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Shooting Down the Phoenix: Shaw v. Reno and the Controversy over Race-Conscious Districting

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SHOOTING DOWN THE PHOENIX: *SHAW v. RENO* AND THE CONTROVERSY OVER RACE-CONSCIOUS DISTRICTING

This . . . is perhaps the Negro's temporary farewell to the American Congress. But let me say, Phoenix-like, he will rise up someday and come again.

George White, Representative from North Carolina, 1901

I. Introduction

It took ninety-one years, but the phoenix did rise again in North Carolina, taking the form of Representative Eva Clayton and Representative Melvin Watt, both elected to Congress in 1992. Their futures are uncertain, however, as are those of many representatives newly elected in 1992. Representatives Clayton and Watt are members of a class of new black representatives that nearly doubled the size of the Congressional Black Caucus. In addition to North Carolina, the phoenix rose in Alabama, South Carolina, Florida and Virginia, all of which sent their first black representatives to Washington since Reconstruction. Many of these new representatives attributed their victories in the 1992 elections to the redistricting that followed the 1990 census pursuant to the amended Voting Rights Act.

The Supreme Court's decision in *Shaw v. Reno* threatens this progress. In *Shaw*, the Court held that majority-minority districts, like the ones from which the above-mentioned representatives were elected, could be struck down as unconstitutional if their shapes could not be explained on any ground other than race and if they were not narrowly tailored to further a compelling state inter-

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1. Delia M. Rios, *Blacks Expecting Big Gains in South; 39 Nationwide are Expected to Take House Seats on Tuesday*, *The Dallas Morning News*, Oct. 30, 1992, at 1A.
The impact of Shaw has been significant; in fifteen months it has already led to the invalidation of three district plans created by the Act. Yet its future impact is not certain. The Shaw decision has confused the four district courts that have interpreted it, and has led each court to approach Shaw claims differently. Consequently, the results of these cases have been puzzling and have produced no manageable standard for analysis. For example, while the Southern District of Georgia invalidated a district of generally average appearance, the Eastern District of North Carolina upheld the infamous “serpentine” District 12, which was the subject of the original Shaw decision.

Shaw will impact much more than the political life span of the representatives serving in the threatened districts; it will also redefine the manner in which voting rights advocates approach minority empowerment. Since the mid-1980s, enforcement of the Voting Rights Act has focused on the creation of single-member majority-minority districts in order to increase the ability of minority group

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5. Id.
8. Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994). See infra notes 116-17 and accompanying text (describing the districts at issue in Shaw). See also infra part IV.B (analyzing the district court decisions that have resolved Shaw claims).
9. Most of the incumbent members of the Congressional Black Caucus were easily reelected in November, 1994, and the Caucus actually increased its numerical strength, although not because of Voting Rights Act redistricting. Adonis E. Hoffman, Perspectives on Election Fallout, L.A. TIMES, Nov. 11, 1994, at B7. J.C. Watts, an African-American Republican running in a 90% white, predominantly Democratic district in Oklahoma, was elected to a seat in the United States House of Representatives. On its face, the election of Representative Watts contradicts many of the arguments that are presented within this Note; Representative Watts enjoyed a broad-based appeal, however, that is extremely rare among first-time candidates, and that may be explained by his status as a former quarterback for the University of Oklahoma football team. See Tim Kurkjian, Sports People: J.C. Watts, SPORTS ILLUSTRATED, Nov. 21, 1994, at 55 (analogizing the probability of success of an African-American, Republican candidate running for Congress in a predominantly white and Democratic district, with that of “a quarterback running the wishbone offense with a weak line, a fullback who fumbles and halfbacks with no speed”).
members to elect representatives of their choice. In a single-member district, voters who live within the district’s boundaries elect one representative to serve that district on the particular legislative body. If the majority of the voters within a single-member district are members of the minority within the general population of the state, the district is termed a majority-minority district. This race-conscious method of districting is much more effective at increasing minority representation than creating multi-member districts, in which the entire electorate selects all members of a representative body. Multi-member districts submerge the minority group within a general population in which it will always be outnumbered. The race-conscious method also encourages gerrymandering, however. Although supporters stress that gerrymandered majority-minority districts are remedial in nature, critics still question the legitimacy of a district that has been created by means of deliberate manipulation. These critics fear that voting rights advocates are attempting to secure proportional representation for minorities, a right not granted by the Constitution or the Voting Rights Act, while advocates reply that they are applying the only viable means of minority empowerment in this political system.

10. Professor Lani Guinier adopted the term “race-conscious districting” to describe the practice of consolidating minority group members in a single or limited number of districts, thus guaranteeing that group a representative of its choice in those districts. Lani Guinier, Groups, Representation and Race-Conscious Districting: A Case of the Emperor’s Clothes, 71 TEX. L. REV. 1589, 1589 n.2 (1993) [hereinafter Guinier, Groups, Representation and Race-Conscious Districting].

11. The following hypothetical electoral system will clarify the distinction between single-member and multi-member districts. Imagine that a municipality must elect a ten-member school board. Under a multi-member system, the entire municipality will constitute the relevant district. Each voter within that district will cast ten votes and the candidates with the ten highest vote totals will be elected. Because all ten members are selected out of one pool of voters, the majority within that pool will select every member and the minority will be completely shut out. In contrast, a single-member plan would divide the municipality into ten separate districts. Voters within each district would vote for one candidate to represent them on the Board. Therefore, the majority within each individual district selects one representative. Where the relevant minority group forms a majority in one of the districts, it will have a strong opportunity to elect a representative of its choice.

12. At its most basic level, a gerrymander is a district whose lines have been manipulated for partisan purposes. It has also been defined as “such a thoughtful construction of districts as will economize the votes of the party in power by giving it small majorities in a large number of districts, and coop up the opposing party with overwhelming majorities in a small number of districts.” Edward Still, Alternatives to Single Member Districts, in MINORITY VOTE DILUTION 248, 251 (Chandler Davidson ed. 1984)(quoting JOHN R. COMMONS, PROPORTIONAL REPRESENTATION 49-51 (1896)).
A minority group becomes empowered only when its votes are as meaningful as the votes of members of other groups. Votes are only meaningful when the group is able to elect the candidate of its choice. Yet, "candidate of its choice" has come to mean a candidate of its race. Theoretically, if all members of a group were able to elect candidates of their own race, they would achieve nearly proportional representation. Although Section 2 of the Voting Rights Act prohibits states from interfering with a group’s ability to elect representatives of its choice, the Act explicitly does not guarantee proportional representation. Herein lies the conflict between empowerment and proportional representation.

This Note analyzes the viability of race-conscious districting on two separate levels: first in terms of its efficacy as a means of empowering minority voters, and second, in light of Shaw, which has restricted the ability of states and localities to create majoritarian-minority districts. Part II critiques the assumptions underlying race-conscious districting and realistically evaluates the effects of such districting, concluding that despite its shortcomings, race-conscious districting has been very effective at empowering minority voters and furthering their political interests. Part III traces the history of the Voting Rights Act and how it influenced the Supreme Court’s treatment of vote dilution. Part IV predicts the future of race-conscious districting in light of Shaw v. Reno. Part IV also explores the conflict between the race-conscious districting mandated by Section 2 of the Voting Rights Act and the prohibition against unconstitutional gerrymanders under the Equal Protection Clause. Part V argues that the Supreme Court, when it revisits this issue, should treat majority-minority districts as a form of political, rather than racial gerrymandering and therefore scrutinize them under the standard set forth in Davis v. Bandemer.

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13. 42 U.S.C. § 1973(b) (1988)("Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").


II. The Emergence of Race-Conscious Districting

Traditionally, courts have supported race-conscious districting as a simple, facially legitimate method of increasing minority representation that does not seriously offend the majoritarian system.16 The racial majority maintains political control within a single-member district, yet district designers redefine the concept of majority.17 Race-conscious districting has dramatically increased the number of minority representatives sitting in Congress, state legislatures and local governing bodies.18 In addition to increasing representation, these districts empower minority voters because they promote the election of authentic representatives19 of the minority group.20 Authentic representatives are theoretically more responsive to minority group needs than representatives elected by the white majority, and therefore their presence inspires minorities to participate in the political system.21 Majority-minority districts thus have two interrelated salutary effects: increased representation and increased participation.

Critics, however, challenge race-conscious districting by alleging that it increases factionalism. Such districting, critics argue, grants

17. Id.
18. Both Blacks and Hispanics are more successful in districted cities than in multi-member, or at-large, cities. Furthermore, the creation of majority-minority districts has contributed invaluably to this success. One study found that in Southern legislatures in 1989, only 2% of the 1,534 state legislators elected from majority-white districts were black. In contrast, 60% of the legislators elected from majority-black districts were black. Bernard Grofman and Chandler Davidson, *Postscript: What is the Best Route to a Color-Blind Society?*, in *CONTROVERSIES IN MINORITY VOTING*, supra note 14, at 300, 309. Another study found that neither of the two Southern black members of Congress sitting in 1985 were elected from majority-white districts. *Id.* at 309-10.
the right to a "safe" seat to some ethnic and racial groups but not to others, thereby inhibiting the movement toward a "color-blind" society.\textsuperscript{22} This criticism relies excessively on inaccurate assumptions and ignores fundamental flaws in the current districting system that, left unchecked, would disproportionately harm racial minorities. Furthermore, it overstates possible negative effects while ignoring the actual benefits that accrue from this districting.

\section*{A. Districting Assumptions}

Districting is premised on two assumptions, which, although racially neutral, have a strong impact on the perceptions and effects of race-conscious districting. These assumptions, concerning geography and fairness, have not only influenced the drawing of district lines, but have also influenced judicial attitudes toward evaluating challenged districts. Yet because these assumptions ignore the realities of forced residential patterns and the political aspects of district design, continued reliance upon them and their accuracy limits the effectiveness of districting as a method of increasing representation.

\subsection*{1. The Geography Assumption}

The primary assumption behind districting is that geography is a valid basis for defining a community of interests. Courts rely heavily on geographic considerations in evaluating districts and are instantly suspicious of any district that does not abide by traditional districting principles.\textsuperscript{23} This reliance reflects a traditional dependence upon geographic boundaries as a measure of representation within our system.\textsuperscript{24} Geographic proximity, however, is not the only means of defining a shared community of interests. Therefore, if a goal of districting is to empower minority voters who share common interests regardless of their proximity to one another, reliance upon geography may not be fair.


\textsuperscript{24} See Pamela S. Karlan, \textit{Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation}, \textit{24 Harv. C.R.-C.L. L. Rev.} 173, 178 (1989)(noting that states were given a role in the federal system because they were distinct geographic entities).
Grouping interests according to geography only is effective at insuring increased minority representation when an area includes racially segregated residential patterns. Even in some generally segregated communities, the population may be dispersed just enough to prevent the creation of a single-member district dominated by the minority group.\textsuperscript{25} Therefore, an emphasis on geography only empowers voters if they happen to live very near one another. This emphasis on defining commonality of interests as requiring geographic proximity worsens the inequality for some minorities because under such a system, their votes are less meaningful not only when compared with white voters, but also when compared with other minority voters who are geographically packed. Moreover, the emphasis actively discriminates against non-packed minority groups because it bases voter choices on geography although their interests have nothing to do with geography.\textsuperscript{26}

African-American voters share a strong commonality of interests that influences their residential patterns. Judge A. Leon Higginbotham has noted that even where the African-American community is dispersed throughout a state, that dispersion can be explained by that state’s history of racism.\textsuperscript{27} Segregation and racial hostility forced African-Americans to settle in areas where they could “minimize physical hostility by whites and maximize the few economic options permitted by racially discriminatory hiring practices.”\textsuperscript{28} Accordingly, even where African-Americans live in small communities dispersed throughout a state, the motivation behind the location and structure of each of those communities is identical, therefore linking them regardless of their proximity.

Judge Higginbotham has also explained that race and past racism not only influence current housing patterns of African-Americans, but also have effects beyond these patterns as well. Throughout American history, most aspects of the African-American experi-

\textsuperscript{25} See, e.g., Hays, 839 F. Supp. at 1209 n.67 (“[W]hen the minority population is spread so evenly throughout a state that a majority-minority district cannot be drawn without dramatically impairing the constitutional rights of the citizens of that state, there may simply be no constitutionally permissible way to draw such a district . . . .”).\textsuperscript{26} See Karlan, supra note 24, at 181 (comparing policy decisions relevant to geography (e.g., street paving, police services within one neighborhood) with those which impact minorities regardless of their residential patterns (e.g., municipal hiring policies or proposed city-wide objectives)).\textsuperscript{27} Higginbotham et al., supra note 2, at 1606.\textsuperscript{28} Id.
ence have been defined by skin color.\textsuperscript{29} To disregard the common-
ality of interests of persons of the same skin color when districting, simply because the African-American community is not completely residentially segregated, "is not only naive, but demeaning."\textsuperscript{30} It ignores the lasting effect that decades of \textit{de jure} segregation\textsuperscript{31} have had on all African-Americans, not just those who live in compact geographic areas.\textsuperscript{32} History has linked African-Americans culturally and politically to the extent that "it is likely that two African-Americans will have more in common simply because of the color of their skin than will random persons who happen to live within the same compact district."\textsuperscript{33} This strong, historically-based, commonality of interests defines African-American voters not only as a racial group, but as a political group as well.

The requirement that districts be compact adds controversy to the emphasis on geography. The Voting Rights Act, as interpreted by the Supreme Court in \textit{Thornburg v. Gingles},\textsuperscript{34} requires proof that it is possible to design a compact district in which members of the relevant minority group would form the majority in order to sustain a claim of vote dilution.\textsuperscript{35} Additionally, twenty-five states require by constitution or statute that legislative districts be compact.\textsuperscript{36} Compactness has been an unmanageable requirement in both of these contexts, however. In order to avoid Voting Rights Act litigation, and on account of the Supreme Court’s failure to offer a compactness test, states have designed many minority districts without adhering to the requirement of compactness. In state litigation, courts have been generally unwilling to invalidate dis-

\begin{itemize}
\item \textsuperscript{29} \textit{Id.} at 1625. ("[S]ince emancipation, race has remained more significant an identifying factor than religion, region, age, class, or status. The history of race has been more important to African-Americans than to any other component in this society.").
\item \textsuperscript{30} \textit{Id.}
\item \textsuperscript{31} \textit{De jure} segregation “refers to segregation directly intended or mandated by law or otherwise issuing from an official racial classification . . . .” \textsc{Black’s Law Dictionary} 425 (6th ed. 1990).
\item \textsuperscript{32} Higginbotham et al., \textit{supra} note 2, at 1627. Focusing on North Carolina, Judge Higginbotham points out that, "[a]s a direct result of hundreds of years of oppression" in that state, African-Americans languish near the bottom of the socio-economic scale. He supports that assertion with statistics regarding income, health, public assistance, unemployment and educational achievement. \textit{Id.}
\item \textsuperscript{33} \textit{Id.} at 1628.
\item \textsuperscript{34} 478 U.S. 30 (1986).
\item \textsuperscript{35} \textit{Id.} at 50. \textit{See infra} notes 100-04 and accompanying text (discussing the \textit{Gingles} standard for establishing vote dilution).
\end{itemize}
Districts on compactness grounds, out of deference towards legislative decisions. In the rare cases in which courts have entertained district challenges on compactness grounds, they have relied on subjective visual analyses rather than on any well-defined measure. Yet, compactness remains a requirement, even if one weighted differently by various courts.

Advocates of the compactness requirement stress that there will be greater internal cohesion and common identity within compact districts. Inherent in that argument, however, are two flawed premises. The first is that persons can choose where they live, which on account of economic and social constraints is not necessarily true, especially for minorities. Further, as discussed above, where persons live may have little or nothing to do with the degree of commonality they share. The second flawed premise is that an irregularly shaped district must have been designed for an illegitimate purpose. Although some irregular districts are illegitimate, so are many well-designed compact districts. Consequently, lack of geographical compactness may serve as evidence of some discriminatory intent behind the drawing of district lines, but should not alone be grounds for striking down such districts entirely.

2. The Fairness Assumption

The second assumption underlying judicial support of race-conscious districting is that the persons responsible for drawing district

37. Id.
38. Id. at 530.
39. Compare Potter v. Washington County, 653 F. Supp. 121, 130 (N.D. Fla. 1986)(holding that plaintiffs had not met first prong of Gingles because proposed minority district “arbitrarily cuts diagonally through the center of the county”) with Dilgaard v. Baldwin County Bd. of Educ., 686 F. Supp. 1459, 1466 (M.D. Ala. 1988)(holding that the relevant question is whether there will be a “strong sense of community within the proposed . . . district,” not whether the district has four regular or twenty-eight uncouth sides).
41. See supra notes 23-33 and accompanying text.
42. As one frequently quoted commentator has remarked, “[d]ragons, bacon strips, dumbbells and other strained shapes are not always reliable signs that partisan (or racial or ethnic or factional) interests are being served, while the most regularly drawn district may turn out to have been skillfully constructed with an intent to aid one party.” Robert J. Sickels, Dragons, Bacon Strips and Dumbbells — Who's Afraid of Reapportionment, 75 YALE L.J. 1300, 1300 (1966).

For an example of the influence partisan politics plays on district design, see infra note 44 and accompanying text; see also David D. Polsby and Robert D. Popper, The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering, 9 YALE L. & POL’Y REV. 301, 309-13 (1991).
lines will do so fairly without favoring a particular group. The curious paradox is that although race-conscious districting advocates rely on this assumption regularly, no one actually believes that it is true. In a classic illustration of the victor claiming the spoils, the political party currently in power controls the redistricting process. That allocation grants power to elected officials who may reflect the interests of only a bare majority, to affect the representation of all voters. More damaging in an empowerment context, however, is that this allocation of power to the majority forces minority voters to depend upon district designers to increase minority representation, even though those designers may be driven by other motives. Those in power are therefore likely to shape districts that will ensure their own re-election, instead of creating districts that will empower minority voters. Those who profess to believe this assumption would also profess that if district designers were to abuse their power, this abuse would appear blatantly in the shape of the district. A compactly designed district, however, can be every bit as discriminatory as a "bizarre" looking one. For this reason, the assumption that district lines will be drawn fairly is not only inaccurate, it is unmanageable.

When a race-conscious society adopts a system that allocates districting power to one political group, districting will always be race-conscious. In the context of the Voting Rights Act, this consciousness is exacerbated. Where officials responsible for districting historically might have concentrated on partisan concerns, the specter of the Act will force them to consider race as well. Districting becomes more complicated when a district must not only protect incumbents, but also must empower minorities and look attractive on paper. Of these desires, the goal of increasing minority representa-

43. See Shaw, 113 S. Ct., at 2826 ("[T]he legislature always is aware of race when it draws district lines."); Davis v. Bandemer, 478 U.S. 109, 128 (1986) ("District lines are rarely neutral phenomena.").

44. The Republican Party's apparently strange fixation on voting rights litigation in the '80s and '90s reflects a realization of the political nature of districting. In the redistricting following the 1990 census results, Chicago Republicans joined forces with African-American and Hispanic civil rights activists. Although their claimed intention was to create a new Hispanic district out of three districts represented by white incumbents, partisan politics played a significant role. Republicans were eager to dilute white Democrats out of minority districts and into Republican suburban districts. The final scheme resulted in the retirement of one of the white incumbents and two races between the other white incumbents. Hugh Davis Graham, Voting Rights and the American Regulatory State, in Controversies in Minority Voting supra note 14.

45. See Still, supra note 12, at 251 (describing two sophisticated districts that manipulate composition in favor of the majority without appearing suspicious).
tion is politically the most expendable, unless the mandates of the Voting Rights Act intervene.

Both of the traditional assumptions underlying districting, geography and fairness, generally prove to be inaccurate. Because of these inaccuracies, districts are not as effective in promoting minority empowerment as advocates would hope.

B. Districting Effects

Although race-conscious districting has increased minority representation, its effects on long-term empowerment are debatable. Even proponents of the goals of race-conscious districting fear that such districts waste too many minority votes, produce less effective representatives and increase factionalism. This section examines and refutes each of these criticisms and demonstrates that race-conscious districting remains the most viable means of minority empowerment.

1. Do Majority-Minority Districts Waste Votes?

Voting rights advocates who criticize race-conscious districting assert that because districting is prone to partisan abuses, single-member districts waste minority votes when they pack more voters within a district than are necessary to carry the district.\(^{46}\) Supporters of this view favor “influence” districts over majority-minority districts. Influence districts are those in which the minority population is not large enough to form a majority and elect a representative of its choice, but is large enough to act as “swing” vote in close elections.\(^{47}\) While the group might gain less representatives of its

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Professor Lani Guinier has also recognized that race-conscious districting wastes votes because it depends upon a “winner take all” philosophy in which losing votes count for nothing. The losing voter must rely on “virtual representation,” vicarious representation by like-minded successful candidates in neighboring districts. In a system that creates a finite number of minority districts, any minority voter living outside the boundaries of one of those districts receives no direct representation by a candidate of her choice.

The efficacy of virtual representation is a necessary assumption to even the fairest of districting systems. In every district a significant percentage of the electorate will not have voted for the winning candidate. Whether those voters are adequately served by neighboring representatives of similar interests raises many questions that are beyond the scope of this Note and therefore will not be discussed here. See Lani Guinier, Keeping the Faith: African-American Voters in the Post-Reagan Era, 24 HARV. C.R.-C.L. L. REV. 393, 427, nn. 152-53 (1989).

choice, its vote would factor into the results of several districts. In a majority-minority district, designers frequently draw lines so that one minority group forms as much as 70% of a district’s population. Because only 51% of the voting electorate is necessary to win an election, a significant number of excess votes that could have supported a preferred candidate in a neighboring district lose their effect. Thus, although minority voters are guaranteed a representative of their choice in one district, they cannot form a percentage of the electorate significant enough to affect electoral outcomes in neighboring districts.

Packing is a legitimate danger of race-conscious districting, but it can be prevented. The preclearance procedure of the Voting Rights Act ensures that states and municipalities justify all districting plans before obtaining approval from the Justice Department. Districting experts have become a major factor in districting litigation; they testify as to (i) the level of racially polarized voting within a community and (ii) the necessary racial composition of an effective majority-minority district. The testimony of these experts lessens the chance that a majority-minority district can be packed. Abuse may always lead to “wasted votes,” but the impact of that abuse can be minimized. Efforts should focus on that minimization rather than on eliminating the creation of majority-minority districts entirely.

2. Have Minority Representatives Been Effective?

Critics of race-based districting also question whether elected minority representatives have been effective. Arguments in favor of authentic representation for minority groups profess that a minority group member will have a greater psychological bond with constituents and will be more sympathetic to the needs of the minority group. Thus, the representative should be more effective, and her presence should inspire other minority group members to participate in the political process, thus reducing group feelings of alienation.

Critics, however, point to several factors that impair

48. See Seamon, 536 F. Supp. at 951 (studying a Texas congressional plan in which three of the districts included minority populations of greater than 70%).
49. See Bernard Grofman & Chandler Davidson, Postscript: What is the Best Route to a Color Blind Society?, in CONTOVERSIES IN MINORITY VOTING, supra note 14, at 310-14.
51. See supra note 19 for an explanation of the term authentic representation.
52. Guinier, The Triumph of Tokenism, supra note 19, at 1106.
53. See id. at 1109-12 (summarizing the “mobilization assumption,” which assumes that authentic representation promotes participation).
these results. They claim that the mere presence of an authentic representative does not empower a minority group unless that member can effectively serve the community, and that although members of a racial group are likely to believe that a representative from their own group will best represent them, that is not always the case.

A representative must overcome her minority status within the legislature. Professor Guinier has noted that using gerrymandered districts to increase minority representation results in gerrymandered legislatures. Authentic representatives may have difficulty influencing white colleagues because the white representatives do not need to consider the needs of the compartmentalized African-American electorate. The white representatives' districts are overwhelmingly white because most of the African-American voters have been districted into majority-African-American districts. The same polarization that occurs within the electorate will occur within the legislature, and because the African-American representative is still in the minority, she will consistently be outvoted.

Empirical evidence, however, contradicts this view. First, while a single African-American representative in Congress might have a negligible influence on policy decisions, the presence of just one minority representative can have substantial influence on a smaller legislative body such as a school board or town council. Not only may the presence of that person change the other members' perceptions about minority group members, but also it is likely that the other members will need to bargain with the minority member to gain her support on certain issues. In a larger body, such as the House of Representatives, a large enough number of minority representatives may be elected to vote as a block and influence the process. In this event, the minority coalition will become more powerful, and white representatives will be forced to bargain with the minority caucus. Furthermore, the minority caucus will be-

54. Id. at 1116-18 (examining situations in which mere presence of black legislators may not always empower minority voters).
55. Id. at 1126.
56. Id. at 1126 ("Blacks elected from black single-member districts are less empowered to influence their white colleagues, whose homogeneous white single-member district base enables them to ignore black interests without electoral consequences.").
57. Guinier, The Triumph of Tokenism, supra note 19, at 1106.
58. Id. at 1116.
59. Frank Parker has reported that in Mississippi, while whites still control the legislature by a wide margin, a powerful African-American caucus has developed. As
come strong enough to expose the majority to the issues important to the minority community.\textsuperscript{60}

Additionally, the ineffectiveness argument ignores the positive effect that the mere presence of authentic representatives has on minority communities. While it is important that representatives attain material benefits for their constituents, there is an added public benefit gained by the presence of minority officeholders.\textsuperscript{61}

As Judge Higginbotham has expressed: "[a] Congress with members of all colors brings more American citizens into the political system, as it announces that government is for all Americans, increases the confidence of all American voters in the government, and thereby cultivates political participation of all Americans."\textsuperscript{62}

3. \textit{Does Race-Conscious Districting Breed Factionalism?}

Critics also contend that race-conscious districting will breed factions and aggravate racial schisms within society. In \textit{Shaw v. Reno},\textsuperscript{63} Justice O'Connor articulated the fear that districts born out of the Voting Rights Act would set back rather than promote a "color blind" society. Justice O'Connor’s reservations mirror that of many critics of the Voting Rights Act: that redistricting has become a form of resegregation.\textsuperscript{65}

Theoretically, the majority-minority single-member districts created pursuant to the Voting Rights Act breed factions through a lack of compromise.\textsuperscript{66} A randomly drawn district will be heterogeneous enough to force all groups to compromise with one another near the center of the spectrum.\textsuperscript{67}

of 1988, only 20 out of 122 members of the Mississippi House were African-American. Yet the consensus among the African-American representatives and veteran white representatives was that when the African-American representatives voted as a block they were able to influence major legislation. Further they were able to invoke certain procedures that did not require a majority vote, such as removing a bill from the House calendar. They also had been able to secure influential committee appointments. \textit{Frank Parker, Black Votes Count 134-35} (1990).

60. \textit{See Higginbotham et al., supra} note 2, at 1637 (listing issues of particular importance to African-Americans).


62. Higginbotham et al., \textit{supra} note 2, at 1637-38 (emphasis in original).

63. 113 S. Ct. 2816 (1993).

64. \textit{See Plessy v. Ferguson, 163 U.S. 537, 559} (1896)(Harlan, J., dissenting)(“Our constitution is color-blind, and neither knows nor tolerates classes among citizens.”).

65. \textit{See Jeffers v. Clinton, 730 F. Supp. 196, 227} (E.D. Ark. 1989) (Eisele, J.)(“Do we really believe in the idea of one political society or should this be a nation of separate racial, ethnic, and language political enclaves?”).

66. \textit{Thernstrom, supra} note 22, at 192-244.

however, the homogeneous electorate will elect representatives who do not need support from a wide spectrum of the community and therefore are unlikely to compromise with others.\(^6\) Thus, according to its critics, the Voting Rights Act encourages groups to remain fractious rather than to build coalitions with one another.

Of all the claimed ill effects of race-conscious districting, the threat of increased factionalism is the least accurate. As one commentator has written, the changes mandated by the Voting Rights Act "simply reflect already existing cleavages within the polity: the cleavages are not necessarily a function of the changes."\(^6\) Critics have seized upon the unproven possibility that segregated districts where representatives need not compromise will become the norm, instead of the more likely outcome that integrated legislatures will develop and legislators will learn to compromise with one another.

In order for minority representatives to succeed, they must compromise. Minority representatives are no doubt as interested in political self-preservation as their white counterparts. They will work as hard as white representatives to bring material benefits home to their constituencies, and because they do not constitute the majority, minority legislators must work with white legislatures in order to secure those benefits. Therefore, they will convince white legislators that what is good for the minority is also good for the majority.\(^7\)

The idea that the above-stated effects limit the efficacy of race-conscious districting has resulted in a backlash against the use of remedial districting and against the Voting Rights Act. Because the Act has evolved from its original goal of providing access to the ballot to the much broader goal of empowerment, it has stirred controversy.

\(^{68}\) *Id.* at 307. Some may consider this lack of compromise as a positive rather than negative factor. After all, a minority representative who is forced to compromise with the white majority often will have less time or ability to serve his constituents' needs. More importantly, he will have to depend on the whims of white voters to remain in office. Yet, if the overall goal of voting rights jurisprudence is to give minorities an effective voice within government, then representatives of each minority group will have to learn to compromise not only with white representatives, but with each other as well. A system that settles for token minority representatives who remain in the minority on representative bodies and do not have to form coalitions with other representatives will not achieve that goal.

\(^{69}\) Fraga, *supra* note 61, at 279.

\(^{70}\) *Id.* at 281-82.
III. Development of Voting Rights Act as Remedy of Vote Dilution

This Part examines the history of the Voting Rights Act and its development as a means of combatting vote dilution. As passed in 1965, it was tremendously successful in providing equal access to the ballot. States employed dilutive devices, however, to emasculate the force of the Act and of the African-American vote, denying African-American voters an equal influence in the political process. Thus, in its earliest form the Act ensured political equality but not political empowerment. After plaintiffs challenged several multi-member districting plans with varying levels of success, Congress amended the Act in 1982 so that it would prohibit vote dilution. Section A below traces the Act and the vote dilution cases brought prior to its 1982 amendment. Section B summarizes the amendment and the standard for vote dilution that developed thereafter.

71. Guinier, No Two Seats, supra note 14, at 1421 (characterizing the political equality vision as insuring that African-Americans “be afforded the right to vote, and [that] their vote . . . count[s] as much as that of whites”).

72. There are a number of common dilution schemes. Majority requirements forced run-off elections when neither candidate won a majority of the vote. In cases where an African-American candidate had won a plurality against two white candidates, a run-off required the African-American candidate to run against a single white candidate who would usually then gain the entire white vote and easily win. Chandler Davidson, The Voting Rights Act: A Brief History, in Controversies in Minority Voting, supra note 14, at 7, 23 n.56.

Anti-single shot rules prohibited voters from voting for fewer candidates than there are offices to be elected. Such provisions frustrated the one tactic minority voters used to increase the power of their votes in a multi-member district. Abigail Thernstrom offers an example of successful single-shot voting: “[I]n a field of thirteen candidates with five seats to be filled and one black candidate, if blacks bullet vote for the single black candidate [that is, if each black voter casts all five of her votes for the black candidate], they deprive white candidates of potential votes and thus aid the Black.” THERNSTROM, supra note 22 at 303, 305.

73. Guinier, No Two Seats, supra note 14, at 1422 (characterizing political empowerment as the possession of an equally meaningful vote).


75. See infra notes 96-99 and accompanying text (discussing the 1982 amendments to the Voting Rights Act).
A. The Voting Rights Act and the Early Defense Against Vote Dilution Claims

The Voting Rights Act has been called the most successful piece of legislation of the "second Reconstruction."76 Passed in 1965 to enforce the voting guarantees of the Fifteenth Amendment,77 its two most important provisions were Section 2 and Section 5. Section 2, the Act's enforcement provision, echoed the words of the Fifteenth Amendment.78 Section 5 prohibited the implementation of any changes in voting procedure in "covered"79 jurisdictions without that jurisdiction first obtaining Justice Department preclearance.80 To obtain preclearance, the proposed changes could not have the purpose or effect of "denying or abridging the right to vote on account of race or color."81

76. Davidson, supra note 72, at 7. Southern historian C. Vann Woodward coined the term "second Reconstruction" to describe the movement following the Second World War which led to the eradication of legalized segregation in the South. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 8-10 (3d. ed. 1974). Woodward divides the era into two distinct periods. During the first the judicial and executive branches of the federal government initiated reforms while Congress and the general public "remained largely unresponsive." Id. at 135. During the second period, the South organized massive resistance to the movement which "aroused popular support and stirred Congress into unprecedented and effective action." Id.

77. The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this Article by appropriate legislation." U.S. CONST. amend. XV, §§ 1, 2.

78. Davidson, supra note 72, at 17.

79. A jurisdiction is covered for the purposes of Section 5 if it falls within one of the following categories: (1) it maintained a test or device as a condition for registering or voting on November 1, 1964, and less than 50% of its total voting-age population was registered or actually voted in the 1964 presidential election; (2) it maintained a test or device as a condition for registering or voting on November 1, 1968, and less than 50% of its total voting-age population was registered or actually voted in the 1968 presidential election; and (3) more than 5% of the citizens of voting age in the jurisdiction were members of a single language minority group on November 1, 1972, and less than 50% of the citizens of voting age had been registered or had voted in the 1972 presidential election. See 42 U.S.C. § 1973(b) (1988); see also 42 U.S.C. § 1973(c) (1988).

80. 42 U.S.C. § 1973(c) (1988). The Act provides that the covered state or political subdivision may seek approval for a proposed change by instituting an action for declaratory judgment in the United States District Court for the District of Columbia, but may avoid that proceeding by obtaining preclearance of the change from the Attorney General's Office. Id. Because most jurisdictions forgo the former option and opt for the latter, the phrase "Justice Department preclearance" is generally used to refer to the Section 5 process.

81. The Supreme Court has liberally construed the provision so that preclearance is now required for a variety of changes. See Georgia v. United States, 411 U.S. 526 (1973) (redistricting); City of Richmond v. United States, 422 U.S. 358 (1972) (annexations); Perkins v. Matthews, 400 U.S. 379 (1971) (changes in location of polling
Since 1975, the Justice Department has based its Section 5 preclearance decisions on the “non-retrogression” principle established by the Supreme Court in *Beer v. United States*. Under *Beer*, the threshold measure of the effect of a change is whether the change results in a retrogression of the group’s preexisting voting rights. A change that increases a group’s rights, even if it falls short of the maximum change that could occur, does not violate Section 5 unless it discriminates on the basis of race or color in violation of the Constitution. For instance, if a state whose current Congressional districting plan includes one majority-minority district out of ten total districts is granted an additional Congressional seat following a census, it will have to design a new plan composed of eleven seats. If, in considering various new plans, the state determined that it could draw three majority-minority districts, but chose instead to draw two, the plan would not violate the non-retrogression principle for its failure to include as many majority-minority districts as practicable, as long as the overall voting strength of the minority group was not weakened.

The Act immediately increased African-American voter registration, especially in the South, but could not overcome the vote dilution schemes that confronted African-American voters. African-American voters who felt shut out of the political process could only challenge dilutive voting procedures on Equal Protection grounds—an uncertain and lengthy procedure. Although the Supreme Court had stated that in some cases, multi-member districts would be subject to challenge if they diluted a group’s vot-

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82. 425 U.S. 130 (1975).
83. *Id.* at 141.
84. *Id.*
85. Justice Department estimates showed that in the five years immediately following passage of the Act, almost as many African-Americans registered in Alabama, Mississippi, Georgia, Louisiana, North Carolina and South Carolina as in the entire century before 1965. Davidson, *supra* note 72, at 21.
86. *Id.* at 37. Plaintiffs were compelled to hire experts to gather the needed evidence in such cases. Vital information included historical evidence on government responsiveness to a particular community, race relations within a jurisdiction, the effects of past election requirements and procedures, voter registration and turnout and voting patterns within specific racial or ethnic enclaves and throughout the community as a whole. *Id.* The burden of proof was daunting and plaintiffs faced the likelihood of lengthy appeals.
ing power, many years passed before a clear standard emerged for establishing unconstitutional vote dilution within those districts.

When the Court finally sustained a challenge to a multi-member district in *White v. Regester* in 1973, it did so not because “every racial or political group has a constitutional right to be represented in the state legislature,” but because the “totality of the circumstances” indicated that the multi-member plan at issue had excluded the plaintiffs “from effective participation in political life . . . .” Thus, the Court focused on the results of the multi-member plan rather than on the intent of the state legislature in establishing the plan.

The success of *White* was relatively short-lived. In 1980, the Court struck a major blow to vote dilution challenges with *City of Mobile v. Bolden*. In *Bolden*, the Court held that plaintiffs mak-

87. Burns v. Richardson, 385 U.S. 73, 88 (1966) (supposing that the invidious effect referred to in *Fortson* could be more easily shown if “districts are large in relation to the total number of legislators, if districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if such districts characterize both houses of a bicameral legislature rather than one”); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (“It might well be that . . . a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population”).

88. For some time, the ability to challenge a multi-member district appeared ethereal at best. While the Court had stated that minority plaintiffs could successfully challenge a multi-member district if they proved that the district impeded their ability to participate in the political process, it was reluctant to find that a group’s inability to elect the representative of its choice established that proof. *Whitcomb v. Chavis*, 401 U.S. 124, 153 (1971) (characterizing the plaintiffs’ claim of vote cancellation as “a mere euphemism for political defeat at the polls”).

89. 412 U.S. 755 (1973). *White* was not the first time the Court had struck down a multi-member plan because of its dilutive effects. Four days prior to the *Whitcomb* decision in 1971, the Court decided *Connor v. Johnson*, 402 U.S. 690 (1971), which invalidated a court-designed multi-member plan for Hinds County, Mississippi. In so doing, the Court established the “*Connor rule*” requiring single-member districts in court-ordered plans nationwide, regardless of whether the established plan diluted minority voting. The Court had more latitude over court-ordered plans because of its general power to supervise lower court proceedings. Further, because such plans were not enacted by state legislatures, the Court was not required to show the deference it would for state policies and procedures, nor were plaintiffs required to meet the heavier burden of proving a Fourteenth Amendment violation. *See generally Parker*, supra note 59, at 106-24 (chronicling early challenges to multi-member district plans).

90. *White*, 412 U.S. at 769-70 (declining to overturn the District Court’s judgment for the plaintiffs because it represented “a blend of history and an intensely local appraisal of the design and impact” of the districts at issue “in light of past and present reality”).

ing a claim under the Constitution or Section 2 of the Voting Rights Act had to show that a state had instituted or maintained a contested practice with discriminatory intent.\textsuperscript{92} Departing from the result-oriented test of \textit{White}, the plurality asserted that only purposeful discrimination could violate the Equal Protection Clause.\textsuperscript{93} The \textit{Bolden} decision set a prohibitively high standard for proving vote dilution. In some instances, proving discriminatory intent would require an evidentiary showing of the motives underlying dilution schemes that had been in existence for nearly a century.\textsuperscript{94}

\textbf{B. Congress Responds to \textit{Bolden}: The 1982 Amendments}

The timing of \textit{Bolden} could not have been more auspicious for the voting rights movement. In 1982, the original Section 5 preclearance provisions of the Act were due to expire, meaning that “covered” jurisdictions would be free to change their electoral systems without Justice Department interference. That expiration alone would have substantially paralyzed the movement against dilution, but considering the \textit{Bolden} decision, expiration appeared even more threatening. The \textit{Bolden} controversy triggered a movement that led not only to the codification of the \textit{White} result-oriented test but also to a twenty-five year extension of Section 5.\textsuperscript{95}

Congress amended Section 2 so that it could accomplish more than just the enforcement of the Fifteenth Amendment. As amended, it prohibited the application of any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . in a manner which results in a denial or abridgement of the right” to vote.\textsuperscript{96} Voters no longer had to prove intentional discrimination in

\textsuperscript{92} Bernard Grofman has noted that the Court’s handling of Equal Protection claims in other contexts indicated that it might adopt an intent standard for proving vote dilution. \textit{See} Washington v. Davis, 426 U.S. 229, 240 (1976) (holding that “the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose”). \textit{Bernard Grofman et al., Minority Representation and the Quest for Voting Equality} 141 n.10 (1992).

\textsuperscript{93} \textit{Bolden}, 446 U.S. at 66.

\textsuperscript{94} Davidson, \textit{supra} note 72, at 38.

\textsuperscript{95} Laughlin McDonald, \textit{The 1982 Amendments of Section 2 and Minority Representation, in Controversies in Minority Voting}, \textit{supra} note 14, at 66, 67.

\textsuperscript{96} 42 U.S.C. § 1973 (1988). Section 2, as codified and amended, reads: (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
order to prevail on a Section 2 claim.\textsuperscript{97} Instead, they needed only to show that "based on the totality of the circumstances," the members of the minority group had less opportunity than others "to participate in the political process and to elect representatives of their choice."\textsuperscript{98} Congress specifically rejected the idea, however, that the amendments were to ensure any form of proportional representation.\textsuperscript{99} Further, it provided no bright-line standard for dilution upon which courts could rely. The Supreme Court established that bright line in \textit{Thornburg v. Gingles}.\textsuperscript{100}

\textit{Gingles} illustrates the inherent conflict between the political empowerment of African-American voters and the Voting Rights Act's explicit prohibition against exactly proportional representation. The Court attempted to resolve this conflict through the development of a simpler test for vote dilution, similar to the "one person, one vote" test. Based on the legislative history of the amended statute, the majority established a three-part test to determine when at-large voting within a multi-member district violated Section 2. First, the minority group challenging the multi-member district must show that it is sufficiently large and geographically compact to form a majority in a single-member district.\textsuperscript{101} Second, the minority group must show that it is politically cohesive.\textsuperscript{102} Third, the minority group must prove that the white majority, when voting as a bloc, is able to regularly defeat the minority's preferred candidate.\textsuperscript{103} The plurality defined racial bloc

\textsuperscript{(b)} A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: \textit{Provided,} That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

97. The Amendments only eliminated the intent requirement for proving a Section 2 violation. The \textit{Bolden} decision retained its force in that it also established that a showing of intent was necessary to bring a successful Equal Protection challenge to dilutive district plans.
99. \textit{Id.}
101. \textit{Id.} at 50.
102. \textit{Id.}
103. \textit{Id.} at 50-51.
voting as "black voters and white voters voting differently," and simplified the standard for proving such voting patterns.

The Gingles test remains the standard for proving vote dilution. It has simplified the litigation process by limiting the discovery needed to prove or disprove such claims. Its focus on racial patterns in elections and demographics has provided a much more concrete basis for stating a claim than its predecessor, the intent test of Bolden, which required inquiry into social and historical factors. Because dilution is now easier to prove, states and municipalities have been more likely to settle claims out of court or to change their districting systems before a challenge arises. Thus, dilution litigation is now cheaper and less likely to be appealed.

Overall, the amendments and the Gingles test led, in the 1980s, to a substantial amount of redistricting designed to empower minority voters. Multi-member district plans were struck down as courts ordered states and counties to create majority-minority single-member districts. These new districts enabled groups that would have been outvoted by the majority in a multi-member system to elect representatives of their choice in single-member districts in which their population was large enough to form the majority. This emerging focus on single-member districts as an empowerment tool, however, led to new controversies.

The Justice Department, acting under Section 5, approved new districts even if they lacked the traditional districting criterion of geographical compactness. As the use of more irregular looking districts became increasingly widespread, it was inevitable that challenges would arise. Shaw v. Reno was just such a challenge and has threatened the future of race-conscious districting.

104. Id. at 53 n.21. The plurality used the terms "racial bloc" voting and "racially polarized" voting interchangeably.

105. McDonald, supra note 95, at 70-71. McDonald uses South Carolina as an example of the post-Gingles change in litigation. In Edgefield County, South Carolina, a challenge to at-large elections was filed in 1974. Litigation lasted more than ten years, including an appeal before the Supreme Court. A similar suit was filed in 1985. Following Gingles and a trial court judgment for the plaintiffs, the county decided not to appeal. Additional suits were then filed against the two largest towns in the county, which both settled out of court. Id. at 71.

106. See John R. Dunne, Redistricting in the 1990's: The New York Example, 14 CARDOZO L. REV. 1127, 1130 (1993)(noting that in making preclearance decisions, the Civil Rights Division does not reject oddly shaped districts as long as they do not dilute minority voting rights).
IV. The Future of Race-Conscious Districting

The Shaw v. Reno decision illustrates that the Court does not favor the pervasive use of race-conscious districting as a remedy for vote dilution. Commentators have noted that Shaw follows a trend by the Court to de-contextualize Equal Protection analysis in order to promote a “color blind” Constitution. Although the effect of Shaw is not yet clear, subsequent lower court decisions reveal a willingness to invalidate many single-member districts.

A. Shaw v. Reno: Establishing the Right to a “Color Blind” Electoral Process

Shaw v. Reno provided the stage for the inevitable confrontation between the Equal Protection Clause and the three-prong Gingles test. A divided Court held that the plaintiffs, white citizens of North Carolina, had stated a valid Equal Protection claim “by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can only be recognized as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification.” The majority, without deciding whether “the intentional creation of majority-minority districts, without more” always gives rise to an Equal Protection claim, found that the plaintiffs had stated a justiciable claim.

The North Carolina Assembly had designed the contested plan in the redistricting that followed the 1990 census. Pursuant to Section 5 of the Voting Rights Act, the Assembly submitted it to

108. Kathryn Abrams, Relationships of Representation in Voting Rights Act Jurisprudence, 71 Tex. L. Rev. 1409, 1410 n.8 (arguing that “Shaw . . . will intensify the trend away from a historical concern with the social and political subordination of blacks, toward a de-contextualized Equal Protection analysis that purports to place all groups on the same footing”).
109. 113 S. Ct. 2816. See also supra notes 100-04 and accompanying text (discussing the Gingles standard for establishing vote dilution).
110. Justice O’Connor delivered the opinion of the Court in which Chief Justice Rehnquist and Justices Scalia, Kennedy and Thomas joined.
Justice White filed a dissenting opinion joined by Justices Blackmun and Stevens. Justices Blackmun, Stevens and Souter filed separate dissenting opinions.
111. Shaw, 113 S. Ct. at 2832.
112. Id.
113. Because the 1990 census results indicated a population increase, the state was awarded a twelfth seat in the United States House of Representatives. Accordingly, the General Assembly passed legislation redistricting the state into twelve districts. Shaw v. Barr, 808 F. Supp. 461, 463 (E.D.N.C. 1992).
the U.S. Attorney General’s Office for approval.\textsuperscript{114} The Attorney General’s Office formally objected to the initial plan, which included one majority-African-American district. The Office decided that the Assembly could have created a second majority-minority district in the south-central to southeastern portion of the state, but failed to do so “for pretextual reasons.”\textsuperscript{115} The General Assembly then submitted a second plan that included two majority-minority districts, the first district, which had been in the original plan and the newly created twelfth district, located in the north central region of the state.

District 1, the original majority-minority district, was somewhat oddly shaped,\textsuperscript{116} but did not inspire the derision reserved for District 12, which was approximately 160 miles long, stretching alongside Interstate 85. The majority described the district as follows: “It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas ‘until it gobbles in enough enclaves of African-American neighborhoods.’”\textsuperscript{117}

The plaintiffs’ claim was not one of vote dilution but one alleging a violation of the Equal Protection Clause. Accordingly, the Court did not apply the \textit{Gingles} test because application of Section 2 was not necessary.\textsuperscript{118} The Court instead studied whether the plaintiffs even had a valid claim in asserting that the districting plan unlawfully segregated voters. In so doing, the Court did not condemn all use of race in districting, conceding that “the legislature always is

\textsuperscript{114} Forty out of the one hundred North Carolina counties are covered by Section 5. Because the redistricting affected covered counties, the plan required preclearance. \textit{Id.} at 463.

\textsuperscript{115} \textit{Shaw}, 113 S. Ct. at 2820.

\textsuperscript{116} The shape of District 1 has been described as a “bug splattered on a windshield.” \textit{Review and Outlook: Political Pornography-II}, \textit{Wall St. J.}, Feb. 4, 1992, at A14.

\textsuperscript{117} \textit{Shaw}, 113 S. Ct. at 2821 (citations omitted). Other commentators were no kinder in assessing the district. See Bernard Grofman, \textit{Would Vince Lombardi Have Been Right If He Had Said: “When It Comes To Redistricting, Race Isn’t Everything, It’s the Only Thing?”} \textit{14 Cardozo L. Rev.} 1237, 1261 (1993)(“a very slender worm with unsightly bulges”); Timothy M. Phelps, \textit{Minority District Challenge}, \textit{Newsday}, Aug. 31, 1993, at 17 (“boa-constrictor like”). A more sweeping, and less accurate assessment called the district “the most flagrant example of racial gerrymandering on the U.S. political map.” Elizabeth McCaughey, \textit{Stopping Racial Gerrymandering}, \textit{U.S.A. Today}, June 29, 1993. Finally, the most humorous commentary has been attributed to Mickey Michaux, one of the candidates for Congress in District 12 in 1992: “I love the district because I can drive down I-85 with both car doors open and hit every person in the district.” \textit{The Almanac of American Politics}, North Carolina, Twelfth District 968 (1994).

\textsuperscript{118} \textit{See supra} notes 100-04 and accompanying text (discussing the \textit{Gingles} standard for establishing vote dilution).
aware of race when it draws district lines . . . .”119 Rather, the Court focused on the special harms that could result if race became too significant a factor in district design. By focusing on the degree to which race was a factor in the design of majority-minority districts, the Court treated these districts as a form of segregation that “threaten special harms not present in vote dilution cases,”120 and thus divorced this claim from prior vote dilution claims. The Court’s discussion focused on the potential harms of majority-minority districts in general, rather than on the specific harms of the North Carolina plan.

For two reasons, the Court summarily rejected the notion that a remedial single-member majority-minority district should be held to less Constitutional scrutiny than other racial classifications. First, it noted the general proposition promoted in Richmond v. J.A. Croson Co., that Equal Protection analysis “is not dependent on the race of those burdened or benefitted by a particular classification.”121 Second, the Court addressed majority-minority districts directly and concluded that they cause the same harms as other racial classifications and therefore should be treated accordingly.122 For example, these plans promote racial stereotypes, which “reinforce[ ] the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls,” and thus exacerbate rather than ameliorate racial polarization in voting.123 Additionally, the Court claimed that majority-minority districts encourage elected officials to pander to a particular racial group at the expense of the rest of their constituency.124 The Court concluded that some majority-minority districts bear “an uncomfortable resemblance to political apartheid.”125 In light of all these potential harms, the Court held, in the spirit of Croson, that racially gerrymandered districts would be held to the same strict scrutiny standard as other classifications based on race. The Court concluded that “[r]acial gerrymandering, even for remedial pur-

119. Shaw, 113 S. Ct. at 2826 (emphasis added).
120. Id. at 2828.
121. Id. at 2829 (quoting Croson, 488 U.S. 469, 494 (1989)(plurality opinion)).
122. Id.
123. Id. at 2827.
124. 113 S. Ct. at 2827.
125. Id. The Court classified the voters of Districts 1 and 12 as “widely separated by geographic and political boundaries” and as having “little in common with each other but the color of their skin.” Id.
poses, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters . . . . It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.”

The Court established that more than one type of evidence would suffice to prove that a district had been impermissibly racially motivated. Plaintiffs could offer direct evidence that a district had been intended as an express racial classification, but the Court recognized that such evidence would be rarely available. Alternatively, therefore, the majority opinion noted instances where inferential evidence would be sufficient proof of a racial motivation.

The majority noted two instances where a court could infer a suspect racial gerrymander. The easier case exists where a plan is “so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to segregat[e] . . . voters on the basis of race.” A second, less obvious case would be where a state designs a districting plan without regard to the traditional districting principles of compactness, contiguity and respect for political subdivisions. Disregard for these principles does not render a districting plan per se unconstitutional, because their application is not constitutionally required, but such disregard does serve as probative evidence of unconstitutionality.

Although the Court declined to rule on whether North Carolina had demonstrated a sufficiently compelling state interest for designing the contested districts, the opinion suggests that it would have found the interests likely to be offered by the State less than compelling. First, although the majority conceded that the State has a strong interest in complying with Section 5 of the Voting Rights Act, it stressed that courts have never given covered jurisdictions “carte blanche to engage in racial gerrymandering in the name of non-retrogression.” Therefore, while the state may have had a strong interest in complying with the non-retrogression

126. Id. at 2832.
127. Id. at 2824 (“No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute.”)(citing Personnel Adm’r. v. Feeney, 442 U.S. 256, 272 (1979)).
128. Id. at 2826-27 (quoting Gomillion v. Lightfoot, 364 U.S. 339, 341 (1964)).
129. Id. at 2827.
130. Id. (“We emphasize that these criteria are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.”).
131. Id. at 2831 (“A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably neces-
principle, it would not have a strong interest in designing more majority-minority districts than necessary. As for compliance with Section 2, the Court stated only that the State would have to survive the Gingles test\textsuperscript{132} in order to satisfy strict scrutiny, and that the issue was left open for remand.\textsuperscript{133} Second, the majority doubted that a District Court would hold eradication of past discrimination to be a compelling state interest. The Court theorized that in the likely event that the District Court found that North Carolina had exceeded the requirements of the Act, the State would be unable to prove that past racial discrimination within the State had been so severe as to warrant that excessive remedial action.\textsuperscript{134}

The four dissenting Justices argued that the majority opinion ignored the fact that a valid Equal Protection claim generally requires a showing of discriminatory effect.\textsuperscript{135} As Justice White pointed out in his dissent, voting rights jurisprudence has established that a group alleging an Equal Protection violation must prove that its members have been “shut out of the political process.”\textsuperscript{136}

In examining the Equal Protection claim, Justice Souter opined that vote dilution is the only harm that unconstitutional districting can cause.\textsuperscript{137} According to Justice Souter, unlike other racially based state decisions, a districting plan does not necessarily benefit members of one race at the expense of another.\textsuperscript{138} A person’s individual right to representation is not infringed when that person is drawn into or out of a particular district. A district only becomes

\textsuperscript{132}See supra notes 100-04 and accompanying text (discussing the Gingles standard for establishing vote dilution).
\textsuperscript{133}Shaw, 113 S. Ct. at 2831.
\textsuperscript{134}Id. at 2832. The Court bases this standard on City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)(plurality opinion), which held that in eradicating the effects of past racial discrimination, a State must have a “strong basis in evidence for [concluding] that remedial action [is] necessary.” Croson, 488 U.S. at 500. The Court apparently is not persuaded by the Justice Department’s opinion that forty of North Carolina’s one hundred counties engaged in sufficiently discriminatory election procedures to warrant Section 5 coverage.
\textsuperscript{135}See Shaw, 113 S. Ct. at 2836 n.4 (White, J., dissenting)(explaining that the position taken by the majority in this case conflicts with that established in Davis v. Bandemer, 478 U.S. 109 (1986)).
\textsuperscript{136}113 S. Ct. at 2835 (White, J., dissenting)(quoting Bandemer, 478 U.S. at 139 (1986)(plurality opinion)).
\textsuperscript{137}Id. at 2847 (Souter, J., dissenting).
\textsuperscript{138}Id. at 2846 (Souter, J., dissenting)(distinguishing districting from decisions that deny one person a right or benefit that is provided to another person).
unconstitutional when it affects the political power of an entire group. Justice Souter argued that if an apportionment scheme does not threaten a group's ability to "participate in the political process and to elect representatives of its choice," then from an effects basis, no wrong has occurred, and concluded that the majority based its finding on appearance rather than effect.

The majority in Shaw compensates for the lack of discriminatory effect by creating a standard that eliminates the effect requirement if a district looks sufficiently irregular. This standard disingenuously stresses the appearance of districts over the harm resulting from them. As Justices Stevens and White acknowledged, the shape of a district is relevant only to the extent that it may show some discriminatory intent, and when intent is not the issue, shape has less significance. Justice Stevens elaborated that a gerrymander becomes unconstitutional not when it takes on a certain shape, but when it serves to "enhance the power of the group in control of the districting process at the expense of any minority group, and thereby to strengthen the unequal distribution of electoral power." Finally, the dissenters argued that the majority opinion, by focusing on appearance, misstates the potential harm of gerrymandered districts. Districts are not harmful because they look unusual but because they are designed to serve an unconstitutional purpose.

Shaw constitutionalized the arguments against race-conscious districting by fitting them under the mantle of the Equal Protection Clause. Indeed, there may be some relation between single-member districts and the racial stereotyping, electioneering and "political apartheid" Justice O'Connor warns against. Unfortunately, she reversed the cause and effect relationship; those dangers are not the effect of race-conscious districting, but rather have

139. Id. at 2846 (Souter, J., dissenting).
140. Id.
141. Elaine Jones of the N.A.A.C.P. Legal Defense Fund has labeled this the "Looks Funny" standard of Equal Protection. Both Sides with Jesse Jackson (CNN Television Broadcast, July 3, 1993).
142. This view was espoused by Justices White and Stevens in separate dissents. White remarked that irregularities in design "have no bearing on whether the plan ultimately is found to violate the Constitution." 113 S. Ct. at 2841 (White, J., dissenting). Stevens found that because the State's intent in creating the two districts was clearly to abide by the Attorney General's ruling, the shape of the districts was irrelevant to this claim. Id. at 2844 (Stevens, J., dissenting).
143. Id. at 2844 (Stevens, J., dissenting).
144. Id.
145. Id. See also id. at 2846 (Souter, J., dissenting).
146. See supra part II.
limited the success of minority candidates for decades, causing legislatures to draw majority-minority districts in an effort to compensate for that limitation.

Initially, there was some thought that Shaw might have little effect on districting. Justices White and Souter both predicted that the majority holding would be limited to situations where a district looked particularly bizarre.\textsuperscript{147} The lower court decisions interpreting Shaw, however, have contradicted this view.

B. Following Shaw: The District Court Responses

Shaw held that a racially gerrymandered majority-minority district would be subject to strict scrutiny, but the Supreme Court did not itself apply the strict scrutiny test to the North Carolina plan; instead it remanded the suit to the district court for further consideration. To date, four district courts have heard Shaw claims, three of which are noteworthy.\textsuperscript{148} Courts have expressed some difficulty in interpreting Shaw,\textsuperscript{149} and while for the most part they have looked to other race-based remedial action cases for guidance,\textsuperscript{150} they have approached the analysis of Shaw claims differently. This section will first discuss what circumstances in fact trigger strict scrutiny, and then how the courts have applied strict scrutiny in race-conscious districting cases.

\textsuperscript{147} See Shaw, 113 S. Ct. at 2834 (White, J., dissenting)(stating that the decision will probably “not substantially hamper a State’s legitimate efforts to redistrict in favor of racial minorities”); 113 S. Ct. at 2848 (Souter, J., dissenting)(“The district at issue in this case is indeed so bizarre that few other[s] . . . are likely to carry the unequivocal implication of impermissible use of race that the Court finds here.”).


1. Proof Required to Trigger Strict Scrutiny

All three district courts have relied heavily on the standard established by the Supreme Court in *Arlington Heights v. Metropolitan Housing Dev. Corp.* 151 In *Arlington Heights*, the Court held that strict scrutiny would apply to any legislation in which race has been shown to be the “substantial” or “motivating” factor, even if race was not the sole or primary justification for the legislation. 152 The district court in *Shaw v. Hunt* 153 applied this standard, 154 while the court in *Hays v. Louisiana* 155 adopted an even broader standard. The *Johnson v. Miller* 156 court also relied on the “substantial or motivating” standard, but interpreted it differently than the *Hunt* court.

The *Hunt* court conceded that *Shaw*’s meaning in the strict scrutiny context was “not immediately clear,” and thus struggled with the various potential interpretations urged by the competing parties. 157 The *Hunt* plaintiffs had urged the court to apply the “sub-

152. *Id.* at 265-66.
154. *Hunt*, 861 F. Supp. at 431 (holding that strict scrutiny will be triggered “by proof—by any means, including state concession, bizarre shape, or some combination of the various factors typically used to prove the ‘intent’ element of an Equal Protection claim under *Arlington Heights*” that race played a substantial or motivating role in the design of the districts). Unlike many other courts and commentators, the *Hunt* court stressed that the constitutional offense involved in a claim of this type is not the bizarre shape of the districts but the deliberate classification of voters by race. *Hunt*, 861 F. Supp. at 431. According to the court’s reading of *Shaw*, peculiar or ugly shapes may bear some significance at the strict scrutiny stage, “but only as circumstantial evidence that the disproportionate concentration of members of a particular race in certain districts was something the line-drawers deliberately set out to accomplish . . . .” *Hunt*, 861 F. Supp. at 431.

The court dismissed outright the State’s argument that the plan should be held to intermediate scrutiny because the State was complying with a federal statute. Although the court acknowledged this federal mandate, it rejected the argument that the Plan should be judged under the intermediate scrutiny standard that the Supreme Court applied to “benign” race-based measures mandated by Congress in *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), rather than the strict scrutiny standard applied to such measures when they are undertaken by state and local governments. *Hunt*, 861 F. Supp. at 435 n.22. The court distinguished the policies at issue in *Metro Broadcasting* from the *Hunt* plan because the *Metro* policies had been specifically mandated by Congress, but a districting plan enacted by a state did not carry “the same imprimatur of congressional approval, even when it is done with the purpose of complying with the Voting Rights Act or the Justice Department’s interpretation thereof.” *Hunt*, 861 F. Supp. at 434 n.22.
stantial or motivating factor" test, while North Carolina argued that the court should apply strict scrutiny only in the absence of a race-neutral explanation for the location, shape and composition of the district. While the court admitted that the North Carolina interpretation was credible, it held that such an interpretation could not be correct because it would render the Shaw opinion virtually meaningless. In other words, application of North Carolina’s trigger standard would not comply with the Hunt court’s interpretation of the Shaw majority’s intention “to place race-based redistricting legislation into the same category as all other forms of race-based state action after Croson, for purposes of analysis under the Equal Protection Clause . . . .”

The Shaw v. Hunt court held that a districting plan would trigger strict scrutiny if the plaintiffs proved that it was deliberately drawn

158. The “substantial” or “motivating” standard derives from Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977)(holding that plaintiffs had failed to prove that a racially discriminatory intent or purpose had motivated a Village rezoning decision). The Hunt plaintiffs interpreted Shaw to establish that in the voting rights context, the Arlington Heights test is satisfied by “proof that the lines of a particular plan were deliberately drawn so as to create one or more districts in which a particular racial group has a majority, even if factors other than race also played a substantial role in the location and shape of those districts.” See Hunt, 861 F. Supp. at 427 (emphasis added). This interpretation was also adopted by a unanimous opinion in Hays v. Louisiana, 839 F. Supp. 1188 (W.D. La. 1993), vacated, 114 S. Ct. 2731 (1994).

159. See Hunt, 861 F. Supp. at 428. The State urged that a more accurate reading of Shaw would limit strict scrutiny to plans that “(i) create districts with highly irregular shapes, (ii) in which citizens of particular racial groups are concentrated in numbers disproportionate to their representation on the state’s population as a whole and (iii) whose shape and location cannot be rationally explained by reference to any districting factor other than race.” Id. Furthermore, while the presence of the first two factors might give rise to an inference that the plan was gerrymandered, the state would be able to rebut that finding with evidence that the shape of the districts could be rationally explained on some other basis. Id. This interpretation would limit application of Shaw to “exceptional cases.” Id.

160. See Hunt, 861 F. Supp. at 428-29. The court advanced two justifications for the State’s interpretation. First, an apparent conflict existed between the plaintiffs’ interpretation and the nature of the Supreme Court’s remand. Noting that the State had conceded that race had been a motivating factor in the plan design, the court hypothesized that if the Shaw Court had intended that the deliberate creation of majority-minority districts was all that was necessary to trigger strict scrutiny, it would have “note[d] the state’s concession, announce[d] that strict scrutiny was therefore applicable, and remand[ed] for application of that standard.” Id. at 429. Instead, the Court suggested that the state might avoid strict scrutiny on remand by producing evidence that would somehow “rebut” or “contradict” the allegation of racial gerrymandering. Id. (citing Shaw, 113 S. Ct. at 2832). Second, the Shaw majority “explicitly reserved the question whether the deliberate creation of majority-minority districts, without more, always triggers strict scrutiny.” Id. That express disclaimer on the part of the Court would appear to discredit the plaintiffs’ interpretation.

to create one or more districts which placed a particular racial group in the majority, even if factors other than race played a significant role in the location and shape of the districts. According to the court, upon this showing of deliberate racial purpose, the State would not avoid strict scrutiny by a showing that the districts could be justified by reference to some other districting principle.

Interestingly, the court never cited the Shaw opinion for support of this standard. Rather, it cites to Shaw for the general principle that race-based districting is as injurious as other classifications based on race, but never for the principle that the “substantial or motivating” factor test should trigger strict scrutiny in this context. In fact, the court concedes that it has not drawn this conclusion directly from Shaw, characterizing its conclusion as “the necessary implication” of its Shaw analysis.

Hays v. Louisiana stated a much broader trigger standard, declaring that all racially gerrymandered districting plans would trigger strict scrutiny. Despite the Supreme Court’s holding in Shaw that an unconstitutional plan would be one that could be “understood only as an effort to segregate voters . . .,” the Hays court emphasized that the State would not defeat a racial gerrymandering claim merely by showing that factors other than race influenced the design of the districting plan. Rather, the court interpreted the Shaw holding to require that the State show that “the contours and content of a redistricting plan can be wholly explained to be the product of . . . factors other than race.” That is, in order to rebut a gerrymandering claim, a State must show that race played no factor in the design of a redistricting plan. Thus, the Hays court

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163. Id.
164. Id. at 431 (citing Shaw, 113 S. Ct. at 2832, and explaining the dangers of race-based districting).
165. For support of its interpretation that strict scrutiny is triggered by application of the “race-a-motivating-factor” test, the Hunt court cites, not Shaw, but two district court decisions: Hays v. Louisiana, 839 F. Supp. 1188 (W.D. La. 1993), which was subsequently vacated by the Supreme Court, and Jeffers v. Tucker, 847 F. Supp. 655, 671-72 (E.D. Ark. 1994)(Eisele, J., concurring), which did not even concern a Shaw claim.
167. Hays v. Louisiana, 839 F. Supp. 1188, 1194 (1994). The court defined a racially gerrymandered district as one intentionally drawn along racial lines or that “otherwise intentionally segregates citizens into voting districts based on their race.” Id.
clearly pronounces a view even stricter than the *Arlington Heights* standard.

The *Johnson v. Miller* court agreed that *Arlington Heights* established the standard as to whether the court should apply strict scrutiny, but interpreted it differently than the *Hunt* court. Unlike the *Hunt* majority, the *Johnson* court interpreted the "substantial or motivating" standard to require plaintiffs to prove that race was the only plausible explanation for the district lines.

The *Johnson* court relied on Shaw's discussion of voting rights precedent in support of its conclusion. The cases cited by Shaw established that a satisfactory showing of intent required not merely that race was a substantial motivation behind a particular district, but that no other equally plausible motivation existed. Nevertheless, it conceded that the Shaw intent standard is more onerous than that used in the cited cases, because those cases were decided prior to the passage of the Voting Rights Act, which legitimized the use of race in districting. Therefore, the court characterized the triggering test as requiring a demonstration "that racial concerns are the only ones plausibly to be inferred from the district's lines.

The *Johnson* court added a caveat that it was not holding that race need be the "sole motivation" in order to trigger strict scrutiny. The *Johnson* court feared that the standard applied in *Hunt* would cause voting rights litigation to "sweep the country at ten-

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172. *Id.* at *15 ("Where it cannot be shown that race was the "substantial" or "motivating" factor behind a voting district by demonstrating that racial concerns are the only ones plausibly to be inferred from the district’s lines, there is no valid Equal Protection claim.").
173. *Id.* at *15 (citing *Shaw*, 113 S. Ct. at 2825-27).
174. *Id.* at *15. The court’s discussion focused on *Wright v. Rockefeller*, 376 U.S. 52, 56-57 (1964), in which an Equal Protection challenge to a districting plan was dismissed because the plaintiffs failed to demonstrate that the district lines were influenced primarily by race: "It may be true . . . that there was evidence which could have supported inferences that racial considerations might have moved the state legislature, but even so, we agree that there also was evidence to support his finding that the contrary inference was ‘equally or more persuasive.’ ” *Wright*, 376 U.S. at 56-57 (citations omitted).
176. *Id.*
177. *Id.* at *16. This would provide a scenario on the opposite scale of the *Hunt* interpretation. Plaintiffs would never be able to prove that race was the only motivating factor, and thus this burden would be as onerous on plaintiffs as the *Hunt* standard would be on defendants. *Id.*
year intervals." It predicted that if the court disallowed race as a factor in districting, every state and local government subject to the requirements of Section 5 of the Voting Rights Act would face litigation with every new districting plan. The Johnson court concluded that a district should trigger strict scrutiny only when the use of race is "abused," and the district lines are unexplainable on grounds other than race.

2. Application of Strict Scrutiny in the Redistricting Context

Application of the strict scrutiny test to a Shaw claim is challenging for lower courts because the Shaw majority provided little guidance. While the courts have easily resolved the issue of burden of proof, holding that the ultimate burden of persuasion rests with the plaintiffs, the courts have differed as to the specific application of the strict scrutiny analysis.

a. Compelling State Interest

At the outset of its "compelling interest" discussion, the Shaw v. Hunt court stressed that the critical inquiry was whether the state had a compelling interest in enacting any race-based redistricting plan and therefore did not need to analyze the particular plan at the "compelling interest" stage. Instead, the court stated that it would scrutinize the particular plan under the "narrowly tailored" prong. In contrast, the Johnson court did focus on the compelling interest of the State in creating the particular plan in dispute. Both Hunt and Johnson examined the same two interests, however: compliance with the Voting Rights Act and eradication of the effects of past and present racial discrimination in North Carolina.

178. Id. at *16.
179. Id.
180. Id. at *16.
181. Hunt, 861 F. Supp. at 434 (noting that "while Shaw offers some brief suggestions about what this standard might require in the redistricting context . . . it does not actually apply it to this particular districting plan").
184. In Johnson, the State had also argued that proportional representation was a compelling state interest. Johnson, 1994 WL 506780 at *22. The court dealt with this claim only briefly because proportional representation is neither a constitutional nor statutory requirement. It further noted that such a goal would establish quotas, expressly prohibited in Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978). The court concluded its denial of this claim with reference to the recent Supreme Court decision in Johnson v. DeGrandy, 114 S. Ct. 2647 (1994). DeGrandy established that while proportional representation could be presented as evidence of non-
The *Hays* court did not perform a compelling interest analysis. Unlike the *Hunt* court, the *Hays* court did not see the need to distinguish the compelling interest stage of analysis from the narrowly tailored stage. The *Hays* defendants offered four governmental interests in support of the districting plan, but because the court concluded that the plan was not narrowly tailored to meet those interests even if they were compelling, it chose not to analyze them in detail.  

### i. Compliance With the Voting Rights Act

Under the general principles established in the race-based remedial action cases, the *Hunt* court held that a state has a compelling interest in engaging in race-based districting “whenever it has a ‘strong basis in evidence’ for concluding that such action is ‘necessary’ to prevent its electoral districting scheme from violating the Voting Rights Act.” The court analogized the Voting Rights Act to Title VII of the Civil Rights Act, stating that if compliance dilution under § 2, it is not required. *DeGrandy*, 114 S. Ct. at 2651. The same point was made in the *Shaw* opinion. *See Shaw*, 113 S. Ct. at 2830.

185. *Hays*, 839 F. Supp. at 1206. The proffered governmental interests were as follows: conformity with § 2 of the Voting Rights Act, conformity with § 5 of the Voting Rights Act, proportional representation of African-Americans in the Louisiana Congressional Delegation, and remedying the effects of past racial discrimination in Congress. *Id.*

Although these claims were not analyzed in the main opinion, a concurring opinion dismissed them as insufficient. *See id.* at 1216-18 (Walter, J., concurring). According to this concurrence, because the constituents were not geographically compact, the Plan did not meet the first prong of the *Gingles* test. *Id.* at 1217 (Walter, J., concurring). Additionally, because Louisiana had one minority district prior to this plan and this plan was designed to create two minority districts, the State could not claim that § 5 applied, because there would have been no retrogression of minority voting strength if only one minority district had been included in the new plan. Therefore, § 5 only mandated that the new plan maintain the one minority district that existed before. *Id.* In addition, because § 2 expressly states that proportional representation of any minority group is not required, the court would have quickly dismissed this claim had it analyzed it. *Id.* Lastly, the concurrence turned to *Croson* as evidence that the Supreme Court has severely limited the ability of legislatures to remedy past discrimination. In *Croson*, the Court held that before remediying past discrimination, a state must “identify that discrimination, public or private, with some specificity.” *Id.* at 1215 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 503 (1989)).

186. *See supra* note 150 (listing race-based remedial action cases).

187. *Hunt*, 861 F. Supp. at 437. The court examined the Supreme Court's treatment of statutory compliance as a compelling interest in the race-based remedial action cases. It found that the Supreme Court has recognized that a state's compelling interest in remediying past discrimination extends to “remediying past or present violations of federal statutes that are designed to eradicate such discrimination . . . .” *Id.* (citations omitted).

with the latter act is a compelling interest, then compliance with the voting law is even "more compelling," for Title VII is based only on the commerce power, while the Voting Rights Act is "a direct exercise of Congress' broad constitutional power to enforce the provisions of the Fourteenth and Fifteenth Amendments."

The Hunt court found nothing in the Shaw opinion that would contradict its interpretation. In fact, the Shaw Court explicitly expressed that states have a "very strong interest" in complying with the Voting Rights Act, "at least to the extent it is constitutionally valid as interpreted and as applied." The Hunt court therefore concluded that because the Supreme Court has upheld the constitutionality of the Voting Rights Act in several contexts, the Shaw opinion supports the notion that compliance with the Act is a compelling state interest.

The Hunt court also interpreted the terms "strong basis in evidence" and "necessary" within the definition of "compelling state interest." It determined that a state would have a "strong basis in evidence" for concluding that it must engage in race-based districting, "when it has information sufficient to support a prima facie showing that its failure to do so would violate the Act." According to the Hunt court, this situation would arise when either the state has been presented with information sufficient to support a prima facie Section 2 challenge to a single-member districting scheme, or when a plan previously submitted by the state has

189. See Wygant, 476 U.S. at 274-75 (plurality); id. at 289-93 (O'Connor, J., concurring).
191. Id. (quoting Shaw, 113 S. Ct. at 2830).
192. The Court has specifically upheld § 5. See South Carolina v. Katzenbach, 383 U.S. 301, 334-35 (1966)(determining that while § 5 was an "uncommon exercise of congressional power," its passage was justified); City of Rome v. United States, 446 U.S. 156, 180-182 (1980)(declining to rule that the 1975 extension of the preclearance requirement was not justified). The Court has also upheld § 2. See Chisom v. Roe-mer, 111 S. Ct. 2354, 2362 (recounting that § 2, as originally passed, was coextensive with the coverage provided by the Fifteenth Amendment)(1991); City of Rome, 446 U.S. at 177 (characterizing § 2 as an "appropriate method of promoting the purposes of the Fifteenth Amendment").
193. Clearly, the state need not await a judicial or legislative finding that discrimination exists before taking state action; such a requirement would undermine a state's incentive to voluntarily remedy discriminatory practices, and undermine the Congressional goal of encouraging voluntary compliance with civil rights laws. Hunt, 861 F. Supp. at 439 (citations omitted).
194. Id. (citations omitted).
195. Hunt, 861 F. Supp. at 440. See also supra notes 100-04 and accompanying text (discussing the Gingles standard for establishing a § 2 vote dilution claim).
been denied preclearance under Section 5. Because Section 2 is not at issue in a Shaw claim, the court focused its discussion on Section 5. In order to prove that it had a strong basis in evidence for believing that the plan was necessary as designed to comply with Section 5, the state must show that it was denied preclearance by the Attorney General's Office, and must also "reasonably conclude, after conducting its own independent reassessment of the rejected plan in light of the concerns identified by the Justice Department, that the Justice Department's conclusion is legally and factually supportable." 

The Johnson court also found that compliance with the Voting Rights Act is a compelling state interest, but stressed that the narrow tailoring stage overshadowed the compelling interest determination in this context. While lamenting over the lack of guidance provided by the Supreme Court in Shaw, the Johnson court concluded that Shaw must have intended to rule that compliance is a compelling interest under some circumstances, but only when the action taken does not go beyond what is required under the Act. 

Thus, the Johnson court found that there is a strong relationship between whether a plan was motivated to further a compelling state interest and whether it was narrowly tailored to meet that interest. In situations involving jurisdictions covered by Section 5, the Johnson court would assume a compelling interest, be-

196. Hunt, 861 F. Supp. at 441. See also supra note 79-84, and accompanying text (discussing the standard for § 5 preclearance).
197. See supra notes 118-20 and accompanying text (distinguishing a Shaw claim from a § 2 vote dilution claim).
198. Hunt, 861 F. Supp. at 443. Plaintiffs had suggested that the Equal Protection Clause requires the State to mount an unsuccessful challenge of a denial of preclearance, in the United States District Court for the District of Columbia, before compliance with § 5 can be deemed a compelling interest. The court rejected this argument for a number of reasons. First, it would indicate disrespect for the authority of the Attorney General, who has been authorized by Congress to make preclearance decisions. Second, it would conflict with the policy of encouraging voluntary compliance with Federal civil rights laws among the states. Third, it would encourage needless litigation, and would provide states with an opportunity to avoid their duty to remedy past discrimination by engaging in protracted litigation. Id.
200. Id. at *24 ("A most useful hint, however, comes from Justice O'Connor's injunction that courts 'bear in mind the difference between what the law permits, and what it requires.' [T]he point here is that the VRA cannot justify all actions taken in its name.") (quoting Shaw, 113 S. Ct. at 2830).
201. Id. at *24-26.
202. For an explanation of § 5 of the Voting Rights Act, see supra notes 79-84 and accompanying text.
cause the State could not have designed the contested plan without Justice Department approval.\textsuperscript{203} Whether that assumption is justified however, turns on the narrow tailoring analysis. The \textit{Shaw} Court was careful to hold that a state may have a compelling interest in taking action to comply with the Act whenever it believes that such action is "necessary."\textsuperscript{204} The \textit{Johnson} court interpreted this to mean that if the plan as designed does more than is necessary, then the state never had a compelling state interest; if the evidence shows that the plan in question was necessary, then the state did have a compelling interest.\textsuperscript{205} Thus, the \textit{Johnson} court approaches the compelling interest analysis in a completely different manner than the \textit{Hunt} court. While the \textit{Hunt} court focused on whether the state had a compelling interest to design \textit{any} plan to increase minority voting strength, the \textit{Johnson} court clearly attempted to find whether the state had a compelling interest to design the \textit{particular} plan in question.\textsuperscript{206}

\textbf{ii. Eradicating the Effects of Past Discrimination}

In both \textit{Hunt} and \textit{Johnson}, the states argued that they had compelling interests in engaging in race-based redistricting to eradicate the effects of past discrimination, even if not compelled to do so by the Voting Rights Act.\textsuperscript{207} The \textit{Hunt} court held that indeed this was a compelling interest, but the \textit{Johnson} court disagreed. The \textit{Hunt} court concluded that the eradication of the effects of past discrimination serves as a compelling state interest for much of the same reason that it found that a state has a compelling interest in complying with the Voting Rights Act.\textsuperscript{208} Relying heavily on the "remedial measure" cases again, the court held that a state could show the compelling interest as long as it could point to instances of "specific discrimination" within its own political processes and not merely "societal discrimination."\textsuperscript{209} As a practical matter, however, a state would rarely rely on eradication as a justification, because the same evidence of discrimination necessary to prove this interest would also prove a need to comply with

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\textsuperscript{203} \textit{Johnson}, 1994 WL 506780, at *26.
\textsuperscript{204} \textit{Id.} at *24 (quoting \textit{Shaw}, 113 S. Ct. at 2831).
\textsuperscript{205} \textit{Id.} at *25.
\textsuperscript{206} \textit{Id.} at *25.
\textsuperscript{207} \textit{Johnson}, 1994 WL 506780 at *23; \textit{Shaw} v. \textit{Hunt}, 861 F. Supp. 408, 443 (E.D.N.C. 1994). In \textit{Johnson}, this interest was not raised by the State, but by the Department of Justice as Intervenor-defendants. \textit{Johnson}, 1994 WL 506780 at *22.
\textsuperscript{208} \textit{Hunt}, 861 F. Supp. at 443.
\textsuperscript{209} \textit{Id.} (citations omitted).
the Voting Rights Act. Nevertheless, the court maintained that a state could claim that eradication of past discrimination was an independent compelling interest if that state had a history of official past discrimination, yet for some reason was not subject to the requirements of the Voting Rights Act.

The *Johnson* court concluded that a state has no compelling state interest in eradicating the effects of prior discriminatory voting practices independent of the Voting Rights Act. The court found that there was no strong Supreme Court precedent supporting such a contention, and that the Voting Rights Act itself had established a sufficient remedial program for that purpose. Thus, according to the court, any remedial interest the state may have claimed was completely subsumed by the mandate of the Voting Rights Act. If a plan went beyond the requirements of the Act it would no longer be narrowly tailored to achieve any other compelling interest. Unlike the *Hunt* court, the *Johnson* majority thought it unlikely that a situation would exist where remedial action was necessary but the Act did not apply. The court maintained that the Act is an adequate protection against intrusions on the right to vote; recognition of any compelling interest beyond compliance with the Act would only loosen the "leash" that the Act places on race-based remedial measures in districting.

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210. *Id.* See *supra* notes 186-98, and accompanying text (summarizing the *Hunt* discussion of compliance with the Voting Rights Act as a compelling state interest).  
211. Such a situation would arise where a state knew that it had a history of official racial discrimination within its political system but that the relevant minority group would not be able to bring a successful § 2 claim because its members were too geographically dispersed throughout the state to constitute a "geographically compact" single-member district in accordance with *Gingles*. *Id.*  
213. *Id.* ("The Supreme Court [in *Shaw*] ... did take time to note that 'only three Justices in *UJO* were prepared to say that States have a significant interest in minimizing the consequences of racial block voting apart from the requirements of the Voting Rights Act.'") (quoting *Shaw*, 113 S. Ct. at 2832) (citations omitted).  
214. *Id.*  
215. *Id.*  
216. *Id.* at *24 n.29 ("[W]e are here presented with a textbook example of 'hard cases' making 'bad law'. ...; the improbability of the [*Hunt*] scenario indicates its dubious value as scaffolding for constitutional arguments.") (quoting Northern Securities Co. v. United States, 193 U.S. 197, 363 (1904) (Holmes, J., dissenting)).  
217. *Johnson*, 1994 WL 506780 at *24. The court contended that the Voting Rights Act acceptably limits the scope of remedial measures a state may make in order to limit the potential harm that can be caused by such measures: "The VRA ensures that states honor the right to vote; our recognition of no other compelling state justification for race-based voting remedies ensures that states do not go too far." *Id.*
b. Narrow Tailoring Analysis

Although the Shaw Court did not explicitly mandate how a state could narrowly tailor a districting plan, all the district courts interpreting Shaw have agreed that a plan would not be narrowly tailored if it affects the rights and interests of citizens more than "reasonably necessary to advance the interest claimed by the state." Beyond that, the courts have disagreed on the importance to be given various districting factors such as compactness, and to what extent a plan need comply with the Voting Rights Act to be considered narrowly tailored. In general, the courts have held that plans that create as many minority-majority plans as possible and that do not comply with traditional districting factors are not narrowly tailored. Notably, only the North Carolina plan at issue in Hunt has been upheld.

Of the five factors that the Supreme Court has traditionally used to find whether a race-based remedial measure is narrowly tailored, two are relevant in a Shaw claim. The first is whether the state could have accomplished its purpose with a race-neutral or less race-conscious method. The second factor that courts consider is whether the plan at issue imposes an undue burden on the rights of innocent third persons.219

219. Hunt, 861 F. Supp. at 445-46. The other three factors traditionally used in remedial measure cases do not significantly affect the outcome of an Equal Protection analysis of a state-designed voting district, although the Hunt court analyzed them at length. The first of the remaining factors, whether the plan imposes a "strict racial quota" or a "flexible goal" towards increasing minority representation, is inapposite, because districting plans rarely, if ever, impose the sort of quota that is constitutionally impermissible. Id. at 446. Unlike racial set-aside provisions, a districting plan that creates a certain number of districts in which members of a minority group constitute a majority, does not guarantee a fixed number of representatives of that race, because members of other races are still permitted to run and to be elected within those districts. Id.

The court found that consideration of the second factor, the duration of the plan, was unnecessary because districting plans are "inherently temporary." Id. at 447. A state action is not narrowly tailored if it will last longer than necessary to redress the discriminatory effects at issue. The court reasoned, however, that because states are forced to redistrict after every census, they will reevaluate the need for majority-minority districts at that time and remove them if they are no longer necessary. Id. The court's reasoning ignores that from a realistic standpoint, once a district is created it is rarely drawn out of the plan. Most states have an official policy of protecting incumbents and therefore would probably attempt to maintain any existing districts in a plan whether demographic changes mandated them or not.

The third factor considers whether there is a reasonable relationship between the plan's goal for minority representation in a pool selected to benefit from the plan and
i. Was a Race-Neutral Alternative Available?

While traditional inquiries into race-based state action focus on whether a race-neutral or less racially based alternative was available, courts must alter that analysis in the voting rights arena because of the widely accepted concession that a state with a compelling interest in complying with the Voting Rights Act has no race-neutral alternative. Therefore, the inquiry is modified to consider two questions: (i) whether the plan creates more majority-minority districts than is reasonably necessary to comply with the Act, and (ii) whether the districts created by the plan contain substantially larger concentrations of minority voters than are necessary to enable minority voters, when voting as a group, to elect a candidate of their choice.

The Hays court held that the Louisiana plan was not narrowly tailored based on either of the two questions above. In so finding, the court focused on the number of majority-minority districts created, the percentage of African-American voters in the districts at issue and the shape of these districts. The court did not focus on the State’s attempted compliance with section 5, but implied that the state had gone beyond what that section requires. It interpreted Beer v. United States as providing that if a state previously had one majority-minority Congressional district, the addition of any more such districts would violate the non-retrogression principle. The Hays court also deemed the percentage of African-Americans of voting age within District 4, 63%, to exceed the percentage necessary to ensure that African-Americans would be able

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the percentage of minorities in the general population. Id. at 447-48. The court found that this factor is satisfied “so long as the percentage of majority-minority districts created by the plan . . . does not substantially exceed the percentage of minority voters in the jurisdiction as a whole.” Id. at 448. Because neither the Hunt plan, nor any of the plans at issue before the courts at this time provide for even near-proportional representation for minorities, this factor while important, is not very relevant to the courts or to this Note’s analysis at this time.

220. Id. at 445.

221. Johnson, 1994 WL 506780, at *12-15; Hunt, 861 F. Supp. at 446; Hays, 839 F. Supp. at 1206-09. This question is a reverse of the Beer non-retrogression principle. While a state may not design a plan that results in a retrogression of minority voting strength and still comply with § 5, it also may not do more than § 5 requires.

222. Johnson, 1994 WL 506780 at *18-20; Hunt, 861 F. Supp. at 446; Hays, 839 F. Supp. at 1206-08. This question is aimed at eliminating “packing.”


224. Id. at 1207.


to elect representatives of their choice.\textsuperscript{227} District 2, the other majority-African-American district, had an African-American population of only 54\%, leading the court to conclude that a similar racial composition in District 4 would have been sufficient to enable the African-American voters in that district to elect a candidate of their choice.\textsuperscript{228} Regarding the shape of District 4, the \textit{Hays} Court noted the testimony of several witnesses who stated that a second minority district could have been created that more closely followed traditional districting principles.\textsuperscript{229}

The \textit{Johnson} court found similar offenses within the Georgia plan. It contended that the plan reflected a "maximization agenda" that did not bode well for the State's claims that it was narrowly tailored.\textsuperscript{230} Additionally, the court noted at the outset that the design of the plan apparently violated explicit Congressional regulations accompanying the Voting Rights Act.\textsuperscript{231} Based on those observations alone, the court concluded that the State had

\textsuperscript{227} Id.  
\textsuperscript{228} Id. at 1207-08. Two main factors are relevant to determine what percentage of African-American voters will create a "safe" district. Where white crossover voting is greater, a district will be safe with a minority voting age population around 50\% or perhaps slightly lower. In districts where minority voter registration is low, a higher percentage of minorities within the voting age will be required unless high crossover voting will counteract the lower African-American turnout. Because District 4 had a relatively high minority population percentage, the court found no need to measure the crossover voting within the district and instead examined whether African-American registration was significantly lower and found that it was not. \textit{Id.} at 1208.  

\textsuperscript{229} One such plan had been created randomly by a computer districting program. While chastising the state for not creating the most compact majority African-American district possible, the court conveniently chose not to consider what factor incumbency protection played in these districting decisions. Previously the court had stated that incumbency motives were irrelevant to the determination of racial gerrymandering, but evidently they are not. \textit{Id.} at 1209.  

\textsuperscript{230} \textit{Johnson}, 1994 WL 506780 at *27.  
\textsuperscript{231} \textit{Johnson}, 1994 WL 506780 at *27. The court specified that the plan appeared to conflict with the regulations promulgated by Congress, which mandated that the Justice Department consider the following:  

\begin{itemize}
  \item [(e)] The extent to which available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered;  
  \item [(f)] The extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries.
\end{itemize}

28 C.F.R. § 51.59.

The court commented in conclusion, that it interpreted the term "inexplicably" in the quoted material above as "envisioning a district with lines unexplainable as anything other than an effort to exclude African-American voters" yet that in this case the offense concerned "a district unexplainable as anything other than an effort to exclude white voters." \textit{Johnson}, 1994 WL 506780, at *27.
not narrowly tailored the plan. The court nevertheless analyzed
the plan with reference to the relevant sections of the Act.232

Like the *Hays* court, the *Johnson* court found it "abundantly
clear" that the state had exceeded the requirements of the non-
retrogression principle of Section 5.233 It objected to the creation
of three majority-minority districts for two reasons. First, the pre-
vious Congressional districting scheme had included one majority-
minority district. Therefore, by creating three such districts, the
State exceeded the requirements of Section 5.234 Second, the crea-
tion of three majority-minority districts appeared to be motivated
by an attempt to achieve proportional representation,235 which the
court reiterated was not a constitutional or statutory require-
ment.236 Unlike the *Hunt* court, the court in *Johnson* held no illu-
sions that such plans are "inherently temporary in nature,"237 on
account of the non-retrogression principle of Section 5.238

The *Johnson* court also held that the plan exceeded the require-
ments of Section 2 compliance.239 To reach this conclusion, the

233. Id. at *28. See also supra notes 82-84 and accompanying text (explaining the
Beer non-retrogression principle).
234. Id. at *28 ("Federal regulations state that '[i]n determining whether a submit-
ted change is retrogressive the Attorney General will normally compare the submit-
ted change to the voting practice or procedure in effect at the time of the submission.'
Apparently neither DOJ nor the General Assembly used this simple guide to section
5 compliance.") (quoting 28 C.F.R. § 51.54(b)).

The court implies that a new plan with two majority-minority districts would not
have gone beyond the requirements of the Act. Id. (Noting that in the previous plan
one district, or 10% of the total, was a majority-African-American district and there-
fore, in the new plan, two majority-African-American districts, constituting 18.8% of
the total would have represented "quite an improvement."). The *Johnson* opinion
gives no indication that the court abides by the standard propounded in *Hays*, that
any new plan including more than one majority-African-American district would have
exceeded the boundaries of § 5.
235. *Johnson*, 1994 WL 506780, at *28 (explaining that three majority-African-
American districts would constitute 27.27% of the total number of districts and that
African-Americans constituted 29.96% of the total Georgia population).
236. Id. See supra note 184 (discussing the *Johnson* court's rejection of propor-
tional representation as a compelling state interest).
237. See supra note 219 (summarizing the *Hunt* court's assertion that because of
census changes, district plans are temporary).
238. *Johnson*, 1994 WL 506780, at *29. The court stressed that the mandates of the
Voting Rights Act alter the "temporary" nature of districting plans. It predicted that
because the Act prohibits any voting changes that have a dilutive or retrogressive
effect upon minority voting strength, the plan ultimately approved out of this litiga-
tion "will become the absolute baseline for subsequent changes." Any plan designed
after the census taken in 2000 will have to include at least as many majority African-
American districts as the plan approved now.
239. Id. at *37.
court examined the factual record to detect whether the creation of the eleventh district was necessary, according to the *Gingles* test.\(^{240}\) It found that the district did not satisfy the first *Gingles* condition because the minority population in south-central Georgia was neither large enough nor sufficiently compact to warrant the creation of that district.\(^{241}\) In accordance with the *Shaw* rhetoric, the *Johnson* court also objected to the grouping of persons whom the record indicated had little in common besides their skin color.\(^{242}\) On account of this alleged lack of commonality, the court impliedly held that the state had not satisfied the second *Gingles* factor, namely, political cohesiveness within the group.

The record also lacked evidence of bloc voting within the white majority, thus falling short in terms of the third *Gingles* factor, which states that white voters, voting as a bloc, consistently prevent minority voters from electing the candidate of their choice. The court found a significant degree of "crossover" voting in Georgia and in District 11, concluding that on average, 22% to 38% of white voters voted for African-American candidates, while 20% to 23% of African-American voters voted for white candidates.\(^{243}\) The *Johnson* court also noted the success of African-American and African-American-preferred candidates in local and statewide elections as evidence of a lack of voter polarization.\(^{244}\)

Lastly, the *Johnson* court studied the racial composition of voters within the district. The court found that the district packed too great a percentage of African-American voters and held that the evidence presented did not support the need for such a large concentration of voters.\(^{245}\) In fact, the evidence showed that the com-

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240. *Id.* at *31. *See also supra* notes 100-04 and accompanying text (discussing the *Gingles* standard for establishing vote dilution).

241. The state had attempted to show that the district was sufficiently compact by the use of the "meanderiness test." The test, created by the State's expert witness, Dr. Lisa Handley, measures the irregularity of a district's shape by determining how much of the district can be reached by straight lines emanating from that one point in the district yielding "the highest percentage of direct, straight line accessibility." *Id.* at *32* (quoting Rpt. of Dr. Handley, at 8-9). The court criticized the test as useless as an accurate measure of District Eleven because it ignores any part of a district that cannot be reached by a straight line. District Eleven contains several "narrow, densely populated appendages" that are not included in the measurement. *Id.*

242. *Id.* (characterizing the State's assertion that the persons within the district constituted a community of interest as "shallow and offensive thinking").

243. *Id.* at *34.

244. *Id.*

245. The state had argued that in order for a majority-African-American district to ensure that African-American voters could elect a representative of their choice, African-American voters had to account for at least 65% of its total population. *Id.* at *35.*
position of the district at issue gave African-American candidates a 73% chance of winning an election. It also characterized this result as far greater than "equal" opportunity, and therefore in excess of the requirements of Section 2.

The North Carolina district court took a more limited approach in holding that the Hunt plan was narrowly tailored. Although it agreed with the Hays court that a plan would not survive strict scrutiny if it failed to comply with the Constitutionally mandated principles of districting, the Hunt court could not hold the same for a plan that simply deviated from non-constitutional districting principles. Therefore, the court refused to read Shaw as the Hays court did, and even predicted that the Supreme Court would not adopt the Hays view when it eventually defines "narrow tailoring" in the redistricting context. Among the reasons cited by the Hunt court for this proposition were that those criteria have little inherent value in the districting process, are not measurable by a "simple and judicially manageable" standard, and would result in undue interference by the federal judiciary in political matters.

ii. Does the Plan Burden Innocent Third Parties?

The courts have differed as to whether a race-based redistricting plan imposes an unacceptable burden on innocent third parties. The courts have also differed as to the significance of this factor. In fact, the Johnson court did not even consider this as a separate factor.

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246. The court criticized the State's expert for basing her findings on the registered African-American population rather than the voting age African-American population. It surmised that an estimate based only on registered voters, "amounts to an incentive for and institutionalization of black voter apathy," which the court would not condone. Johnson, 1994 WL 506780, at *36. Voting age population would be the proper measure because it does not attempt to compensate for low registration or turnout. Id.

247. The court also pointed out that had this estimate been based on voter age population the probability would have been even higher. Id. at *37.


249. Id. at 451. See also Pildes and Niemi, supra note 36, at 584-85 (1993).


factor. The conflict among the courts derives from their differing views as to the importance of compactness to the constitutional analysis.

In Louisiana, the *Hays* court found that a plan would impose an undue burden on third parties if it deviated from traditional notions of geographical compactness, contiguity and respect for the integrity of political subdivisions to a greater degree than necessary to accomplish its compelling purpose.\(^{252}\) Thus, a court would invalidate a plan whenever a state could have drawn a different plan in a way that did “substantially less violence” to traditional districting principles, both those mandated by the constitution, such as “one person, one vote,” and those that are not.\(^{253}\) Because failure to abide by those principles “adversely affected countless third-party interests,” the *Hays* court held that the plan at issue could not survive strict scrutiny and was therefore unconstitutional.\(^{254}\)

In North Carolina, the *Hunt* court also considered whether a plan might unduly burden third parties because of the stigmatic injury associated with racial classifications.\(^{255}\) While the court had found that such an injury was sufficient for standing purposes, it did not think that on that basis the plan could be considered as imposing an undue burden.\(^{256}\) On the contrary, the court concluded that Congress had adequately weighed the burdens imposed by the Voting Rights Act when deliberating over its passage, and found that they were not unacceptable given the compelling need for the remedy provided by the Act.\(^{257}\) For that reason, the *Hunt* court deferred to Congress’ judgment.

3. **The Impact of the District Court Decisions**

The decisions in *Hays*, *Johnson* and even *Hunt* create an uncertainty that should alarm districting advocates. Fortunately, the *Hays* decision, which was the broadest of the three decisions, has been vacated by the Supreme Court, indicating that even the Court felt that *Hays* had read the *Shaw* decision too broadly.\(^{258}\) *Hays*,

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\(^{252}\) *Hays*, 839 F. Supp. at 1208-09.
\(^{253}\) *Id.* at 1208.
\(^{254}\) *Id.* at 1209.
\(^{255}\) *Hunt*, 861 F. Supp. at 454.
\(^{256}\) *Id.* at 455.
\(^{257}\) *Hunt*, 861 F. Supp. at 456 (“We believe that Congress ... [balanced] ... the need for race-based districting as a remedy for past and present discrimination in the states' electoral processes and the burden that such measures impose upon innocent third parties when it enacted and twice extended the ... Voting Rights Act.”) (citations omitted).
however, will still have a strong impact on this controversy; the Supreme Court has recently announced that it would hear the appeal of the Hays case to resolve the issue. The Supreme Court has also issued a stay of the Johnson ruling pending review, rendering the Georgia districting plan temporarily still valid. Appeals to the Hunt and Johnson decisions have also been filed with the Court, but it has not yet ruled on whether it will hear those cases or add them to its consideration of the Hays case.

Yet, the Johnson decision remains a threat to race-conscious districting because it invalidated a district that is rather unremarkable in its appearance. This result highlights an additional problem with Shaw that the lower court interpretations have uncovered—that "bizarreness" exists only in the eye of the beholder. Although the Shaw decision relied heavily on district shape as an indication that a district violates the Equal Protection Clause, the district court decisions appear to rely little on shape, and more on the respective courts' preconceived notions about the legitimacy of race-conscious districting. The conflict between the Hunt decision, which upheld an extremely irregular district, and the Johnson decision, which invalidated an unsuspicious looking district, creates an appearance of arbitrariness in the courts' decisionmaking that can not continue.

Another flaw in the lower court decisions is that, like the Shaw decision, they neglect to acknowledge that the very "stereotypes" they warn against are the very factors a group must prove to establish a vote dilution claim under Gingles. This creates a strange double standard. If a state wishes to prove vote dilution to justify a reapportionment scheme, it must acknowledge racial bloc voting. On the other hand, if a state wants to remedy vote dilution, it may

262. See Marcia Coyle, Politics, Law Clash in Racial Redistricting, NAT'L J., Oct. 31, 1994, at A1, A24 (characterizing the Georgia district as "hardly as bizarre as the shape of Maryland").
263. Maps of the Georgia and North Carolina districts have been attached as Appendix A.
not redistrict in a way that takes racial bloc voting into consideration.

The inconsistencies among the decisions have only exacerbated the districting controversy. While a clarification of Shaw is certainly necessary, perhaps there is an even more pressing need to develop a new approach to districting that focuses less on race and more on interests.

V. Solution: Reconciling Empowerment with Equal Protection

The real solution to the race-conscious districting controversy may be to analogize the creation of such districts to politics instead of to segregation. While the Supreme Court’s reservations about the excessive reliance upon race in districting may be grounded in the best intentions, it may result in “devastating racial consequences.” A more interest-oriented approach would treat majority-minority districts not as racial gerrymanders but as political gerrymanders, recognizing the reality that these districts are designed to link persons of similar interests who happen to be of the same race, not vice versa.

It is time to recognize that although all majority-minority districting involves race, it is actually a form of political, and not racial gerrymandering. The modern age of redistricting has been greatly influenced by the Voting Rights Act. For the most part, the Act has empowered and protected African-American voters, making it much more difficult to completely shut them out of the political system.

The use of race in districting today is largely different than it was thirty years ago for two reasons. The most obvious is of course the presence of the Voting Rights Act, which prevents district designers from fencing African-American voters out of the political process and actually mandates the creation of majority-minority districts in certain districts. In addition, African-American voters have already been empowered to the extent that they can influence district lines and have often worked with Republican and Democratic politicians in manipulating district design. Accordingly, African-American voters are able to form coalitions with each other to argue for the issues that concern them and to try to sway white voters and representatives on those issues. In that sense, a districting plan in which some districts have been specifically

264. See Higginbotham, Jr. et al., supra note 2, at 1604.
265. See supra note 44 (chronicling relation between Republican incumbents and voting rights advocates in designing Chicago districts).
designed for white voters and some for black voters, is less like South Africa under apartheid, and more like Congress, where Democrats and Republicans must learn to work together. While Congress is arguably ineffective, it is not unconstitutional.

On the same day that *Thornburg v. Gingles* 266 was decided, the Supreme Court decided *Davis v. Bandemer*, 267 holding that the intentional drawing of district boundaries for partisan ends does not, in and of itself, violate the Equal Protection Clause. 268 That decision held that political gerrymandering cases are justiciable under the Equal Protection Clause, but that "a threshold showing of discriminatory vote dilution is required for a *prima facie* case of an equal protection violation." 269 The Court added that even where a party has drawn lines with "the specific intention of disadvantaging one political party's election prospects," there has been no unconstitutional discrimination unless the redistricting in fact disadvantages that party at the polls. 270 Moreover, the Court held, as it did in early multi-member district challenges, 271 that mere loss in an individual election does not suffice to create a "strong indicia of lack of political power and the denial of fair representation." 272

Application of the *Davis* standard to Shaw claims would provide a fair, objective resolution to this controversy. No group of white voters can prove that their votes have been diluted simply because they have been placed in a majority-minority district where their chosen candidate is unlikely to win. They cannot show that they have been denied fair representation any more than the democratic plaintiffs in *Davis* could make that showing. Plaintiffs making a Shaw claim might attempt to distinguish themselves from *Davis* by claiming that they have been segregated on a racial basis. Although they have been segregated for reasons rooted in race, the causes of their segregation actually extend much more broadly than race. Because of their differing histories, African-American voters and white voters have different political views, have separate needs and seek different benefits from their elected representatives. In that sense, they are no different than members of

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266. 478 U.S. 30 (1986).
268. Id. at 139.
269. Id. at 143.
270. Id. at 139.
271. See supra notes 85-94 and accompanying text (chronicling early vote dilution challenges).
272. *Davis*, 478 U.S. at 139.
competing political parties who want differing commitments from elected representatives.

Treating Shaw claims as political gerrymanders and applying the Davis standard to these claims will resolve the majority-minority controversy more fairly than the Shaw standard. First, requiring that plaintiffs show that they have been shut out of the political process provides a more manageable standard that does not depend on a factor as subjective as shape in order to determine a districting plan's validity. Second, applying the political gerrymander standard would lessen the stigma on newly created majority-minority districts by focusing on the diversity of interests among white and minority voters instead of the diversity of colors.

In adopting terms such as "segregation" and "political apartheid," while still professing a desire that justice be "color blind," the Court underestimates its own influence. The Court insists steadfastly that the districts at issue in Shaw, which result from lobbying, negotiation and compromise on the part of all relevant interest groups, are inherently illegitimate because one or more of those groups is of a different racial background. At the same time, it upholds the legitimacy of majority-white political gerrymanders that are created through the same process. If the Court were to cease treating interest-oriented white districts differently from similar minority districts, the public would be less likely to doubt the legitimacy of the latter districts. Because the public's attitude toward representation would be more interest-oriented instead of race-oriented, members of different races might stop focusing on race so heavily, and might instead realize that they have more in common than they previously realized.

A third reason that it would be more fair and effective to apply the Davis standard, is that the Davis standard will more effectively further the goal of the Voting Rights Act of empowering minority voters. It will acknowledge that minority representation should be increased not because minorities deserve to be treated differently, but because their political interests often are different, for valid and substantial reasons. Once the general public recognizes that many differences among the races are caused by legitimately diverse interests, people of like interests but different races will be more likely to form coalitions. In the long run, this will broaden the appeal of minority candidates and increase their chances of election. Additionally, the Davis standard will lessen voting rights litigation, as plaintiffs will understand exactly what proof is necessary to sustain a claim, and fewer frivolous claims will be brought.
Ironically, the author of the Shaw opinion, Justice O'Connor, concurred in the Davis judgment, but argued that "the legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out ... present a political question in the truest sense of the word." Yet in Shaw she assumed that majority-minority district design is prompted by racial motives and not political motives, as if the two have nothing in common. It may be time to rethink that view.

VI. Conclusion

Since the 1982 amendments of the Voting Rights Act, bizarre districting has quietly flourished. This districting has not suppressed any racial group, however, but has promoted and encouraged new interest groups that share a commonality of interests, not unlike that shared within political parties. Shaw and its progeny will no doubt inspire challenges by disgruntled voters claiming that their districts are forms of "political apartheid" and that they too have been denied the right to participate in a "color blind electoral process." In setting the standard upon which those claims will be judged, the Supreme Court should rethink its approach so that it is less racially-focused and more interest-focused.

If the Court adopts the Davis v. Bandemer standard, it will create a fairer resolution to this controversy and will encourage the public to acknowledge the legitimate commonality of interests prevalent among minority groups. Minority representation will increase while at the same time the race of those representatives will lessen in significance as they become noted for their interests and their achievements, rather than their color. This resolution will diffuse the current controversy and allow representatives elected out of those districts to spend less time worrying about litigation and more time worrying about representing their constituents.

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Appendix A