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Exercising the right to vote is an essential component of our democracy and is protected by the Fourteenth[1] and Fifteenth Amendments[2] of the United States Constitution. Congress, therefore, has ample power pursuant to the Necessary and Proper Clause[3] to preserve such voting rights in congressional elections.[4] The passage of the Voting Rights Act of 1965 was a

1 *See* U.S. CONST. amend. XIV (providing that "[n]o states shall. . .deny to any persons within its jurisdiction the equal protection of the laws"). *See generally* Nixon v. Condon, 286 U.S. 73, 84 (1932) (striking down statute allowing political parties to determine who could be members and vote); Nixon v. Herndon, 273 U.S. 536, 541 (1927) (holding that statute preventing blacks from voting in primaries was blatant violation of Equal Protection Clause of Fourteenth Amendment).

2 *See* U.S. CONST. amend. XV (providing that "[t]he right. . .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"); *see also* Guinn v. United States, 238 U.S. 347, 362 (1915) (striking down attempt by Oklahoma to avoid Fifteenth Amendment through use of grandfather clause enabling only those capable of voting in 1866 and their descendants to vote); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (establishing voting as fundamental political right).

3 U.S. CONST. art. I, § 8, cl. 18. *See* U.S. CONST. amend. XIII, § 2; amend. XIV, § 5, amend XV, § 2 (granting Congress enforcement power by appropriate legislation); *see also* McCulloch v. Maryland, 17 U.S. 316, 421 (1819) (interpreting use Necessary and Proper Clause to be appropriate and convenient where federal government sought to establish national bank). *See generally* Gary Lawson & Patricia B. Granger, *The Proper Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 336 n.189 (1993) (stating that rationale behind enabling clauses is that they confer upon federal government similar enforcement power that state governments possess); Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 155 (1992) (stating that while states could act using their general police powers, Congress would have had difficulty finding similar enforcement power without section 2).

4 *See* U.S. CONST. art. I, §2, cl. 1 (providing general rules governing election of United States Representatives); *see also* U.S. CONST. art. I, §4 (allowing states to prescribe time, place and manner for election of Senators and Representatives); Buckley v. Valeo, 424 U.S. 1, 23 (1976) (holding that constitutional power of Congress to regulate procedure for federal elections is well established and beyond reproach); Oregon v. Mitchell, 400 U.S. 112, 120 (1970) (noting that Necessary and Proper Clause further augments Congress' power to regulate national elections); *see, e.g.*, United States v. Classic et al., 313 U.S. 299, 318 (1941) (noting that state law makes primaries integral part of overall election process, therefore subject to protection under art. I, § 2 of Constitution). *But see* Republican Part of the State of Connecticut v. Tashjian, 599 F. Supp. 1228, 1235 (D. Conn. 1984), *aff'd*, 479 U.S. 208 (1986) (holding that state's power to regulate conduct in primaries is given great weight); Mitchell v. United States, 400 U.S. 112, 122 (1970) (determining that Congress has power to regulate congressional elections

manifestation of Congress' reaction to the abhorrent racial discrimination in voting rights in the United States.[5] Put simply, Congress enacted the Voting Rights Act of 1965 ("the Act") to bar discriminatory voting laws in any form on the basis of race or color.[6]

Congress' objective in drafting the Act was to eliminate the use of voter dilution devices such as literacy tests, poll taxes and intimidation tactics.[7] The Act was also designed to prevent the introduction of new devices or processes that might dilute the voting rights of Black citizens.[8] Despite the laudable goals of the

including age and other qualifications).

5 *See* Voting Rights Act of 1965, 42 U.S.C. § 1973 (1965); S. REP. NO. 97-417, at 4-7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 181-84 (indicating purpose of act to prohibit any voting practice or procedure resulting in discrimination); H.R. REP. NO. 89-439, at 23 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2440 (noting original purpose of Voting Rights Act was to protect African Americans); *see also* Chisom v. Roemer, 501 U.S. 380, 392 (1991) (indicating lack of controversy in passing Voting Rights Act was due to its being viewed as restating Fifteenth Amendment); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (noting purpose is to "banish the blight of racial discrimination in voting."); Nixon v. Kent County, 76 F.3d 1381, 1389 (6th Cir. 1996) (recognizing that Voting Rights Act prohibited "any practice that abridged right of any citizen to vote"); McGhee v. Granville County, 860 F.2d 110, 117 (4th Cir. 1988) (finding that 1982 amendments to Voting Rights Act were not intended to be interpreted as providing right of proportional representation). *See generally* ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 4 (1987) (suggesting sole purpose of Voting Rights Act was black enfranchisement); David O. Barrett, Note, *The Remedial Use of Race-Based Redistricting After* Shaw v. Reno, 70 IND. L.J. 255, 258-59 (1994) (noting that remedial purpose of VRA was originally interpreted to allow creation of majority-minority districts).

6 *See* Board of Estimate City of New York v. Morris, 489 U.S. 688, 692 (1989) (noting that equal protection guarantee of "one person, one vote" extends to congressional districting plans); *see also* Hadley v. Junior College Dist. of Metro. Kansas City, Missouri et al., 397 U.S. 50, 54 (1970) (interpreting one person-one vote rule to require that "each person's vote counts as much, insofar as it is practicable, as any other person's"); Reynolds v. Sims, 377 U.S. 533, 560 (1964) (noting that Equal Protection Clause requires adherence to principle of one person, one vote); Gray v. Sanders, 372 U.S. 368, 379 (1963) (suggesting that Fifteenth, Seventeenth and Nineteenth Amendments require each person's vote be given equal weight).

7 *See* S. REP. NO. 97-417, at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 189-90 (noting that "a broad array of dilution schemes were employed to cancel the impact of the new black vote"); *see also* Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969) (holding that switch from district to at-large voting may result in dilution of minority voting power); *Reynolds*, 377 U.S. at 555 (finding dilution of voting strength can be as harmful as outright prohibition of voting rights). *See generally* Captain Frederick G. Slabach, *Equal Justice: Applying the Voting Rights Act to Judicial Elections*, 62 U. CIN. L. REV. 823, 846 (1994) (noting Supreme Court needed to adopt concept of vote dilution not for constitutional reasons but to give effect to Voting Rights Act); Mary J. Kosterlitz, Note, Thornburg v. Gingles: *The Supreme Court's New Test for Analyzing Minority Vote Dilution*, 36 CATH. U. L. REV. 531, 535 (1987) (explaining that vote dilution is premised on illegal attempts to infringe on minority power to elect representatives of their choice).

8 *See* THERNSTROM, *supra* note 5, at 23 (noting that Mississippi legislative amended state laws to reduce minority gains derived from increased black voter registration); Nancy K. Bannon, *The Voting Rights Act: Over The Hill At Age 30?*, 22 HUM. RTS. 10, 11 (1995) (noting that Voting Rights Act is viewed as primary force behind dramatic in-

Act, minorities continued to be underrepresented in the United States Congress.[9]

Following the 1990 census, many new congressional districts were created with the intention of increasing the number of minority members in Congress.[10] To effectuate this purpose and comply with the mandates of the Act, these newly-drawn districts were designed to be majority-minority districts.[11] These majority-minority districts were intended to permit sufficiently large groups of minority voters to elect a candidate of their choice within their district.[12] Many of these districts, however, are threatened by constitutional challenges based on the notion that race conscious redistricting violates the Fourteenth

crease in minority election to public office); Laughlin McDonald, *The Counterrevolution In Minority Voting Rights*, 65 MISS. L.J. 271, 272 (1995) (stating that extraordinary increase in minority office holding largely result of increase in majority-minority districts); *see also* Pamela S. Karlan, *The Right to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1738-1739 (1993) (stating that black elected officials became part of political system because of pressures exerted by Congress on executive branch through its preclearance requirements).

9 *See* Frank R. Parker, *The Damaging Consequences of the Rehnquist Court's Commitment to Color Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763, 770-71 (1996) (noting severe underrepresentation of minorities in Congress and that "blacks who constitute 11.1% of nation's voting age population, made up only 4.9% of the members of Congress. Hispanics, with 7.3% of the country's voting age population, had only 2.5% of the representation in Congress"). *See generally* HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 9 (1992) (providing statistical breakdown of minority representation).

10 *See* Sean Simpson, Note, *Could the Best Tightrope Walkers Manage to Walk the Line Between Race Consciousness and Race-Predominance? An Analysis of Race-Based Redistricting in Light of* Miller v. Johnson, 23 PEPP. L. REV. 1317, 1352 (1996) (remarking that country saw largest increase in minority representation since passage of Voting Rights Act); *see also* Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of* Shaw v. Reno, 3 D.C. L. REV. 1, 2 (1995) (noting increase from 26 to 52 black members of Congress and 13 to 18 in House Hispanic Caucus after 1990 census).

11 *See* Rogers v. Lodge, 458 U.S. 613, 617 (1982) (acknowledging that if states were divided into strictly multimember districts significant minorities could be completely shut out from pro rata because of "winner take all" system); Whitcomb v. Chavis, 430 U.S. 124, 142 (1971) (noting constitutionality of submerging minorities in winner take all election, but holding unconstitutional purposeful devising districts to create multimember districts); McDonald, *supra* note 8, at 289 (stating that effect of majority-minority districts has been creation of most integrated districts in country); Jack Quinn et. al., *Congressional Redistricting in the 1990's: The Impact of the 1982 Amendments to the Voting Rights Act*, 1 GEO. MASON U. CIV. RTS. L.J. 207, 209 (1990) (stating that legislative redistricters must draw minority districts whenever failure to do so would result in minority vote dilution); *see also* A. Leon Higginbotham *et al.*, Shaw v. Reno: *A Mirage of Good Intentions With Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1624-25 (1994) (stating that insinuations that majority-minority districts are comparable to political apartheid are absurd because of apartheid's damaging effects to minorities).

12 *See* McDonald, *supra* note 8, at 271 (concluding that increase in minority office holdings is directly linked to increase in majority-minority districts); *see also* Carol Rhodes, *Changing the Constitutional Guarantee of Voting Rights from Color Conscious to Color-Blind: Judicial Activism by the Rehnquist Court*, 16 MISS. C. L. REV. 309, 316 (1996) (noting creation of majority-minority districts is to remedy past discrimination).

Amendment and is not mandated by the Act.[13] The Supreme Court, therefore, has been faced with the paradox of interpreting a statute intended to remedy racial injustice while simultaneously limiting the use of race as a factor in implementing the remedy.

This Note analyzes the future of the Voting Rights Act within the constitutional framework promulgated by the Supreme Court in its recent pronouncements in redistricting decisions. Part One reviews the development of sections 2 and 5 of the Act and the case law interpreting them. Part Two reviews the Court's "new" equal protection standing in the context of voting rights violations. Part Three assesses the effect of the present Court's departure from a jurisprudence which permitted race-based classifications in congressional redistricting. Part Four explores the difficulties that states face regarding compliance with the Voting Rights Act, while simultaneously avoiding the present Court's conservative Fourteenth Amendment jurisprudence. Finally, this Note concludes that while a state may theoretically attempt to address minority representation concerns, the present Court's strict scrutiny standard of review will continue to threaten new gains in minority representation achieved through redistricting.

I. EVOLUTION OF THE VOTING RIGHTS ACT OF 1965

A. Section Two: Using a Result Based Analysis

The Voting Rights Act of 1965 was designed to safeguard the voting rights of citizens regardless of their race.[14] Sections 2 and

13 *See* Bush v. Vera, 116 S. Ct. 1941, 1950 (1996) (challenging Texas legislature's redistricting plan on the grounds that it violated 14th Amendment); Miller v. Johnson, 515 U.S. 900, 903 (1995) (challenging redistricting plan on grounds that it violated Equal Protection Clause); Shaw v. Reno, 509 U.S. 630, 631 (1993) (challenging Districts One and Twelve on grounds that they violated Fourteenth Amendment); Able v. Wilkins, 946 F. Supp. 174, 174 (D.S.C. 1996) (challenging three state senate election districts and nine house election districts on grounds that they were drawn with race as predominant factor).

14 *See* Chisom v. Roemer, 501 U.S. 380, 403 (1990) (recognizing broad remedial purpose of Voting Rights Act which should be interpreted to permit "broadest possible scope in combating racial discrimination"); Allen v. State Bd. Of Elections, 393 U.S. 544, 567 (1969) (finding that Voting Rights Act should be read to provide broadest possible scope for fighting voting discrimination based on race); South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966) (noting Voting Rights Act enacted for broad remedial purpose of eliminating racial discrimination in voting); *see also* Mark W. Mahoney, Comment, *The Voting*

5 are the most effective in combating minority vote dilution.[15] These sections are the backbone of the Act and are widely used to remedy violations of minority voting rights.

Section 2 of the Act, states in part:

> 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 . . .

Section 2 is essentially a codification of the Fifteenth Amendment.[16] Its promulgation serves as the mechanism for bringing voting rights discrimination claims in federal court.[17]

Many courts interpreted section 2 as requiring a "purposeful intent" to discriminate in order to establish a violation, while other courts only required a "discriminatory result."[18] In 1980, the Supreme Court, in *Mobile v. Bolden*,[19] resolved this uncertainty by invoking an intent test. This test required proof that the challenged districting plan resulted in minority vote dilution, and that the plan was enacted with the actual intent to deprive minority plaintiffs of voting power.[20] The stringent standard set

Rights Act of 1965: Is It Applicable to State Judicial Elections?, 29 DUQ. L. REV. 745, 749 (1991) (noting care taken by Congress in wording statute to provide maximum scope possible). *See generally* HOWARD & DALE KRANE & THOMAS P. LAUTH, COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE 1965 VOTING RIGHTS ACT 14-18 (1982) (providing general framework of Voting Rights Act and its pertinent sections).

15 *See* Scott Gluck, *Congressional Reaction to Judicial Construction of Section Five of the Voting Rights Act of 1965*, 29 COLUM. J.L.& SOC. PROBS. 337, 339 (1996) (suggesting that VRA is most effective civil rights legislation ever passed in United States); Carol R. Goforth, *What is She? How Race Matters and Why it Shouldn't*, 46 DEPAUL L. REV. 1, 53 (1996) (noting success of Voting Rights Act in combating overt discrimination on basis of race); *see also* Glenn P. Smith, *Interest Exception to One-Resident, One Vote: Better Results From the Voting Rights Act?*, 74 TEX. L. REV. 1153, 1181 (1996) (recognizing success of section two challenges to judicial election practices).

16 *See* Adam J. Chill, *The Fourteenth and Fifteenth Amendments With Respect to the Voting Franchise: A Constitutional Quandary*, 25 COLUM. J.L.& SOC. PROBS. 645, 653 (1992) (suggesting substance of Fifteenth Amendment was codified in Voting Rights Act of 1965); Michael J. Moffat, *The Death of the Voting Rights Act or an Exercise in Geometry?* Shaw v. Reno *Provides More Questions Than Answers*, 22 PEPP. L. REV. 727, 740 (1995) (noting Voting Rights Act is codification of Fifteenth Amendment).

17 *See* Darren Rosenblum, *Overcoming "Stigmas": Lesbian and Gay Districts and Black Electoral Empowerment*, 39 HOW. L.J. 149, 153 (1995) (noting that section 2 contains provision permitting racial and linguistic minorities to challenge districting plans that dilute their voting power).

18 *See* Harvell v. Blytheville Sch. Dist., 33 F.3d 910, 912 (8th Cir. 1994) (noting that "intent test" was repudiated by 1982 Amendments).

19 446 U.S. 55 (1980).

20 *Id.* at 55 (declaring that establishment of section 2 or Fifteenth Amendment viola-

forth in *Bolden* proved to be difficult to meet and effectively barred victims of voting rights violations from establishing their claims.[21]

Congress remedied the harsh effects of the intent test by amending the Act in 1982,[22] requiring a result standard to determine violations of section 2.[23] Through this change, Congress sought to lessen the burden on plaintiffs seeking relief under section 2.[24]

tion required proof of intentional discrimination). *See* Katharine Inglis Butler, *Affirmative Racial Gerrymandering: Rhetoric and Reality*, 26 CUMB. L. REV. 313, 332 (1995-96) (discussing *Bolden* standard which required plaintiffs to show at-large elections were maintained for discriminatory purpose); *see also* Paul L. McKaskle, *The Voting Rights Act and the "Conscientious Redistricter"*, 30 U.S.F. L. REV. 1, 17 (1995) (suggesting "totality of circumstances" approach may be used to infer "intent" on part of legislatures).

21 *See* Tim R. Sass & Stephen L. Mehay, *The Voting Rights Act, District Elections*, 38 J.L. & ECON. 367, 368 (1995) (suggesting that movement to challenge at-large voting systems was temporarily derailed by *Mobile* decision); *see also* Michael E. Lewynn, *How Radical is Lani Guinier?*, 74 B.U. L. REV. 927, 929 (1994) (stating "broad coalition of civil rights activists" urged Congress to amend Voting Rights Act).

22 Voting Rights Act, 42 U.S.C. § 1973 *amended by* Pub. L. No. 97-20, 96 Stat. 134 (1982).

23 *See* Velasquez v. City of Abilene, Texas, 725 F.2d 1017,1021 (5th Cir. 1984) (noting that Congressional passage of 1982 Amendment included rejection of purpose test and adoption of result test); Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section Two of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 450-51 (1988) (noting that Congress amended Voting Rights Act by providing second avenue of relief which required only proof that voting device resulted in discrimination); Lewynn, *supra* note 21, at 931 (noting 1982 amendments signaled Congress' disapproval of results test); *see also* Andrew P. Miller & Mark A. Parhman, *Amended Section Two of the Voting Rights Act: What Is the Intent of the Results Test?*, 36 EMORY L.J. 1, 4 (1987) (stating that prior to 1982 amendments, it was unclear whether Congress intended to establish requirement of discriminatory intent or merely discriminatory results); Frank R. Parker, *The "Results" Test of Section Two of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 716 (1983) (noting elimination of intent in 1982 amendments was highly controversial).

24 42 U.S.C. § 1973 (1972). Section 2 specifically provides as follows:

> (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, or in contravention of the guarantees set forth in section 1973-b(f)(2) of this title, as provided in subsection (b) of this section (b) [a] violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State of political subdividion are not equally open to participation by members of a class of citizens protection 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: [p]rovided, 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.; *see* City of Mobile, Alabama v. Bolden, 446 U.S. 55, 66 (1980) (ruling that it was not enough to prove intent by showing inadequate representation).

Thereafter, the Court in *Thornburg v. Gingles*[25] interpreted the amended language of section 2 to require three preconditions for establishing a claim.[26] First, the minority group must demonstrate that it is sufficiently large and geographically compact to constitute a majority in one or more single member districts.[27] Second, the minority group should be politically cohesive.[28] Finally, the plaintiffs must prove that the majority has also voted as a bloc and generally has defeated a minority's preferred candidate.[29] The requirements in *Gingles* eliminate the stringent standard set forth in *Bolden* and permit claims to be brought under section 2 where a state's redistricting plan results in discrimination.[30]

B. Section Five of the Act

Section 5 of the Voting Rights Act[31] is commonly known as the

25 478 U.S. 30 (1986).

26 *Id.* at 30 (1986) (holding that North Carolina redistricting plans violated totality of circumstances set forth in section 2).

27 *Id.* at 31 (requiring that minority group support singular candidate).

28 *Id.* (stating that bloc voting majority must usually be able to defeat candidates supported by politically cohesive minority).

29 *See Gingles*, 478 U.S. at 53 (showing analytical techniques to compile data concerning voting patterns of minority groups); McKaskle, *supra* note 20, at 29-30 (stating that geographical compactness requirement prevents against legislating for proportional representation); Rick G. Strange, *Application of Voting Rights Act to Communities Containing Two or More Minority Groups - When Is the Whole Greater Than the Sum Of the Parts?*, 20 TEX. TECH L. REV. 95, 128-129 (1989) (stating that courts should determine that group is properly aggregated so as to ensure that purpose of Act is being carried out).

30 *See* S. REP. NO. 417, 97th Cong., 2d. Sess. 1982, *reprinted in* 1982 U.S.C.C.A.N. 177, 180 (addressing idea expressed in *Bolden* by noting that Voting Rights Act does not require proof of discriminatory intent); *see also* White v. Regester, 412 U.S. 755, 765 (1973) (noting that plaintiff's burden of proof rests on evidence showing its members had less opportunity than others in given district to participate in political process and be represented in Congress fairly); *c.f.* Jack Quinn et al., *Congressional Redistricting in the 1990's: The Impact of the 1982 Amendments to the Voting Rights Act*, 1 GEO. MASON U. CIV. RTS. L.J. 207, 244 (1990) (enumerating three part *Gingles* test to be used when minority group asserts that additional minority districts should have been created).

31 42 U.S.C. § 1973c. Section 5 provides in relevant part:

> Whenever a State or political subdivision with respect to the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) . . . "

Id.

"preclearance section," because it remedies discriminatory voting practices by mandating that all voting laws be reviewed by the Justice Department before they may be implemented. Section 5 is applicable to states that have a documented history of implementing voter dilution devices ("covered states").[32] It precludes covered states from enforcing voting changes until they are submitted to the Justice Department and cleared by the Attorney General.[33] A covered state, therefore, has the burden of proving to the Justice Department, by a preponderance of the evidence, that a change does not have a discriminatory purpose or effect.[34]

The Supreme Court, in *Beer v. United States*,[35] refined this

32 *See* Allen v. State Bd. of Elections, 393 U.S. 544, 566 (1969) (holding Congress intended to reach any state enactment which altered election law of covered state in any way); Beer v. U.S., 425 U.S. 130, 141 (1957) (holding redistricting plan which created minority district where none existed does not violate section 5 of Voting Rights Act); *see also* James F. Blumstein, *Racial Gerrymandering and Vote Dilution:* Shaw v. Reno *in Doctrinal Context*, 26 RUTGERS L.J. 517, 559 (1995) (defining covered jurisdiction under section 5's preclearance requirement as state presumed to have taken part in pattern of discriminatory practices in past in order to prevent minorities from equal access to political process); Katharine Inglis Butler, *In the U.S. Supreme Court: May a Court Adopt a Temporary "Remedial" Election Plan That Mirrors the Very Plan It Has Enjoined for Not Following Voting Rights Act Requirements?*, WEST'S LEGAL NEWS, Oct. 7, 1996, at 26, 10588, *available in* 1996 WL 564831 (1996) (emphasizing covered jurisdictions have burden of proving that changes made to voting practices do not discriminate against minorities).

33 *See* Laughlin McDonald, *Racial Fairness - Why Shouldn't It Apply to Section Five of the Voting Rights Act?*, 21 STETSON L. REV. 847, 848 (1992) (stating that preclearance requires proof that proposed changes in certain jurisdictions will not have discriminatory effects on account of race, color or membership in language minority); Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1284-85 (1989) (suggesting that appointments made by President to Department of Justice significantly impacts effectiveness of Preclearance provision); *see also* R. Tim Hay, Comment, *Blind Salamanders, Minority Representation, and the Edwards Aquifer: Reconciling Use-Based Management of Natural Resources with the Voting Rights Act of 1965*, 25 ST. MARY'S L.J. 1449, 1477 (1994) (stating that preclearance often freezes politics of state because reviewing authority must ensure that jurisdiction is in full compliance with Voting Rights Act). *See generally* BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 17-18 (1992) (stating that context of 1965 Act which included section 5 required covered states to submit changes to voting rights prior to their implementation).

34 *See Beer*, 425 U.S. at 141 (holding non-retrogression principle was ameliorative because it improved blacks' representation); James A. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach From the Voting Rights Act*, 69 VA. L. REV. 633, 688 (1983) (explaining non-retrogression principle as applied in *Beer*); Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of* Shaw v. Reno, 3 D.C. L. REV. 1, 48 (1995) (noting non-retrogression principle does not allow for free racial gerrymandering); *see also* Lockhart v. United States, 460 U.S. 125, 136 (1983) (applying principles established in *Beer* and concluding that introduction of staggered terms would not have "retrogressive effect on minority voting strength"); James B. Zouras, Shaw v. Reno: *A Color Blind Court in a Race Conscious Society*, 44 DEPAUL L. REV. 917, 934 (1995) (discussing plan which was struck down because section 5 precludes changes that have retrogression effect).

35 425 U.S. 130 (1976).

test by finding that a "discriminatory purpose or effect" exists only if a covered state's voting change subject to preclearance meets two conditions.[36] First, the change is subject to the "retrogression test" which requires that the state enhance or leave unchanged the current electoral position of minorities.[37] Second, the voting change must not result in discrimination against minorities in violation of the Constitution.[38]

Until recently, sections 2 and 5 served as a powerful tool in reducing discrimination in the redistricting process.[39] The Supreme Court, however, in its most recent congressional redistricting decisions, has invalidated many of the newly-drawn congressional districts on constitutional grounds. [40] The Court's current approach to reviewing race-based redistricting raises the issue of whether minorities, once again, have been denied the necessary tools to combat societal discrimination in voting rights.

II. SHAW V. RENO: MANUFACTURING A CLAIM FOR VOTING RIGHTS VIOLATIONS

In *Shaw v. Reno*,[41] the Supreme Court wrestled with the issue of whether North Carolina's redistricting plan, which included

36 *Id.* at 131. An ameliorative plan cannot violate section 5 unless the plan itself discriminates on the basis of race or color as to violate the Constitution. *Id.*

37 *Id.* at 146.

38 *Id.*

39 *See* HOWARD BALL ET AL., COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE 1965 VOTING RIGHTS ACT 57 (1982) (stating that Justice Department's efforts along with civil rights groups and complying registrars led to doubling of southern black electorate by 1968); *see also* Susan L. Hearne, League of United Latin American Citizens v. Clements: *Section Two of the Voting Rights Act and Judicial Elections*, 65 TUL. L. REV. 1712, 1719-20 (1991) (stating that relationship between sections 2 and 5 aim to eliminate all forms of racial discrimination in all voting practices); *cf.* Arthur J. Anderson, *Texas Legislative Redistricting: Proposed Constitutional and Statutory Amendments for Improved Process*, 43 SW. L.J. 719, 744 (1989) (noting basis for racial discrimination claims lie within Fifteenth Amendment, Equal Protection Clause, and sections 2 and 5 of Voting Rights Act).

40 *See* Bush v. Vera, 116 S. Ct. 1941, 1959-60 (1996) (holding three Texas districts are unconstitutional since race was "predominant factor" motivating drawing of district lines); Miller v. Johnson, 515 U.S. 900, 915 (1995) (invalidating Georgia's majority black eleventh district because State "subordinated to racial objectives" is traditional districting principles); Shaw v. Reno, 509 U.S. 630, 642 (1993) (holding that appellants claims under Equal Protection Clause and reapportionment scheme is so extremely irregular on its face that it rationally can be viewed only as effort to segregate races for purpose of voting).

41 509 U.S. 630 (1993).

majority-minority districts, was constitutional.[42] The Court, in an opinion authored by Chief Justice Rehnquist, suggested that the plaintiffs might be harmed by reinforcement of racial stereotypes. It was proffered that this harm may result because classifications may reinforce the notion that an elected official only represents a specific racial group.[43] The Court's willingness to consider this potential stigma as injury-in-fact allowed the *Shaw* plaintiffs to bring a claim under the Equal Protection Clause.[44] This decision began the weakening of the mandates of the Voting Rights Act.[45] The Court's willingness to entertain such a claim may result in a retreat in America's thirty-year commitment to racial equality in the area of voting rights.[46]

To further complicate matters, the Court, without much clarification, suggested in dicta that although benign race classifica-

42 *See id.* at 634 (1996) (stating question before Court is whether appellants claim, revising district plan to create irregular-shaped district and therefore racial gerrymandering, was cognizable); *see also* Timothy G. O'Rourke, Shaw v. Reno: *The Shape of Things to Come*, 26 RUTGERS L.J. 723, 724 (1995) (noting possible effect of *Shaw* is to threaten electoral gains made in 1992). *See generally* Richard C. Reuben, *Voting Rights in Court—Challenges to Race-Based Districts Could Shatter Minority Electoral Gains*, 13 CAL. LAW. 39, 40 (1993) (arguing challenges to race-based districts are potential threat to minority electoral gains); Stephens A. Holmes, *Did Racial Redistricting Undermine Democrats?*, N.Y. TIMES, Nov. 13, 1994, at 1, 32 (arguing race-based reapportionment siphoned Democratic votes out of white districts and cost democrats five seats in 1992 and 10 seats in 1994).

43 *See Shaw*, 509 U.S. at 653 (suggesting that strict scrutiny is necessary to determine if classification is truly benign); *see also* Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (recognizing preferential race assignment may result in harm to its intended beneficiaries); United Jewish Org. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 172 (1977) (Brennan, J., concurring) (reasoning that preferential race assignment may disguise policy that results in continuation of disadvantageous treatment of plan's beneficiaries); *cf.* Loving v. Virginia, 388 U.S. 1, 11 (1967) (noting that stigmatization and racial hostility may result from racial classification).

44 *Shaw*, 509 U.S. at 649-50 (suggesting that classification of voters only by race injures voters by reinforcing racial stereotypes which undermine system of representative democracy); *cf.* City of Richmond v. Croson, 488 U.S. 469, 493 (1983) (stating that unless classifications based on race are strictly reserved for remedial settings, they may promote notions of racial inferiority). *See generally* Goforth, *supra* note 15, at 1 (noting that race is considered factor in Congressional redistricting, adoption, employment, and education).

45 *See* McDonald, *supra* note 8, at 273-74 (noting Court's opinion threatens to overthrow gains in minority office holding); O'Rourke, *supra* note 42, at 723 (noting possible effect of *Shaw* is to threaten electoral gains).

46 *See generally* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231 (1995) (holding minority set-aside programs adopted by Congress to foster racial diversity must pass strict scrutiny review); Miller v. Johnson, 515 U.S. 900, 911 (1995) (ruling strict scrutiny standard of review to be applied to any minority-majority electoral district in which race was predominant factor in promulgation of such district); Thornburg v. Gingles, 478 U.S. 30, 50 (1986) (requiring federal judges fashioning redistricting remedies to rely solely on single-member districts); Parker, *supra* note 9, at 764 (noting Court's recent decisions adversely effect efforts to gain greater equity in electoral representation).

tions are permissible, strict scrutiny review must be applied to determine if the classification is truly harmless.[47] The most troublesome aspect of the Court's holding, however, is its failure to insist upon a showing of discriminatory intent or purpose by the North Carolina legislature.[48] By failing to require an injury-in-fact, the Court has opened a floodgate of challenges to many of the newly-drawn districts that were designed to combat long standing racial inequities.[49]

A. Representational Harms in a Race-Conscious Society

Shaw and its progeny recognized that any group of voters may state a cognizable claim in challenging newly-drawn districts so long as they were drawn with respect to race.[50] The harm that was recognized by the Court is most accurately described as the withholding of the right to participate in a color-blind election.[51]

47 *See Shaw*, 509 U.S. at 653 (considering level of scrutiny which should apply in apportionment context); Stuart Taylor, Jr., *A Rorschach Test for Racial Gerrymanders*, LEGAL TIMES, July 5, 1993, at 25 (noting that *Shaw* reiterates important constitutional principle that racial classifications should be used for important reasons and in small doses). *But cf.* Linda Greenhouse, *Justices Delve Anew Into Race and Voting Rights*, CHI. DAILY L. BULL., July 12, 1993, at 20 (reasoning failure of small minority group to achieve success at polls cannot indicate Voting Rights Act is at odds with theory of Voting Rights Act). *See generally* ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS, 63-78 (1987).

48 *See* James B. Zouras, Shaw v. Reno: *A Color-Blind Court In A Race Conscious Society*, 44 DEPAUL L. REV. 917, 969 (1995) (criticizing Court's failure to require showing of discriminatory intent undermines purpose of Fourteenth Amendment); *see also* United Jewish Org. Inc. v. Carey, 430 U.S. 144, 165-68 (1977) (noting Court's proposition in *Beer* that Constitution does not prevent state from "creat[ing] or preserv[ing] black majorities in particular districts in order to ensure that its reapportionment plan complies with section 5."); Chapman v. Meier, 420 U.S. 1, 17 (1975) (requiring proof that "the group has been denied access to the political process equal to the access of other groups"); White v. Regester, 412 U.S. 755, 765-66 (1973) (requiring more than mere lack of success at polls to make out successful claim).

49 *See* Allen v. Wright, 468 U.S. 737, 755 (1984) (discussing whether stigmatic harm to racially defined group gives individual member of that group standing); *see also* Antonin Scalia, *The Doctrine Of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881-82 (1983) (emphasizing that courts should accord greater weight to traditional requirement that plaintiff's alleged injury be particularized one, which sets plaintiff apart from others); Brian R. Markley, Comment, *Constitutional Provisions in Conflict: Article III Standing and Equal Protection After* Shaw v. Reno, 43 U. KAN. L. REV. 449, 466 (1995) (noting that injury suffered in *Shaw* resembles abstract, generalized harm previously deemed insufficient to satisfy art. III case or controversy for standing).

50 *See Shaw*, 509 U.S. at 658 (holding valid cause of action existed under Equal Protection Clause because irrational apportionment separated voters based on race); *see also Miller*, 515 U.S. 900, 908 (1995) (holding residents of challenged district had standing to bring equal protection challenge).

51 *See Shaw*, 509 U.S. at 642 (noting appellants did not allege harm due to vote dilution based on race rather they claimed segregating voters based on race violated consti-

As a result, although covered states may be compelled to legislate in accordance with the Justice Department, they will be preemptively deemed to have a discriminatory intent.[52] It is submitted that the merits of such a case are more likely to be reached under an equal protection claim rather than under a claim of vote dilution.[53] The Court's imaginative standing criteria established by *Shaw* seems to indicate their disdain for the use of race in any districting context.[54] The immediate impact of *Shaw*'s holding was the threat to majority-minority districts created in response to the 1990 census.[55]

III. *MILLER V. JOHNSON*: SIGNALING THE END OF INTERMEDIATE SCRUTINY FOR BENIGN RACE DISCRIMINATION

In *Miller v. Johnson*, the Supreme Court strayed further into the political thicket.[56] The *Miller* Court expanded the *Shaw* holding by permitting both a claim of representational harm and

tutional right to have "color-blind" electoral process); *cf.* United States v. Hays, 515 U.S. 737, 750 (1995) (finding appellants did not have standing for their complaint that redistricting scheme violated voter's right to engage in color-blind process); Kimberly V. Mann, Note, Shaw v. Reno*: A Grim Foreboding for Minority Voting Rights*, 5 MD. J. CONTEMP. LEGAL ISSUES 147, 164 (1994) (noting nothing in Constitution guarantees right to color-blind election).

52 *See Shaw*, 509 U.S. at 643 (discussing necessity of judicial inquiry into purpose behind statutes that have express racial classification); Zouras, *supra* note 34, at 971-972 (suggesting Court's automatic presumption of invidious intent is troublesome); *see also* Robert A. Curtis, *Race-Based Equal Protection Claims After* Shaw v. Reno, 44 DUKE L.J. 298, 306-07 (1994) (examining Shaw's irregular shape interpretation conflict with other areas of law); Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of* Shaw v. Reno, 3 D.C. L. REV. 1, 30-31 (1995) (discussing inconsistencies between *Shaw* and prior cases stemming from *Shaw's* presumption of invalidity regarding racial classification).

53 *See* Zouras, *supra* note 34, at 971 (noting plaintiffs in context of vote dilution claim would have faced impossible challenge in proving discriminatory effect).

54 *See* Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 292-93 (1996) (discussing *Shaw*, Court references to "segregation" in regards to standing which "obscures the point that the challenged districts are in fact among the most racially diverse in the country"); *see, e.g.*, Jack Pritchard, Note, United States v. Hays*: A Winnowing of Standing to Sue in Racial Gerrymandering Claims*, 47 MERCER L. REV. 955, 961 (1996) (discussing *Hays* as reaction to *Shaw* regarding existence of standing based on stigmatic injury).

55 *See* Voinovich v. Quilter, 507 U.S. 146, 155-56 (1993) (stating that majority-minority districts threatened by *Shaw* decision were drawn as result of 1990 census).

56 *See* Miller v. Johnson, 115 S. Ct. 2475, 2500 (1995) (Ginsburg, J., dissenting) (stating that federal courts ventured into political thicket of apportionment to secure equal voting rights for members of racial minorities). *But see* Chapman v. Meier, 420 U.S. 1, 27 (1975) (reiterating that state legislatures, not federal courts, are responsible for reapportionment); White v. Weiser, 412 U.S. 783, 795-96 (1973) (recognizing that districting is part of political process, such decisions must be made by those charged with political tasks).

holding that the shape of a district created a presumption of race-based redistricting.[57] The Court stopped short, however, of completely eliminating the use of race as a consideration in redistricting.[58] The plurality opinion failed to provide any clear guidelines in determining to what extent race may be used in congressional redistricting.[59] In a potentially fatal blow to the Voting Rights Act, Justice O'Connor rationalized the application of strict scrutiny to Georgia's Eleventh District by holding that compliance with section 5 of the Act did not constitute a compelling interest.[60] Thus, the Court found it was irrelevant that the redistricting plan was "narrowly tailored" to such interests.[61] The Court determined that a proper reading of the Voting Rights

57 *See Miller*, 115 S. Ct. at 2488 (requiring showing that race was primary motivation in shaping district while traditional districting principles were subordinated); *see also id.* at 2498, 2500 (Stevens, J., dissenting) (recognizing that Georgia's congressional plan was form of "racial integration" designed to ensure Black participation in electoral process); City of Mobile v. Bolden, 446 U.S. 55, 87 (1980) (Stevens, J., concurring) (pointing out that legislators make judgments that members of certain identifiable groups whether racial, ethnic, economic will vote in same manner); Richard H. Pildes, Book Review, *The Politics of Race: Quiet Revolution in the South*, 108 HARV. L. REV. 1359, 1367 (1995) (pointing out that contention like "blacks need not run in 'safe' minority districts to be elected" are myths that distort public discussions).

58 *See Miller*, 115 S. Ct. at 2488 (holding plaintiff's requirement of showing that race was predominant factor motivating legislature's decision must be supported by proof of legislature's subordination of traditional race-neutral districting principles); *Id.* at 2500 (Ginsburg, J., dissenting) (reasoning that state legislators recognize communities that have particular racial makeup to account for interests shared by persons grouped together); Richard H. Pildes & Richard H. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 496 (1993) (noting compliance with section 2 of Voting Rights Act and Gingles test requires race-conscious districting). *But cf.* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 527 (1989) (Scalia, J., concurring) (reasoning that use of race preferences to even score reinforces manner of thinking that will lead to more injustice).

59 *See Miller*, 115 S. Ct. at 2500 (1995) (Ginsburg, J., dissenting) (concluding Court is only divided by issue of how race may be considered in redistricting); *see also* Laughlin McDonald, *Can Minority Voting Rights Survive* Miller v. Johnson?, 1 MICH. J. RACE & L. 119, 145-46 (1996) (commenting on difficulty in applying Miller standard in taking race into account in redistricting); *cf. Miller*, 115 S. Ct. at 2497. (Stevens, J., dissenting) (arguing that Court failed to explain what showing plaintiff must make to establish standing to litigate).

60 *See Miller*, 115 S. Ct. at 2491 (noting mere assertion of remedial action to eradicate past racial discrimination does not constitute compelling interest); Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995) (noting all racial classifications imposed by government must be narrowly tailored to serve compelling interest); *Accord* Shaw v. Reno, 509 U.S. 630, 658 (1993) (holding that plaintiffs' claim was justiciable under strict scrutiny review, Court reached no conclusion as to whether State's interest in meeting requirements of Voting Rights Act constituted compelling state interest); *cf.* City of Mobile Ala. v. Bolden, 446 U.S. 55, 64 (1980) (holding that racially discriminatory motivation is necessary ingredient of Fourteenth or Fifteenth Amendment violation).

61 *See Miller*, 115 S. Ct. at 2493 (determining that there was no threat of retrogression in Georgia's redistricting plan and that it was Justice Department policy rather than Voting Rights Act that required third majority-minority district).

Act did not require Georgia's drawing of its Eleventh District to enhance the percentage of the minority voting population.[62] Strict scrutiny review as applied in *Miller* may further purge many minorities from elected office.[63]

A. Race Based Redistricting as Benign Race Classification

Prior to *Shaw*, the Supreme Court had limited exposure to the problem of race-based redistricting.[64] Moreover, the entire area was not considered subject to judicial review because it was deemed a political question.[65] For example, in three cases prior to *Shaw*, the court specifically failed to address whether, absent a claim under section 5 of the Act, a state may use race to bolster minority voting strength.[66] Not surprisingly, in keeping with its affirmative action jurisprudence, the Court has been reluctant to apply anything less than heightened judicial scrutiny in the re-

62 *Id.* at 2492 (reasoning that legislative plans that increase majority-minority cannot violate section 5 unless apportionment itself so discriminates on basis of race or color as to violate Constitution) (quoting Beer v. United States, 425 U.S. 130, 141 (1976)); *see also Beer*, 425 U.S. at 141 (reasoning that legislative reapportionment that enhances voting position of racial minorities cannot have effect of diluting right to vote on account of race within meaning of section 5).

63 *See* McDonald, *supra* note 59, at 162 (noting Court's equal protection decisions of past two terms are damaging to minorities' efforts to overcome past societal discrimination).

64 *See* United Jewish Org. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 155-162 (1977) (rejecting objections by petitioners to use of racial criteria in redistricting under Voting Rights Act); Whitcomb v. Chavis, 403 U.S. 124, 156-63 (1971) (holding discrimination was not invidious where representatives of legislative district, known minority ghetto, did not reside in district); Wright v. Rockfeller, 376 U.S. 52, 58 (1964) (accepting lower Court's finding that challenged part of New York Act was not intended to segregate on basis of race or place of origin); Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (holding that Alabama legislature may not redraw district to deprive petitioners of municipal franchise).

65 *See* BLACK'S LAW DICTIONARY 1158 (6th ed. 1990) (defining political question doctrine to be based upon premise that certain issues are subject to separation of powers, rendering their determination outside realm of judicial resolution). *But see* Baker v. Carr, 369 U.S. 186, 207-210 (1962) (stating that although issue of legislative apportionment appears to be political question, Supreme Court has held that challenging state apportionment statute does not present nonjusticiable political question); Colegrove v. Green, 328 U.S. 549, 552 (1946) (holding that federal courts may declare particular electoral system invalid).

66 *See Gomillion*, 364 U.S. at 346 (finding that Alabama legislature actions to segregate racial minority and affect voting distribution was controversy "out of the so-called political arena and into the conventional sphere of constitutional litigation"); *United Jewish Org. of Williamsburgh*, 40 U.S. at 168 (avoiding interference with state plan that is authorized because "it undertakes, not to minimize or eliminate the political strength of any group or party, but to . . . provide a rough sort of proportional representation in the legislative halls of the State"); *Wright*, 376 U.S. at 69 (directing plaintiffs to attack constitutionality of state statute and negate inference that racial segregation was purpose of redistricting).

districting context.[67]

On the other hand, there is a long history of intermediate scrutiny for benign race discrimination.[68] This has been suggested by Justice Steven's dissent in *Bush v. Vera*,[69] where the Court held that a race-based district was unconstitutional.[70] Not until *Richmond v. J.A. Croson*[71] was there a clear majority on the Court[72] supporting the application of strict scrutiny to race based classifications without regard to whether a minority or majority was burdened or benefited.[73] Prior to *Richmond*, the

67 *See* James U. Blackshear, *Majority Black Districts, Kiryas Joel, and Other Challenges to American Nationalism*, 26 CUMB. L. REV. 407, 407 (1995-96) (theorizing that racial criteria in redistricting will generally be subject to strict scrutiny, offering Voting Rights Act and remedial action for racial discrimination as examples); Paul Butler *et al.*, *Race Law and Justice: The Rehnquist Court and the American Dilemma*, 45 AM. U. L. REV. 567, 569 (1996) (hypothesizing that "judging by the Court's rhetoric," holding in *Miller* suggested strict judicial scrutiny, it was merely "a natural follow-up" to *Shaw*); Thomas R. Haggard, *Mugwump, Mediator, Machiavellian, or Majority? The Role of Justice O'Connor in the Affirmative Action Cases*, 24 AKRON L. REV. 47, 47 (1990) (discussing lack of majority view as to appropriate level of review for race-based classifications); John E. Nowak, *The Rise and Fall of Supreme Court Concern for Racial Minorities*, 36 WM. & MARY L. REV. 345, 443 (1995) (theorizing that Justice Souter, given his dissenting opinion in *Shaw*, may be inclined to vote in favor of federal racial affirmative action programs); *see also* Stanley Pierre-Louis, *The Politics of Influence Dilution Claims Under Section Two of the Voting Rights Act*, 62 U. CHI. L. REV. 1215, 1231-32 (1995) (discussing impact of *Shaw* on race based redistricting, author criticizes holding as not prohibitive of such practice); Douglas Hill Schwartz, *Toward a Colorblind Society: The Supreme Court Reaffirms its Position Against Raced-Based Redistricting*, 64 U. CIN.L. REV. 1439, 1457 (1996)(discussing Justice Ginsburg's dissent in *Miller* which criticizes majority holding that strict scrutiny applies whenever race is motivating factor in redistricting, further urging that it is minority voters who require more judicial protection than others).

68 *See* Bush v. Vera, 116 S. Ct. 1941, 1977 (1996) (Stevens, J., dissenting) (noting that prior to *Shaw* only strict scrutiny applied where individual or set of individuals were harmed because of their race).

69 116 S. Ct. 1941, 1977 (1996) (Stevens, J., dissenting).

70 *Id.* at 1959-60 (explaining that districts resulting from racial gerrymandering are unconstitutional).

71 488 U.S. 49 (1989).

72 *Id.* Justices Marshall and Blackmun each filed dissenting opinions in which Justice Brennan joined. *Id.*

73 *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995) (overruling post-*Croson* decision in *Metro Broad. v. FCC*, that race based classifications may be subject to intermediate scrutiny, reiterating that race based classification is subject to strict judicial scrutiny); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (noting strict scrutiny is intended to "smoke out" illegitimate use of race by making certain legislature employs means most narrowly tailored to achieve goal); *see also* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 567 (1996) (hypothesizing that holdings of *Croson* and *Adarand* apparently apply when legislation contains classification for Native Americans); Karen M. Berberich, Note, *Strict in Theory, Not Fatal in Fact: An Analysis of Federal Action Programs in the Wake of* Adarand v. Pena, 11 ST. JOHN'S J. LEGAL COMMENT. 101, 111-15 (1995) (discussing history of Supreme Court failure to decide on applicable standard for governmental race based classification prior to application of strict scrutiny in *Croson*); Krista L. Cosner, *Affirmative Action in Higher Education: Lessons and Directions From the Supreme Court*, 71 IND. L.J. 1003, 1012-14 (1996) (setting forth history of affirmative

Court permitted racial classifications upon a showing that they served an important governmental objective and thus satisfied intermediate scrutiny.[74] Furthermore, whenever the Court reviewed these classifications, it showed deference to any congressional acts which utilized benign race classifications to further the "general welfare" of the United States.[75] Similar to *Richmond*, where a minority set-aside program adopted by a municipality was struck down by the Court, congressional districting pursuant to Congress' mandate in the Voting Rights Act was not given any deference by the Court.[76]

B. Should Intermediate Scrutiny Be Applied to Benign Race-Based Redistricting?

In *Adarand Constructors v. Pena*,[77] a post *Shaw* decision, the Court declined to utilize intermediate scrutiny to analyze congressional race-based classifications. Like state race-based classification, the Court decided that congressional race-based classifications should be subject to strict scrutiny analysis.[78]

action educational programs, author asserts that *Croson* and *Adarand* may serve to undermine those higher education programs aimed at increasing minority enrollment).

74 *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-75 (1986) (requiring that affirmative action plans for public employees must be justified by past or present discrimination by government agency), *reh'g denied*, 478 U.S. 1014 (1986); Fullilove v. Klutznick, 448 U.S. 448, 489 (1980) (granting Congress considerable latitude in temporary use of race and ethnic criteria to accomplish remedial objectives); Brian C. Eades, *The United States Supreme Court Goes Color-Blind:* Adarand Constructors Inc. v. Pena, 29 CREIGHTON L. REV. 771, 799-801 (1996) (discussing evolution of Supreme Court treatment of race conscious government programs); David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 43 n.38 (1995) (offering examples of instances in which Court has allowed use of racial criteria); Bradley David Wine, Note, *Can You Get to Kings County on Interstate 95: A Reevaluation of* United Jewish Organizations v. Carey *In Light of* Shaw v. Reno, 19 VT. L. REV. 843, 879-80 (1995) (asserting that Court's rejection of dissenting opinion of *United Jewish Organizations* that racial criteria is impermissible, although allowing States to consider race in districting, should not be considered endorsement of such consideration).

75 *See Fullilove*, 448 U.S. at 489.

76 *See* Bush v. Vera, 116 S. Ct. 1941, 1941 (1996) (considering failure to review race based classifications as abdication of Court's role in safeguarding mandates of Constitution); *see also* Presley v. Etowah Cty. Comm'n., 502 U.S. 491, 508 (1992)(distinguishing between deference and acquiescence in applying administrative interpretation of Voting Rights Act); Barrett, *supra* note 5, at 273 (advocating greater deference to congressional intent in providing state remedial action for past discrimination, author urges that Court should commit to permitting use of race in those state actions designed to comply with section 5); David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37, 82 n.108 (1984) (suggesting that open lines of communication should be maintained between judiciary and legislature when questions of constitutionality of congressional actions arise).

77 115 S. Ct. 2097 (1995).

78 *See Adarand*, 515 U.S. at 236 (deciding that same standard of scrutiny should ap-

Applying this standard in the congressional districting context inevitably bars benign race-based classifications intended to remedy prior "societal discrimination."[79] A strict scrutiny test, therefore, would require that any race based remedy be for an "identified discrimination" and that such remedial action have a strong basis in evidence.[80] Arguably, the type of evidence required in *Adarand* is similar to the evidence necessary to establish a claim under section 2 of the Voting Rights Act.[81] It is submitted that a plaintiff who satisfies the requirement of a vote dilution claim may, in effect, also pass muster under a strict scrutiny analysis.

IV. *BUSH V. VERA*: AN IMPOSSIBLE STANDARD TO MEET WHILE COMPLYING WITH THE VOTING RIGHTS ACT

In *Bush v. Vera*,[82] the Court recognized that states have a compelling interest when redistricting to avoid section 2 liability. The Court, nonetheless, held that Texas' attempts at redistricting were not narrowly tailored to comply with section 2 of the Voting Rights Act.[83] In *Vera*,[84] the Court focused primarily on

ply to Congress as applied to states via Fifth Amendment); *see also* Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975) (discussing application of equivalent standards to state and federal governments via Fourteenth and Fifth Amendments, respectively); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (noting that restrictions placed on States by Fourteenth Amendment Due Process Clause are equally applicable to federal government by way of Fifth Amendment Due Process Clause); Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (declaring it "unthinkable" that Constitution, which impresses restrictions on states should "impose a lesser duty on federal government").

79 *See Vera*, 116 S. Ct. at 1962 (noting that remedial action to correct societal discrimination is not appropriate compelling state interest); *Adarand*, 515 U.S. at 238 (Scalia, J., concurring in part and concurring in judgment) (suggesting that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction"); *Id.* at 2119 (Thomas, J., concurring in part and concurring in judgment) (asserting that "governmental-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice").

80 *See Vera*, 116 S. Ct. at 1962 (stating that state's interest in using racial classification is compelling when past discrimination is identifiable and strongly evidenced); Shaw v. Hunt, 116 S. Ct. 1894, 1902-03 (1996) (describing circumstances under which State attempt to remedy past use of race is permissible as when past discrimination is "identified" and heavily based in evidence).

81 *See Vera*, 116 S. Ct. at 1962-63 (rejecting appellant's claim of need to remedy vote dilution as section 5 compliance, since appellant had cited same reasons in claiming compliance with section 2, Court did not reject notion that same reason could, in fact, underlie both claims).

82 116 S. Ct. 1941 (1996).

83 *Id.* (holding Texas districts as unconstitutional because subordination of traditional districting principles was not narrowly tailored to considerations of race). *See* Harvard Law Review Association, *Leading Cases*, 110 HARV. L. REV. 135, 135 (1996)

what justification a state may present in defense of its newly-drawn districts.[85] The Court rejected the notion that political factors such as partisanship and incumbency were predominant factors.[86] Although appellants presented ample evidence suggesting that it was involved in political gerrymandering,[87] the Court concluded that race was the "predominant factor" in drawing its districts.[88]

The Court analyzed Texas' use of detailed racial data and found that traditional districting principles were neglected.[89] The strong correlation of the newly drawn district layout to the protection of incumbents as a factor was recognized by the

(discussing facts of *Romer v. Evans*, where Supreme Court affirmed injunction of enforcement of section 2 where districting was not narrowly tailored to meet recognized compelling interests); Jennifer Denise Rogers, Miller v. Johnson*: The Supreme Court "Remaps"* Shaw v. Reno, 56 LA. L. REV. 981, 1004 (1996) (discussing *Vera* district court determination that avoidance of § 5 liability, even if justifiable, was unconstitutional because not narrowly tailored).

84 *Id.* at 1960 (finding that since districts formed were unexplainable on grounds other than racial considerations, strict scrutiny would be appropriate test because this was raced based classification); *see* Kent D. Hollis, *Strict or Benign Scrutiny Under the Equal Protection Clause: Troublesome Areas Remain*, 35 ST. LOUIS U. L.J. 93, 116 (1990) (stating that racial classifications intended to help disadvantaged groups should merit lower standard of constitutional review). *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 489 (1980) (granting Congress considerable latitude in temporary use of race and ethnic criteria to accomplish remedial objectives); Regents of the Univ. of California v. Bakke, 438 U.S. 265, 355-362 (1978)(Brennan, J., concurring) (presenting notion of a lower standard for benign racial classifications).

85 *See* Bush v. Vera, 116 S. Ct. 1941, 1952 (1996) (reviewing District Court's record to determine whether incumbency protection played role in redistricting). *See generally* Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 249 (noting "[t]he way in which districts are drawn often determines which voters will be able to elect their preferred candidates and which voters will have their preferences go unsatisfied"); *cf.* Amar, *supra* note 3, at 1290 n.47 (arguing that "[t]he power to draw district lines is the power to decide which groups shall wield real power in a district and which groups shall be relegated to perpetual minority status").

86 *Bush*, 116 S. Ct. at 1956 (concluding racially motivated gerrymandering had greater influence than politically motivated gerrymandering).

87 *See Bush*, 116 S. Ct. at 1957 (noting that evidence suggested predominance of race and despite strong correlation between race and political affiliation, maps indicated political affiliation was subordinated to race).

88 *Bush*, 116 S. Ct. at 1957 (noting despite strong correlation between race and political affiliation, racial criteria predominated). *Id.* at 1955 (noting appellants concession that substantial disregard for traditional districting existed, but only for purpose of uniting communities of interest in single district). *But cf.* Shaw v. Reno, 509 U.S. 630, 646 (1993) (noting that "when members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes."); United Jewish Orgs., Inc. v. Carey, 430 U.S. 144, 176 (1977) (Brennan, J., concurring) ("It would be naive to suppose that racial considerations do not enter into apportionment decisions.").

89 Johnson v. Miller, 115 S. Ct. 2475, 2488 (1995) (noting in order for strict scrutiny to apply traditional districting criteria must be subordinate to race).

Court.[90] The majority, however, deemed the lack of other non-race data in proportion to that of race as controlling in their decision.[91] Evidence of the correlation between political affiliation and race was considered insufficient to overcome the use of race in Texas' redistricting plan.[92] In sum, when the majority considered the bloc-by-bloc racial data used by Texas to draft its plan, they found it created a presumption of race-based districting that was not rebutted by other evidence.[93] Consequently, the Court's view of the evidence triggered the use of a strict scrutiny standard of review for Texas' newly-drawn districts.

Since the Court concluded that race was a predominant factor,[94] the Court's focus shifted to whether such a classification was "narrowly tailored to further a compelling interest."[95] Texas

90 *Bush*, 116 S. Ct. at 1956. In some instances, incumbency protection might explain a State's decision to depart from other traditional districting principles in the drawing of bizarre district lines. *Id.* (quoting Shaw v. Reno, 509 U.S. 630, 646 (1993)). The fact that many of the voters being fought over by the incumbent Democrats were indeed African-American, "would not in and of itself, convert a political gerrymander into a racial gerrymander, no matter how conscious redistricters were of the correlation between race and party affiliation." *Id.*

91 *Bush*, 116 S. Ct. at 1955. The evidence existed that the state had complied detailed racial data for use in redistricting. *Id.* The appellants presented a substantial case that incumbency protection rivaled race in determining the district's shape. *Id.* District 30 was designed in part to create a safe Democratic seat for Representative Johnson. *Id.* Traditional districting principles were followed without much conscious thought, they cannot be said to have been 'subordinated to race.' *Id.* In considering whether race was the 'predominant factor motivating the legislature,' it is however, evidentially significant that at the time of the redistricting, the State had compiled detailed racial data for use in redistricting, but made no apparent attempt to compile, and did not refer specifically to, equivalent data regarding communities of interest." *Id.*

92 *Id.* at 1956 (arguing although incumbency protection may explain departure from traditional redistricting, but Texas districts used race as proxy for political characteristics). *But cf. id.* at 1988 (Stevens, J., dissenting) (noting statistical affiliation correlation between blacks and their political affiliation); *id.* at 2001 (Souter, J., dissenting) (recognizing role racial groups play in political decision making); *id.* (quoting *Miller*, 115 S. Ct. at 2497) (O'Connor, J., concurring)) (noting that "race-conscious redistricting does not always violate the Constitution").

93 *Id.* at 1957 (noting "districting software used by state provided racial data at the block-by-block level").

94 *Id.* at 1958 ("District 30's combination of bizarre, non-compact shape and overwhelming evidence that shape was essentially dictated by racial considerations of one form or another is exceptional . . . .").

95 *Id.* at 1960 (concluding that since strict scrutiny applies, Court must determine whether three districts drawn were "narrowly tailored to further a compelling state interest"). *See Vera*, 116 S. Ct. at 1963 (holding that two requisite conditions must be satisfied for State's interest in remedying past discrimination to be compelling: specific identified discrimination and strong basis in evidence necessitating remedial action); *id.* (quoting *Shaw*, 509 U.S. at 657) (stating that "the only current problem that appellants cite as in need of remediation is alleged vote dilution as a consequence of racial bloc voting, the same concern that underlies their VRA section 2 compliance defense, which we have assumed to be valid . . . We have indicated that such problems will not justify race-based districting unless 'the State employ[s] sound districting principles, and . . . the af-

presented evidence to suggest its motives in redistricting included avoiding liability under the "result test" of section 2 of the Act,[96] remedying past and present discrimination, and satisfying the "nonretrogression" principle of section 5 of the Act.[97]

A. Compliance With Section Two Compelling But Unnecessary

While the Court in *Vera* recognized that compliance with section 2 of the Act may be a compelling interest,[98] the Court was not convinced that Texas' redistricting plan was necessary to comply with the "result test."[99] Although mindful of the state's sovereign interest in redistricting,[100] the Court suggested Texas'

fected racial group's residential patterns afford the opportunity of creating districts in which they will be in the majority.'").

96 *See* Voting Rights Act of 1965 § 2(b), 42 U.S.C. § 1973(b) (1996). A violation exists under § 2(b)'s "results test" when, "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.*; *see also Vera*, 116 S. Ct. at 1960 (discussing that under results test for determining VRA violations "[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 designed by plaintiffs' experts in endless 'beauty contests.'"); *id.* at 1961 (quoting *Miller*, 115 S. Ct. at 2488) (reaffirming that "[i]t is well-settled that reapportionment is primarily the duty and responsibility of the States [and not the federal courts]."); *but cf. id.* at 1998 (Souter, J., dissenting) (reasoning that "the combined plurality, minority, and Court opinions do not ultimately leave the law dealing with a *Shaw* claim appreciably clearer or more manageable than *Shaw* itself did . . . [T]he price of *Shaw I*, indeed, may turn out to be the practical elimination of a State's discretion to apply traditional districting principles . . ..").

97 *See* Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973(c) (1996) (prohibiting State or political subdivision subject to Section Four of Act from enforcing any voting practice that will result in denying or abridging minority's right to vote); *see also Vera*, 116 S. Ct. at 1958 (quoting *Vera v. Richards*, 861 F. Supp. 1304, 1341 (S.D. Tex. 1994)) (finding there to be unconstitutional gerrymander due to bizzarely drawn districts as well as disregard for traditional redistricting guidelines).

98 *See* Growe v. Emison, 507 U.S. 25, 39-40 (1993) (supporting premise that multimember and at-large districting plans pose threat to minority voter participation) ; Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973), *aff'd on other grounds sub nom.* East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1975) (setting out factors for consideration in determining constitutionality of at-large and multimember districting plans); *see also* Shaw v. Hunt, 116 S. Ct. 1894, 1905 (1996) (stating assumption that "compliance with section 2 could be a compelling interest").

99 *See Vera*, 116 S. Ct. at 1961 (finding that state "lacks a strong basis in evidence" and that bizarre shape of district, and lack of compactness were predominantly due to race).

100 *See* Voinovich v. Quilter, 507 U.S. 146, 156 (1993) (recognizing state apportionment as domain of states unless there exists violation of federal law); *Vera*, 116 S. Ct. at 1964 (noting dissent's concern as to courts involvement in districting process); Chapman v. Meier, 420 U.S. 1, 27 (1975) (confirming that reapportionment is primarily duty and responsibility of State through its legislature or other body, rather than of federal court);

plan was not in compliance with the "result test." Thus, it appears that the Court suggested that an acceptable plan to remedy or avoid liability under section 2 is one that would be aware of race, but does not use race as a predominant factor.[101] Seemingly, states may continue to redress section 2 violations by walking the tightrope created by the Rehnquist Court.

B. Compliance With Section Five as a Compelling Interest

Similarly, the Court declined to recognize Texas' compliance with section 5 of the Act as being reasonably necessary to further a compelling state interest and thus it did not meet the strict scrutiny standard.[102] Speaking for the majority, Justice O'Connor suggested that a proper reading of the statute, and particularly a reading of its non-retrogression principle, did not require Texas to increase the number of majority-minority districts.[103] The only acceptable plan, therefore, would be one drafted to preserve the position of minorities with respect to their right to vote.[104] Unfortunately, this Court is at odds with the Justice Department's reading of section 5, which deemed section 5 to require the maximization of majority-minority districts.[105] In the view of the Court, however, Texas went well be-

Reynolds v. Sims, 377 U.S. 533, 586 (1964) (recognizing that judiciary should institute interim reapportionment plans only when legislature fails to reapportion according to federal constitutional requisites); Maryland Comm. v. Tawes, 377 U.S., 656, 676 (1964) (recognizing primary responsibility for representative apportionment as falling on legislature).

101 *See Vera*, 116 S. Ct. at 1961.

102 *Id.* at 1963 (recognizing no basis in state argument that increase in African-American population of one district was "necessary to insure nonretrogression."); Shaw v. Reno, 509 U.S. 630, 655 (1993) (concluding reapportionment plans would not be considered narrowly tailored to avoid retrogression if State surpassed actions "reasonably necessary" in engaging in such avoidance); *see also* Allen v. State Bd. of Elections, 393 U.S. 544, 565 (1969) (noting section 5 applies to subtle as well as obvious state regulations). *See generally* Katharine Inglis Butler, *Affirmative Racial Gerrymandering: Rhetoric and Reality*, 26 CUMB. L. REV. 313, 318-20 (1995) (discussing general application and procedural requirements of § 5 of Voting Rights Act).

103 *Vera*, 116 S. Ct. at 1949.

104 *See id.* at 1963 (recognizing that nonretrogression does not serve as authorization for State to insure continued electoral success, but requires State to act in manner to safeguard minority right to elect representatives of choice); *see also* Beer v. U.S., 425 U.S. 130, 141 (1976) (noting section 5 of Act does not permit implementation of reapportionment leading to retrogression in regards to exercise of right to vote); Scott Gluck, *Congressional Reaction to Judicial Construction of Section Five of the Voting Rights Act of 1965*, 29 COLUM. J.L. & SOC. PROB. 337, 342 (1996) (stating section 5 of Act covers "changes in electoral laws aimed at vote dilution").

105 *Vera*, 116 S. Ct. at 1950 (stating that intentional creation of majority-minority districts is subject to scrutiny); *see also* Heather K. Way, *A Shield or a Sword? Section*

yond what was necessary to comply with the mandates of section 5.[106]

C. *Vera: Creating an Impossible Standard for States to Achieve*

Although recent decisions have severely limited the sovereignty of states in the area of districting, states should continue to pursue the goals of the Act.[107] Moreover, the plurality in *Vera* expressly permitted the use of race as a factor in redistricting.[108] It seems, however, that the Supreme Court will no longer tolerate flagrant use of race as a predominant factor in legislation.[109] The Court's incorporation of an equal protection analysis into voting cases will severely limit the ability of states to draw majority-minority districts and simultaneously comply with the Act.[110]

Five of the Voting Rights Act and the Argument for the Importance of Section Two, 74 TEX. L. REV. 1439, 1449 (1996) (noting Justice Department can force jurisdictions that redistrict to adopt majority-minority district).

106 *Vera*, 116 S. Ct. at 1963.

107 *Id.* at 1964 (recognizing that there are no "bright line" rules for such districting issues, Court suggested that its recent line of cases may act as gauge for states to act in compliance with Voting Rights Act); Scott E. Blissman, *Navigating the Political Thicket: The Supreme Court, the Department of Justice, and the "Predominant Motive" in District Apportionment Cases After* Miller v. Johnson, 5 WIDENER J. PUB. L. 503, 538 (1996) (commenting Supreme Court failed to create bright line rules as to what extent legislature can consider race in apportionment process); *cf.* Samuel Issacharoff, *Racial Gerrymandering in a Complex World: A Reply to Judge Sentelle*, 45 CATH. U. L. REV. 1257, 1265-66 (1996) (criticizing judicial "ongoing and indecisive entry into the tangled world of redistricting").

108 *See Vera*, 116 S. Ct. at 1951 (noting classification based on race is not always subject to strict scrutiny merely because race is factor); Robert Marguard, *High Court May Draw Line on Racial Districts by Taking Up This Voting Rights Case: The Supreme Court Shows Willingness to Hear, Not Duck, the Hard Issues*, CHRISTIAN SCI. MONITOR, Dec. 9, 1996 (discussing *Vera* decision that race could not be "predominant, overriding" factor in creating districts); *see also* Steven G. Calabresi, *Out of Order*, POL'Y REV., Sept. 19, 1996 at 14 (discussing Justice's passionate disagreement over congressional redistricting issue).

109 *See* Annette Fuentes, *Behind the Lines: The Conservative Stealth Attack on Racial Redistricting*, VILLAGE VOICE, Oct. 22, 1996 at 28 (discussing current Court's willingness to discard majority-minority districts and that has opened floodgates to these types of suits); *see also* Michael J. Moffat, *The Death of the Voting Rights Act or an Exercise in Geometry - Shaw v. Reno Provides More Questions than Answers*, 22 PEPP. L. REV. 727, 778 (1995) (stating flagrant use of race will not be tolerated); Chi Chi Sileo, *Courting Change: Thomas Leads Charge on Race, Federalism*, INSIGHT ON NEWS, Sept. 4, 1995 at 8 (noting impact of Miller on Voting Rights Act and conflicts which will arise).

110 *See* Goforth, *supra* note 15, at 55 (noting that practically speaking, courts lacked ability to remedy systematic discrimination); *see also* Aaron Epstein, *Supreme Court Rejects Racially Drawn Districts*, THE RECORD, June 14 1996, at A1 (describing Supreme Court as "torn" between Voting Rights Act and the Equal Protection clause when deciding validity of Majority-minority districts). *See generally* Kathryn Abrams, *Raising Politics Up: Minority Political Participation and Section of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 520 (1994) (describing safe districts as approach that most courts currently

The constitutionality of section 2 of the Voting Rights Act has never been directly challenged. Consequently, states are subject to section 2 liability.[111] As a result, states may be hard-pressed to comply with section 2 of the Act while simultaneously avoiding suit for violation of the Fourteenth Amendment under the Court's "representational harms" cause of action.[112] It is likely that the Court will continue to view compliance with section 2 as a compelling state interest.[113] Assuming this is the case, states may be inclined to create majority-minority districts to avoid liability.[114] States, however, should be cautious of the Court's impossible standard, which requires that so long as traditional districting criteria are not subordinated to race, strong evidence that the *Gingles* factors are present, and a district is drawn to address these factors, any newly-drawn district would be deemed presumptively constitutional.[115] Conversely, where the district lines are bizarrely drawn, and the district is not compact, and traditional districting criteria are neglected, the district would be unconstitutional.[116] Districts drawn with the intention of in-

favor and identifying process as within category of race conscious remedies that framers of Voting Rights Act explicitly anticipated).

111 *See* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (holding section 2 of Voting Rights Act was valid exercise of power under Fifteenth Amendment); *see also* White v. Alabama, 867 F. Supp. 1519, 1549 (M.D. Ala. 1994), *vacated* 74 F.3d 1058 (1996), *on remand* 922 F. Supp. 522 (1996) (noting result test has not been held unconstitutional); Bonnie L. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 730 (1996) (noting Court hinted that Congress did not intend require race-based districting with section 2 of VRA, to do so would be unconstitutional).

112 *See Vera*, 116 S. Ct. at 1969 (O'Connor, J. concurring) (noting States would be irresponsible in disregarding liabilities of section 2 "results test"); *see also* J. Morgan Kousser, Shaw v. Reno *and the Real World of Redistricting and Representation*, 26 RUTGERS L.J. 625, 655 (1995) (asserting O'Connor's analysis froze white supremacy and black exclusion in place even if districts patently violated both section 2 and Fourteenth and Fifteenth Amendments).

113 *See Vera*, 116 S. Ct. at 1969; *see also* McKaskle, *supra* note 20, at 52 (suggesting compliance with section 2 is arguably compelling state interest).

114 *See* David M. Guinn & Paul C. Sewall, Miller v. Johnson*: Redistricting and the Elusive Search for a Safe Harbor*, 47 BAYLOR L. REV. 895, 906-907 (1995) (discussing what strict scrutiny test may require from states).

115 *See Vera*, 116 S. Ct. at 1969 (suggesting that where these factors are not met districting should be presumptively unconstitutional); Shaw v. Reno, 509 U.S. 630, 642-43 (noting racially aligned redistricting was not impermissible per se); *see also* Hernandez v. New York, 500 U.S. 352, 361 (1991) (discussing "disproportionate impact does not turn the prosecutor's actions into a per se violation of equal protection clause").

116 *See, e.g.*, DeWitt v. Wilson, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994) (stating "*Shaw* applies to redistricting plans that on their face are so dramatically irregular that they can only be explained as attempts to segregate by the races for purpose of voting without regard for traditional redistricting principles"); George L. Waas, *The Process and Politics of Legislative Reapportionment and Redistricting Under the Florida Constitution*,

creasing minority representation will be vulnerable to equal protection challenges and consequently may result in the loss of minority members of Congress.[117]

D. Compliance With Section Five as Compelling State Interest

Given that section 5 of the Voting Rights Act requires all "covered states" to obtain preclearance by the Attorney General or approval by a United States District Court,[118] the preclearance requirement is considered applicable to congressional redistricting plans.[119] In particular, section 5's "non-retrogression" principle prevents states from instituting any voting procedures which would diminish a voting minority's exercise of the electoral franchise.[120] The Court thus concedes that covered states have a compelling state interest in complying with section 5 of the Voting Rights Act.[121] Nevertheless, states must be certain that their redistricting plans are narrowly tailored to comply

18 NOVA. L. REV. 1001, 1008 (1994) (noting "there is no point at which population deviation becomes de minimis or insignificant for congressional reapportionment").

117 *See Leading Cases*, 110 HARV. L. REV. 135, 185-86 (1996) (noting *Shaw* unjustifiably prevents good faith effort to America's history of discrimination in voting); *see also* Carol M. Swain, *Limiting Racial Gerrymandering: The Future of Black Representation Current*, WEST LEGAL NEWS, Jan. 1, 1996 at 3, *available in* 1996 WL 9829876 (commenting on probable loss of or difficulty in keeping black representation due to recent decisions). *See generally* Waas, *supra* note 116 at 1008-09 (stating Equal Protection Clause applies to state legislative realignment).

118 Voting Rights Act, 42 U.S.C. § 1973(c)(1972). *See* Rome v. United States, 446 U.S. 156, 161 (1980) (holding that "Section 5 of the Voting Rights Act of 1965 requires preclearance for all covered districts"); Bush v. Vera, 116 S. Ct. 1941, 1949 (1996) (noting preclearance requirement has substantive goal to insure that no voting procedure changes would be made that would lead to retrogression in position of racial minorities with respect to their right to vote); *see also* Loren Singer, *Fee Charged to Convention Delegates Required Preclearance, Supreme Court Decides*, WEST LEGAL NEWS, March 3, 1996 at 2713 (stating requirement of preclearance by U.S. Attorney General under section 5 regarding any change in voting practice or procedure).

119 *See* Beer v. U.S., 425 U.S. 130, 133 (1976) (requiring that voting changes "not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color"); *see also* Miller v. Johnson, 115 S. Ct 2475, 2483 (noting preclearance mechanism applies to congressional redistricting plans and requires changes not have purpose of denying right to vote on account of race or color). *See generally* George W. Jordan, *Navigating the Constitutional Minefield of Race-Conscious Redistricting*, 2 TEX. F. C.L. & C.R. 81, 81 (1996) (discussing preclearance requirements).

120 *See Beer*, 425 U.S. at 141; *Miller*, 115 S. Ct. at 2483. *See generally* BERNARD GROFMAN, VOTING RIGHTS, VOTING WRONGS: THE LEGACY OF BAKER V. CARR 11 (1990) (noting prohibiting power of section 5 requirements to end discriminatory use of at-large elections).

121 *See Vera*, 116 S. Ct. at 1963 (holding although Texas had compelling interest, it went beyond what was necessary to avoid retrogression); *see also* Rogers, *supra* note 83, at 995 (discussing when court will ever determine whether compliance with section 5 preclearance is equivalent to compelling interest); Jordan, *supra* note 119, at 81 (noting compliance with section 5 "may constitute compelling interest").

with section 5.[122] For example, even when states are complying directly with the orders of the Justice Department, their plans may still not survive strict scrutiny.[123] Apparently, the Court has deemed it unnecessary in the redistricting context to grant the Executive Branch any deference in the latter's interpretation of the Act.[124]

It seems the Court will permit neither Congress nor the states to overreach the mandates of section 5, even if such overreaching will serve to remedy past societal discrimination.[125] Consequently, redistricting plans that attempt to increase the number of majority-minority districts will, in all likelihood, be considered in violation of section 5 of the Voting Rights Act.[126] Since section 5's remedial purpose is limited, the Court's interpretation of its purpose will not permit states, which are increasing their majority-minority districts, to argue that such compliance with section 5 constitutes a compelling state interest.[127] The majority, arguably, has foreclosed the possibility of using past racial discrimination in any way to justify the use of the Act to improve

122 *See Miller*, 115 S. Ct. 2475, 2493 (1995) (noting that section 5 has limited substantive goal); *see also* Rodney A. Smolla, *The Ghosts of Homer Plessy*, 12 GA. ST. U. L. REV. 1037, 1060 (1996) (noting court did not unequivocally state that compliance with *Miller*, standing alone, would automatically satisfy strict scrutiny test).

123 *See Miller*, 115 S. Ct. at 2493; *see also* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2112-13 (1995) (noting all racial classifications reviewed under strict scrutiny); Lydia M. Nicosia, *A State Violates the Equal Protection Clause of the Fourteenth Amendment When it Uses Race as a Predominant Factor in Drawing Congressional Districts*, 25 STETSON L. REV. 925, 925-26 (1996) (discussing strict scrutiny as applied in *Miller v. Johnson*).

124 *See Miller*, 115 S. Ct. at 2491 (refusing to allow executive branch to share in judicial powers); *see also* Bernard Schwartz, *"Administrative Law Cases During 1995"*, 48 ADMIN. L. REV. 399, 415-16 (1996) (noting *Miller* confirmed that voting rights under equal protection analysis is for judiciary, not executive to decide).

125 *See* Jeffers v. Tucker, 847 F. Supp. 655, 670 (E.D. Ark. 1994) (describing conflict between holding in *Shaw* and need for classification based on race to remedy VRA violations to be "catch-22" situation). *See generally* Laughlin McDonald, *Can Minority Voting Rights Survive* Miller v. Johnson?, 1 MICH. J. RACE & L. 119, 123-26 (1996) (describing Georgia's difficulty in arriving at valid redistricting plan).

126 *See* Beer v. U.S., 425 U.S. 130, 141 (1976) (holding "ameliorative plans" cannot violate section 5 unless apportionment plan discriminates on basis of race or color). *See, e.g.*, Dewitt v. Wilson, 856 F. Supp. 1409, 1413-14 (E.D. Cal 1994) (redistricting plan in California upheld even though race was factor because it was used in permissible balance of traditional redistricting principles and VRA).

127 *See Miller*, 115 S. Ct. at 2490; *see also* Shaw v. Hunt, 116 S. Ct. 1894, 1898 (1996) (rejecting state's interest in complying with section 5 of VRA as valid justification for classification based on race). *But see* Richard Briffault, *Race and Representation After* Miller v. Johnson, 1995 U. CHI. LEGAL F. 23, 58-59 (1995) (noting that Court left door open by allowing states to prove existence of compelling interest to justify classification based on race).

minority voting rights.[128]

CONCLUSION

While the Voting Rights Act of 1965 has been called the most important civil rights legislation of this century, it is clearly a law under siege. Although the Supreme Court has found the mandates of sections 2 and 5 of the Voting Rights Act constitutional, the remedial relief available under the Act has been severely limited by recent decisions. It appears that the Court's foray into the political thicket may be an attempt by the majority to stamp its own vision of a color-blind society.

Unfortunately, some states are now left in the precarious position of attempting to address their ignominious past according to the federal guidelines while exposing themselves to potential liability under the Supreme Court's paternalistic gaze. Though well intended, the Court's vision is not a true reflection of America's racial realities, past or present.

Gary Day

128 *See Rogers*, *supra* note 83, at 987 (noting that 1982 amendments and *Thornburg* do not suggest that VRA ensures members of any class proportional representation).