Fordham Urban Law Journal

Volume 25 | Number 3 Article 10

1998

WALKING A TIGHTROPE: REDRAWING CONGRESSIONAL DISTRICT LINES AFTER SHAW V. RENO AND ITS PROGENY

Donovan L. Wickline

WALKING A TIGHTROPE: REDRAWING CONGRESSIONAL DISTRICT LINES AFTER *SHAW V. RENO* AND ITS PROGENY

*Donovan L. Wickline**

Introduction

For over thirty years, the Voting Rights Act ("VRA")[1] has quietly revolutionized[2] minority voting rights and power in the United States. Congress enacted the VRA in 1965 as a response to the array of discriminatory devices that southern jurisdictions used to deny Blacks political participation after the passage of the Fifteenth Amendment.[3] Today, some commentators consider the VRA to be the most effective civil rights statute ever.[4] The most dramatic example of the immediate effectiveness of the VRA occured in Mississippi, where the Black registration rate soared from 6.7% to 59.4% within three years of the statute's passage.[5] Moreover, the number of Black elected officials increased in the seven originally targeted southern states from fewer than 100 in 1965 to 3265 in 1989.[6]

The quiet era of the VRA, however, has ended. In recent years, the statute has gained center stage in the debate over the constitu-

* J.D. Candidate, Fordham University School of Law, 1998; A.B., Columbia University, 1995. The author wishes to thank Professor Terry Smith, Fordham University School of Law, for his insightful comments and guidance.

1. Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1998).

2. *See generally* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994) (showing how the VRA "quietly" enfranchised Black voters in the South during its first twenty-five years) [hereinafter QUIET REVOLUTION].

3. The Fifteenth Amendment states in pertinent part: "The 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." U.S. CONST. amend. XV, § 1.

4. *See* Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction*, *in* QUIET REVOLUTION, *supra* note 2, at 386.

5. *See* James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, *in* QUIET REVOLUTION, *supra* note 2, at 374 tbl.12.1.

6. *See* Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 7, 43 (Bernard Grofman & Chandler Davidson eds., 1992) [hereinafter CONTROVERSIES]. The seven originally targeted states were Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and 40 counties in North Carolina. *Id.* at 19.

tionality of a variety of race-conscious public policies.[7] In voting rights cases, the dispute has focused on a remedy to certain violations of the VRA: the creation of majority-minority election districts[8] where voting is otherwise polarized along racial lines.

In *Shaw v. Reno* ("*Shaw I*")[9] and its progeny,[10] the United States Supreme Court invalidated majority-minority congressional districts in North Carolina, Georgia, and Texas using strict scrutiny analysis under the Fourteenth Amendment's Equal Protection Clause ("EPC").[11] By requiring that majority-minority congressional districts be redrawn, however, the Supreme Court has in-

7. Although the continued necessity for affirmative action programs has dominated this debate, the constitutional arguments and analyses, regarding the legality of affirmative action and the constitutionality of majority-minority voting districts, are substantially parallel. *Compare* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (ruling that strict scrutiny must be applied to federal affirmative action programs) *and* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (striking down a city minority set-aside program after applying strict scrutiny) *with* Miller v. Johnson, 515 U.S. 900 (1995) (striking down a majority-minority voting district after applying strict scrutiny) *and* Shaw v. Reno, 509 U.S. 630 (1993) (ruling that strict scrutiny must be applied to a majority-minority voting district that was so bizarre in shape that only unconstitutional racial gerrymandering could provide the explanation).

8. Majority-minority election districts are geographic areas where voting-age minorities constitute an electoral majority. *See* United States v. Hays, 515 U.S. 737, 739 (1995).

9. 509 U.S. 630 (1993).

10. Abrams v. Johnson, 117 S. Ct. 1925 (1997); Shaw v. Hunt ("*Shaw II*"), 116 S. Ct. 1894 (1996); Bush v. Vera, 116 S. Ct. 1941 (1996); Miller v. Johnson, 515 U.S. 900 (1995).

11. The Fourteenth Amendment states in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

vited litigation under Sections 2[12] and 5[13] of the VRA.[14] As a result of the Court's decisions, state legislatures face a Catch-22. If they use race as a predominant factor in drawing congressional districts, they are subject to strict scrutiny under the EPC. If they fail to draw majority-minority districts, however, they are subject to litigation under Sections 2 and 5 of the VRA.

This Note explores the tension between the Supreme Court's recognition of a new cause of action under the EPC and the established requirements of the VRA. Part I explains how the EPC originally was interpreted to protect voting rights and how Congress, in an effort to provide further protection, enacted the VRA.

---

12. 42 U.S.C. § 1973 (1998). Section 2 provides:

> (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 abridgment of the right of any citizen of the United States to vote on account of race or color . . . .
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the 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: 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.

Id.

13. *Id.* at § 1973c. Section 5 is intended to identify and eliminate any new state voting requirements or procedures, in those jurisdictions found to have histories of systemic racial discrimination, that have the purpose or effect of "denying or abridging the right to vote on account of race or color." *Id.*; *see also* Beer v. United States, 425 U.S. 130, 141 (1976) ("[T]he purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."). The Justice Department's long-standing interpretation of section 5 incorporates the "results" standard of section 2. *See* Heather K. Way, Note, *A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2*, 74 TEX. L. REV. 1439, 1439 (1996). *But see* Reno v. Bossier Parish Sch. Bd., 117 S. Ct. 1491, 1501 (1997) (holding that preclearance under section 5 may not be denied solely because a covered jurisdiction's new voting "standard, practice, or procedure" violates section 2).

14. *See* Johnson v. Miller ("*Johnson III*"), 922 F. Supp. 1556 (S.D. Ga. 1995), *aff'd sub nom.* Abrams v. Johnson, 117 S. Ct. 1925 (1997). As a result of the Supreme Court's decision in *Miller*, the Southern District of Georgia ordered a remedial congressional districting plan that reduced the number of majority-Black districts from three to one. *See Johnson III*, 922 F. Supp. at 1561. Thereafter, the minority groups in *Abrams* challenged this court-ordered plan as retrogressive and a dilution of Black voting strength in violation of sections 2 and 5 of the VRA. *See* Brief for Appellants at *i, *Abrams* (No. 95-1425), *available in* 1996 WL 416713; *see also infra* Part II.C.2.

Part II reviews the Supreme Court decisions in *Shaw I* and its progeny and examines the tension created by application of the VRA and EPC. Part III argues that the VRA and EPC can coexist in harmony if the Court holds that compliance with the statute is a compelling state interest, and that a majority-minority district drawn to remedy a Section 2 violation is narrowly tailored by virtue of what the plaintiffs must show to establish the violation in the first instance. The Note concludes that the Court should clarify the meaning and role of "compactness"[15] in redistricting and provide some guideposts for the legislators, litigants, and courts involved in the reapportionment process.

I. Background

A. The EPC Protects Voting Rights

In the United States, voting is a fundamental political right.[16] Over 100 years ago, the Fifteenth Amendment[17] was ratified, constitutionally guaranteeing the right to vote for minorities.[18] The need for the protections of the Fourteenth Amendment[19] in the voting rights context became clear, however, because states attempted to deny Blacks their right of suffrage through discriminatory devices such as poll taxes, literacy tests, and racial

15. "Compactness" in redistricting may refer to the shape of the district or the dispersion of the population within the district, but the Supreme Court has never provided clear guidance for determining what "compact" means or how the analysis regarding whether a district's shape is compact should interrelate with the inquiry that focuses on population. *See infra* Parts II.C.1 and III.B.2.

16. *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966) ("[W]ealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned."); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (referring to "the political franchise of voting" as a "fundamental political right, because preservative of all rights"); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-10, at 1460-61 (2d ed. 1988) (stating that the right at stake in cases involving voting rights is one to equal participation in governmental and societal decision-making).

17. U.S. CONST. amend. XV.

18. The Fifteenth Amendment states in pertinent part: "The 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." *Id.* § 1.

19. The Fourteenth Amendment states in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

gerrymandering of voting districts.[20] Some states even created at-large election schemes. These plans diluted the potential voting strength of minorities because the larger White population would vote cohesively for its preferred candidates.[21] Other states gerrymandered districts[22] so that minorities were either excluded from important voting districts[23] or scattered among various districts, ensuring that they could never constitute a majority of votes in any district.[24] Therefore, both the Fourteenth and Fifteenth Amendments are necessary to constitutionally guarantee the right to vote and to protect the right of a citizen to have his or her vote count.

The EPC of the Fourteenth Amendment[25] requires that a citizen not only be allowed to vote, but also possess voting power that is weighted equally to that of other citizens.[26] In equal protection

20. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 310-13 (1966) (discussing the history of discriminatory voting procedures designed specifically to prevent Black citizens from exercising their right to vote).

21. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 616 (1982) (striking down the use of an at-large electoral system and upholding the lower court's order that the state adopt single-member districts). At-large or multimember district electoral plans dilute minority voting strength when the majority group votes cohesively for the candidates of their choice, effectively barring the minority group from electing any of the candidates of their choice. *Id.* at 616-17. At-large election schemes disfranchised Blacks by indirection because White officials would abolish districts entirely and place Black voters in majority-White multimember districts. *See* Davidson, *supra* note 6, at 24.

In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Supreme Court made it substantially more difficult for minority plaintiffs to challenge at-large or multimember districts when it held that they had to prove intent to discriminate on the basis of race if they were to successfully bring a claim of vote dilution under section 2 of the VRA. *Id.* at 66. In 1982, however, Congress amended section 2 effectively overruling the Court's holding in *Bolden* by prohibiting any voting practice, regardless of its purpose, that *results* in discrimination. *See supra* note 12.

22. The term gerrymander, named after Massachusetts Governor Elbridge Gerry, became popular in 1812 after then-governor Gerry approved a salamander-shaped district drawn by the state legislature to benefit his Democratic party. *See* Kristin Silverberg, Note, *The Illegitimacy of the Incumbent Gerrymander*, 74 TEX. L. REV. 913, 922-23 (1996).

23. *See, e.g.*, Wright v. Rockefeller, 376 U.S. 52, 53-56 (1964) (upholding a New York congressional apportionment statute excluding African American and Puerto Rican citizens from one district and placing them in other districts because the plaintiffs failed to prove discriminatory intent); Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960) (ruling that an Alabama law was unconstitutional if petitioners could show that the all-White Alabama legislature redrew Tuskegee's municipal boundaries to exclude all but four or five of the city's 500 Black voters, but none of its White ones).

24. See Davidson, *supra* note 6, at 24, which discusses how redistricting processes dominated by Whites resulted in gerrymandering to disfranchise Blacks by indirection so that they would not make up a majority of the voters in any district.

25. U.S. CONST. amend. XIV.

26. *See* Reynolds v. Sims, 377 U.S. 533, 560-61 (1964) ("[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people . . . .").

cases, the Supreme Court applies strict scrutiny to legislative actions when a plaintiff proves that the government possessed a racially discriminatory intent or purpose.[27] When a plaintiff shows such intent, the Court requires the defendant to show that the legislature narrowly tailored its law to satisfy a compelling governmental interest.[28]

To prove discriminatory intent, a plaintiff must show either that a law clearly, or on its face, discriminates on the basis of race,[29] or that in its application a clear pattern emerges that is "unexplainable on grounds other than race."[30] If the plaintiff proves that discriminatory purpose is one motivating factor in the decision to enact the legislation, then strict scrutiny must be applied.[31]

---

27. Miller v. Johnson, 515 U.S. 900, 912 (1995) ("[S]tatutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object.").

28. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[Racial] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."). Moreover, in *City of Richmond v. Croson*, the Court stated:

> Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also assures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

488 U.S. 469, 493 (1989). This strict scrutiny test is difficult to overcome. *See* Bush v. Vera, 116 S. Ct. 1941, 1978 (1996) (Stevens, J., joined by Ginsburg and Breyer, J.J., dissenting) ("[W]e apply 'strict scrutiny' more to describe the likelihood of success than the character of the test to be applied."). *But see* Korematsu v. United States, 323 U.S. 214, 219-20 (1944) (upholding the use of internment camps, during World War II, for persons of Japanese ancestry after applying strict scrutiny).

29. *See, e.g.*, *Croson*, 488 U.S. at 477-78 (striking down a city program that set-aside contracts for minority businesses).

30. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977). The *Arlington Heights* Court stated that "[a]bsent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative," and the Court must look to direct and circumstantial evidence of discriminatory purpose. *Id.* In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court held a facially race-neutral city ordinance to be unconstitutional under the EPC because the plaintiffs showed that it was administered exclusively against Chinese immigrants. *Id.* at 374. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Court held that if the petitioners proved their allegations that an Alabama law created a racially gerrymandered district, the statute infringed on the right of Blacks to vote in violation of the Fifteenth Amendment. *Id.* at 341-42.

31. *See Arlington Heights*, 429 U.S. at 265-66. In *Arlington Heights*, the plaintiff, a nonprofit real estate developer, alleged that the city violated minorities' equal protection rights by refusing to rezone a fifteen-acre parcel so as to permit the construction of low- and moderate-income housing. *Id.* at 252. The Court held that the plaintiff failed to prove that racially discriminatory intent or purpose was a motivating factor in the zoning decision, thus ending the constitutional inquiry. *Id.* at 270.

The Supreme Court has used the EPC to create principles governing the mapping of voting districts. Applying strict scrutiny analysis, the Court has struck down redistricting plans that used at-large electoral schemes because they classified citizens on the basis of race.[32] Moreover, it held that a state legislature that was not apportioned on a population basis violated the EPC because it unconstitutionally diluted voter strength.[33] Almost as soon as states were forbidden from using various discriminatory voting devices, however, they created new practices to prevent Black citizens from voting.[34] Congress passed the Civil Rights Act of 1964 to remedy the problem,[35] but state and local governments continued to deny minority citizens their right to vote.[36]

B. The Voting Rights Act

Congress enacted the Voting Rights Act in 1965 to enforce the Fourteenth and Fifteenth Amendments to the Constitution.[37] The VRA contained broad provisions[38] that sought not only to provide Blacks access to the voting booth, but also to force states to end all discriminatory voting practices,[39] including literacy tests and poll

32. *See* Rogers v. Lodge, 458 U.S. 613, 616-17 (1982); *see also supra* note 21 and accompanying text.

33. *See* Reynolds v. Sims, 377 U.S. 533, 576-77 (1964) (establishing the one-person, one-vote principle by holding that every voting district in a state must be constructed as nearly of equal population as practicable); *see also infra* text accompanying notes 47-49.

34. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 310-13 (1966) (listing various practices designed to deprive Black citizens of the vote); Gomillion v. Lightfoot, 364 U.S. 339, 341-42 (1960) (forbidding racial gerrymandering of districts); Smith v. Allwright, 321 U.S. 649 (1944) (declaring White primaries unconstitutional); Guinn and Beal v. United States, 238 U.S. 347 (1915) (invalidating grandfather clauses); *see also supra* note 20 and accompanying text.

35. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 1971 (1998)).

36. *See Katzenbach*, 383 U.S. at 314 ("Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration.").

37. H.R. REP. NO. 89-439, at 6 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437.

38. *Katzenbach*, 383 U.S. at 315-16 (outlining the stringent remedies the VRA aimed at voting discrimination). "After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively." *Id.* at 337.

39. According to Sen. Jacob Javits, the VRA's purpose was "not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination. . . . The bill would attempt to do something about accumulated wrongs and the continuance of the wrongs." S. REP. NO. 97-417, at 5 (1982) (quoting 111 CONG. REC. 8295 (1965)).

taxes.[40] In addition, the VRA required that jurisdictions with a history of discrimination which depressed political participation receive federal preclearance before adopting any new voting requirement or procedure.[41]

Although Congress ensured that Black citizens had the right to register and cast a ballot, many jurisdictions adopted discriminatory measures designed to circumvent the empowerment of minority voters.[42] As a result, the courts and executive branch had to address the issue of vote dilution to ensure that Black citizens were provided effective political power.[43] Challenges to such state voting procedures occur under Sections 2 and 5 of the VRA, as well as under the Fourteenth and Fifteenth Amendments.[44]

Section 2 authorizes claims by private citizens against a state for unlawful vote dilution.[45] In *Reynolds v. Sims*,[46] decided the year before the VRA was passed, the Supreme Court held for the first time that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[47] Five years later, in *Allen v. State Board of Elections*,[48] the Court relied on the *Reynolds* one-person, one-vote decision to conclude that diluting the voting strength of racial minorities violated the VRA.[49]

---

40. 42 U.S.C. § 1973 (1965). Section 2 originally provided that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." *Id.*

41. *Id.* at § 1973c; *see supra* note 13.

42. *See* Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (creating at-large voting system for county officeholders); *see also supra* notes 20-21 and accompanying text.

43. *See* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 184 (1989).

44. *See* Bernard Grofman, *Would Vince Lombardi Have Been Right if He Had Said: "When it Comes to Redistricting, Race isn't Everything it's the Only Thing?"*, 14 CARDOZO L. REV. 1237, 1239 (1993).

45. 42 U.S.C. § 1973 (1998). See *supra* note 21 for examples of vote dilution.

46. 377 U.S. 533 (1964).

47. *Id.* at 555; *see supra* note 33 and accompanying text.

48. 393 U.S. 544 (1969).

49. *See id.* at 565-66, 569. The *Allen* Court stated that:

> The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot . . . . Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.

Id. at 569.

In 1980, however, the Supreme Court abruptly changed the landscape of vote dilution litigation with its decision in *City of Mobile v. Bolden*.[50] In *Bolden*, the Court held that plaintiffs in vote dilution cases must prove that the challenged system was enacted or maintained in order to deprive Blacks of political power.[51] By requiring plaintiffs to prove intent, litigation challenging discriminatory voting practices under the Constitution and Section 2 of the VRA dried up.[52]

In response to *Bolden*, Congress added an important amendment to Section 2 in 1982, eliminating the requirement of discriminatory intent and providing that any voting procedure that lessens the opportunity of minority voters to elect the candidates of their choice violates Section 2 of the VRA.[53] In *Thornburg v. Gingles*,[54] however, the Supreme Court established three preconditions[55] plaintiffs challenging an apportionment plan under Section 2 must prove: (1) that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district;"[56] (2) that it is "politically cohesive;"[57] and (3) that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[58] If plaintiffs show that

50. 446 U.S. 55 (1980); *see supra* note 21 and accompanying text.

51. *See id.* at 66.

52. Laughlin McDonald, *The 1982 Amendments of Section 2 and Minority Representation*, *in* CONTROVERSIES, *supra* note 6, at 67 ("Because of the plaintiff's onerous new burden of proof, litigation challenging discriminatory voting practices under the Constitution and section 2 dried up.").

53. *See* 42 U.S.C. § 1973 (1998).

54. 478 U.S. 30 (1986).

55. Also referred to as the "*Gingles* factors."

56. *Gingles*, 478 U.S. at 50.

57. *Id.* at 51.

58. *Id.* The legislative history of section 2, particularly the Senate Report, indicates that a "variety of factors, depending upon the kind of rule, practice, or procedure called into question," are relevant in determining if a plan "results" in discrimination. S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 206-07. Typical factors include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

"racial and ethnic cleavages . . . necessitate majority-minority districts to ensure equal political and electoral opportunity," the remedy is race-conscious districting.[59]

Under Section 5 of the VRA, covered jurisdictions must submit their election plans for preclearance to the Department of Justice or the District Court for the District of Columbia to illustrate that they neither abridge the minority vote nor dilute minority voting power in violation of Section 2.[60] To obtain preclearance, the Department of Justice encourages states to "maximize" minority voting power by creating majority-minority districts.[61] The purpose of Section 5, according to the Supreme Court's interpretation in *Beer v. United States*,[62] is to ensure that no changes in voting laws "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[63]

II. Redistricting under the VRA and Tension with the EPC

The Supreme Court initially deferred to states when analyzing the creation of majority-minority voting districts.[64] The Court found no injury, under the EPC, to plaintiffs who alleged that race was used for its own sake in drawing a majority-minority voting

---

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. This list is referred to as the "Senate Factors," and is relied on by courts applying the "totality of the circumstances" test set forth in section 2 of the VRA. *Gingles*, 478 U.S. at 37; *see supra* note 12.

59. Johnson v. De Grandy, 512 U.S. 997, 1020 (1994).

60. Section 5 requires that covered jurisdictions submit redistricting plans to the Attorney General for preclearance before they can enforce the plans. 42 U.S.C. § 1973c. If the Attorney General denies preclearance, states may attempt to obtain a declaratory judgment granting preclearance from the federal district court for the District of Columbia, or they may petition that court before requesting preclearance from the Attorney General. *Id.* Section 5 requirements apply to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . ." 42 U.S.C. § 1973c, as amended.

61. *See, e.g.*, Johnson v. Miller ("*Johnson I*"), 864 F. Supp. 1354, 1361 (S.D. Ga. 1994) (stating that the Department of Justice encouraged states to maximize the number of majority-Black districts); Vera v. Richards, 861 F. Supp. 1304, 1345 (S.D. Tex. 1994).

62. 425 U.S. 130 (1976).

63. *Id.* at 141; *see supra* note 13.

64. *See, e.g.*, United Jewish Organizations v. Carey, 430 U.S. 144 (1977).

district.[65] In *Shaw v. Reno* and its progeny, however, the Court has transformed voting rights litigation by applying strict scrutiny analysis to majority-minority voting districts and then striking them down on equal protection grounds.[66]

A. Initial Deference to the VRA

In deciding whether to approve reapportionment plans, the Department of Justice[67] interpreted the *Beer* nondilution requirement as imposing an affirmative duty on states to maximize minority voting strength and to create majority-minority districts.[68] The Supreme Court implicitly approved such actions in *United Jewish Organizations v. Carey* ("*UJO*")[69] when it upheld New York's intentional use of race to enhance minority representation in the state legislature. Three of the eight participating justices in *UJO* found that the intentional use of race was not unconstitutional if the state neither intended nor accomplished vote dilution.[70] Moreover, the *UJO* plurality held that a state could consider race when districting to satisfy the requirements of the VRA.[71] As a result,

65. *Id.* at 154 n.14 (stating that petitioners argue "that the history of the area demonstrates that there could be—and in fact was—*no reason other than race* to divide the community at this time.").

66. *See supra* notes 9-11 and accompanying text.

67. *See supra* note 60 and accompanying text (explaining that states may obtain preclearance of their redistricting plan from the Attorney General rather than a federal court).

68. *See, e.g., Johnson I*, 864 F. Supp. 1354, 1393 (S.D. Ga. 1994). *See supra* note 61 and accompanying text.

69. 430 U.S. 144 (1977). In *UJO*, a New York redistricting plan was submitted to the Attorney General, pursuant to section 5, who objected to it because the plan appeared to dilute the vote of minorities, specifically Blacks and Puerto Ricans. *See id.* at 148-50. State officials responded to this objection by redrawing the district lines, whereby the percentage of minority voters in districts where minorities already constituted a majority increased substantially. *See id.* at 151. The Attorney General did not object to the new plan, but a group of Hasidic Jews sued, alleging that their vote had been diluted by the new plan. *See id.* at 152. Moreover, they alleged that there was "no reason other than race" that the community was divided at the time. *Id.* at 154 n.14; *see supra* notes 64-65 and accompanying text.

70. *Id.* at 165 (opinion of Justice White, joined by then-Justice Rehnquist and Justice Stevens) (finding that the plan, by deliberately drawing nonWhite districts, did not minimize or unfairly cancel out White voting strength, because under the contested redistricting plan, Whites continued to be fairly represented relative to their share of the population).

71. *UJO*, 430 U.S. at 155-65 (opinion of Justice White, joined by Justices Brennan, Blackmun, and Stevens). As Justice White observed, "[w]here it occurs, voting for or against a candidate because of his race is an unfortunate practice. But it is not rare .... It does not follow, however, that the State is powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls." *Id.* at 166-67.

the *UJO* Court created a highly deferential standard under which plaintiffs would have difficulty proving that a state redistricting plan, approved by the Department of Justice as consistent with the requirements of the VRA, violated the Fourteenth Amendment.[72]

B. *Shaw v. Reno* and its Progeny

1. Shaw I: *The Supreme Court Applies Strict Scrutiny to a Majority-Minority Redistricting Plan*

Although some commentators consider the Voting Rights Act to be the most important and successful civil rights bill ever passed,[73] criticism of the statute has increased dramatically in recent years.[74] Critics of the VRA allege that the race-conscious remedies in vote dilution litigation[75] violate the notion that the Constitution is color-blind.[76]

The Supreme Court appeared to agree with these critics in *Shaw I*[77] when it departed from the lenient standard it created in *UJO* and created a new cause of action under the EPC.[78] In a five-to-four decision, the *Shaw I* Court stated that, regardless of motivation, where a legislative redistricting plan is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting," it must undergo the same

72. *Id.*

73. *See* Davidson & Grofman, *supra* note 4, at 386.

74. *See* Grofman, *supra* note 44, at 1247 ("But there can be little doubt that, since the mid-1980s, there has been a backlash against the Voting Rights Act.").

75. *See id.* at 1248. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 42-61 (1986) (noting that states must consider race because they must ensure that their redistricting plan does not scatter minorities among majority-white districts, thus diluting minority voting power); *UJO*, 430 U.S. at 167-68 (permitting the consideration of race when redrawing the lines of voting districts).

76. Grofman, *supra* note 44, at 1248. The concept of a color-blind Constitution first arose in Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.") (Harlan, J., dissenting). *See also Shaw I*, 509 U.S. 630, 657 (1993) ("Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire."). In some cases, however, the Court has been willing to accept race-conscious remedies. *See, e.g.*, United States v. Paradise, 480 U.S. 149, 185-86 (1987) (affirming court-ordered quota imposed to remedy public employer's past discrimination); Wygant v. Jackson Bd. of Educ., 476 U.S. 275 (1986) (noting that a public employer may voluntarily use a race-conscious plan to remedy past racial discrimination by that public employer).

77. 509 U.S. 630 (1993).

78. *UJO* was substantially narrowed by the Court's decision in *Shaw I*. *See infra* notes 81-83 and accompanying text.

strict scrutiny applied when other state laws classify citizens by race.[79]

The *Shaw I* Court stated that bizarrely shaped districts lack traditional districting principles and therefore raise an inference of unconstitutional racial discrimination.[80] Moreover, the Court distinguished *UJO* as a vote dilution case[81] and emphasized that redistricting legislation that classifies citizens on the basis of race involves a different, "special" type of injury, which eliminates the need for the plaintiffs to establish vote dilution or deprivation.[82] The Court found that "a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract."[83]

Although the majority expressed no view as to whether the intentional creation of majority-minority districts would always give rise to an equal protection cause of action,[84] it nonetheless instructed that, once plaintiffs successfully prove that a state legislature racially gerrymandered its congressional redistricting plan, courts should review the plan with "close judicial scrutiny."[85] This strict scrutiny standard requires that a state offer sufficient proof

79. *Shaw I*, 509 U.S. at 641-47. The *Shaw I* case arose when the North Carolina legislature developed a redistricting plan which created new congressional voting districts to reflect population increases indicated in the 1990 census. *See id.* at 633-34. The Attorney General objected to the plan, pursuant to section 5, noting that the addition of another majority-minority district would prevent dilution of the minority vote, and that the drawing of such a district was feasible. *See id.* at 634-35. The legislature thus created a new plan, adding a second majority-minority district, which gained the approval of the Attorney General, but also generated much controversy. *See id.* at 635-36.

80. *Id.* at 646-47. Traditional districting principles include "compactness, contiguity, and respect for political subdivisions." *Id.* at 647. "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." *Id.* at 646 (citations omitted).

81. *Id.* at 652. *But see UJO*, 430 U.S. 144, 154 n.14 (1977) (alleging that there was "no reason other than race" that the community was divided at the time, a *Shaw I*-type equal protection challenge).

82. *Shaw I*, 509 U.S. at 649-50 ("Classifying citizens by race, as we have said, threatens special harms that are not present in our vote-dilution cases.").

83. *Id.* at 648.

84. *See id.* at 649. Similarly, the Court expressed no view whether the creation of majority-minority districts to comply with the VRA is a compelling state interest because, in this case, the statute did not require such a district to be drawn. *See id.* at 653-54.

85. *Id.* at 657. For a discussion of the two-step analysis that courts must apply when examining state actions under the EPC, see *supra* notes 27-31 and accompanying text.

that it narrowly tailored its redistricting plan to satisfy a compelling governmental interest.[86]

2. Miller v. Johnson: *The Supreme Court Expands its Holding in* Shaw I

After *Shaw I*, courts split widely when interpreting what constitutes a compelling governmental interest and how a state could narrowly tailor a redistricting plan to achieve that interest.[87] Courts also disagreed when interpreting the plaintiffs' burden of proof in cases alleging that race-conscious redistricting plans violated the EPC. In particular, the courts disagreed on the degree of race consciousness that would trigger strict scrutiny.[88]

In *Miller v. Johnson*,[89] the Supreme Court attempted to resolve the uncertainty created by *Shaw I*. It held that if the plaintiff could establish, through either direct or circumstantial evidence,[90] that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a

86. *See Shaw I*, 509 U.S. at 658; *see also supra* note 28 and accompanying text.

87. *See, e.g.*, Vera v. Richards, 861 F. Supp. 1304, 1339-41 (S.D. Tex. 1994) (holding that the legislature did not narrowly tailor the districts to achieve a compelling interest because there was evidence of oddly-shaped boundaries); *Johnson I*, 864 F. Supp. 1354, 1393 (S.D. Ga. 1994) (finding that compliance with the VRA might be compelling, but holding that the state's redistricting plan was not "reasonably necessary" to achieve compliance, because it exceeded the requirements of the Act); Shaw v. Hunt, 861 F. Supp. 408, 476 (E.D.N.C. 1994) (holding that compliance with the VRA constituted a sufficiently compelling interest that justified racially gerrymandering the voting districts); Hays v. Louisiana, 839 F. Supp. 1188, 1209 n.67 (W.D. La. 1993) (holding that a plan creating additional majority-minority districts would be reasonably necessary only if a state needed to add another majority-minority district to prevent a reduction of minority voting strength).

88. *See, e.g.*, DeWitt v. Wilson, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994) ("[I]n redistricting, consciousness of race does not give rise to an [EPC] claim of racial gerrymandering . . . ."); *Johnson I*, 864 F. Supp. at 1372 (holding that race must be the "overriding, predominant force determining the lines of the district" to prove racial gerrymandering); *Vera*, 861 F. Supp. at 1338 (explaining that race must be a "primary consideration"); *Hays*, 839 F. Supp. at 1195 (interpreting *Shaw I* to require that race need only be a tangible factor to invoke strict scrutiny). *Cf.* Bridgeport Coalition for Fair Representation v. City of Bridgeport, 26 F.3d 271, 278 (2d Cir. 1994) (applying *Shaw I* to a city council redistricting plan, and holding that it did not trigger strict scrutiny because race was not the city's sole motivation when designing the plan).

89. 515 U.S. 900 (1995). In *Miller*, the Court confronted the constitutionality of Georgia's Eleventh Congressional District, and struck it down by yet another five-to-four decision.

90. The *Miller* Court stated that "[s]hape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Id.* at 913.

particular district," then the districting plan would be subject to strict scrutiny.[91] The *Miller* Court stated, however, that a majority-minority redistricting plan created to comply with the VRA could withstand strict scrutiny, but only where there was "convincing evidence" that remedial action was reasonably necessary to satisfy the requirements of the statute.[92]

Agreeing with the district court that race was the predominant factor motivating the state legislature's drawing of Georgia's Eleventh Congressional District, the *Miller* Court addressed the requirements of strict scrutiny.[93] The *Miller* Court concluded that the majority-minority district was not required "under a correct reading of the [VRA]"[94] because it was part of an ameliorative apportionment plan. Therefore, an additional majority-minority district could not be compelled by Section 5 because that provision only prohibits retrogression of minority voting rights or power.[95] The *Miller* Court added that the Justice Department's interpretation of Section 5 as authorizing it to preclear only those reapportionment plans that maximized majority-minority districts created constitutional difficulties for Section 5 and brought the VRA "into tension with the Fourteenth Amendment."[96]

---

91. *Id.* at 916. "[A] plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.*

92. *Id.* at 920-21.

93. *See id.* at 916-17.

94. *Id.* at 921. The *Miller* Court stated:

> Whether or not in some cases compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination, it cannot do so here. As we suggested in Shaw [I], compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws.

Id. The Court noted, however, that a compelling state interest existed when a state attempted to "eradicat[e] the effects of past racial discrimination." *Id.* at 920 (citing *Shaw I*, 113 S. Ct. at 2831). But in this case, the defendants did not argue "that it created the [majority-minority] district to remedy past discrimination . . . ." *Id.*

95. *See id.* at 923; *see also supra* note 63 and accompanying text.

96. *Id.* at 927. Moreover, the Court stated that "[t]here is no indication Congress intended such a far-reaching application of § 5, so we reject the Justice Department's interpretation of the statute and avoid the constitutional problems that interpretation raises." *Id.*; *see supra* note 61 and accompanying text.

3. *Muddy Waters: The Supreme Court Decisions in* Shaw II *and* Bush v. Vera

The *Miller* Court did not decide whether compliance with the Voting Rights Act constituted a compelling governmental interest. Moreover, it did not specify in which instances a state may draw majority-minority districts to remedy potential or adjudicated violations of Section 2 of the VRA. In its 1995 Term, the Supreme Court struck down majority-minority congressional districts in North Carolina[97] and Texas.[98] The Court, however, did not specify the constitutional parameters of drawing boundaries to improve representation for minorities who have been historically shut out.

In *Shaw II*, North Carolina sought to prove three compelling state interests to sustain its contested minority-controlled congressional district: (1) to eradicate the effects of past and present discrimination; (2) to comply with Section 5 of the VRA; and (3) to comply with Section 2 of the VRA.[99] Although the Court recognized that a state's interest in remedying the effects of past or present racial discrimination may justify a government's use of racial distinctions, it pointed out that for the interest to rise to a compelling level it must be specifically identified.[100]

As in *Miller*, the *Shaw II* Court did not reach the question of whether compliance with the VRA, standing alone, was a compelling interest. It found that an additional majority-minority congressional district was not necessary under a correct reading of the statute, and thus it was not a narrowly tailored remedy.[101] In rejecting North Carolina's Section 5 defense, the Court noted that the same Justice Department policy of maximizing the number of majority-Black districts that was rejected in *Miller* was present in this case.[102] With respect to the state's Section 2 defense, the Court held that the majority-minority district could not remedy any potential Section 2 violation because "no one . . . could reasonably suggest that the district contains a 'geographically compact' population of any race."[103]

---

97. Shaw v. Hunt ("*Shaw II*"), 116 S. Ct. 1894 (1996).

98. Bush v. Vera, 116 S. Ct. 1941 (1996).

99. *See Shaw II*, 116 S. Ct. at 1902.

100. *See id.* at 1902-03 ("[A]n effort to alleviate the effects of societal discrimination is not a compelling interest.").

101. *See id.*

102. *See id.* at 1904 (citations omitted); *see also supra* note 96 and accompanying text.

103. *Id.* at 1906 (citations omitted); *see supra* note 56 and accompanying text.

In *Shaw II*'s companion case, *Bush v. Vera*, Justice O'Connor delivered a plurality opinion for the Court which applied strict scrutiny to three newly-created majority-minority districts in Texas.[104] With utter disregard for traditional redistricting principles, the state formed these districts, whose contours were unexplainable in terms other than race.[105] In rejecting the state's defense that it drew the minority-controlled districts to comply with VRA requirements, the Court "assume[d] without deciding that compliance with the results test [of Section 2] can be a compelling state interest,"[106] but found that the districts' bizarre shape and lack of compactness defeated any claim that they were narrowly tailored.[107]

Justice O'Connor also filed a significant concurring opinion, however, to express her view that the state interest in avoiding liability under Section 2 of the VRA is compelling.[108] Moreover, she would have held that "[i]f a state has a strong basis in evidence for concluding that the *Gingles* factors are present," and creates a majority-minority "district that 'substantially addresses' the potential liability . . . and does not deviate substantially from a hypothetical court-drawn § 2 district for predominantly racial reasons, . . . its districting plan will be deemed narrowly tailored."[109]

Although Justice O'Connor concluded that Section 2 does not require a non-compact majority-minority district,[110] Justice Kennedy observed in his concurrence, "neither does [Section 2] forbid it, provided that the rationale for creating it is proper in the first instance."[111] Justice Kennedy also noted that "[d]istricts not drawn

104. *See Bush*, 116 S. Ct. at 1958-60

105. *See id.*

106. *Id.* at 1960.

107. *See id.* at 1960-61. The Court noted, however, that "[a] § 2 district that is reasonably compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts . . . in endless 'beauty contests.'" *Id.* at 1960 (emphasis in original).

108. *See id.* at 1968 (O'Connor, J., concurring); *see also id.* at 1989 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); *id.* at 2007 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting).

109. *Id.* at 1970.

110. *See id.* ("[D]istricts that are bizarrely shaped and non-compact, and that otherwise neglect traditional districting principles and deviate substantially from the hypothetical court-drawn district, for predominantly racial reasons, are unconstitutional.").

111. *Id.* at 1972 (Kennedy, J., concurring).

for impermissible reasons or according to impermissible criteria may take any shape, even a bizarre one."[112]

C. Lower Court Reactions to *Miller*, *Shaw II*, and *Bush*

As a result of the Supreme Court's decisions in *Miller*, *Shaw II*, and *Bush*, lower courts have applied strict scrutiny to strike down majority-minority districts after finding that race was the predominant factor in drawing the district's boundaries.[113] District courts also have rejected new challenges to majority-minority voting districts while attempting to conform their decisions with the analytical framework established in *Shaw I* and its progeny.[114] In what may be an unanticipated consequence, however, some courts have required plaintiffs in Section 2 vote dilution cases to show that

112. *Id.* Justice Kennedy also observed, that "[t]he first Gingles condition refers to the compactness of the minority population, not the compactness of the contested district." *Id.* at 1971.

113. *See, e.g.*, Diaz v. Silver, 978 F. Supp. 96, 117 (E.D.N.Y. 1997) (declaring the mostly Hispanic Twelfth Congressional District in New York unconstitutional, after applying strict scrutiny, because race and ethnicity were the dominant factors used to draw it); Moon v. Meadows, 952 F. Supp. 1141, 1151 (E.D. Va. 1997) (striking down a majority-minority congressional district as unconstitutional racial gerrymander because the state subordinated traditional districting principles to accomplish its goal of a safe Black district); Smith v. Beasley, 946 F. Supp. 1174, 1210-11 (D.S.C. 1996) (striking down, on equal protection grounds, majority-minority state legislative districts because state failed to prove that districts at issue were specifically drawn to achieve a compelling state interest in remedying effects of past or present discrimination, and the districts were not narrowly tailored to remedy any potential section 2 violation or to avoid retrogression as prohibited by section 5); Hays v. Louisiana, 936 F. Supp. 360 (W.D. La. 1996) (holding *Miller* to be commanding precedent, and striking down a majority-minority district as a racial gerrymander that could not be demonstrated to be narrowly tailored to achieve a compelling governmental interest).

114. *See, e.g.*, Theriot v. Parish of Jefferson, 966 F. Supp. 1435, 1449-50 (E.D. La. 1997) (holding that strict scrutiny was not warranted because changes in district configuration were driven primarily by politics); King v. State Bd. of Elections ("*King I*"), 979 F. Supp. 582 (N.D. Ill. 1996), *vacated*, 117 S. Ct. 429 (1996). In *King I*, a three-member panel of the U.S. District Court for the Northern District of Illinois held Illinois' Chicago-based Fourth Congressional District, the first Hispanic-majority congressional district in the Midwest, to be constitutional, despite its "extraordinary" shape, because it was justified under the VRA. 979 F. Supp. at 616-17. The Supreme Court, however, set aside the *King I* opinion and ordered the Federal District Court in Chicago to reconsider its decision in light of the Court's rulings in *Shaw II* and *Bush*. 117 S. Ct. 429 (1996); *see also* Linda Greenhouse, *Setback for Hispanic Congressional District*, N.Y. TIMES, Nov. 13, 1996, at A4. On remand, a three-judge panel held that the Fourth Congressional District was narrowly tailored to remedying a potential violation of or achieving compliance with the VRA and, therefore did not violate the EPC. *See* King v. State Bd. of Elections ("*King II*"), 979 F. Supp. 619, 627 (N.D. Ill. 1997).

their districting plan comports with *Shaw I* and its progeny in order to satisfy the first *Gingles* precondition.[115]

1. *What Compactness is Required?*

Some post-*Miller/Bush* courts have dismissed Section 2 claims because the plaintiffs could not show that the majority-minority district they would create was compact enough to survive an equal protection challenge.[116] Other courts have opined that it is a mistake to conflate the *Gingles* threshold requirement of a geographically compact minority population with the principle of compactness of district shape which is used to assess whether racial gerrymandering has occurred.[117] The latter courts have noted that the first *Gingles* factor, which requires that a minority group be sufficiently compact to constitute a majority in a single member district,[118] is an inquiry into causation that necessarily classifies voters by their race.[119] In *Miller*, however, compactness was merely one of many factors whose presence bore on the ultimate question of whether race was the predominant factor motivating the draw-

115. *See, e.g.*, Milwaukee Branch of the N.A.A.C.P. v. Thompson, 935 F. Supp. 1419, 1424-25 (E.D. Wis. 1996) (finding that a proposed remedy under section 2 that departs from traditional redistricting principles solely to create a majority-Black district is impermissible under the *Gingles* standard), *aff'd*, 116 F.3d 1194 (7th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3338 (U.S. Oct 31, 1997) (No. 97-753); Reed v. Town of Babylon, 914 F. Supp. 843, 871 (E.D.N.Y. 1996) (finding that a plaintiff seeking to meet its burden of showing compactness under the first *Gingles* precondition should not be permitted to rely on a plan that would have no chance of being found to be narrowly tailored to redress the violation).

116. *See supra* note 115 and accompanying text.

117. *See, e.g.*, Clark v. Calhoun County, 88 F.3d 1393, 1406 (5th Cir. 1996); *King I*, 979 F. Supp. at 614. For example, in *King I*, the panel noted that the question raised by *Gingles* is whether the minority population (and not the district drawn to accommodate that population) is geographically compact and sufficiently numerous to constitute a majority in a single member district. *See* 979 F. Supp. at 614. By contrast, the *King I* court determined that there is a second measure of compactness (i.e., a traditional race-neutral districting principle) that concerns whether a district drawn to remedy a section 2 violation satisfies the requirements of the EPC, and to conflate the two into a single measurement confuses the liability with the damages analysis, and represents an unwarranted extension of *Shaw I*. *See id.* Similarly, the *Clark* court found that *Bush* and *Shaw II* support the conclusion that *Miller's* emphasis on purpose does not apply to the first *Gingles* factor because in neither case did the Court suggest that a district drawn for predominantly racial reasons would necessarily fail the *Gingles* test. *See Clark*, 88 F.3d at 1406-07.

118. *See supra* note 56 and accompanying text.

119. *See, e.g.*, *Clark*, 88 F.3d at 1406-07. Moreover, the *Clark* court ruled that to the extent that the plaintiffs' proposed remedy to the Section 2 violation may have to survive an equal protection challenge, and show that race was not used at the expense of traditional political concerns any more than reasonably necessary, that remedy was not ripe for review at the liability stage. *See id.* at 1407-08.

ing of particular district lines.[120] Moreover, the Supreme Court has never provided clear guidance for determing what "compact" means or how the analysis regarding district shape should interrelate with the inquiry that focuses on population.

2. *The Plot Thickens: A Redistricting Plan, Compelled by* Miller, *That Reduces the Number of Majority-Minority Districts is Challenged under the VRA*

In *Miller*, the Supreme Court declared Georgia's Eleventh Congressional District unconstitutional.[121] As a result of this decision, the *Miller* plaintiffs also successfully challenged Georgia's Second Congressional District, based on proof that the majority-minority district contravened the EPC because it was drawn to segregate voters according to their race.[122] As to the remedy, the Georgia district court initially deferred to the Georgia legislature, allowing it an opportunity to draw a new congressional map.[123] When the legislature was unable to redraw the map and adjourned, however, it effectively left the task to the district court.[124]

The district court devised a plan that reduced Georgia's majority-minority congressional districts from three to one.[125] Although the district court considered the possibility of creating a second majority-minority district, it concluded that to do so would subordinate Georgia's traditional districting policies by considering race predominantly.[126] Moreover, the district court found that Section 2 did not require it to create a second majority-minority district in Georgia because of the "geographic dispersion of its minority population and lack of any significant vote polarization."[127]

In a five-to-four decision, the United States Supreme Court affirmed the Georgia district court's plan.[128] One of the questions presented to the Court was whether a court-ordered plan that fragments the African-American population in two majority-Black districts and disperses it throughout the state, thereby reducing the number of majority-Black districts from three to one, is retrogres-

120. *See supra* note 91 and accompanying text.
121. *See supra* notes 89-96 and accompanying text.
122. *See* Johnson v. Miller ("*Johnson II*"), 922 F. Supp. 1552 (S.D. Ga. 1995).
123. *See Johnson III*, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995).
124. *See id.*
125. *See id.* at 1561.
126. *See id.* at 1566.
127. *Id.*
128. Abrams v. Johnson, 117 S. Ct. 1925 (1997).

sive and dilutes Black voting strength in violation of Sections 2 and 5 of the VRA.[129]

In holding that the district court's remedial redistricting plan did not violate Section 2 of the VRA, the *Abrams* Court found that none of the *Gingles* preconditions,[130] which set out the basic framework for establishing a vote dilution claim, were met.[131] The *Abrams* Court also rejected the appellants' contention that the district court plan violated Section 5 of the VRA. Specifically, it found that the appellants' proposed benchmarks (the Georgia legislature's 1991 and 1992 redistricting plans) for measuring retrogression were impermissible because they were never in effect and constitutionally defective.[132]

---

129. *See* Brief for Appellants at *i, Abrams v. Johnson, 116 S. Ct. 1823 (Nos. 95-1425, 95-1460), 1996 WL 416713 (1996). The *Abrams* appellants argued that the court-ordered plan violated section 2 because the alternative remedial plans submitted to the district court showed that it was clearly possible to draw two reasonably compact majority-Black congressional districts in Georgia. *See id.* at *43. The Department of Justice submitted a proposed majority-minority district that was roughly pear-shaped, while Abrams offered two proposals for minority-controlled districts that were roughly wine bottle-shaped. *See* Paul L. McKaskle, *In the U.S. Supreme Court: The Voting Rights Act and the Scope of Shaw v. Reno*, 12-9-96 WLN 13086. In all of the appellants' proposals, however, the Black population was not contiguous, and counties were split up, contrary to traditional districting principles in Georgia. *See id.* Appellants also argued that the totality of the circumstances, including evidence of past discrimination and its continuing effects, strongly supported a finding that the court's plan would result in discrimination in violation of section 2. *See* Brief for Appellants at *44 (citing Johnson v. De Grandy, 512 U.S. 997, 1018 (1994)).

130. *See supra* notes 55-58 and accompanying text.

131. *See Abrams*, 117 S. Ct. at 1936 ("In fact, none of the three *Gingles* factors, the threshold findings for a vote dilution claim, were established here.") (citing Bush v. Vera, 116 S. Ct. 1941, 1959-1961 (1996)). Specifically, the *Abrams* Court found that the district court did not commit a clear error when it determined that the Black population was not sufficiently compact for a second majority-Black district and, thus, the first *Gingles* factor was not satisfied. *See id.* Moreover, the *Abrams* Court found that the district court did not clearly err in finding insufficient racial polarization, given the evidence of significant White crossover voting, to meet the second and third *Gingles* factors. *See id.* at 1936-37. The Court particularly noted the results of the 1996 general elections in which all three Black incumbents won elections under the court plan, two in majority-White districts running against White candidates. *See id.* at 1937.

132. *See id.* at 1938-39. The *Abrams* Court, in fact, agreed with the district court that the 1982 plan, in effect for a decade, was the appropriate benchmark, and found that the appellants did not show that Black voters suffered a retrogression in their voting strength under the court plan measured against the 1982 plan. *See id.* at 1939. Moreover, the Court rejected appellants' assertion that, even using the 1982 plan as a benchmark, the district court's plan was retrogressive because under the 1982 plan one of the ten districts was majority-Black, while under the district court's plan one of eleven districts was majority-Black. *See id.* ("Under that logic, each time a State with a majority-minority district was allowed to add one new district because of population

The dissent in *Abrams* primarily complained that the majority decision departed dramatically from the Georgia legislature's preference for two majority-minority districts, which the district court was not free to disregard.[133] The *Abrams* dissenters also disagreed with the majority's conclusion that Sections 2 and 5 of the VRA did not require a second majority-minority district in Georgia.[134] Finally, the *Abrams* dissent argued that the majority decision exacerbated the concern that *Shaw I* and its progeny—particularly, the "predominant racial motive" test[135]—improperly would shift redistricting authority from legislatures to courts and prevent the legitimate use of race as a redistricting factor.[136]

III. Erecting a Safety Net for Redistricting's "Tightrope Walkers"

The Supreme Court should clarify the relationship between its new equal protection cause of action and the requirements of the Voting Rights Act because they are in tension, sending conflicting messages to legislators, litigants, and courts involved in the redistricting process.

---

growth, it would have to be majority-minority. This the Voting Rights Act does not require.").

133. *See Abrams*, 117 S. Ct. at 1943 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting) (citing Upham v. Seamon, 456 U.S. 37, 43 (1982)). In *Upham*, the Supreme Court ruled that a district court drawing congressional districts is "not free to disregard the political program of the . . . Legislature." 456 U.S. at 43.

134. *See id.* at 1946. Specifically, the *Abrams* dissent suggested that the district court improperly analyzed the "compactness" of the proposed majority-minority districts by conflating *Shaw I* and its progeny compactness, which concerns the shape or boundaries of a district, with section 2 compactness, which concerns a minority groups compactness. *Id.* at 1947. For a discussion of the confusion among the lower courts regarding the proper "compactness" analysis, see *supra* Part II.C.1. The dissenters also found Georgia's discriminatory history and the fact that African-American representatives have come almost exclusively from majority-minority districts strongly support the existence of racially polarized voting, despite the fact that the African-American incumbents were reelected in the 1996 general elections. *See Abrams*, 117 S. Ct. at 1947 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting). Moreover, the dissent argued that the question of whether the evidence showed that the failure to create a second majority-minority would violate section 2 of the VRA never needed to be answered because the proper question is "whether the evidence is strong enough to justify a legislature's reasonable belief that that was so." *Id.* at 1948 ("A legal rule that permits legislatures to take account of race only when § 2 really requires them to do so is a rule that shifts the power to redistrict from legislatures to federal courts (for only the latter can say what § 2 really requires).").

135. Miller v. Johnson, 515 U.S. 900, 917 (1995); *see supra* note 92 and accompanying text.

136. *Abrams*, 117 S. Ct. at 1949 ("Thus, given today's suit, a legislator might reasonably wonder whether he can ever knowingly place racial minorities in a district . . . .").

A. Tension Between the *Shaw* Equal Protection Analysis and the Requirements of the VRA

Congress created the Voting Rights Act to enforce the Fourteenth and Fifteenth Amendments by eradicating the continued discrimination against minority groups in the voting process and ensuring that minorities were not denied their constitutional right to vote.[137] For three decades after the VRA, the Supreme Court's principal concern with respect to the role of race in representation was vote dilution, resulting in great deference to the VRA.[138] With the recent decisions in *Shaw I* and its progeny, however, the Court has developed a new, analytically distinct, approach to race and representation that analyzes majority-minority congressional districts with strict scrutiny, under the Equal Protection Clause, if traditional districting principles are subordinated to race.[139]

The two approaches are in tension because, while the remedy to Section 2 vote dilution is the adoption of majority-minority districts,[140] racially motivated districting is subject to strict scrutiny by the Supreme Court.[141] The Court, however, makes assumptions about the place of race in politics that are at odds with the necessary precondition of vote dilution litigation: that voting is racially polarized.[142] Unfortunately, the Court's laudable goal of removing race from politics conflicts with the finding in many vote dilution cases that race plays a significant role in politics through the deci-

137. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 315 (1996) ("The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting."). *See supra* Part I.B.

138. *See* Richard Briffault, *Race and Representation After Miller v. Johnson*, 1995 U. CHI. LEGAL F. 23, 23 (1995); *see also supra* Part II.A.

139. *See supra* Part II.B. For an interesting and original article positing the creation of majority-minority United States Senate districts, see Terry Smith, *Rediscovering the Sovereignty of the People: The Case for Senate Districts*, 75 N.C. L. REV. 1, 60 (1996) ("Whatever may be the effects of *Shaw* and its progeny on majority-minority House districts, these precedents do not preclude the creation of majority-minority or minority enhanced Senate districts, for such districts can be drawn in accordance with traditional districting criteria."); *see also* Jeanmarie K. Grubert, Note, *The Rehnquist Court's Changed Reading of the Equal Protection Clause in the Context of Voting Rights*, 65 FORDHAM L. REV. 1819, 1821 (1997) (arguing that racial classifications that benefit a racial minority are constitutionally permissible under the EPC).

140. *See* Johnson v. De Grandy, 512 U.S. 997, 1019-20 (1994); *see also supra* note 59 and accompanying text.

141. *See supra* Part II.B.

142. *See* Thornburg v. Gingles, 478 U.S. 30, 50-51; *see also supra* notes 54-58 and accompanying text.

sions of voters.[143] Thus, the Court's new approach forces governments to be color-blind when voters are not.

1. *Redistricting's Catch-22*

By considering racially motivated actions that increase the representation of racial minorities to be as problematic as actions that decrease minority political strength, the Supreme Court presents state legislatures with a Catch-22. When states create majority-minority districts to satisfy Sections 2 and 5 of the VRA, which require that the legislature consider minority voters when drawing district lines,[144] their redistricting plan is vulnerable to constitutional attack on equal protection grounds. How states can comply with the VRA and avoid violating the EPC remains unclear, as race almost always predominates when states reapportion their electoral districts to comply with the federal statute.

2. *The Supreme Court's Implicit Challenge of Vote Dilution Doctrine*

Shaw v. Reno and its progeny do not directly challenge the vote dilution doctrine. The Supreme Court still permits the use of race to eradicate the effects of past racial discrimination, and allows jurisdictions to use race to comply with the VRA.[145] Regardless of the merits of the Court's new approach to redistricting in cases where the plaintiffs do not allege vote dilution, to the extent that *Shaw I* and its progeny compel strict scrutiny of electoral districts drawn pursuant to Section 2 of the VRA, the Court unnecessarily intrudes on the vote dilution doctrine pronounced in *Thornburg v. Gingles*.[146]

In *Gingles*, the Supreme Court established a comprehensive framework for analyzing vote dilution claims. An essential requirement under the *Gingles* analysis is that a minority group be able to show that it is "sufficiently large and geographically com-

143. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 616-17 (1982); *see also* KEITH REEVES, VOTING HOPES OR FEARS? 100 (1997) ("In the entire checkered history of this country, only nine blacks have ever won election to the U.S. Congress from districts where whites were overwhelmingly in the majority."); *supra* note 21 and accompanying text.

144. See *supra* Part I.B for a discussion of VRA requirements under sections 2 and 5.

145. *See, e.g.*, *Shaw II*, 116 S. Ct. 1894, 1902-03 (1996); *Bush v. Vera*, 116 S. Ct. 1941, 1960-61 (1996); *Miller v. Johnson*, 515 U.S. 900, 920-21 (1995); *Shaw I*, 509 U.S. 630, 653-56 (1993); *see supra* Part II.B.

146. 478 U.S. 30 (1986); *see supra* notes 54-58 and accompanying text.

pact to constitute a majority in a single-member district."[147] In *Shaw I* and its progeny, a district's lack of compactness has been a major factor for the Court, in deciding both whether to apply strict scrutiny and whether the majority-minority district can survive heightened judicial review.[148] If a minority group has established a vote dilution claim under *Gingles*, however, a court should not inquire further into the compactness of a district's shape, and the motivations behind it, because the group already has shown its numerosity and geographic compactness.

Moreover, a finding of a Section 2 violation under *Gingles* is causally related to the fact that the minority group is geographically compact and constitutes a politically cohesive unit, though the White majority votes sufficiently as a bloc to defeat the minority's preferred candidate.[149] A finding of vote dilution under *Gingles* also is causally related to racially adverse social and historical conditions, including the history of an electoral system's past discrimination.[150] Therefore, once a plaintiff establishes a Section 2 violation under the *Gingles* framework, the Court's equal protection concerns, regarding the constitutionality of a majority-minority district drawn with race as the predominant motive, are satisfied. Thus, a *Shaw I*-type strict scrutiny review of that district represents an implicit challenge of the vote dilution doctrine.

B. *Abrams v. Johnson*: A Missed Opportunity for the Supreme Court to Resolve Tension and Permit the EPC and VRA to Coexist in Harmony

To resolve the tension between its equal protection analysis in *Shaw v. Reno* and its progeny, and the requirements of the VRA, the Supreme Court should have used *Abrams v. Johnson*[151] to clarify both the contours of vote dilution claims, and how majority-minority districts (as remedies to violations of Section 2 of the VRA) can survive strict scrutiny. By failing to explain the scope and limits of *Shaw I* and its progeny, the Court has delayed the resolution of important issues, leaving state legislatures and private

147. *Gingles*, 478 U.S. at 50; *see supra* note 56 and accompanying text.

148. *See supra* Part II.B.

149. *See Gingles*, 478 U.S. at 51; *see also supra* notes 56-58 and accompanying text.

150. The history of official discrimination in the state or political subdivision affecting the minority group's ability to participate in the democratic process is part of the "totality of the circumstances" analysis courts use to determine if a section 2 violation exists once the *Gingles* preconditions are established. *See supra* note 58.

151. 117 S. Ct. 1925 (1997). See *supra* Part II.C.2 for a discussion of the *Abrams* litigation.

litigants to question whether the creation of majority-minority voting districts, pursuant to the VRA, are constitutional under the EPC.

1. *Majority-Minority Districts, Drawn to Comply with the VRA, Can Survive Strict Scrutiny*

One of the most significant issues the *Abrams* Court should have resolved is whether compliance with Section 2 of the VRA constitutes a compelling state interest permitting the creation of minority-controlled districts. The outcome of this question likely depends on Justice O'Connor, who represents the swing vote in the *Shaw v. Reno* line of cases.

In *Bush v. Vera*, Justice O'Connor, the author of the plurality opinion, also wrote a very important separate concurring opinion, where she expressed her view that compliance with the results test of Section 2 is a compelling state interest.[152] Because the four *Bush* dissenters also determined that a majority-minority congressional district, drawn to avoid liability under the VRA, serves a compelling interest,[153] Justice O'Connor could have provided the determinative vote for a holding that a second minority-controlled district in Georgia was compelled by the VRA, and thus was constitutional regardless of racial motivation.

Logic supports such a result. Strict scrutiny should not outlaw a race-based remedy to a violation of the VRA, because the statute compels race-based districting when there is a violation of Section 2.[154] If the Supreme Court will not recognize race-conscious districting as constitutional under the EPC, then it must be prepared to strike down the VRA itself as unconstitutional. However, considering congressional intent,[155] for the Court to find that the VRA

152. 116 S. Ct. 1941, 1968 (1996) (O'Connor, J., concurring); *see supra* note 108 and accompanying text.

153. *See id.* at 1989 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); *see also id.* at 2007 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting); *supra* note 107 and accompanying text.

154. *See* Johnson v. De Grandy, 512 U.S. 997, 1020 (1994). "[A]dherence to *Gingles* to remedy violations of Section 2 necessarily implicates race" because of the showing minority groups must make in the first instance to establish the violations. Sanchez v. Colorado, 97 F.3d 1303, 1327 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1820 (1997); *see also* Clark v. Calhoun County, 88 F.3d 1393, 1408 (5th Cir. 1996) ("Redistricting to remedy found violations of § 2 of the Voting Rights Act by definition employs race."); *supra* notes 54-59 and accompanying text.

155. *See supra* notes 37-41 and accompanying text.

violates the Fourteenth Amendment's equal protection guarantee would be "cruelly ironic."[156]

2. *The Meaning and Role of Compactness in Redistricting*

For a majority of the Supreme Court to find that compliance with Section 2 permits a majority-minority district drawn with race as the predominant motive, the Justices will have to be satisfied that the *Gingles* preconditions are met. Specifically, a majority of the Court must be convinced that a majority-minority district has a "sufficiently large and geographically compact" Black population, and that racially polarized voting exists in the district.[157] Although the *Abrams* appellants' proposals for a second majority-minority district were roughly pear or wine bottle shaped,[158] this should not have prevented the Court from finding that a second "reasonably compact" minority-controlled congressional district could be created in Georgia.

In her concurrence in *Bush*, Justice O'Connor stated that districts that are bizarrely-shaped and non-compact for predominantly racial reasons are unconstitutional.[159] If Justice O'Connor meant that an oddly shaped majority-minority district, drawn to remedy a Section 2 violation, is presumptively unconstitutional, then her statement reflects a mistaken view of the compactness required under Section 2.[160] Justice Kennedy asserted correctly in his concurrence in *Bush* that the first *Gingles* factor refers to the compactness of the minority population, not the contested district, and that Section 2 does not forbid a non-compact majority-minority district.[161]

---

156. *Bush*, 116 S. Ct. at 2007 (Souter, J., dissenting).

157. *See supra* notes 56-58 and accompanying text.

158. *See supra* note 129.

159. *See Bush*, 116 S. Ct. at 1970 (O'Connor, J., concurring); *see also supra* note 110 and accompanying text.

160. Such a definition of compactness is also substantially more stringent than the lower courts' interpretation of the *Gingles* compactness requirement. *See* Bernard Grofman, *Expert Witness Testimony and the Evolution of Voting Rights Case Law*, *in* CONTROVERSIES, *supra* note 6, at 218-19 (stating that lower courts generally interpret the compactness requirement loosely to mean only that the minority population must be "sufficiently geographically concentrated so that a district could be created in which the minority is a majority").

161. *See Bush*, 116 S. Ct. at 1971-72 (Kennedy, J., concurring); *see also supra* notes 111-12 and accompanying text. The *Abrams* dissent also asserted that it is a mistake to conflate *Shaw I* and its progeny compactness, which concerns district shape or boundaries, with section 2 compactness, which concerns a minority group's compactness. *See* Abrams v. Johnson, 117 S. Ct. 1925, 1947 (1997) (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting); *see also supra* note 132.

Justice Kennedy holds the legally principled position because it conforms with the Supreme Court's prior decision in *Gingles*. Justice Kennedy's assertion also adheres to the Court's previous declaration in *Reynolds v. Sims* that public officials "represent people, not trees or acres."[162] The Court, therefore, should direct the lower federal courts that the Section 2 compactness inquiry applies to the geographical compactness of the minority *population*, while the EPC compactness question asks whether the *district* drawn subordinates traditional race-neutral principles (i.e., compactness of district shape) more than is "reasonably necessary" to satisfy the VRA.[163]

Ironically, if the Court requires majority-minority districts to have a particular shape, these districts may actually stand out in contrast to majority-White districts that do not face such restrictions.[164] Moreover, the Court's recent decisions have essentially triple-counted geographic compactness by using it to (1) decide whether plaintiffs have shown that racial considerations predominated, thus triggering strict scrutiny;[165] (2) decide whether minority voters could have made a prima facie showing of liability under Section 2 of the VRA, thus establishing a potential compelling interest for the challenged plan;[166] and (3) decide whether the challenged districts are narrowly tailored in that they avoid unduly subordinating traditional districting principles, including compactness.[167]

Although the distinction between compactness of district shape, a traditional districting principle, versus compactness of minority population, a necessary *Gingles* precondition, may seem to be arti-

162. Reynolds v. Sims, 377 U.S. 533, 562 (1964); *see also id.* at 580 ("Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote.").

163. *See supra* notes 117-120 and accompanying text.

164. *See Bush*, 116 S. Ct. at 1990 (Stevens, J., dissenting) (citing Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 309 (1995-96)). Moreover, topography (mountain ranges, rivers, bays), lines of communication and transportation, local government boundaries and the "one person, one vote" requirement justify the departure from districts that are nearly square in shape. *See* Paul L. McKaskle, *The Voting Rights Act and the "Conscientious Redistricter"*, 30 U.S.F. L. REV. 1, 64 (1995).

165. *See, e.g., Shaw I*, 509 U.S. 630, 641-47 (1993); *see supra* note 79 and accompanying text.

166. *See e.g., Shaw II*, 116 S. Ct. 1894, 1906 (1996); *see supra* note 103 and accompanying text.

167. *See, e.g.*, Bush v. Vera, 116 S. Ct. 1941, 1960-61 (1996); *see supra* note 107 and accompanying text.

ficial because a geographically compact population should produce a compact district, it already has split the lower federal courts addressing Section 2 claims (which were not even triggered by a *Shaw* redistricting decision).[168] Some courts have conflated the two issues of compactness and unfairly rejected Section 2 liability because the plaintiffs' proposed remedy either departed from traditional redistricting principles or had no chance of surviving strict scrutiny.[169] Other courts correctly have kept separate the issue of Section 2 liability from the analysis of whether the proposed remedy satisfies the requirements of the EPC.[170] It is important to keep separate the equal protection analysis of a majority-minority district drawn to remedy a Section 2 violation from the *Gingles* analysis of whether there is a violation of Section 2 in the first instance, because a district drawn to avoid liability under the VRA may be able to survive strict scrutiny even if traditional districting principles were subordinated to race.

3. *Guideposts for the Legislators, Litigants, and Courts Walking Redistricting's Tightrope*

Because the Supreme Court decided *Abrams* without resolving whether majority-minority voting districts are constitutional race-based remedies for violations of Section 2, and without clarifying the meaning and role of compactness, it failed to relieve the tension between its equal protection analysis, under *Shaw I* and its progeny, and its vote dilution doctrine. At a minimum, therefore, the Court should provide some guideposts to future legislators and vote dilution litigants seeking to create majority-minority districts.

For example, the Supreme Court could instruct lower courts that majority-minority districts, drawn with race as the predominant factor, can survive strict scrutiny if two conditions are met: (1) the district is necessary to cure a VRA violation; and (2) the legislature uses race as the predominant factor only after trying in good faith to cure the violation without subordinating race to traditional districting principles.[171] Although such a holding would not completely resolve the tension between the VRA and EPC, the Court would at least demonstrate its continued commitment to the VRA,

168. *See supra* Part II.C.1.

169. *See supra* note 115 and accompanying text.

170. *See supra* notes 117-120 and accompanying text.

171. *Cf.* Dillard v. City of Greensboro, 946 F. Supp. 946, 955 (M.D. Ala. 1996) (allowing a Special Master to use race as a predominant factor only after attempting to draw a majority-minority district without subordinating traditional race-neutral districting principles).

as well as to the enforcement of its race-conscious remedies where necessary to achieve its goals of protecting minority voting rights and power.[172]

The Supreme Court also could read a heightened compactness requirement into its *Gingles* analysis, prohibiting majority-minority districts that are non-compact in shape because they cannot survive narrow tailoring scrutiny under equal protection analysis.[173] This approach is inappropriate, however, because the creation of a minority-controlled district, pursuant to the VRA, is meant to establish a normal, color-blind state of affairs in a place where racially polarized voting has subsumed minority voting rights and power. Indeed, the compactness inquiry should be reduced where past racial discrimination is shown, because the breadth of the remedy ought to fit the injury proven.[174]

Critics of the VRA may argue that the statute already has achieved its goals, given that all the minority candidates in districts that were redrawn as a result of *Shaw I* and its progeny were reelected to Congress in 1996.[175] One election, however, is not dispositive proof that minority groups are able to elect representatives of their choice in predominantly White districts.[176] Moreover, the success of these minority candidates in the 1996 election may more accurately bespeak the power of incumbency.[177] The real test of whether majority-minority districts are still necessary will come

---

172. *See supra* Part I.B.

173. *See supra* notes 109-10 and accompanying text.

174. Congress has made clear that, in fashioning a remedy to a section 2 violation, a "court should exercise its traditional equitable powers to fashion relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to partcipate and elect candidates of their choice." S. REP. No. 97-417, at 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208.

175. Kevin Sack, *Victory of 5 Redistricted Blacks Recasts Gerrymandering Dispute*, N.Y. TIMES, Nov. 23, 1996, at A1.

176. *See* Thornburg v. Gingles, 478 U.S. 30, 74-76 (1986). Indeed, the open racism revealed in the release of the "Texaco tapes" clearly shows that discriminatory practices by the White majority in this country are still a significant problem that requires the redress of remedial statutes. *See* Kurt Eichenwald, *Texaco Executives, On Tape, Discussed Impeding a Bias Suit*, N.Y. TIMES, Nov. 4, 1996, at A1. Texaco executives, recorded on tape, referred to plaintiffs in an impending employment discrimination suit as "Black jelly beans" upset about being "glued to the bottom of the bag." *Id.* at D4. Moreover, the problem of minority representation is acutely felt in the Black community as fourteen percent of a total voting age population of 10.4 million Black men nationwide are currently or permanently barred from voting either because they are in prison or have been convicted of a felony. *See* Fox Butterfield, *Many Black Men Barred From Voting*, N.Y. TIMES, Jan. 30, 1997, at A12; *see also supra* note 143 and accompanying text.

177. *See* Cynthia A. McKinney, *A Product of the Voting Rights Act*, WASH. POST, Nov. 26, 1996, at A15 ("[W]ithout the ability to represent the old [majority-minority]

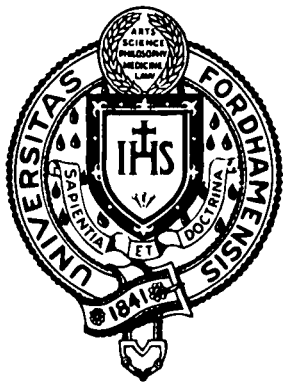
from the minority candidates who vie for seats after the incumbents from former majority-minority districts leave office.

Conclusion

In *Shaw v. Reno* and its progeny, the Supreme Court has redefined the voting rights debate, subjecting majority-minority districts, drawn to comply with the VRA, to strict scrutiny under the EPC. To resolve the conflicting demands that legislators, litigants, and courts now face when attempting to redraw congressional district lines, the Court should hold that creating a majority-minority district to remedy a Section 2 violation is a compelling state interest that is narrowly tailored.

Moreover, the Supreme Court should instruct the lower courts to keep the analysis of compactness for Section 2 liability separate from the equal protection analysis of the proposed remedy. Without these clarifications, legitimate vote dilution claims may be rejected unfairly, and congressional redistricting will remain akin to a tightrope walk without a safety net.

district and develop a political profile, I would have been largely unknown to voters in the new . . . district, and unlikely to win election.").


ARTS
SCIENCE
PHILOSOPHY
MEDICINE
LAW
IHS
SAPIENTIA
ET
DOCTRINA
UNIVERSITAS FORDHAMENSIS
1841