristics of the
individuals within the district. Even where a racial group is
disproportionately represented within a district, the State may identify
relevant nonracial demographic and socioeconomic characteristics.
The examples given by the Court were age, economic status, religion,
education, and community and political affiliation.\textsuperscript{358} Thus, a
district that is intended to be heavily Democratic may include a
disproportionate number of black voters based on their political
preference, rather than their race, without implicating \textit{Shaw}.

The second set of considerations relates to the characteristics of the
districts themselves. According to the Court, the State may introduce
evidence of “[t]raditional districting principles,”\textsuperscript{359} which include,
but are not limited to, “compactness, contiguity, . . . respect for
political subdivisions,”\textsuperscript{360} and “geographic boundaries.”\textsuperscript{361} For

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{356} Aleinikoff and Issacharoff, \textit{supra} note 106, at 614.
\item \textsuperscript{357} While these factors are listed as relevant to the State’s rebuttal, it is likely that the
plaintiffs would bring them to the reviewing court’s attention earlier by arguing in their case-in-
chief that the challenged districts cannot be explained in nonracial terms.
\item \textsuperscript{358} \textit{Shaw v. Reno}, 113 S. Ct. at 2826-27.
\item \textsuperscript{359} \textit{Id.} at 2827.
\item \textsuperscript{360} \textit{Id.}
\item \textsuperscript{361} \textit{Id.} at 2821. This list of traditional districting principles was not intended to be
exhaustive. \textit{See id.} at 2827 (prefacing list of principles with phrase “such as”).
\end{itemize}
\end{footnotesize}
example, a district may have a bizarre appearance because it follows a geographic feature such as a river. In such a case, shape would not provide evidence that the State intended to create a racial classification.

A critical issue in Stage II is likely to be whether the State's evidence may reflect only those factors that the legislature actually considered in the reapportionment process. The answer to this question depends on the nature of the plaintiffs' case. As noted in Part III-A, to the extent that the plaintiffs rely on objective evidence, the State may rely on objective factors that, while not considered in the reapportionment process, would cause the reapportionment not to be publicly perceived as race based. On the other hand, to the extent that the plaintiffs rely on direct evidence of the State's intent that may be publicly perceived, evidence of factors not a part of the reapportionment process is less likely to rebut the plaintiffs' claim. It must be kept in mind, however, that the ultimate inquiry is into public perceptions of an obvious pretext, which necessarily has an objective component.

The majority in Shaw v. Reno clearly intended the obvious pretext standard to be difficult for plaintiffs to satisfy, seeking to condemn only the most "rare" and "exceptional cases." That race was a substantial or motivating factor in the State's decision is insufficient. Because an obvious pretext is the equivalent of an express racial classification, the reviewing court must conclude that the reapportionment is the functional parallel of the State sending voters a letter that explicitly instructs them where to vote based on their race. Stage III now turns to the issues that are relevant if the State cannot rebut the plaintiffs' prima facie case.

E. Stage III: Satisfying Strict Scrutiny

I. General principles

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362. See supra note 178 (discussing example of district that ran along Mississippi river).
363. See supra note 178.
364. See supra Part III-C.
366. Id. at 2826.
367. See supra Part II-B-2 (discussing obvious pretext requirement as key to proof of social harms).
368. See supra note 145 and accompanying text.
If, at the close of Stage II, the reviewing court concludes that the challenged measure "could not be explained on grounds other than race," the plaintiffs have fulfilled their burden of proving that the State has created an obvious pretext. The existence of a racial classification is therefore taken as established. In Stage III, the State must then prove that it was justified in creating a racial classification by satisfying the elements of the strict scrutiny standard. First, the interest pursued by the state must be "compelling." Second, the classification must be narrowly tailored to fulfill that compelling interest.

The compelling governmental interest identified by the majority in Shaw v. Reno was compliance with the Voting Rights Act. The Court limited its endorsement, however, by noting that a compelling state interest existed only where the Voting Rights Act was "constitutionally valid as interpreted and as applied." In particular, the issue of whether the Voting Rights Act could constitutionally require the creation of a racial classification was left unanswered. Thus, States seeking to defend a racial gerrymander on the basis of compliance with the Voting Rights Act must be prepared to defend the constitutionality of the Act in that context. Additionally, the State must establish that the Act required it to create majority-minority districts; the mere fact that racial gerrymandering does not violate

370. Id. at 2832 (noting Court's determination to use "close judicial scrutiny").
371. Id.
372. Id.
373. Id. at 2830. The Court in Shaw v. Reno discussed an additional possible compelling interest, rectifying the effects of past racial discrimination where there is a "strong basis in evidence for concluding that remedial action is necessary." Id. at 2832 (citations and alterations omitted). The Court strongly indicated, however, that an obvious pretext for racial classification could be used to correct historical discrimination only where required by the Voting Rights Act. Id. According to Justice O'Connor:

We note, however, that only three Justices in UJO were prepared to say that States have a significant interest in minimizing the consequences of racial bloc voting apart from the requirement of the Voting Rights Act. And those three Justices specifically concluded that race-based districting, as a response to racially polarized voting, is constitutionally permissible only when the State "employ[s] sound districting principles," and only when the affected racial group's "residential patterns afford the opportunity of creating districts in which they will be in the majority." Id. (quoting United Jewish Orgs. v. Carey, 420 U.S. 144, 167-68 (1977)) (alteration in original).

A compelling interest in remedying historical discrimination in voting apart from compliance with the Voting Rights Act, therefore, is apparently illusory.
374. Id.
375. See id. at 2831 ("Appellants further argue that if § 2 did require adoption of North Carolina's revised plan, § 2 is to that extent unconstitutional. These arguments were not developed below, and the issues remain open for consideration on remand.").
376. See id. at 2830 ("Courts must bear in mind the difference between what the law permits, and what it requires.").
the Voting Rights Act does not constitute a compelling governmental interest.

The Court in Shaw indicated that racial gerrymandering would not be narrowly tailored to comply with the Voting Rights Act if the State went beyond what was reasonably necessary to comply.\(^\text{377}\) Because racial classifications are presumptively illegitimate,\(^\text{378}\) the State must establish that no reasonable alternative existed that would have satisfied the Voting Rights Act. A racial classification would not be narrowly tailored to comply with the Act if a reapportionment could be implemented that (1) would not sacrifice other state interests, (2) would not violate the Voting Rights Act, and (3) would not itself be a racial classification. Alternatively, if no other plan existed that would satisfy the Act, a racial classification would be narrowly tailored.\(^\text{379}\)

2. **Section 2 of the Voting Rights Act**

The Court in Shaw v. Reno indicated that two sections of the Voting Rights Act may require the creation of majority-minority districts.\(^\text{380}\) The first is section 2, which prohibits the enactment of a voting procedure that results in the dilution of minority voting strength.\(^\text{381}\) Where the three elements outlined in Thornburg v. Gingles\(^\text{382}\) are satisfied, the Voting Rights Act requires the creation of majority-minority districts to prevent minority vote dilution. In such a situation, the “compelling interest” element of strict scrutiny is satisfied.

Early reactions have read Shaw as placing increased emphasis on the first prong of Gingles, the compactness requirement.\(^\text{383}\) Presented with noncompact districts that were proposed as ostensibly required by section 2, a three-judge panel in Jeffers v. Tucker\(^\text{384}\) concluded that

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377. Id. at 2831 (referring to § 5 compliance).
382. 478 U.S. 30 (1986); see supra text accompanying note 75 (reciting Gingles standard).
383. Pildes & Niemi, supra note 85, at 582 ("Courts might become more likely to find that the Act does not require extremely noncompact districts, particularly at the stage of determining substantive liability under the Act."); Id. at 582 n.271 ("[A]s a statutory matter, courts are unlikely to interpret the Act to require highly irregular districts after Shaw.").
the districts "would have to be consistent with the spirit of Shaw." Similarly, in Marylanders for Fair Representation, Inc. v. Schaefer, another panel read Shaw as forbidding the implementation of plans that elevate race "to the exclusion of traditional, nonracial districting principles." These interpretations are mistaken, however, to the extent that Shaw is read as determining when substantive liability exists under section 2. Shaw explicitly does not preclude the implementation of bizarrely shaped districts based on section 2 compliance, as long as the narrow tailoring element is satisfied.

It is in terms of narrow tailoring that Shaw does directly impact on section 2. Neither the Voting Rights Act nor Gingles explicitly require the State to adopt a district that includes the compact minority community upon which substantive liability was based. Drawing an analogy to constitutional law, before Shaw, section 2 itself had no narrow tailoring requirement. For example, if North Carolina had been found to be in violation of section 2 because it neglected to create a majority-minority district to encompass a compact minority community in the southern coastal plan, the State could have complied with the Act by adopting a majority-minority district, such as district 12, which lies nowhere near the coastal plain.

After Shaw, however, a different result occurs. If the State seeks to create a majority-minority district to comply with section 2, it is likely that the implemented district must include the relevant compact minority community. Otherwise, the State has done more than was reasonably necessary to comply with the Act. Similarly, if it is possible for the State to design a majority-minority district that is itself compact, that district must be implemented if, judging by the totality of the circumstances, it does not constitute a racial classification.

389. Pildes & Niemi, supra note 85, at 582 n.273 ("Even if courts become more strict in the way they interpret the first prong of Gingles ... they might still permit 'highly irregular' districts as a remedy after liability has otherwise been found. ... The legal question would then be whether the creation of this irregular district was 'narrowly tailored'...'). Along those lines, Shaw for the first time creates a cause of action for individuals seeking to challenge a reapportionment on the grounds that a minority community was not sufficiently compact to invoke the protections of § 2.
390. This does not mean, however, that the State must design the district to be as compact as possible. See Aleinikoff & Issacharoff, supra note 106, at 649 n.243 ("This would put pressure on states to draw relatively compact districts ... but it could not sensibly produce a requirement for the most compact districts - there are simply too many other variables ... "). If the Supreme Court determined that Congress did not intend § 2 to require the adoption of such districts the result in the text might be avoided because, as with § 5, see infra notes 394-98 and
3. Section 5 of the Voting Rights Act

The second compelling state interest discussed by the Court in Shaw was compliance with section 5 of the Voting Rights Act. In a covered jurisdiction, preclearance will be denied if the government cannot establish that its proposed change does not have the purpose or effect of "denying or abridging the right to vote." If the relevant discriminatory effect is a "clear violation" of section 2, the strict scrutiny analysis undertaken above logically applies to section 5 as well.

On the other hand, when purposeful discrimination or a "retrogression" of the right to vote is involved, a different narrow tailoring inquiry is appropriate. As the compactness element of section 2 is not involved, Shaw's reference to shape finds no corresponding requirement in the State's proffered compelling state interest. Except to the extent that an alternative district is not a racial classification because it is more compact, gauging narrow tailoring according to shape would therefore do nothing more than duplicate part of the earlier inquiry into whether the challenged reapportionment is a racial classification.

Slightly modified, an examination of compactness would properly test narrow tailoring not by focusing on shape alone, but by determining whether the State could have reduced the number of irregular lines that capture minority communities while still including enough minority voters to create a sufficient majority-minority district. This view refocuses the inquiry where it belongs, on the State's use of race. Moreover, it establishes that, in this context, shape is not itself probative of narrow tailoring. If all that is relevant is the State's excessive efforts to include minority communities in a district, a far simpler and more workable test is to consider racial proportions alone. A majority-minority district that is a racial classification and eighty-percent black is not narrowly tailored because it goes beyond what is necessary to ensure that minorities have an opportunity to

accompanying text, there would no longer be a relationship between the Act and compact districts. The same would be true if Congress amended the Act to explicitly permit § 2 compliance through the adoption of any available majority-minority district. On the other hand, narrow tailoring would still likely require the adoption of a more compact alternative to the challenged district if it did not constitute a racial classification.

392. 28 C.F.R. § 51.52(a) (1993).
393. Id. § 51.55(b)(2) (1993).
395. Pildes & Niemi, supra note 85, at 585.
elect the candidate of their choice as required by the Voting Rights Act. By contrast, a fifty-five percent voting age population may be acceptable.396

This view "smoke[s] out' impermissible uses of race" by ensuring that the State has not caused harm to innocent third parties.397 by unnecessarily "packing" minority voters into a district under the guise of increasing minority representation. Gauging narrow tailoring exclusively by shape has no such advantage because, as Shaw explicitly states, noncompactness alone does not cause a cognizable injury.398 An emphasis on shape also undermines the goals of the Voting Rights Acts by preventing minority congressional representation when it is most needed. If narrow tailoring under Shaw permits the creation of only those majority-minority districts that are compact, minority congressional representation will be possible only when housing is segregated so that minority populations are geographically bunched together. It is in such a situation that minorities, in terms of sheer numbers, are most likely to be able to influence policy choices by electing local representatives. On the other hand, when minority communities are somewhat dispersed, and local electoral successes are minimized, the need for national representation is greatest.

CONCLUSION

In Shaw v. Reno, the Supreme Court concluded that the obviously race-based design of voting districts, without any proof of an effect on individual or group rights, could violate the Fourteenth Amendment. If this principle were extended to its logical limit, many voting systems and the Voting Rights Act itself would be subject to significant challenge. Fortunately, the logic and the language of the decision indicate that the application of Shaw v. Reno will be limited to those rare redistricting plans that are an obvious pretext for racial classification. By applying the three-stage prima facie method discussed in this Note, courts can faithfully implement Shaw v. Reno and be certain that they are complying with its intended scope.