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BETWEEN THE DEVIL AND THE DEEP BLUE SEA: COURTS, LEGISLATURES, AND MAJORITY-MINORITY DISTRICTS

For as long as voting districts have existed, battles involving competing interests in legislative bodies have been waged to gain electoral advantage by drawing districts to include certain voters, while excluding others.[1] The process of designing voting districts has yielded some notoriously gerrymandered districts.[2] The Supreme Court has determined that redistricting plans gerrymandered for political purposes will be upheld as long as those plans do not discriminate against voters from opposing parties, or dilute those citizens' votes.[3] The Court, however, rejected gerry-

1. *See* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 588 (1993). Even Patrick Henry attempted to manipulate the shape of a congressional district in Virginia to prevent James Madison from being elected to Congress. *See id.* at 588 n.2; *see also* Jon M. Anderson, Comment, *Politics and Purpose: Hide and Seek in the Gerrymandering Thicket After* Davis v. Bandemer, 136 U. PA. L. REV. 183, 183-84 (1987) (observing that districts gerrymandered for political purposes have been drawn for many years, but the Supreme Court did not find this issue justiciable until 1986); Eric J. Stockman, Note, *Constitutional Gerrymandering:* Fonfara v. Reapportionment Comm'n, 25 CONN. L. REV. 1227, 1227 (1993) (describing the Massachusetts legislative battle in 1812 that resulted in wildly distorted voting districts).

2. *See* Aleinikoff & Issacharoff, *supra* note 1, at 588 n.1. The term gerrymander refers to the distorted districts drawn by legislators, and was named after Massachusetts Governor Elbridge Gerry who approved a redistricting map that included a district in the shape of a salamander. *See id.*

3. *See* Davis v. Bandemer, 478 U.S. 109, 136 (1986) (citing Whitcomb v. Chavis, 403 U.S. 124, 156 (1971)). In *Davis*, Indiana Democrats challenged a redistricting scheme that combined single and multi-member districts in both the Senate and the House. *Id.* at 115. Under a multi-member redistricting scheme, voters elect more than one representative to a political body. *See* Robert Barnes, Comment, *Vote Dilution, Discriminatory Results, and Proportional Representation: What is the Appropriate Remedy for a Violation of Section 2 of the Voting Rights Act?*, 32 UCLA L. REV. 1203, 1223 n.88 (1985). Multi-member districts typically are larger than single-member districts, and if voters tend to vote along racial or party lines, only majority representatives will be elected. *See id.* In *Davis*, following implementation of the plan, fewer Democrats were elected than the proportions of voters who cast ballots for Democrats indicated. 478 U.S. at 115. The district court observed that the scheme "stacked" Democrats into districts with large Democratic majorities and divided them among other districts, giving Republicans in those districts an electoral advantage, and diluting the voting strength of Democrats. *See id.* at 116-17. The Supreme Court held that cases of political gerrymandering can be justiciable when plaintiffs claim an equal protection violation. *See id.* at 143. However, the Court required plaintiffs to show discriminatory vote dilution in order to establish a prima facie case. *See id.* The Court determined that the plaintiffs in this case failed to make such a showing. *See id.*

mandered redistricting plans drawn to exclude African Americans from a particular district,[4] and that served to block African-American participation in primary elections.[5] The Court also has invalidated districts with such disproportionate populations that the votes in one district effectively carry more weight than those in another.[6]

With the enactment of the Voting Rights Act in 1964,[7] reapportionment of voting districts in the United States has been a confused, laborious process. Under section 5 of the Act,[8] certain covered jurisdictions are required to have their redistricting plans precleared before implementation.[9] The purpose of preclearance is to assure that the past abuses of legislative power that caused the disenfranchisement of minorities do not recur.[10] In the early stages of judicial activity under the Act, the Supreme Court used an equal protection analysis to invalidate a number of multi-member districts;[11] determining that, while such redistricting plans are not unconstitutional per se, under certain circumstances, the plans

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4. *See* Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (determining that a redistricting plan drawn to deprive African-American citizens of the right to participate in the political process is within the realm of judicial correction). In *Gomillion*, the Court acknowledged the state's power to draw district lines, but determined that the Constitution limits the exercise of that power. *See id.*

5. *See* Terry v. Adams, 345 U.S. 461, 470 (1953) (disallowing a private primary that excluded African-American voters).

6. *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964) (holding that the Equal Protection Clause requires states to apportion all votes for seats in a legislature on a population basis, to assure that votes of all citizens in the state carry the same weight).

7. *See* 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994).

8. *See id.* § 1973c. Section 5 of the Act was codified as 42 U.S.C. § 1973c..

9. *See id.* Section 5 singles out certain jurisdictions with a history of discriminatory voting practices or procedures. *See id.* § 1973(b). These "covered" jurisdictions must gain approval from either the Justice Department or from a three-judge panel of the United States District Court for the District of Columbia, by proving that the new plans do not cause retrogression in minority voting strength. *See id.* § 1973c; *see also* Aimée D. Latimer, Note, Miller v. Johnson: *The Supreme Court Eases the Burden of Proving Racial Gerrymandering*, 27 LOY. U. CHI. L.J. 97, 109 & n.94 (1995). Retrogression refers to a reduction in the minority voting strength in a jurisdiction. *See* Beer v. United States, 425 U.S. 130, 141 (1976). Congress provided the Justice Department preclearance procedure to give states an efficient venue for gaining approval of their voting changes. *See* Richard A. Williamson, *The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provisions*, 62 WASH. U. L.Q. 1, 4-5 (1984). While decisions of the Justice Department may not be appealed, any jurisdiction dissatisfied with the Justice Department's determinations may petition the United States District Court for the District of Columbia for de novo review. *See* 42 U.S.C. § 1973(c) (1994).

10. *See* Barnes, *supra* note 3, at 1211. Because covered jurisdictions have violated the voting rights of minority voters in the past, section 5 presumes that an independent entity must review any change in election practices or procedures in these jurisdictions, to ensure that new discriminatory devices are not implemented. *See id.* at 1211-12.

11. *See id.* at 1223.

might minimize or cancel the voting strength of minority groups.[12] Recently, a number of states seeking preclearance have included majority-minority districts in their plans.[13] The United States Department of Justice approved such redistricting strategies.[14]

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12. *See* Burns v. Richardson, 384 U.S. 73, 88 (1966) (finding that a court could invalidate a multi-member redistricting scheme with proof that the scheme was designed to or would operate to minimize or cancel minority voting strength); Fortson v. Dorsey, 379 U.S. 433, 439 (1965) (stating that a challenger can show unconstitutional vote dilution if a district configuration "designedly or otherwise" minimizes or cancels minority voting strength); *see also* Barnes, *supra* note 3, at 1223. In the early stages of jurisprudence under the Act, parties rarely invoked section 2 because courts considered it coextensive with the Equal Protection Clause. *See id.* at 1222. A showing of both discriminatory purpose and discriminatory effect was required. *See Burns*, 384 U.S. at 89; *Fortson*, 379 U.S. at 439 (stating that a challenger can show unconstitutional vote dilution if a district design "designedly or otherwise" minimizes or cancels minority voting strength).

13. *See* Steven A. Holmes, *Majority Rules: But Will Whites Vote for a Black?*, N.Y. TIMES, June 16, 1996, at 4-1 (observing that several states drew majority-minority districts; simultaneously, the number of minority members in Congress rose from twenty-six to thirty-nine in the 1992 election and to forty-one in the 1994 election). In a majority-minority district, members of one or more minority groups comprise the majority of the voting-age population, providing increased opportunities for minority voters to elect candidates of their choice. Earlier battles were fought over other redistricting methods that limited minority access to the political process. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 627 (1982) (finding that a county maintained a multi-member redistricting scheme to prevent Mexican-American candidates from participating fully in the political process); Whitcomb v. Chavis, 403 U.S. 124, 142-43 (1971) (finding that, although multi-member districts are not unconstitutional per se, plaintiffs may challenge the redistricting schemes when voting plans minimize or cancel the voting strength of certain racial or political elements); Gomillion v. Lightfoot, 364 U.S. 339, 343-45 (1960) (declaring that, because the state designed a change of city boundaries to prevent African Americans from voting in city elections, the plan violated the Fourteenth and Fifteenth Amendments).

14. *See* Latimer, *supra* note 9, at 126 n.210. The Attorney General interpreted the section 2 requirement that states could not dilute minority voting strength to mean that states had a fair duty to recognize minority voting rights. *See id.* Scholars debate whether the Justice Department is broadening the scope of section 5 excessively by "incorporating" section 2. *See* Heather K. Way, Note, *A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for Incorporation of Section 2*, 74 TEX. L. REV. 1439, 1443-44 (1996). Under section 5, the Justice Department must review plans to assure they are not retrogressive. *See id.* Under section 2, a private party or the Justice Department may bring a suit in a local federal district court on the ground that a voting practice or procedure results in the denial or abridgement of the right to participate in the electoral process. *See* 42 U.S.C. § 1973(a) (1994). Section 2 does not require a showing of discriminatory purpose. *See id.* Instead of measuring the impact of an existing voting practice or procedure, section 2 analysis reveals only whether the practice dilutes minority voting strength, making it a broader test. *See* Mark E. Haddad, Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 YALE L.J. 139, 146, 144 (1984); Way, *supra*, at 1443-44. Thus, by incorporating section 2 into section 5, it is argued that the Justice Department exceeds its authority because section 5 limits the Department's power only to preventing retrogression under new voting practices or procedures. *See id.; see also* Beer v. United States, 425 U.S. 130, 141 (1976) (stating that the purpose of section 5 is to assure that no change in voting procedures will lead to a retrogression of minority voting

Following the 1990 census, as the number of minority representatives in Congress increased, some residents of majority-minority districts began to sue their states in federal district courts,[15] claiming a violation of their constitutional rights under the Equal Protection Clause of the Fourteenth Amendment.[16] Taking a novel approach to standing,[17] the plaintiffs did not claim that the redistricting practices harmed them in

strength). When a procedure enhances minority voting strength, there is no vote dilution within the meaning of the Act, and that a plan "cannot violate [the Act] unless the new apportionment itself so discriminates as to violate the Constitution." *Id.* Scholars argue that finding discriminatory effect in an existing voting practice or procedure, without a showing of retrogression, exceeds the Department's remedial authority. *See* Way, *supra*, at 1443.

15. *See* Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of* Shaw v. Reno, 3 D.C. L. REV. 1, 6 (1995). White and minority voters have filed lawsuits in federal courts in the states of California, Florida, Georgia, Louisiana, Mississippi, North Carolina, and Texas. *See id.* Some of the challengers to these majority-minority districts were candidates who had lost their electoral bids in primaries or general elections within these districts. *See* Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-*Shaw *Era*, 26 CUMB. L. REV. 287, 297 n.60 (1995-96) (noting that such lawsuits may provide relief from the "otherwise unreviewable outcomes of the political process").

16. *See* Parker, *supra* note 15, at 1. The Fourteenth Amendment provides in relevant part, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Congress enacted the Fourteenth Amendment shortly after the Civil War to enable African Americans to achieve equal legal status in post-Civil War society. *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 788 (1985).

17. The doctrine of standing is rooted in Article III, Section 2 of the Constitution, which provides, "the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. CONST. art. III, § 2. Standing under Article III requires that anyone bringing a claim before a court must have a direct or concrete interest in the outcome of the case that would warrant judicial intervention. *See* RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 304-05 (2d ed. 1994).

specific, identifiable ways.[18] Rather, they argued that society as a whole is harmed when state legislatures draw districts along racial lines.[19]

In the landmark redistricting case of *Shaw v. Reno* (*Shaw I*),[20] the Supreme Court held that five North Carolina plaintiffs made a cognizable

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18. *See* Shaw v. Reno, 509 U.S. 630, 658 (1993) (*Shaw I*). In *Lujan v. Defenders of Wildlife*, the Court ruled that, to have standing, a plaintiff must demonstrate that he or she has suffered a concrete injury that is more than "conjectural or hypothetical." 504 U.S. 555, 560 (1992). The Court applied a three-part test to determine whether a plaintiff has standing. *See id.* First, he or she must demonstrate "injury in fact," or "an invasion of a legally protected interest which is . . . concrete and particularized and actual or imminent." *Id.* Second, the plaintiff must show a causal connection between the injury and the action being challenged. *See id.* Finally, a court must find it likely, not merely speculative, that the injury can be redressed by a favorable ruling. *See id.* at 561.

In the voting rights context, prior to *Shaw I*, courts required plaintiffs making constitutional claims of racial discrimination, due to voter disenfranchisement or vote dilution, to prove both that states discriminated purposefully and that state action had a discriminatory effect. *See* Karlan, *supra* note 15, at 289-90. Justice O'Connor, however, writing for the majority in *Shaw I*, noted that equal protection claims are "analytically distinct" from claims of vote dilution. 509 U.S. at 652. Plaintiffs could bring challenges to reapportionment schemes by arguing that a redistricting plan is so irrational on its face that courts could only interpret it as an attempt to segregate voters on the basis of race. *See id.* at 658. Later, the Court added the standing requirement that anyone bringing such a claim must live in the challenged district to show particularized harm. *See* United States v. Hays, 115 S. Ct. 2431, 2436 (1995). Nonetheless, the *Hays* Court did not address the requirements of causal connection between the injury and the challenged action and the likelihood that the court could correct the injury by a favorable decision. *See* Karlan, *supra* note 15, at 291.

19. *See, e.g.*, Johnson v. Miller, 864 F. Supp. 1354, 1370 (S.D. Ga. 1994) (*Johnson I*) (stating that the plaintiffs had not suffered individual harms; rather, the systemic harm of racial classification gave rise to an equal protection claim), *aff'd and remanded*, 115 S. Ct. 2475 (1995); DeWitt v. Wilson, 856 F. Supp. 1409, 1411-12 (E.D. Cal. 1994) (describing plaintiffs' claim as one involving suspect racial gerrymandering, affording an equal protection cause of action), *aff'd in part*, 115 S. Ct. 2637 (1995); Hays v. Louisiana, 839 F. Supp. 1188, 1193 (W.D. La. 1993) (plaintiffs argued that, because the legislature drew voting districts to segregate voters by race and did not follow traditional redistricting principles, plaintiffs had a valid equal protection claim under *Shaw I*); *vacated*, 512 U.S. 1230 (1994); Shaw v. Barr, 808 F. Supp. 461, 470 (E.D.N.C. 1992) (plaintiffs claimed that the legislature denied them, and all other citizens in North Carolina, equal protection by creating voting districts with a majority of African-American voters), *rev'd*, Shaw v. Reno, 509 U.S. 630 (1993).

20. 509 U.S. 630 (1993).

equal protection claim.[21] The Court stated that strict scrutiny[22] should apply to a congressional district so bizarrely shaped that it could only have been drawn with race as its primary rationale.[23] The Court's holding was expanded in *Miller v. Johnson*[24] to include not just outrageously shaped districts, but any district shown to have been drawn with race as the predominant factor.[25]

These cases illustrate two dilemmas faced by states covered under the Act. First, under section 5 of the Act, state redistricting plans must meet the preclearance requirements of the Justice Department.[26] In the alternative, states can seek a declaratory judgment from a three-judge panel of the United States District Court for the District of Columbia.[27] In addition, section 2 of the Act forbids a jurisdiction from enforcing a redistricting plan that limits access to the political process for minorities.[28]

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21. *See id.* at 658. Prior vote dilution claims had required a showing of material injury. *See supra* notes 17-18 (describing the requirements for standing in cases involving constitutional rights and redistricting). Before *Shaw I*, a voting practice or procedure violated the Equal Protection Clause only when it unduly diminished the political strength of a constitutionally protected group. *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election District Appearances after* Shaw v. Reno, 92 MICH. L. REV. 483, 493 (1993). The plaintiffs in *Shaw I* could identify no tangible harm. *See id.* at 506. Nor did they need to; the Supreme Court recognized a violation of the Equal Protection Clause when "race-consciousness" dominates the political process. *See id.* at 500. The Court determined that expressive harms "that result from ideas or attitudes expressed through governmental action, rather than from the more tangible or material consequences the action brings about," are constitutionally cognizable. *Id.* at 506-07.

22. *See Shaw I*, 509 U.S. at 658. The strict scrutiny test articulated in *Shaw I* has two parts. First, a plaintiff must prove that the state legislature was motivated by race in drawing its district lines, thereby raising a cognizable equal protection claim. *See id.* at 644. Second, if race is found to be the motivating factor, the court must determine whether the redistricting plan is "narrowly tailored to further a compelling governmental interest." *Id.* at 658. In *Shaw I*, the Court found that compliance with section 5 of the Voting Rights Act would not necessarily provide this justification. *See id.* at 654-55. The Supreme Court remanded *Shaw I* to the district court to complete the second part of the inquiry. *See id.* at 655.

23. *See id.* at 658.

24. 115 S. Ct. 2475 (1995).

25. *See id.* at 2488; *see also* Latimer, *supra* note 9, at 126-31 (discussing the majority opinion in *Miller*). The Court determined that the shape of a district may provide circumstantial evidence of race-based decision making, but even where the plan appears to be race-neutral, other direct evidence may be used to show racial motivation. *See Miller*, 115 S. Ct. at 2489; *see also* Latimer, *supra* note 9, at 128. In *Miller*, the Court found such additional evidence in the Justice Department's insistence on the creation of a third majority-minority district. 115 S. Ct. at 2489; *see also* Latimer, *supra* note 9, at 129.

26. *See supra* note 9 and accompanying text (describing the preclearance requirements for jurisdictions covered under the Act).

27. *See* 42 U.S.C. § 1973c (1994).

28. *See id.*; Allen v. State Bd. of Elections, 393 U.S. 544, 565 (1969) (holding that the

The second dilemma is embodied in the predominant factor standard, articulated by the Court in *Miller*, under which the Supreme Court has indicated it will apply strict scrutiny to redistricting plans in which race is a predominant factor in the governing body's decision making.[29] This has proven to be extremely difficult for lower courts and legislative bodies to interpret.[30] This difficulty is compounded by the fact that the Court has delivered divided redistricting decisions since *Shaw I*.[31]

What is a legislature to do? Several have turned the redistricting process over to the same district courts that invalidated their plans as violations of the Equal Protection Clause.[32] The results have been varied, as courts have struggled to ascertain when race has become an important enough factor to warrant judicial intervention.[33] The abdication of political responsibility to the courts raises the concern that, although courts frequently have intervened in redistricting battles,[34] the Supreme Court

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Act covers even minor changes in state election laws); South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) (finding that Congress may use any rational means to stop racial discrimination in voting).

29. *See Miller*, 115 S. Ct. at 2490. The holding in *Miller* has been interpreted to mean that, by maximizing minority voting potential, a state subordinates traditional redistricting principles to race, thus exceeding the requirements of the Act. *See* Lynett Henderson, Commentary, *Lost in the Woods: The Supreme Court, Race, and the Quest for Justice in Congressional Reapportionment*, 73 DEN. U. L. REV. 201, 221 (1995).

30. *See* Karlan, *supra* note 15, at 299 (observing that courts have been drawn into complex redistricting battles because the Supreme Court has failed to provide a clear standard to guide their decision making).

31. *See infra* note 253 (describing the composition of the Court in redistricting cases since *Shaw I*).

32. *See* Vera v. Bush, 933 F. Supp. 1341, 1344 (S.D. Tex. 1996) (observing that, after the invalidation of three Texas voting districts by the Supreme Court, the Texas Governor refused to call a special session of the legislature to design new districts, leaving the district court to create a new plan); Johnson v. Miller, 922 F. Supp. 1556, 1569 (S.D. Ga. 1995) (*Johnson II*) (leaving the design of voting districts to the district court after the legislature failed to agree on a plan), *aff'd*, Abrams v. Johnson, 65 U.S.L.W. 4478 (1997).

33. *See infra* note 122 and accompanying text (describing district courts' responses to the Supreme Court's rulings in *Shaw I* and *Miller*).

34. *See, e.g.*, Wise v. Lipscomb, 437 U.S. 535, 540 (1978) (finding that where a court declares a redistricting scheme unconstitutional, and the legislature fails to develop a legitimate plan, the court has a duty to draw a plan, pending subsequent legislative action); Connor v. Finch, 431 U.S. 407, 415 (1977) (finding that federal courts must act when state legislatures are unable to redistrict within a constitutionally mandated framework); Reynolds v. Sims, 377 U.S. 533, 566 (1964) (stating that, while the power belongs to states to impose their political philosophies on their citizens, the courts must intervene where there is a denial of constitutionally protected rights); Baker v. Carr, 369 U.S. 186, 237 (1962) (holding redistricting questions justiciable when a claim of a constitutional violation is raised); *see also* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1647-48 (1993) (observing that reapportionment cases such as *Baker v. Carr* and *Reynolds v. Sims* have led to an enormous change in the way political institutions conduct business by finding reapportionment

consistently has held that legislatures are the bodies best suited to manage the process.[35] In those situations where courts are obligated to act, they must base their judgments on clear standards and limit their discretion to curing constitutional or statutory violations.[36]

Neither *Shaw I* nor *Miller* held that the Voting Rights Act is unconsti-

claims justiciable, and requiring apportionment by population); Abner J. Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of* Baker v. Carr, 1995 U. ILL. L. REV. 683, 686-87 (arguing that, by using the Equal Protection Clause to permit the intervention of federal courts in "political questions," the *Baker* Court started a revolution in court involvement in electoral politics).

35. *See Wise*, 437 U.S. at 539 (declaring that legislative bodies should not leave reapportionment responsibilities to the federal courts); *Connor*, 431 U.S. at 414 (stating that legislative reapportionment is the work of legislatures); White v. Weiser, 412 U.S. 783, 793 (1973) (recognizing that reapportionment is primarily a legislative matter).

36. *See, e.g.*, Upham v. Seamon, 456 U.S. 37, 43 (1982) (per curiam) (holding that the Court's remedial powers are limited to curing constitutional or statutory violations); *Wise*, 437 U.S. at 540 (stating that when courts must intervene, they will be held to stricter standards than legislatures); *Connor*, 431 U.S. at 415 (noting that courts lack the political authority to address conflicting state reapportionment policies, but where legislatures fail in redistricting tasks, courts must act with care); *Weiser*, 412 U.S. at 795 (finding that federal district courts should follow the policies and preferences of individual states in developing redistricting plans, and should not intrude in state policy making more than necessary); Whitcomb v. Chavis, 403 U.S. 124, 163-64 (1971) (stating that the limited powers of courts must be adequate to cure constitutional violations, but may intrude on state policies only to the extent of curing such violations). The major concerns that gave rise to these limitations were expressed in early dissents by Justice Frankfurter in *Baker v. Carr*, 369 U.S. 186, 266 (1962), and Justice Harlan in *Reynolds v. Sims*, 377 U.S. 533, 589 (1964). Justice Frankfurter warned that judicial abstention from political entanglements is essential to maintain the Court's objectivity and moral authority. *See Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting). Justice Frankfurter also argued that lower courts would be extremely confused by the Supreme Court's failure to articulate a standard for relief, particularly when it had made such a drastic change. *See id.* at 267-68.

In *Reynolds*, Justice Harlan warned, "Generalities cannot obscure the cold truth that cases of this type are not amenable to the development of judicial standards." 377 U.S. at 621 (Harlan, J., dissenting). In the voting rights litigation of the 1990s, a number of commentators restated the arguments of Justices Harlan and Frankfurter, and now there is considerable confusion over the constitutionality of majority-minority districts. *See* Issacharoff, *supra* note 34, at 1646-47 (arguing that the Court's standards regarding partisan gerrymandering are unworkable because they lack clear commands for judicial management, resulting in confused, politically charged, ad hoc adjudication); Earl M. Maltz, *Political Questions and Representational Politics: A Comment on* Shaw v. Reno, 26 RUTGERS L.J. 711, 711-13 (1995) (arguing that the issues raised by the Court in *Shaw I* are actually nonjusticiable political questions because the Constitution specifically gives the authority for elections to the legislative branch, and because judicial intervention in redistricting upsets the balance of power between the legislative and judicial branches); Mikva, *supra* note 34, at 687 (observing that the Court's rulings on political matters demonstrate the inability of the judiciary to understand and manage them); Jeremy M. Taylor, Comment, *The Ghost of Harlan: The Unfulfilled Search for Judicially Manageable Standards in Voting Rights Litigation*, 65 MISS. L.J. 431, 435 (1995) (arguing that the judicial standards do not provide a principled basis for judicial review for the voting rights issues being litigated today).

tutional, thus states are required to continue to meet its requirements.[37] In both cases, however, the Court limited the use of race as a factor in district design, casting some doubt as to the reach of the Act.[38] In *Shaw I*, Justice O'Connor appeared to determine that the bizarre shape of a district, explainable on no other ground than race, would give rise to an equal protection claim.[39] In *Miller*, Justice Kennedy stated that a district's unusual shape might provide circumstantial evidence, but a more significant finding included evidence showing that race was a predominant factor in the legislature's redistricting decision.[40] Because satisfying the Act and applying the Court's predominant factor test have left states confused about acceptable redistricting strategies, a number of legislatures have abandoned redistricting responsibilities, leaving courts, in several circumstances, to intervene.[41]

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37. *See* Miller v. Johnson, 115 S. Ct. 2475, 2493 (1995); *see also* Pildes & Niemi, *supra* note 21, at 486 (observing that the Act not only permits, but requires that states be race-conscious when redistricting).

38. *See Miller*, 115 S. Ct. at 2493; Shaw v. Reno, 509 U.S. 630, 654-55 (1993) (*Shaw I*). Justice O'Connor, writing for the majority in *Shaw I*, stated that the district court would need to determine on remand whether avoiding vote dilution under section 2 of the Act would be sufficient justification for race-based redistricting. *See id.* at 658. Justice O'Connor determined, however, that the need to comply with the nonretrogression principle under section 5 of the Act does not give states unlimited discretion in drawing district lines. *See id.* at 654-55. A race-based plan that exceeds the requirements of section 5 may still be unconstitutional. *See id.* at 654.

The *Miller* Court found that the Justice Department exceeded its authority by requiring the creation of more majority-minority districts than necessary to satisfy the nonretrogression requirement of section 5. *See Miller*, 115 S. Ct. at 2493. The Court even stated that "when the Justice Department's interpretation of the Act compels race-based redistricting, it by definition raises a serious constitutional question." *Id.* at 2492. Some commentators have found these decisions difficult to square with the purpose of the Act. *See, e.g.*, Karlan, *supra* note 15, at 307-08 (observing that neither *Shaw I* nor *Miller* explains the relationship between the Court's decisions and the Act, except to say that a state cannot rely on an unconstitutional interpretation of the Act even if a plan is precleared by the Justice Department); Parker, *supra* note 15, at 47 (arguing that *Shaw I* actually created a disincentive for states to make good faith efforts to comply with the Act, because of the fear of lawsuits by white voters); Lisa Erickson, Comment, *The Impact of the Supreme Court's Criticism of the Justice Department in* Miller v. Johnson, 65 MISS. L.J. 409, 426-27 (1995) (arguing that the *Miller* decision appears to conflict with Congress's intent and undermines the authority of the Justice Department). *But see* Katharine Inglis Butler, *Affirmative Racial Gerrymandering: Rhetoric and Reality*, 26 CUMB. L. REV. 313, 317 (1995-1996) (arguing that, while the Act requires legislators to be race-conscious in redistricting, it has never required that districts be drawn with race as the only criterion); Abigail Thernstrom, *Voting Rights: Another Affirmative Action Mess*, 43 UCLA L. REV. 2031, 2056 (1996) (observing that, while race plays a part in redistricting, the Act does not require racial stereotyping).

39. *See Shaw I*, 509 U.S. at 658.

40. *See Miller*, 115 S. Ct. at 2489.

41. *See supra* note 32 and accompanying text (discussing state legislatures that have

This Comment first examines the historical role of courts in redistricting cases, and the limits the Supreme Court has placed on that role. This Comment describes *Shaw I*, *Miller*, and *Bush v. Vera*,[42] and will examine their effects on redistricting in North Carolina, Georgia, and Texas, respectively. This Comment next discusses the variety of district court responses to the Supreme Court's rulings on race-based redistricting, demonstrating different approaches to the application of the predominant factor standard. Finally, this Comment concludes that the Supreme Court has created a standard without a definition, blurring the line between political questions and judicial authority, empowering courts beyond appropriate limits, and creating public mistrust of the judiciary. This Comment proposes that the Court return to a standard which is easier to interpret than the predominant factor standard. This would give state legislative bodies stronger guidance as to the constitutional parameters of redistricting, thereby limiting judicial intervention in the redistricting process, and maintaining judicial integrity.

I. POLITICAL QUESTIONS AND JUSTICIABILITY IN REDISTRICTING

A. Baker v. Carr: *Justiciability and its Limits*

Political questions are those issues that courts have determined to be the exclusive province of elected bodies, either because the Constitution has committed certain matters to the legislative branch of government, or because courts have determined that judicial procedures are inadequate for some types of cases.[43] These cases form a narrower class than

recently abdicated their redistricting responsibilities to district courts).

42. 116 S. Ct. 1941 (1996).

43. *See* 13A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3534, at 451 (2d ed. 1984). The Supreme Court first confronted the political question doctrine in *Luther v. Borden*, where it held that it is the responsibility of the other branches of government to determine what constitutes a lawful state government. *See* 48 U.S. (7 How.) 1 (1849). The political question doctrine is not clearly defined, and commentators disagree as to its usefulness, or even as to its existence. *See, e.g.*, Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 201 (1971) (stating that the variety of invocations of the political question doctrine suggests that the concept encompasses nothing more than issues the courts are unwilling to review); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 599-601 (1976) (arguing that the political question doctrine is really a recognition of the limitations on courts' powers to leave certain matters for self-policing by the political branches, even when constitutional questions might be raised); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1059-60 (1984-85) (arguing that a political question doctrine exists, but should be abandoned because society needs the protection of judicial review); Michael E. Tigar, *Judicial Power, The "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135, 1163 (1970) (arguing that the political question doctrine is merely a group of legal rules based generally on deference to the political

the phrase "political question" might suggest; courts frequently decide intensely political matters, despite this doctrine of deference to political bodies.[44]

Courts and scholars have debated extensively about what constitutes the narrow class of issues that are essentially untouchable by the courts; however, legislative redistricting is considered to be at "the very heart of the political process."[45] The Supreme Court provided its most definitive guidance on political questions in an apportionment case, *Baker v. Carr*.[46] The Court delineated six factors to consider when identifying a political question: (1) if the issue is committed by the Constitution to a coordinate branch of the government, (2) if there is an absence of judicially discoverable or manageable standards for adjudicating the issue, (3) if the issue cannot be decided without an initial policy determination inappropriate for judicial discretion, (4) if a judicial decision would demonstrate a lack of respect for a coordinate branch of government, (5) if an issue requires adherence to a previously made political decision, or (6) if embarrassment would result from varied pronouncements from different branches of government.[47]

In *Baker*, plaintiffs challenged the constitutionality of a Tennessee apportionment statute because, despite significant population growth and

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branches rather than deference in an identifiable class of cases).

44. *See* INS v. Chadha, 462 U.S. 919, 942-43 (1983) (stating that "the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine" and arguing that courts cannot simply avoid issues with political implications); Powell v. McCormack, 395 U.S. 486, 548 (1969) (finding a justiciable action following the refusal of Congress to seat a congressman after he had been elected). Following the decision in *Baker* and the enactment of the Voting Rights Act, courts have heard cases in nearly every field of political regulation and, using the Equal Protection Clause to resolve political questions, have altered the landscape of electoral politics. *See* Mikva, *supra* note 34, at 686-87.

45. 13A WRIGHT, *supra* note 43, § 3534.1, at 460.

46. 369 U.S. 186 (1962). *Baker* provides the Court's clearest attempt to delineate the factors that separate political and judicial power. *See* 13A WRIGHT, *supra* note 43, § 3534, at 453. Many commentators consider *Baker* to be monumentally significant because it realigned the balance of political and judicial power, giving courts enormous latitude in applying the Equal Protection Clause to legislative injustices. *See* Issacharoff, *supra* note 34, at 1647-48 (observing that, by its rulings in *Baker* and *Reynolds v. Sims*, the Court altered the established ways of doing political business across the country in order to enforce the guarantees under the Equal Protection Clause); Mikva, *supra* note 34, at 686 (noting that the *Baker* decision allowed increased representation of minorities in the political process).

47. *See Baker*, 369 U.S. at 217. Some matters the *Baker* Court considered to be nonjusticiable included: foreign relations, the validity of congressional enactments, and matters involving the status of Indian tribes. *See id.* at 211, 214-17. However, the *Baker* court emphasized the importance of case-by-case inquiries to determine whether a political question exists. *See id.* at 210-11.

shifts in the state from 1901 to 1961, the legislature had not reapportioned its voting districts since 1901.[48] The district court acknowledged that the plaintiffs' constitutional rights were violated, but dismissed the claim in part because it determined there was not a justiciable cause of action.[49] The court stated that reapportionment is a political question and outside the purview of the courts.[50]

Upon certiorari, the Supreme Court held that the appellants had a justiciable cause of action,[51] finding that their rights under the Equal Protection Clause were violated; thus judicial intervention was necessary.[52] The Court first noted that the political question doctrine applies only to the relationship between the judiciary and the coordinate branches of the federal government, and not to the relationship between the judiciary and state governments.[53] The Court observed that it previously had acted on political matters when the administration of a state's affairs raised constitutional questions, amenable to judicial correction.[54] The Court found that this case fell within those parameters because the district court had acknowledged a violation of the Equal Protection Clause and the Court determined it could develop an appropriate remedy for the violation.[55]

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48. *See id.* at 192.

49. *See id.* at 196. In *Baker*, the Court defined a justiciable matter as one in which there is an identifiable duty, an ascertainable breach of that duty, and the availability of an appropriate remedy. *See id.* at 198; *see also supra* text accompanying note 47 (describing the criteria delineated by Justice Brennan in *Baker* for identifying a nonjusticiable political question).

50. *See Baker*, 369 U.S. at 196-97.

51. *See id.* at 197-98. The Court noted that the search for protection of a political right does not necessarily raise a political question. *See id.* at 209. Nonjusticiability of a political question is governed largely by separation of powers principles, and courts must decide these issues on a case-by-case basis. *See id.* at 210-11.

52. *See id.* at 210. The Court furthered its argument by contrasting its decisions in *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), where it intervened to protect African-American voters from disenfranchisement, and *Colegrove v. Green*, 328 U.S. 549, 552-53 (1946), which, the Court argued, addressed state interests entirely within the state's domain. *See Baker*, 369 U.S. at 229-31.

53. *See Baker*, 369 U.S. at 210. The Court used as examples *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 181 (1892), in which it reversed the Nebraska Supreme Court's determination that the governor could not continue to hold office because he was not a citizen of Nebraska, nor of the United States, and *Kennard v. Louisiana ex rel. Morgan*, 92 U.S. 480, 481 (1875), where it considered whether removal of certain individuals from public office violated their rights under the Fourteenth Amendment. *See Baker*, 369 U.S. at 229.

54. *See Baker*, 369 U.S. at 229.

55. *See id.* at 198. Justice Frankfurter, joined by Justice Harlan, wrote a lengthy dissent in which he argued the futility of judicial interference with the "political conflict of forces by which the relation between population and representation has time out of mind

It is noteworthy that the most comprehensive standards for determining justiciability were authored in a case involving voting districts.[56] On numerous occasions since *Baker*, the Court has determined that judicial review of the reapportionment process is appropriate to correct constitutional violations.[57] It has persisted in acknowledging, however, that reapportionment is highly political and judges should intervene with caution and respect for the legislature's redistricting preferences.[58] The guiding principle expressed in *Baker* is that courts must act where constitutional rights are violated.[59] In *Baker*, the Court recognized a justiciable claim because voters' rights to equal protection were violated when a legislature refused to reapportion its voting districts.[60]

The dissent in *Baker* is also noteworthy. Justice Frankfurter expressed concern that judicial intervention in this reapportionment debate would create enormous confusion because of the Court's inability to offer a clear standard to guide lower courts in their decision making.[61] The issue of clear standards continues to haunt courts in the debate over majority-minority redistricting.[62]

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been and now is determined." *Id.* at 267 (Frankfurter, J., dissenting). Justice Frankfurter stressed that, not only is political activity outside the Court's sphere of expertise, but it could undermine the credibility of the judiciary, which rests on detachment from political entanglements. *See id.* Justice Frankfurter also warned of the flood of litigation that undoubtedly would result because the Court failed to provide lower courts with guidelines for developing specific remedies in an area so lacking in precedent. *See id.* Justice Frankfurter stated that the Court's ruling "conveys no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary." *Id.* at 268.

56. *See* 13A WRIGHT, *supra* note 43, § 3534, at 453. It is observed, however, that the *Baker* standards are confusing and difficult to apply. *See id.* at 454. In the three decades since the Supreme Court found reapportionment justiciable, many commentators have agreed that courts have been unable to articulate standards that legislatures can use to guide them through the redistricting process. *See infra* note 62 (summarizing the views of courts and commentators as to the lack of judicially manageable standards for redistricting). Perhaps because of the complexity of the political question doctrine, the *Baker* Court emphasized the need for case-by-case inquiry before intervening in political matters. *See Baker*, 369 U.S. at 211.

57. *See supra* note 34 and accompanying text (listing cases in which the Court has ruled that the judiciary must act to correct constitutional violations).

58. *See supra* note 35 and accompanying text (listing cases in which the Court placed limits on the breadth of federal courts' review).

59. *See Baker*, 369 U.S. at 229; *see also supra* notes 34, 36 (listing cases in which the Supreme Court has limited judicial remedial powers in redistricting cases to curing constitutional or statutory violations).

60. *See Baker*, 369 U.S. at 191-92, 209.

61. *See supra* note 55 (describing Justice Frankfurter's arguments against judicial intervention in the redistricting process).

62. *See* Bush v. Vera, 116 S. Ct. 1941, 1975 (1996) (Stevens, J., dissenting) (warning that the Court, "with its 'analytically distinct' jurisprudence of racial gerrymandering

B. The Voting Rights Act Enlarges the Judicial Role in Redistricting

The *Baker* Court's definition of equal protection, as guaranteed by the Fourteenth Amendment, and the right to vote articulated in the Fifteenth Amendment,[63] were the principles guiding the enactment of the Voting Rights Act[64] and its amendments.[65] Members of Congress observed that the Act was written to provide all Americans equal access to the voting franchise.[66] Specifically, Congress intended the Act to combat discrimination against African Americans, not only by eradicating current discriminatory practices, but by attempting to address a history of discrimination.[67]

In passing the Act, Congress affirmed the power of the courts to protect minorities from discrimination in the electoral process.[68] Section 5 of the Act requires a covered jurisdiction to obtain preclearance with the Justice Department before implementing any change in voting practices or procedures, or in the alternative, to seek a declaratory judgment in the United States District Court for the District of Columbia.[69] An equal

struck out into a jurisprudential wilderness that lacks a definable constitutional core" (citation omitted)); *see id.* at 1998 (Souter, J., dissenting) (stating that the Court's failure to provide a useful standard for distinguishing lawful from unlawful use of race in redistricting has not only created confusion among courts and legislatures, but has shifted responsibility for redistricting to the courts); *see also* Karlan, *supra* note 15, at 299 (noting that unlike *Baker*, in which judicial involvement in apportionment was acceptable because courts could rely on familiar standards that would prevent them from becoming overly involved in political questions, recent redistricting cases have provided less clear standards, drawing courts into complex political battles).

63. U.S. CONST. amend. XV, § 1. The Fifteenth Amendment provides, "[T]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." *Id.*

64. *See* H.R. REP. NO. 89-439, at 6 (1965); Schnapper, *supra* note 16, at 789 (arguing that the legislative history of the Fourteenth Amendment shows the framers' intent to provide race-conscious remedies to ensure equal protection for minorities); Williamson, *supra* note 9, at 2 (stating that the Act was passed "under the legislative authority conferred by section 5 of the fourteenth amendment, section 2 of the fifteenth amendment, and article I, section 4 of the Constitution").

65. 42 U.S.C. §§ 1971, 1973-1973bb-1 (1994).

66. *See* S. REP. NO. 97-417, at 4-5 (1982).

67. *See* S. REP. NO. 97-417, at 5. The Report of the House Judiciary Committee concerning the 1965 Voting Rights Bill observed that states consistently had obstructed the efforts of the Justice Department to enforce the right of African Americans to vote under the Fifteenth Amendment. *See* H.R. REP. NO. 89-439, at 9-10. From the time the Thirteenth, Fourteenth, and Fifteenth Amendments (the Reconstruction Amendments) were enacted, states had found ways to circumvent these laws, prompting Congress to act to protect African Americans. *See* Williamson, *supra* note 9, at 2.

68. *See supra* note 9 (describing the role of the United States District Court for the District of Columbia under section 5 of the Act).

69. *See supra* notes 9-10 and accompanying text (describing the procedural requirements of section 5 of the Act).

protection claim that a state's voting practice minimizes or cancels the voting strength of a minority group may also be brought.[70] An equal protection challenge requires a showing that a state practice has a discriminatory effect and that the state implemented the practice for a discriminatory purpose.[71]

In 1982, Congress amended section 2 of the Act to clarify its intention that proof of a claim of vote dilution does not require a showing of purposeful discrimination.[72] Rather, under the amended section 2, only a showing of discriminatory effect would be needed.[73] Following the 1982 amendments,[74] private citizens had a lighter burden in challenging state actions that diluted the voting strength of minority groups.[75]

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70. *See infra* note 71 and accompanying text (discussing equal protection challenges to vote dilution claims).

71. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979) (finding that, where a statute is neutral on its face, both purpose and impact must be considered); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977) (finding disproportionate impact in equal protection analysis is not irrelevant, but requiring proof of discriminatory purpose as the central element in the inquiry); Washington v. Davis, 426 U.S. 229, 239 (1976) (stating that both disproportionate impact and discriminatory purpose must be shown to prove an equal protection violation).

72. *See infra* note 73 (quoting the language of the original and revised section 2, and describing Congress's purpose in changing the language). *But see* Mobile v. Bolden, 446 U.S. 55 (1980). In *Bolden*, a group of African-American voters in Mobile, Alabama brought a class action suit against the city, claiming that a multi-member redistricting scheme diluted their voting strength, thereby violating their constitutional rights and their rights under section 2 of the Act. *See id.* at 58. The Court upheld the scheme, finding that the plaintiffs had not proven the city's intent to discriminate. *See id.* at 65. Congress responded to this decision by amending the Act in 1982, clarifying the language in section 2 to require only a showing of discriminatory effect. *See* Williamson, *supra* note 9, at 15-16 (arguing that the purpose of amending section 2 was to correct the Court's application of the Act).

73. *See* 42 U.S.C. § 1973(a) (1994). Section 2 states in relevant 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 abridgement of the right of any citizen of the United States to vote on account of race or color.

Id. (emphasis added). The language of the original Act, unchanged in the 1970 and 1975 Amendments, stated that, "No voting qualification or prerequisite . . . shall be imposed or applied by any State or political subdivision . . . *[to] den[y] or abridge[ ]* . . . the right . . . to vote on account of race or color." 42 U.S.C. § 1973(a) (1965) (emphasis added); *see also* Williamson, *supra* note 9, at 15-16 & 16 n.81 (citing House and Senate reports declaring that a violation of the Act could be established by a showing of discriminatory effect and stating that Congress could not change the Court's constitutional ruling but could, and did, correct the Court's application of the Act through "appropriate legislation").

74. *See* 42 U.S.C. § 1973 (1994).

75. *See id.* § 1973(b). A vote dilution claim requires a showing that minority groups are blocked from electing their preferred candidates through the use of certain practices

In 1986, the Court decided *Thornburg v. Gingles*,[76] the first comprehensive interpretation of section 2 of the Act since the 1982 amendments.[77] In addition to holding that proof of causation or purpose was not required to make a prima facie case of vote dilution,[78] the Court set the standard by which private actions could be brought under section 2.[79] The *Gingles* Court concluded that three elements must be proven to determine the validity of a section 2 challenge: (1) the challenging minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district, (2) the challenging minority group must be politically cohesive, and (3) the majority group must vote as a bloc so as to defeat minority candidates generally.[80] Writing for the majority, Justice Brennan based these criteria on a Senate report, listing factors to be considered to show discriminatory effect under the amended section 2.[81] Justice Brennan identified the most important of these fac-

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that diminish the strength of their votes through the use of certain practices. *See* Mary J. Kosterlitz, Note, Thornburg v. Gingles: *The Supreme Court's New Test for Analyzing Minority Vote Dilution*, 36 CATH. U. L. REV. 531, 534-35 (1987). A common practice in several states was to employ majority-white multi-member districts. *See id.* at 535. These schemes diluted minority voting strength by making it more difficult to elect candidates preferred by minority groups. *See* Rogers v. Lodge, 458 U.S. 613, 627 (1982) (finding that a multi-member redistricting scheme was maintained for invidiously discriminatory purposes); Whitcomb v. Chavis, 403 U.S. 124, 143 (1971) (finding that multi-member districts are not unconstitutional per se, but may be invalidated when used to minimize or cancel the voting strength of minorities). Furthermore, minority voting strength may be diluted by drawing districts that have wide disparities in numbers of voters. *See* Reynolds v. Sims, 377 U.S. 533, 558 (1964) (defining the principle of "one person, one vote").

76. 478 U.S. 30 (1986). In *Gingles*, African-American voters in North Carolina challenged a 1982 legislative redistricting plan, claiming the plan impaired their ability to elect the candidates of their choice, thereby violating their rights under the Fourteenth and Fifteenth Amendments, and under section 2 of the Voting Rights Act. *See id.* at 34-35. The suit was filed before the Act was amended, but the case was not tried until after the enactment of the amendments in 1982. *See id.* at 35. Applying the discriminatory effects test, the district court held that the plan violated section 2 because it resulted in the dilution of African-American voting strength. *See id.* at 37-38. The Supreme Court upheld the district court's decision as to all but one of the challenged districts. *See id.* at 42.

77. *See* Kosterlitz, *supra* note 75, at 533. Defining the criteria required for a claim of vote dilution under the amended section 2, the Court provided guidance for initial vote dilution inquiries. *See id.*

78. *See Gingles*, 478 U.S. at 74.

79. *See id.* at 50-51.

80. *See id.* Although *Gingles* was designed only to apply to multi-member or at-large electoral districts, *see* Pildes & Niemi, *supra* note 21, at 487, the Court later extended its holding to single-member districts. *See* Growe v. Emison, 507 U.S. 25, 40-41 (1993).

81. *See Gingles*, 478 U.S. at 48-49 & n.15; *see also* Larry J.H. Liu, *The Minority-Preferred Candidate in* Thornburg v. Gingles: *An Argument for Color-Blind Voting*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 631, 639 (1994). These factors include: a history of official discrimination that negatively affects minority access to the political process; racially polarized voting; unusually large voting districts with practices that could dis-

tors as the extent of racially polarized voting and the extent to which minority candidates were elected to public office.[82] The *Gingles* test, providing specific criteria required to raise a section 2 claim against a multimember redistricting scheme, was later expanded to apply to vote dilution claims in single member districts.[83]

II. *SHAW V. RENO* AND *MILLER V. JOHNSON*: THE NEW EQUAL PROTECTION AND MAJORITY-MINORITY DISTRICTS

In 1993, with its decision in *Shaw v. Reno* (*Shaw I*), the Court signaled an abrupt change of direction, bypassing the effects test and the *Gingles* standard, and finding a new equal protection cause of action.[84]

A. Shaw v. Reno: *Bizarre Shapes and Racial Apartheid*

Following the 1990 census, several states covered under section 5 of the Voting Rights Act drew majority-minority voting districts that resulted in a significant increase in the number of minority members in the United States House of Representatives.[85] One such district was North Carolina's Twelfth, which followed a narrow path across the state.[86] The district at many points was no wider than the interstate highway corridor.[87] After the Justice Department precleared the district,[88] five resident

advantage minority voters; denial of access to the candidate slating process; the extent to which members of a minority group are disadvantaged with respect to education, employment, or health that might hinder their participation in the political process; whether campaigns include racial appeals; the extent to which minority candidates have been elected to public office; whether elected officials are unresponsive to the needs of minority constituents; and whether the policy underlying the use of a particular voting standard, practice, or procedure is tenuous. *See* S. REP. NO. 97-417, at 28-29 (1982); *see also* Liu, *supra*, at 639 n.46.

82. *See Gingles*, 478 U.S. at 48 n.15.

83. *See Growe*, 507 U.S. at 40.

84. *See supra* notes 72-76 and accompanying text (describing vote dilution claims under section 2 of the Act, the Equal Protection Clause, and *Gingles*).

85. *See* Holmes, *supra* note 13, at 4-1. Before the 1990 census, the national voting age population was 11.1% African-American and 7.3% Hispanic. *See* Parker, *supra* note 15, at 2. Congressional membership included only 4.9% African-American, however, and only 2.5% Hispanic. *See id.* Implementing redistricting schemes that included majority-minority districts, the number of African Americans in Congress rose from 26 to 39, and the number of Hispanics increased from 13 to 18. *See id.*

86. *See* Shaw v. Reno, 509 U.S. 630, 635 (1993) (*Shaw I*).

87. *See id.* The district also divided counties and towns; five of the ten counties through which it passed were cut into three different districts. *See id.* at 636.

88. *See* Shaw v. Barr, 808 F. Supp. 461, 465 (E.D.N.C. 1992), *rev'd*, Shaw v. Reno, 509 U.S. 630 (1993). In 1991, the North Carolina legislature approved a state-wide redistricting plan that included one majority-minority district. *See id.* at 463. The Justice Department denied preclearance, claiming that the legislature had failed to recognize a second concentrated minority population in the south central part of the state, and that the

voters challenged the plan, arguing that it violated the Equal Protection Clause because it was racially motivated.[89] The district court dismissed the suit for failure to state a claim,[90] noting that these voters had failed to show that a particular group of citizens had been harmed by this redistricting scheme.[91]

The Supreme Court found a justiciable equal protection cause of action.[92] Following earlier decisions that race-based classifications in education and employment would be subject to strict scrutiny, the Court determined that equal protection is denied, not only when a specific harm is visited on a particular individual or class of individuals, but when districts are drawn to classify people according to race.[93] Writing for the majority, Justice O'Connor described this equal protection claim as "analytically distinct" from one involving vote dilution.[94] Justice

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legislature's reasons for failing to do so were pretextual. *See* Parker, *supra* note 15, at 7. The legislature responded by creating a second majority-minority district, not in the area recommended by the Justice Department, but in the central Piedmont part of the state. *See id.* The plan, including this notoriously long and thin district, was precleared by the Justice Department. *See id.* In the 1992 congressional elections, two African-American representatives were elected from these districts, the first African Americans to represent North Carolina in Congress since 1901. *See id.*

89. *See Barr*, 808 F. Supp. at 470.

90. *See id.* at 473. The district court first observed that, under *Morris v. Gressette*, 432 U.S. 491 (1977), the Attorney General's preclearance decisions are not subject to judicial review by any court. *See Barr*, 808 F. Supp. at 467. A governmental entity that disagrees with the Attorney General's ruling must seek de novo review in the United States District Court for the District of Columbia. *See id.* The court determined, therefore, that the plaintiffs had failed "to state a cognizable federal claim for relief." *Id.*

91. *See Barr*, 808 F. Supp. at 470. As for the plaintiffs' equal protection argument, the court observed that the pleadings did not include the fact that the plaintiffs were white. *See id.* The court took judicial notice of the plaintiffs' race, stating that an equal protection claim that failed to distinguish one group from another, thereby alleging harm to a particular group, would be "self-defeating." *See id.* The district court dismissed the plaintiffs' claim, finding that they could not prove impermissible legislative intent to deprive white voters, statewide, of an equal opportunity to participate in the electoral process and elect candidates of their choice. *See id.* at 472. The court noted that invidious intent could be inferred if the legislature was controlled by an African-American majority, but, "as a matter of judicial notice . . . [that was] not the fact here." *Id.*

92. *See* Shaw v. Reno, 509 U.S. 630, 642 (1993) (*Shaw I*).

93. *See id.* at 642-43; *see also* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995) (finding all racial classifications to be subject to strict scrutiny); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) (holding that state and local governments may not develop classifications on the basis of race for either benign or invidious discriminatory purposes); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319-20 (1978) (holding that a medical school admissions program based on race was subject to strict scrutiny).

94. *See Shaw I*, 509 U.S. at 652. A vote dilution claim, under the Fourteenth Amendment, requires a showing of "actual, material harm to the voting strength of an identifiable (and constitutionally protected) group." Pildes & Niemi, *supra* note 21, at

O'Connor determined that the harm is one that affects society as a whole, by favoring impermissible racial stereotypes, rather than an identifiable harm that prevents a minority group from gaining equal access to the electoral process.[95]

B. Miller v. Johnson*: Race as the Predominant Factor*

In *Shaw I*, the Court appeared to determine that a finding of unconstitutional race-based redistricting would be predicated on the geographic shape of the district.[96] That notion was dispelled in *Miller v. Johnson*.[97]

Justice Kennedy, writing for the majority in *Miller*, went beyond merely examining district shape, determining that many indicia may provide evidence that race has been the predominant factor in the legislature's district design.[98] Georgia, like North Carolina, had become entitled to one additional seat in Congress following the 1990 census.[99] The Georgia General Assembly drew a plan containing eleven congressional districts, including two majority-minority districts, the Fifth and the

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493. Such a claim simply was unavailable to the North Carolina plaintiffs in *Shaw I*, however. *See id.* at 494. Although two African Americans had been elected to Congress in 1992, a proportionally larger share of North Carolina's congressional seats were still controlled by white representatives. *See id.*

95. *See Shaw I*, 509 U.S. at 648. This harm must be distinguished clearly from the material harm of a vote dilution claim. *See* Pildes & Niemi, *supra* note 21, at 506. The harm described in *Shaw I* is an "expressive harm" caused not by the consequences of governmental action, but rather by ideas and attitudes that violate public understandings and norms. *See id.* at 506-07. In *Shaw I*, the Supreme Court found harm in the fact that a redistricting scheme subordinating other values (such as district shape) to racial considerations sends a message that the governing body places too great an emphasis on race. *See id.* at 509.

The harms anticipated by the Supreme Court are described in the subjunctive. *See* Karlan, *supra* note 15, at 295. The Court observed that racial classifications "threaten to stigmatize," racial gerrymandering "may exacerbate" patterns of bloc voting, and elected representatives "are more likely" to listen to a specified type of constituent. *Id.* (quoting Shaw v. Reno, 509 U.S. 630, 643, 648 (1993)). Far from being the individualized injuries required under *Lujan v. Defenders of Wildlife*, these are more like the conjectural harms courts normally avoid. 504 U.S. 555, 560 (1992); *see supra* notes 17-18 and accompanying text (describing a plaintiff's burden of showing particularized harm in order to have standing).

96. *See Shaw I*, 509 U.S. at 658. Justice O'Connor declared that North Carolina's Twelfth District was "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race." *Id.*

97. 115 S. Ct. 2475 (1995).

98. *See id.* at 2486.

99. *See* Johnson v. Miller, 864 F. Supp. 1354, 1360 (S.D. Ga. 1994) (*Johnson I*), *aff'd and remanded*, 115 S. Ct. 2475 (1995). Prior to the 1990 census, Georgia had only one district that was represented by an African American, despite the fact that 27% of Georgia's population was African-American. *See* Laughlin McDonald, Essay, *Can Minority Voting Rights Survive* Miller v. Johnson?, 1 MICH. J. RACE & L. 119, 120 (1996).

Eleventh.[100] In the preclearance process, the Justice Department rejected this plan[101] as well as a second plan that also contained two majority-minority districts.[102] Finally, the General Assembly adopted a plan with three majority-minority districts, which was precleared by the Justice Department.[103] When the 1992 congressional elections were held under the new redistricting scheme, African Americans were elected in each of the state's majority-minority districts.[104] Five white residents of the Eleventh District brought suit, claiming unconstitutional racial gerrymandering that violated their rights under the Equal Protection Clause.[105]

The district court upheld the claim, viewing the threshold issue to be not whether the shape of the district was bizarre, but rather, whether race had played a predominant role in the General Assembly's decision making.[106] Applying strict scrutiny, the court found the district to be a race-based gerrymander because the evidence demonstrated that the Georgia General Assembly's primary motivation was to meet the Justice Department's preclearance requirement of three majority-minority districts.[107] The court determined that the plan could not survive strict scru-

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100. *See Miller*, 115 S. Ct. at 2483; *see also* McDonald, *supra* note 99, at 127.

101. *See Miller*, 115 S. Ct. at 2483. The reasons given by the Justice Department for rejecting the plan were that Georgia had a history of racially polarized voting, the legislature was predisposed to draw no more than two majority-minority districts, and the legislature had not attempted in good faith to recognize concentrations of African Americans in the southwestern part of the state. *See* Joint Appendix at 99, 101, 105-107, Miller v. Johnson, 115 S. Ct. 2475 (1995) (No. 94-797) [hereinafter Joint Appendix].

102. *See Miller*, 115 S. Ct. at 2484. Again, the Justice Department noted that the legislature seemed predisposed to draw only two majority-minority districts, and observed that the legislature had "no legitimate reason" for failing to include in a majority-minority district the second largest concentration of African Americans in the state. *See* Joint Appendix, *supra* note 101, at 124.

103. *See Miller*, 115 S. Ct. at 2484. This proposal was similar to one known as the "max-black" plan that the American Civil Liberties Union advocated to the Justice Department. *See id.*

104. *See* Latimer, *supra* note 9, at 124.

105. *See Miller*, 115 S. Ct. at 2485. The plaintiffs were white citizens who lived in the Eleventh District, including one candidate who had competed unsuccessfully in the Democratic primary. *See* McDonald, *supra* note 99, at 129. Plaintiffs argued that the district was irregularly shaped; the district court determined that the Justice Department had forced the legislature to create three majority-minority districts. *See Miller*, 115 S. Ct. at 2485; Latimer, *supra* note 9, at 124-25.

106. *See* Johnson v. Miller, 864 F. Supp. 1354, 1372 (S.D. Ga. 1994) (*Johnson I*), *aff'd. and remanded,* 115 S. Ct. 2475 (1995). The Court found that some deliberate consideration of race would not necessarily trigger strict scrutiny, as long as race was not the predominant factor. *See id.* at 1373.

107. *See id.* at 1377-78. The court determined that the Justice Department's agenda was dominated with racial concerns, and that primary consideration of race is subject to

tiny; though the Act might provide a compelling interest for designing majority-minority districts in some instances, this plan was not narrowly tailored because it exceeded the requirements of the Act.[108]

The Supreme Court affirmed the district court's ruling.[109] The Court agreed that a combination of types of evidence, including bizarre shape and direct evidence of the legislature's purposeful consideration of race, could be used to prove that race was the predominant factor in the legislature's decision.[110]

In *Miller*, the Court expanded its holding from *Shaw I*, that appeared to limit proof of racial gerrymandering to consideration of the shape of the district.[111] Significantly, in applying strict scrutiny to this redistricting scheme, the Court found that Georgia did not have a compelling interest in meeting the Justice Department's preclearance requirements[112] because the Department had exceeded its authority by demanding more majority-minority districts than necessary under the Act.[113] Without a compelling interest, the Court determined that the plan violated the Equal Protection Clause, and remanded the case to the district court to address the constitutional violation.[114]

Miller was not the first case in which the Court had applied strict scru-

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strict scrutiny. *See id.* at 1360, 1369.

108. *See id.* at 1384. First, the court observed that section 5 requires only that the state avoid retrogression of minority voting strength. *See id.* The court claimed that this plan sought instead to maximize African-American electoral power. *See id.* at 1385. Next, the court used the *Gingles* test to determine that section 2 of the Act did not require the creation of the Eleventh District. *See id.* at 1390; *see also supra* text accompanying note 80 (describing the factors required by the *Gingles* Court to prove vote dilution). The court determined that a geographically compact majority-minority district could not be drawn, and therefore no majority-minority district was required. *See Johnson I*, 864 F. Supp. at 1390. In addition, the court found the evidence did not support claims of majority bloc voting or cohesiveness of African-American voting. *See id.* at 1391.

109. *See Miller*, 115 S. Ct. at 2494.

110. *See id.* at 2489.

111. *See id.* at 2486; *see also supra* notes 92-95 and accompanying text (discussing the Court's holding in *Shaw I*).

112. *See Miller*, 115 S. Ct. at 2491. As in *Shaw I*, the Court refrained from deciding whether avoiding a vote dilution challenge under section 2 of the Act is a sufficiently compelling justification for race-based redistricting decisions. *See id.* at 2493. In this case, the Court determined that the state had no compelling interest in complying with Justice Department mandates which exceeded the requirements of the Act. *See id.*

113. *See id.* at 2491. The Court did not indicate what would be a proper exercise of Justice Department authority, or whether a "correct" interpretation of section 5 could withstand strict scrutiny. *See id.* at 2493. The Court warned, however, that the Justice Department was bringing the Act into tension with the Fourteenth Amendment by demanding that states "engage in presumptively unconstitutional race-based districting." *Id.* at 2493.

114. *See id.* at 2494.

tiny to racial classifications involving non-minorities. In affirmative action decisions about medical school admissions programs and minority set-asides for government contracts,[115] the Court ruled that any race-based government program would be subject to strict scrutiny.[116] These voting rights cases appear different, however, because they involve a congressional mandate to take corrective action for the benefit of racial minorities regarding the fundamental right to vote.[117] Nonetheless, the Court in *Shaw I* and *Miller* required that strict scrutiny also be applied to racial classifications in redistricting.[118]

In making these rulings, the Court has departed from the understanding that the Equal Protection Clause was written to protect minorities.[119] The Court determined instead that states deprive all their citizens of equal protection when race is the predominant consideration in the drawing of district lines,[120] claiming no harm to individuals per se, but harm to society as a whole caused by reinforcing racial stereotypes.[121]

III. GOING HOME: THE STATES AFTER THE SUPREME COURT RULINGS

States are required to proceed with the redistricting process within the Supreme Court's narrow framework. Lower courts have responded by developing various interpretations of *Shaw I* and *Miller*,[122] and several of

115. *See supra* note 93 (listing cases outside the voting context in which the Supreme Court has required the application of strict scrutiny to race-based classifications).

116. *See supra* note 93.

117. *See supra* notes 63-68 and accompanying text (discussing Congress's intent to combat discrimination against African Americans in the electoral process).

118. *See* Shaw v. Reno, 509 U.S. 630, 654-55 (1993) (*Shaw I*) (stating that a plan may satisfy the nonretrogression requirement of section 5 and still be enjoined as unconstitutional if it goes beyond what section 5 requires).

119. *See* Schnapper, *supra* note 16, at 789. The Fourteenth Amendment was enacted by a congress that sought special protections to integrate recently freed slaves into society. *See id.* at 784-85 (observing that the Freedmen's Bureau Act and the Civil Rights Act were passed concurrent with the Fourteenth Amendment, and were supported by the same legislators). Congress enacted the Voting Rights Act to protect those who had been denied access to the political process. *See* Williamson, *supra* note 9, at 1-2 (stating that the Act was passed under the "legislative authority conferred by section 5 of the fourteenth amendment, section 2 of the fifteenth amendment, and Article I, section 4 of the Constitution").

120. *See* Miller v. Johnson, 115 S. Ct. 2475, 2486 (1995). Writing for the majority, Justice Kennedy described the central mandate of the Equal Protection Clause as "racial neutrality in governmental decisionmaking." *Id.* at 2482.

121. *See supra* note 21 (discussing the distinction between individualized material harms and expressive harms caused by attitudes and ideals).

122. *See, e.g.*, Shaw v. Hunt, 861 F. Supp 408, 476 (E.D.N.C. 1994) (holding that race was a substantial and motivating factor in the state's decision making, but the state had a compelling interest in complying with the Act and the redistricting plan was sufficiently

these redistricting decisions have been appealed to the Supreme Court.[123] The Court has ruled in three additional cases since the 1995 *Miller* decision, and in each instance, the Court found race to be the predominant factor motivating the legislature.[124] In North Carolina, Georgia, and Texas, following the Supreme Court's rulings, the legislatures and district courts have responded in very different ways.

A. North Carolina: The Plan Survives Strict Scrutiny in the District Court

Following *Shaw I*, the Supreme Court remanded the North Carolina redistricting plan to the United States District Court for the Eastern District of North Carolina, for a reevaluation of the merits of the case.[125] On remand, the district court held that, although the voters challenging the majority-minority districts had standing to make an equal protection

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narrowly tailored to withstand strict scrutiny), *rev'd*, 116 S. Ct. 1894 (1996); DeWitt v. Wilson, 856 F. Supp. 1409, 1412 (E.D. Cal. 1994) (holding that strict scrutiny is required only when race is the only consideration in a redistricting decision), *aff'd in part*, 115 S. Ct. 2637 (1995); Johnson v. Miller, 864 F. Supp. 1354, 1372 (S.D. Ga. 1994) (*Johnson I*) (holding that strict scrutiny applies when race is shown to have been a predominant factor in the redistricting decision), *aff'd and remanded*, 115 S. Ct. 2475 (1995); Vera v. Richards, 861 F. Supp. 1304, 1345 (S.D. Tex. 1994) (holding that race must be the most significant factor in a redistricting decision before strict scrutiny will apply), *aff'd*, Bush v. Vera, 116 S. Ct. 1941 (1996).

123. *See* Bush v. Vera, 116 S. Ct. 1941 (1996); Shaw v. Hunt, 116 S. Ct. 1894 (1996) (*Shaw II*); *Miller*, 115 S. Ct. 2475; United States v. Hays, 115 S. Ct. 2431 (1995). The Court also reviewed a redistricting plan ordered by the United States District Court for the Southern District of Georgia, following remand from *Miller* and upheld the plan. *See* Abrams v. Johnson, 65 U.S.L.W. 4478, 4479-80 (1997) (affirming the Court's decision in Miller).

124. *See infra* notes 125-54, 191-208 and accompanying text (discussing the history of and the Court's decisions in *Shaw II* and *Vera*). The Court did not reach the merits in a Louisiana case, *United States v. Hays*, but remanded it to the district court because the Louisiana legislature reconfigured its district lines while Supreme Court review was pending. *See* Hays v. State, 936 F. Supp. 360, 364 (W.D. La. 1996). The new redistricting scheme was also appealed to the Supreme Court, but again the Court did not reach the merits of the case because it determined the plaintiffs lacked standing. *See id.* at 365. Standing would have been granted automatically had the plaintiffs been residents of the district, but as non-residents, they were required to show individualized harm. *See id.* The Court concluded that these plaintiffs could not make that showing. *See id.* This decision is significant because the *Hays* Court articulated the only real standard a plaintiff must meet to have standing to bring an equal protection claim for racial gerrymandering. *See id.*; *supra* notes 17-18 (describing the Court's prior rulings on requirements for standing).

125. *See* Shaw v. Reno, 509 U.S. 630, 658 (1993) (*Shaw I*).

claim,[126] the state had developed a redistricting plan that survived strict scrutiny.[127]

The district court initially determined that North Carolina had several compelling interests in drawing majority-minority districts.[128] First, the state had sufficient evidence to conclude that a race-based redistricting plan might prevent challenges to the legislature's redistricting scheme.[129] Without such a scheme, African-American voters might have grounds to mount a prima facie challenge under section 2 of the Act[130] to any plan that did not contain two majority-minority districts.[131] In addition, the state had ample evidence that a race-based redistricting plan supported a compelling interest in complying with section 5 of the Voting Rights Act,[132] because the Justice Department legally had denied preclearance

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126. *See* Shaw v. Hunt, 861 F. Supp. 408, 425 (E.D.N.C. 1994), *rev'd*, 116 S. Ct. 1894 (1996). The district court did not arrive at this conclusion easily. It observed that the Supreme Court's prior rulings had required plaintiffs to show concrete injury, rather than something abstract or conjectural. *See id.* at 424. In the district court's view, the injury claimed in *Shaw I*, that the redistricting plan caused harm by reinforcing racial stereotypes and creating racial divisions in society, was precisely the abstract, speculative "injury in perception" the Supreme Court previously found inadequate. *See id.* at 424-25 (quoting Powers v. Ohio, 499 U.S. 400, 426-27 (1991) (Scalia, J., dissenting)). The district court also noted that mere placement of constituents in a particular voting district did not seem to constitute unequal treatment because all eligible voters could vote and all votes carry equal weight. *See id.* at 425-28. Nonetheless, because the Supreme Court had found the "stigmatic injury" of racial classifications to constitute sufficient injury in fact to bring equal protection challenges, the district court determined the plaintiffs did have standing. *See id.* at 425-27.

127. *See id.* at 476; *see also supra* notes 89-91 and accompanying text (describing the district court's analysis in *Shaw v. Barr*). The redistricting plan survived only temporarily, however. The constitutionality of the scheme again was appealed to the Supreme Court, which held that the plan could not survive strict scrutiny. *See* Shaw v. Hunt, 116 S. Ct. 1894, 1899 (1996) (*Shaw II*). The district court's judgment was reversed. *See id.* at 1907.

128. *See* Shaw v. Hunt, 861 F. Supp. 408, 474 (E.D.N.C. 1994), *rev'd*, 116 S. Ct. 1894 (1996). The Court noted that at the compelling interest stage of analysis, the interest should be evaluated not on the basis of a particular redistricting plan, but on the basis of any race-based plan. *See id.* at 437.

129. *See id.* at 474.

130. *See* 42 U.S.C. § 1973 (1994).

131. *See Hunt*, 861 F. Supp. at 474; *see also supra* note 14 (describing the differences between challenges under sections 2 and 5 of the Act). One of the factors a state is likely to consider when drawing district lines is the possibility that too few majority-minority districts may give rise to a section 2 challenge. *See Hunt*, 861 F. Supp. at 440. While section 5 applies when a state seeks to implement a new voting practice or procedure, a section 2 challenge is based on a showing that minority access to the political process has been diluted. *See supra* note 75 and accompanying text (describing the requirements for a vote dilution claim under section 2 of the Act). A citizen, or the Justice Department, may claim a section 2 violation by showing only that discrimination has resulted from the practice or procedure in question. *See supra* note 79 and accompanying text.

132. *See* 42 U.S.C. § 1973c.

to an earlier plan.[133] The court found that the state also had a compelling interest in eradicating past discrimination in North Carolina.[134]

Using the five-part test developed by the Supreme Court in its affirmative action jurisprudence,[135] the district court determined that the North Carolina plan was sufficiently narrowly tailored to address the state's compelling interests.[136] Under part one of the test, the court examined whether the state could have accomplished its purpose by some entirely race-neutral means, or whether it would be possible to depend less on racial classifications.[137] The court determined that the plan was narrowly tailored because the state did not create more majority-minority districts than were necessary to comply with the Act, and the percentages of mi-

133. *See Hunt*, 861 F. Supp. at 474.

134. *See id.* at 443. The court noted Supreme Court decisions holding that a state may have a compelling interest in eradicating the effects of past or present discrimination, even when no statutory mandate exists. *See id.* The state could possibly exceed the requirements of the Act, with sufficient evidence that remedial action was necessary to eradicate the effects of past discrimination. *See id.* at 444.

In North Carolina, a former Confederate state with an overwhelmingly white legislature, the court found "a legacy of official discrimination and racial bloc voting . . . that has played a significant part in the ability of any African-American citizen of North Carolina, despite repeated responsible efforts, to be elected to Congress in a century." *Id.* at 476.

135. *See id.* at 445. The district court found that the Supreme Court provided no framework in *Shaw I* for conducting a strict scrutiny analysis in voting rights cases. *See id.* at 444. Therefore, the lower court looked to other Supreme Court decisions in which strict scrutiny had been applied to other race-based remedial measures. *See id.* at 445; *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507-08 (1989) (rejecting quotas as a means for removing barriers to minority participation in the construction industry); United States v. Paradise, 480 U.S. 149, 171 (1987) (stating that factors for determining whether race-conscious remedies are appropriate include: "necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief," and "the impact of the relief on the rights of third parties"); Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 486 (1986) (stating that, when considering race-conscious remedies for exclusion of minorities from membership in a union, factors to be used include: efficacy of alternatives; length of time the remedy will be required; relation of minority membership goal to concentration of minority membership in targeted population, and alternatives if the goal cannot be met); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986) (determining that other, less intrusive alternatives to race-based layoff plans are available); Fullilove v. Klutznick, 448 U.S. 448, 510-11 (1980) (finding that factors for race-conscious hiring remedies include the possibility of using other measures, length of time the remedy is expected to be required, relationship between target minority population and percentage of minorities in overall population, and availability of waiver provisions if goal cannot be met).

136. *See Hunt*, 861 F. Supp. at 475.

137. *See id.* at 445. The court reduced this analysis to two questions: whether the state had created more majority-minority districts than were reasonably necessary to comply with the Act, and whether the majority-minority districts contained substantially larger minority populations than were needed to give minority residents the opportunity to elect their preferred candidates. *See id.* at 446.

norities in those districts were no greater than necessary to give African-American voters the opportunity to elect their preferred candidates.[138]

In part two of the test, the court inquired as to whether the plan imposed a strict racial quota, or whether it offered a flexible goal by which to measure progress in eliminating discrimination.[139] The court found that no such rigid quota was imposed.[140]

Under part three of the test, the court examined whether the plan was merely temporary, with a "built-in mechanism" for reevaluation.[141] The court found that, because redistricting plans are evaluated and redrawn after every decennial census, they remain in place no longer than necessary to give minorities greater access to the political process.[142]

Under part four of the test, the court asked whether a reasonable relationship existed between the plan's goal for minority representation among a particularized group and the percentage of minorities within the targeted population.[143] The court found that, because the percentage of majority-minority districts did not exceed the percentage of minority voters in the state's population, this factor was satisfied.[144]

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138. *See id.* at 475. The districts in question contained 50.5% and 53.5% African-American voting majorities. *See id.*

139. *See id.* at 446. The district court followed Justice O'Connor's assertion in *City of Richmond v. J.A. Croson Co.*, 988 U.S. 469, 507 (1989), that quotas are constitutionally impermissible because they rest on the flawed assumption that, without unlawful discrimination, minorities would be represented in all positions in the same proportion as their representation in the general population. *See Hunt*, 861 F. Supp. at 446.

140. *See Hunt*, 861 F. Supp. at 446. The court noted that quotas are not imposed when majority-minority districts are drawn, because candidates for office can be non-minority as well as minority, and minorities are not guaranteed that their candidates will win. *See id.* Majority-minority districts merely guarantee that minority voters will have a fair opportunity to elect representatives of their choice. *See id.* at 447.

141. *See id.* In prior affirmative action decisions, the Supreme Court sought remedial measures that would be removed when the discriminatory effects were no longer felt. *See id.*; Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 479 (1986) (stating that remedial measures should be removed when no longer needed to prevent discrimination); Fullilove v. Klutznick, 448 U.S. 448, 513 (1980) (Powell, J., concurring) (stating that remedial measures should last no longer than the discriminatory behavior they were designed to eliminate).

142. *See Hunt*, 861 F. Supp. at 475. The district court also noted that the threat of lawsuits challenging the constitutionality of race-based districts will force state legislatures to reexamine redistricting plans. *See id.* at 447.

143. *See id.* at 447-48.

144. *See id.* at 448. The court was not advocating proportional representation, which Congress rejected when it amended the Voting Rights Act in 1982. *See* 42 U.S.C. § 1973(b) (1994); *Voting Rights Act Hearings Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 97th Cong. 16, 16-17, 2d Sess. (1982) (statements of Senators Hatch and Dole). Rather, the district court noted that such proportionality could serve as a "rough proxy for the equality of political and electoral opportunity that

Under part five of the test, the court examined whether, by providing benefits to an identified group, the challenged plan imposed too great a burden on innocent third parties.[145] The plaintiffs argued that an undue burden is imposed on voters when they are placed in districts that deviate from traditional redistricting principles.[146] The court held that a burden to innocent parties may, at times, be constitutionally permissible.[147] Moreover, even though the shapes of the challenged districts were not compact, the districts complied with constitutional principles; compactness simply is not a constitutional requirement.[148]

In *Shaw v. Hunt*, the district court upheld the General Assembly's decision, thus indirectly preserving the traditional principle that redistricting should remain with legislatures.[149] The court followed *Shaw I* by finding that the plaintiffs had standing[150] and by subjecting North Carolina's redistricting plan to strict scrutiny.[151] However, the court disagreed with the Supreme Court's determination that society is harmed, and the Equal Protection Clause violated, when districts are drawn along racial

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the Voting Rights Act guarantees." *Hunt*, 861 F. Supp. at 448 (citing Johnson v. De Grandy, 512 U.S. 997, 1014 n.11 (1994)).

145. *See Hunt*, 861 F. Supp. at 448. The Supreme Court has rejected affirmative action programs that cause individuals who have not been discriminated against to make sacrifices to achieve racial equality. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986) (arguing that imposition of discriminatory legal remedies against innocent people to correct societal discrimination is inappropriate); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978) (stating that it is unfair to force innocent persons to bear the burden for redressing grievances they did not create).

146. *See Hunt*, 861 F. Supp. at 449. These principles include "geographical compactness, contiguity, and respect for the integrity of [existing] political subdivisions." *Id.*

147. *See id.* at 448. Such a burden might be acceptable if innocent third parties suffered only marginal unfairness that was outweighed by the compelling interest in eradicating discriminatory practices. *See id.*

148. *See id.* at 475. The required principles include "one person, one vote," avoiding dilution of minority voting strength, and redistricting to ensure fair and effective representation for all citizens. *See id.*

149. *See id.* The district court stated this principle explicitly in *Shaw v. Barr*, observing that questions about the political and social wisdom of North Carolina's redistricting plan are political by nature. 808 F. Supp. 461, 473 (E.D.N.C. 1992), *rev'd*, Shaw v. Reno, 509 U.S. 630 (1993).

150. *See Hunt*, 861 F. Supp. at 425; *see also supra* note 126 (describing the district court's interpretation of the standing requirement in redistricting cases). The district court observed, however, that the broad definition of standing imposed by the Supreme Court has "disquieting implications." *Hunt*, 861 F. Supp. at 426.

151. *See Hunt*, 861 F. Supp. at 429. The district court seemed to anticipate the Supreme Court's holding in *Miller*, noting that, although *Shaw I* emphasized the shape of districts as a determining factor, the decision was to be understood more broadly; districts would be subjected to strict scrutiny any time they were drawn with a "deliberate racial purpose." *Id.* at 431.

lines.[152] The Supreme Court reversed the district court's decision in *Hunt*,[153] holding that the North Carolina plan could not survive strict scrutiny because the state's interests in eliminating past discrimination, and in complying with sections 2 and 5 of the Act were not sufficiently compelling.[154]

B. Miller v. Johnson: *Narrowing the Range of Permissible Race-Based Districts and Expanding the Court's Role*

Plaintiffs in Georgia stated a similar claim to that in *Shaw I*, arguing that they had suffered constitutional harm by being placed in racially gerrymandered districts.[155] Unlike the District Court for the Eastern District of North Carolina, however, the District Court for the Southern District of Georgia embraced the equal protection analysis articulated by the Supreme Court in *Shaw I*, applying the "predominant factor" test.[156]

In *Miller*, the Supreme Court found Georgia's Eleventh Congressional District unconstitutional.[157] On remand, the Georgia General Assembly

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152. *See id.* at 476. In its conclusion, the district court stated that:

> Pointing essentially to the odd shapes of the two districts resulting in part—though by no means entirely—from the legislature's racial design, the plaintiffs, through counsel, have characterized the plan as a "constitutional crime." We have concluded instead that, under controlling law, it is a justifiable invocation of a concededly drastic, historically conditioned remedy in order to continue the laborious struggle to break free of a legacy of official discrimination and racial bloc voting in North Carolina's electoral processes . . . . We decline in this case to put a halt to the effort by declaring the plan unconstitutional.

Id.

153. *See* Shaw v. Hunt, 116 S. Ct. 1894 (1996) (*Shaw II*).

154. *See id.* at 1907. The Supreme Court rejected each of the district court's grounds for a compelling interest. First, it found the state's interest in eliminating past discrimination a mere "generalized assertion," lacking in specific evidence that might afford guidance as to a remedy. *Id.* at 1902-03. Second, it held that compliance with section 5 of the Act fails to provide a compelling interest where the Justice Department demands a plan that exceeds the scope of the Act. *See id.* at 1904. Finally, the Court found that compliance with section 2 of the Act cannot provide a compelling interest where the remedy does not satisfy the requirement of geographical compactness under section 2. *See id.* at 1906.

155. *See* Miller v. Johnson, 115 S. Ct. 2475, 2485 (1995); *see also supra* notes 92-95 (discussing the Supreme Court's finding in *Shaw I* that equal protection is violated when district lines divide people by race).

156. *See* Johnson v. Miller, 864 F. Supp. 1354, 1372 (S.D. Ga. 1994) (*Johnson I*), *aff'd and remanded*, 115 S. Ct. 2475 (1995); *see also supra* notes 109-10 and accompanying text (discussing that direct evidence of the legislature's racial considerations, along with bizarre shape, can be used to prove that race was the predominant factor in the district's design).

157. *See supra* notes 85-95 and accompanying text (discussing the redistricting process in North Carolina, and the rulings on the legislature's redistricting plan in the district court and the Supreme Court).

again was faced with the task of redrawing its district lines.[158] After several failed attempts, however, the General Assembly adjourned, notifying the district court that it was unable to complete the ordered task.[159]

Demonstrating its awareness of the limits on courts' roles in redistricting,[160] but also claiming the need to act quickly as the 1996 congressional elections approached, the district court concluded that it must redraw Georgia's redistricting plan.[161] Ultimately, the district court developed a plan that departed radically from any of those drawn by the General Assembly.[162] The court acknowledged the Supreme Court's prior rulings that judicial remedies are to be limited to correcting the constitutional or statutory defects in a plan.[163] When it presented its own plan, however, the district court distinguished these decisions by claiming that deference was not possible because none of the General Assembly's plans was a "product of Georgia's legislative will."[164] The court argued that the Justice Department's unconstitutional interference tainted all the redistricting plans prepared by the General Assembly since 1990.[165]

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158. *See* Johnson v. Miller, 922 F. Supp. 1552, 1559 (S.D. Ga. 1995) (*Johnson II*), *aff'd*, Abrams v. Johnson, 65 U.S.L.W. 4478 (1997).

159. *See id.* The district court noted that it had "deferred" to the General Assembly to give the state the opportunity to develop a new congressional redistricting map. *See id.* Initially, the district court ordered the parties to submit plans that made the fewest changes possible while still correcting the unconstitutional districts. See Jurisdictional Statement and Appendix 1, 3-4, Abrams v. Johnson, 95-1425, filed March 6, 1996 [hereinafter Jurisdictional Statement]. A later order required the parties to submit proposals based on the first plan drawn and submitted to the Justice Department for preclearance. *See id.* at 4. The Governor of Georgia and other state defendants submitted nothing, claiming they did not understand the constitutional requirements. *See id.*

160. *See Johnson II*, 922 F. Supp. at 1559; *see also supra* notes 34-36 and accompanying text (describing the redistricting process as inherently political, and discussing the limitations placed by the Supreme Court on judicial intervention in this arena).

161. *See Johnson II*, 922 F. Supp. at 1559.

162. *See* Jurisdictional Statement, *supra* note 159, at 5. The court eliminated two of the three majority-minority districts from the General Assembly's plan, dispersed the African-American populations that had been located in the Second and Eleventh Districts throughout five other districts, relocated 31.2% of the state's population into new congressional districts, and moved three incumbent members of Congress, two of whom were African-American, into new districts. *See id.* at 5-7.

163. *See Johnson II*, 922 F. Supp. at 1559; *see also supra* notes 34, 36 (surveying Supreme Court decisions which stress that, in redistricting matters, courts' remedies should be limited to curing constitutional or statutory violations).

164. *See Johnson II*, 922 F. Supp. at 1560. The court reasoned that the Justice Department had influenced the legislature's planning process too heavily. *See id.* As a result, "[u]sing the current plan as a basis for the remedy would, in effect, validate the Justice Department's, constitutionally objectionable actions." *Id.*

165. *See id.* When this case first came before the district court, the court was deeply troubled by the Justice Department's involvement. *See* Johnson v. Miller, 864 F. Supp. 1354, 1367-68 (S.D. Ga. 1994) (*Johnson I*), *aff'd and remanded*, 115 S. Ct. 2475 (1995). In

In its denunciation, however, the court also rejected the General Assembly's first plan, which had been developed prior to Justice Department involvement in the state's redistricting process.[166]

Having eliminated all the General Assembly's post-1990 plans, the district court stated that its new task was comparable to those in which courts must act without any state plans to follow.[167] The court determined, therefore, that its guiding principles were to be the "one person, one vote" requirement[168] in conjunction with the state's traditional redistricting principles.[169] Noting that its plan included some deviations in population from district to district,[170] the court observed that, at times, traditional redistricting principles took precedence.[171]

Because the district court was convinced that Justice Department interference tainted any plan drawn after the 1990 census,[172] the court looked to the principles developed by the General Assembly in its 1972 and 1982 redistricting plans.[173] These principles included not splitting

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particular, the court stated its belief that the Justice Department was acting in collusion with the American Civil Liberties Union to maximize African-American voting strength. *See id.* at 1368. The Court justified its refusal to consider even the first plan drawn by the General Assembly prior to its interactions with the Justice Department, by noting that the first plan's Eleventh District contained some of the same features that became a part of the unconstitutional Eleventh District. *See Johnson II*, 922 F. Supp. at 1563 n.9.

166. *See* Jurisdictional Statement, *supra* note 159, at 15. That plan contained two majority-minority districts, rather than the court's one. *See id.* at 14.

167. *See Johnson II*, 922 F. Supp. at 1561. The district court appeared to follow the Supreme Court's rulings that judicially drawn redistricting plans must be developed according to stricter standards for population equality and fairness than legislatively drawn plans. *See* Wise v. Lipscomb, 437 U.S. 535, 541 (1978) (stating that federal courts will be held to stricter standards because courts lack the political authority of legislative bodies and must refrain from arbitrariness and discrimination); Connor v. Finch, 431 U.S. 407, 419 (1977) (finding that courts are given narrower latitude in departing from population equality standards than legislatures).

168. *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964). In *Reynolds*, the Supreme Court held that the Equal Protection Clause requires seats in a bicameral state legislature to be apportioned by population. *See id.* An individual suffers constitutional harm if his or her vote carries different weight than the votes of other citizens. *See id.* Although the emphasis in *Reynolds* was on individual rights, the Court also sought to develop legal rules that would force states to produce rational, fair redistricting plans. *See* Issacharoff, *supra* note 34, at 1650.

169. *See Johnson II*, 922 F. Supp. at 1561; *see also infra* notes 173-78 and accompanying text (describing the guidelines used by the Georgia General Assembly in redistricting).

170. *See Johnson II*, 922 F. Supp. at 1561.

171. *See id.* at 1561-62 (noting an attempt to avoid splitting pre-existing voting districts).

172. *See id.* at 1563.

173. *See id.*

political subdivisions,[174] maintaining districts in each of the four corners of the state,[175] keeping one urban minority district in Atlanta,[176] maintaining district cores,[177] and protecting incumbents.[178]

Ultimately, the district court found that, while compliance with the Act compelled Georgia to maintain one majority-minority district, it compelled no more.[179] Applying the effects test of section 2 of the Act,[180] and the three-prong *Gingles* test to determine whether section 2 violations exist,[181] the court found that no other African-American population

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174. *See id.* at 1564. The court observed that, in designing congressional districts, the General Assembly never split a county until 1972. *See id.* The 1982 plan split three counties, while the court's remedial plan split six. *See id.* The court believed this was necessary to preserve communities of voters with common interests. *See id.* The plan approved by the Justice Department, however, split twenty-three counties. *See id.*

175. *See id.* at 1565.

176. *See id.* The court determined that only one majority-minority district was necessary to comply with the Act. *See id.* According to the court, this district, the Fifth in Atlanta, could be justified because it was geographically contiguous, and a community of interest existed among the residents. *See id.*

177. *See id.* Although the court did not define these district cores, it observed that the legislature's plans in 1972, 1982, and 1992 demonstrated preference for keeping the cores intact. *See id.*

178. *See id.* Opponents of the district court's plan argue that the court took little care to protect incumbents and, ultimately, three incumbents were dislocated, two of whom were African-American. *See* Jurisdictional Statement, *supra* note 159, at 8.

179. *See Johnson II*, 922 F. Supp. at 1566. Given the Supreme Court's rulings against districts designed with race as the predominant factor in the decision making, it is ironic that the lower court chose to keep the Fifth as a majority-minority district, as it was drawn specifically because of race. *See* Karlan, *supra* note 15, at 305-06 & n.101 (describing the racial motivations in drawing the Fifth District). The district was originally designed as a remedy for a Georgia legislative plan that divided Atlanta's African-American community into two districts, neither of which had an African-American majority. *See id.*

180. *See* 42 U.S.C. § 1973 (1994); *supra* note 14 (describing the effects test under section 2). The legislative history of the Act illustrates Congress's intent that a party claiming a violation of section 2 need only show that a voting practice resulted in discrimination; intent to discriminate need not be proven. *See* S. REP. NO. 97-417, at 27 (1982); *see also* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1427 (1983) (discussing the legislative history of section 2). Section 2 now prohibits any voting standard, practice or procedure "which *results in* a denial or abridgment" of the right to vote. 42 U.S.C. § 1973(a) (1994) (emphasis added); *see also* Williamson, *supra* note 9, at 15 n.81 (describing congressional intent that a violation of section 2 could be established with a showing of discriminatory effect).

181. *See* Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986); *see also supra* text accompanying note 80 (describing the *Gingles* test). Although in *Shaw I*, Justice O'Connor described the plaintiffs' equal protection claim as one "analytically distinct" from vote dilution, see *Shaw v. Reno*, 509 U.S. 630, 652 (1993) (*Shaw I*), the geographical compactness component of the *Gingles* test clearly remains significant as an indicator of race-based redistricting. *See* Bush v. Vera, 116 S. Ct. 1941, 1952 (1996) (observing that Districts 18, 19, and 30 in Texas were among the most irregularly shaped in the country); Shaw v.

in the state was sufficiently large and geographically compact to warrant another majority-minority district.[182] In addition, the court found evidence that minority candidates throughout the state had gained support from majority voters; while some vote polarization did exist, it was not "alarming."[183]

Regarding section 5 of the Act,[184] the court observed that, unlike the General Assembly, it was not required to seek preclearance from the Justice Department.[185] Therefore, whether the district court acted appropriately or not, its actions were protected from oversight with respect to the mandates of the Voting Rights Act.[186]

Private appellants and the Justice Department challenged this plan, arguing, among other things, that the District Court disregarded the Georgia General Assembly's preference for two majority-minority districts and the court-drawn plan violated sections 2 and 5 of the Voting Rights Act.[187] The Supreme Court, in a five to four decision, found that the district court did not err in rejecting all redistricting plans drawn after 1990,[188] and that the district court's plan did not violate the Voting Rights Act.[189] Justice Breyer wrote a strong dissent arguing that the legislative

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Hunt, 116 S. Ct. 1894, 1906 (1996) (*Shaw II*) (noting the geographical compactness requirement). Prior to *Shaw I*, legislatures could conclude that if people voted in racial blocs and candidates preferred by minority voters generally were defeated, additional majority-minority districts were necessary, where they could be drawn, to prevent section 2 challenges. *See supra* text accompanying note 82 (describing Justice Brennan's primary concerns for proof of vote dilution); *see also* Parker, *supra* note 15, at 4. At that time, the standard of geographical compactness either was not applied or was not imposed strictly. *See id.* at 4 n.14.

182. *See Johnson II*, 922 F. Supp. at 1566.

183. *See id.* at 1567.

184. *See* 42 U.S.C. § 1973c (1994).

185. *See Johnson II*, 922 F. Supp. at 1569. Section 5 review is not required for plans developed by federal courts. *See id.* The court noted that, when a plan is drafted by a legislature and is merely reviewed by a federal court, it must meet the preclearance requirements of section 5. *See id.*

186. See id.

187. *See* Abrams v. Johnson, 65 U.S.L.W. 4478, 4479-80 (1997).

188. *See id.* at 4483. The Court found support for the district court's assertion that a second majority-minority district could not be drawn without considering race over other redistricting principles. *See id.* It also agreed that pressure from the Justice Department had caused the General Assembly to include two majority-minority districts in its first plan since the 1990 census, even before the Justice Department had begun its preclearance process. *See id.*

189. *See id.* at 4484-85. Regarding section 2 of the Act, the Court relied primarily on the first of the criteria articulated in *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), requiring a minority group to be sufficiently large and geographically compact to form a majority in a voting district. *See Abrams*, 65 U.S.L.W. at 4483. Determining that the General Assembly's 1982 redistricting plan was the most recent constitutional benchmark for assessing retrogression, the Court readily found that the district court's plan was not retro-

decisions made by the Georgia General Assembly in this decade were influenced by many forces, and the Justice Department's influence was not unusual or inappropriate.[190]

C. Bush v. Vera: *Setting Limits on Judicial Activity*

The District Court for the Southern District of Texas adopted a third approach to the redistricting dilemma. Like the District Court for the Southern District of Georgia in *Miller*, the court had determined that three of its congressional districts were so disfigured that racial segregation must have been the predominant consideration in their design.[191] Applying strict scrutiny, the court determined that the state could satisfy a compelling interest in complying with section 2 of the Act by designing more regularly shaped majority-minority districts;[192] however, this plan, with its intricate district designs, was not narrowly tailored to fulfill the requirements of section 2.[193] Despite the fact that the court followed *Shaw I* fairly closely in finding constitutional harm when race-based districts are drawn,[194] on remand the court took a somewhat more restrained approach in designing its remedial plan than that taken by the Georgia court.[195]

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gressive. *See id.* at 4485.

190. *See Abrams*, 65 U.S.L.W. at 4491. Justice Breyer observed that the Court should not listen to the post hoc expressions of some members to ascertain the will of the General Assembly as it was developing its plans, or overlook the pressures and considerations other than race that may have influenced their thinking. *See id.* He questioned why the influence exerted by the Justice Department should be considered less legitimate than that of other groups, such as consumer groups, businessmen, or farmers. *See id.*

191. *See* Vera v. Richards, 861 F. Supp. 1304, 1344 (S.D. Tex. 1994), *aff'd*, Bush v. Vera, 116 S. Ct. 1941 (1996). Both the Texas and Georgia district courts delivered their opinions after the Supreme Court announced its decision in *Shaw I* on June 28, 1993. *See id.*; Johnson v. Miller, 864 F. Supp. 1354, 1354 (S.D. Ga. 1994) (*Johnson I*), *aff'd and remanded*, 115 S. Ct. 2475 (1995). The Georgia district court decided *Johnson I* on September 12, 1994, less than a month after the Texas court delivered its opinion in *Richards*.

192. *See Richards*, 861 F. Supp. at 1342.

193. *See id.* at 1344.

194. *See id.* at 1310. The court determined that race had influenced the redistricting process significantly, making Districts 18, 29, and 30 unconstitutional. *See* Vera v. Bush, 933 F. Supp. 1341, 1342 (S.D. Tex. 1996). Districts had been drawn, almost block by block, to correspond with minority populations. *See id.* The court found this reliance on race to be an unconstitutional use of racial stereotypes. *See id.* at 1344 (citing Bush v. Vera, 116 S. Ct. 1941, 1964 (1996)).

195. *See Vera*, 933 F. Supp. at 1344-45. The court, quoting several Supreme Court opinions, observed that reapportionment is a legislative responsibility, and that the judiciary may only intervene when the legislature has failed to act. *See id.*; *see also infra* notes 214-20 and accompanying text (discussing the Texas court's limited action, adhering to the traditional understanding that courts' roles in redistricting are to be circumscribed). By contrast, the Georgia district court, while referring to the Supreme Court's rulings on

Following the 1990 census, Texas became entitled to three additional voting districts, raising its total allocation to thirty.[196] The Texas Legislature developed a redistricting plan that placed two new districts in the Houston area and one in Dallas County.[197] Six Texas voters challenged the plan, claiming that all thirty districts in the state were racial gerrymanders that violated their rights under the Fourteenth Amendment.[198] The District Court for the Southern District of Texas ruled that only three of the newly created districts were race-based gerrymanders.[199] In arriving at its decision, the court examined the state's use of a computer program that analyzed racial data on a nearly block-by-block basis.[200] The court observed that the lines drawn on the redistricting map corresponded almost exactly with locations of African-American, Hispanic, and white populations.[201] In addition, the court found direct evidence of racial motivation within the legislature.[202] Applying strict scrutiny, the court determined that the shape of a majority-minority district must be

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limited judicial authority in redistricting, developed a permanent plan that radically altered district lines, reduced the number of majority-minority districts from three to one, and ignored the General Assembly's post-1990 planning preferences. *See Johnson II*, 922 F. Supp. at 1559; *supra* notes 155-90 and accompanying text (discussing the Georgia district court's plan.) However, because the districts had been reconfigured, the court also invalidated the congressional primaries in the redrawn districts, requiring new primaries to be held concurrently with the 1996 presidential election. *See Vera*, 933 F. Supp. at 1342. This is a significant intervention into the electoral process.

196. *See* Bush v. Vera, 116 S. Ct. 1941, 1950 (1996). The census results revealed that the population increased primarily in urban areas with minority populations. *See id.*

197. *See id.* at 1950-51. Districts 18 and 29 were created near Houston and District 30 was placed in Dallas County. *See id.* at 1951.

198. *See id.*; *see also supra* note 16 (providing relevant text of the Fourteenth Amendment).

199. *See Bush*, 116 S. Ct. at 1951. Of all the districts challenged, the only ones the court found unconstitutional were two that were majority African-American and one that was majority Hispanic. *See* McDonald, *supra* note 99, at 151. Eighteen of the challenged districts were majority-white. *See id.* While the court acknowledged that a number of these were bizarrely shaped, it determined they were designed less to favor one race over another than to protect incumbents. *See id.* at 152.

200. *See Bush*, 116 S. Ct. at 1953. The lines forming the unconstitutional districts were drawn almost block-by-block, and correlated very closely with pockets of minority voters. *See id.* These districts also created practical problems because the zigzag of district lines split voting precincts, making campaigning and election management difficult. *See id.* at 1959.

201. *See* Vera v. Richards, 861 F. Supp. 1304, 1308 (S.D. Tex. 1994), *aff'd*, Bush v. Vera, 116 S. Ct. 1941 (1996).

202. *See Bush*, 116 S. Ct. at 1952. This evidence was ascertained partly from a letter from the legislature to the Justice Department, pointing out that the districts were configured to allow minorities to elect representatives to Congress. *See id.* at 1952-53. In addition, the State conceded that the districts were created to enlarge electoral opportunities for minority voters. *See id.* at 1953.

as traditional as possible when a state is seeking to comply with the Act.[203]

The Supreme Court affirmed the district court's judgment,[204] finding that race was the predominant factor in the state's decision making.[205] The Court "assume[d] without deciding" that a state may have a compelling interest in avoiding a violation of section 2 of the Act.[206] Still, to be narrowly tailored to this state interest, the shape of the district would have to comply with the *Gingles* test, and adhere to more traditional redistricting principles.[207] The Court determined that the shape of these districts failed to meet the *Gingles* compactness requirement.[208]

Following the district court's initial decision, the Texas Legislature held hearings in 1995, but declined to develop a new redistricting plan.[209] When the Supreme Court affirmed the district court's decision, the Governor of Texas decided against calling a special session of the legislature before the November 1996 congressional elections.[210] Because the legislature failed to act, the district court determined that it must assume responsibility for drawing a new plan.[211] The court reasoned that it would be better to provide the state with an interim plan than to proceed with elections in districts that were unconstitutional, particularly when two

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203. *See Richards*, 861 F. Supp. at 1343.

204. *See Bush*, 116 S. Ct. at 1964.

205. *See id.* at 1958-60. The Supreme Court noted, however, that race was not the only consideration when these district boundaries were drawn. *See id.* at 1952. For example, in Districts 18 and 29, the state maintained the integrity of already existing jurisdictional lines, kept their urban character, and kept them relatively compact. *See id.* at 1953-54. Also, the unusual shape of District 30 was attributable in part to efforts to protect incumbents. *See id.* at 1955-56. Despite the Court's finding of race as the predominant factor in the district's design, incumbency protection played a genuinely significant role. *See* David M. Guinn & Paul C. Sewell, Miller v. Johnson: *Redistricting and the Elusive Search for a Safe Harbor*, 47 BAYLOR L. REV. 895, 914-15 (1995) (observing that the district court raised the issue of incumbency protection, but focused instead on the evidence of racial consideration in the designs of the districts).

206. *See Bush*, 116 S. Ct. at 1960.

207. *See id.* at 1961. The Court applied the three-prong test in *Thornburg v. Gingles* to determine liability under section 2 of the Act, and found that the minority populations were not sufficiently geographically compact to compel formation of majority-minority districts. *See id.*; *see also supra* note 80 and accompanying text (describing the *Gingles* test).

208. *See Bush*, 116 S. Ct. at 1961.

209. *See* Vera v. Bush, 933 F. Supp. 1341, 1344 (S.D. Tex. 1996).

210. *See id.* The Texas Lieutenant Governor and the Speaker of the House stated that "the legislators were uninterested in and would be inconvenienced by the holding of a special session." *Id.*

211. *See id.* at 1346.

congressional election cycles already had passed under the unconstitutional plan.[212]

The Texas district court approached its task very differently than the district courts in Georgia and North Carolina.[213] First, the Texas court acknowledged the Supreme Court's decisions in *Reynolds v. Sims*,[214] *Wise v. Lipscomb*,[215] and *Upham v. Seamon*.[216] From these cases, the court noted that redistricting is a political task reserved for political bodies.[217] Nonetheless, because in the instant case, the legislature chose not to complete this task,[218] the court would be required to remedy the constitutional problem.[219]

Aware of its limited role, the court first devised only an interim redistricting plan, stating that it would require the Texas Legislature to draw its own scheme the following year.[220] Although the plan was designed to be temporary, the court sought to comply with the requirements for permanent court-ordered redistricting plans.[221] These include "population equality; compliance with [sections] 2 and 5 of the Voting Rights Act; tailoring the districts as closely as possible to the scope of the viola-

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212. *See id.*

213. *See supra* notes 155-90 and accompanying text (discussing the redistricting plan developed by the District Court for the Eastern District of Georgia in response to the Supreme Court's decision in *Miller*); *supra* notes 125-54 and accompanying text (discussing the North Carolina district court's response to the Supreme Court's ruling in *Shaw I*).

214. 377 U.S. 533 (1964). The *Reynolds* Court determined that, while redistricting is a complex process involving many considerations that should be left to the states, there are times when the judiciary must protect those whose constitutional rights are denied. *See id.* at 566. The Court held that the Equal Protection Clause requires that voting districts be apportioned on a population basis to assure that each person's vote carries the same weight. *See id.* at 568.

215. 437 U.S. 535, 539-40 (1978) (acknowledging that redistricting is a legislative task, but where a legislature fails to carry out its responsibility, the courts are obliged to impose a plan, which will be held to stricter standards than a plan drawn by the legislature).

216. 456 U.S. 37, 43 (1982) (stating that, where a district court must correct a state's apportionment plan, its modifications are limited to those necessary to correct a constitutional or statutory defect; the court is not at liberty to ignore the state's political objectives).

217. See Vera v. Bush, 933 F. Supp. 1341, 1344-45 (S.D. Tex. 1996).

218. *See id.* at 1346; *see also supra* notes 209-10 and accompanying text (describing the Texas Governor's refusal to call a special session of the legislature to develop a new redistricting plan).

219. *See Vera*, 933 F. Supp. at 1346.

220. *See id.*; *supra* notes 155-90 and accompanying text (describing the redistricting plan developed by the District Court for the Eastern District of Georgia in response to the Georgia General Assembly's failure to draw a new plan).

221. *See Vera*, 933 F. Supp. at 1347; *supra* note 167 and accompanying text (discussing the Supreme Court's rulings that courts will be held to stricter standards in redistricting than legislatures).

tion; and effectuating 'the legislative choices' in the previous redistricting plans."[222] The court explained that it tried to maintain the "compactness and contiguity" of districts, while affecting the surrounding districts as little as possible.[223] It also tried to maintain relatively high minority populations in the unconstitutional districts.[224]

The court redrew the boundaries for the three new districts, and redesigned portions of ten others.[225] In each of these thirteen districts, the court invalidated already completed congressional primaries and ordered open primaries to be held in conjunction with the 1996 presidential election.[226]

D. District Courts Attempt to Apply the Shaw I *and* Miller *Tests*

The variety of responses to the Supreme Court's rulings on voting districts in North Carolina, Georgia, and Texas indicates that the predominant factor standard delineated in *Miller* has proven to be the type of judicially unmanageable standard feared by Justice Frankfurter in his *Baker* dissent.[227] The district court in North Carolina ruled that the state legislature's redistricting plan survived strict scrutiny, a decision subsequently reversed by the Supreme Court.[228] In Georgia, when the General Assembly failed to develop a new plan, the district court drew a permanent plan that differed dramatically from the General Assembly's

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222. *Vera*, 933 F. Supp. at 1347.

223. *Id.* at 1348. Despite these efforts, the court found the interim plan required that lines for thirteen districts be redrawn. *See id.* at 1353.

224. *See id.* at 1350.

225. *See id.* at 1342.

226. *See id.*

227. *See* Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting); *see also supra* note 55 (describing Justice Frankfurter's concerns that when courts enter the political arena, particularly without a clear set of guidelines articulated by the Supreme Court, confusion will result and the credibility of the Court will be undermined); *see also* Samuel Issacharoff, *Racial Gerrymandering in a Complex World: A Reply to Judge Sentelle*, 45 CATH. U. L. REV. 1257, 1264 (1996) (observing that the judiciary is not an appropriate institution for addressing the political and distributional concerns underlying redistricting; since there are no discernible standards for lower courts to follow, in the process, judicial legitimacy is lost); Karlan, *supra* note 15, at 299 ("The Court has yet to discover, or at least to articulate in a fashion it thinks the lower courts can apply, a manageable standard for deciding when race-conscious districting is permissible."). The judiciary, rather than being a body of neutral interpreters, is using its own political philosophy about race and democracy to manage the redistricting process. *See id.*; *see also* Taylor, *supra* note 36, at 435 (stating that existing judicial standards are not necessarily applicable to multi-racial districts and arguing that the Supreme Court must develop workable standards to guide lower courts in voting rights decisions).

228. *See* Shaw v. Hunt, 861 F. Supp. 408, 476 (E.D.N.C. 1994), *rev'd*, 116 S. Ct. 1894 (1996).

proposed plans since 1990.[229] When the Supreme Court found three Texas districts to be unconstitutionally race-based gerrymanders, and the legislature refused to call a special session to correct its plan, the federal district court in Texas devised a limited interim plan, stating that the legislature must take ultimate responsibility for redistricting.[230]

Further evidence of the difficulty in applying the predominant factor standard can be found in California and Illinois redistricting plans, that the Supreme Court has not yet reviewed. On the same day the Supreme Court ruled on the Georgia districts in *Miller*, it summarily affirmed California's legislative redistricting plan, which also had been challenged as a racial gerrymander.[231] California's plan was drawn by a panel of three special masters after the legislature failed to agree on a redistricting scheme.[232] In approving the plan, the California Supreme Court observed that the special masters succeeded in maximizing the voting potential of all "'functionally, geographically compact' minority group[s]" and giving great consideration to the requirements of the Act.[233] The district court found it unnecessary to apply strict scrutiny, despite the plaintiffs' argument that race had been considered in the planning, because the special masters had balanced many traditional redistricting principles, including the requirements of the Act.[234]

229. *See* Johnson v. Miller, 922 F. Supp. 1556, 1560-61 (S.D. Ga. 1995) (*Johnson II*), *aff'd*, Abrams v. Johnson, 65 U.S.L.W. 4478 (1997). This plan was reviewed by the Supreme Court on December 9, 1996, and the district court's judgment was affirmed. *See* Abrams v. Johnson, 65 U.S.L.W. 4478, 4480 (1997).

230. *See* Vera v. Bush, 933 F. Supp. 1341, 1346 (S.D. Tex. 1996).

231. *See* DeWitt v. Wilson, 856 F. Supp. 1409, 1411 (E.D. Cal. 1994), *aff'd in part*, 115 S. Ct. 2637 (1995).

232. *See* McDonald, *supra* note 99, at 147. The special masters were required to follow a set of California redistricting criteria that included population equality among districts, contiguity and compactness, and respect for jurisdictional boundaries and geographic regions. *See DeWitt*, 856 F. Supp. at 1411. The masters held hearings for six days and received twenty-two proposed redistricting schemes, all of which they rejected because the plans did not satisfy the criteria the masters were to follow. *See id.* The masters gave careful attention to the requirements of the Act, seeking to draw boundaries that would withstand section 2 challenges. *See id.* They considered the "functional[] geographical[] compact[ness]" of minority groups as well as actual geographical compactness, demonstrating regard for a sense of community despite the absence of clear geographical boundaries. *Id.* Ultimately, the California Supreme Court and the federal district court approved the plan developed by the masters because it balanced traditional redistricting principles with the requirements of the Act. *See id.* at 1413.

233. *See DeWitt*, 856 F. Supp at 1411 (citing Wilson v. Eu, 823 P.2d 545, 549 (Cal. 1992)).

234. *See id.* at 1413. The court concluded that if strict scrutiny had been necessary, the California plan would have been sufficiently narrowly tailored to survive. *See id.* at 1415. The simultaneous decisions in *Miller* and *DeWitt* are not easily reconciled; the California special masters clearly accounted for the voting potential of minority groups, while

In Illinois, when state legislators failed to develop a redistricting plan after the 1990 census, a panel of the District Court for the Northern District of Illinois assumed the responsibility.[235] The panel selected a plan that included a majority-Hispanic district, the Fourth District in Chicago.[236] The court determined that a majority-Hispanic district was mandated under section 2 of the Act because the Hispanic population in Chicago met the *Gingles* test.[237] Plaintiffs challenged the district as an unconstitutional racial gerrymander.[238]

Noting the unusual shape of the Fourth District, a second panel of the district court heard the challenge, and determined that the court clearly had considered race and ethnicity in its attempt to meet the requirements of the Act.[239] The court noted a lack of guidance from the Supreme Court regarding standards for deciding when a redistricting plan is narrowly tailored, and further observed that as a result, district courts have been deciding these matters inconsistently.[240] In applying strict scrutiny, however,[241] the court determined that the plan was narrowly tailored to meet the state's compelling interest.[242] The district court's decision was appealed to the Supreme Court, which vacated and remanded

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carefully adhering to traditional redistricting principles. *See* McDonald, *supra* note 99, at 148.

235. *See* King v. State Bd. of Elections, No. 95 C 827, 1996 WL 130439, at *1 (N.D. Ill. Mar. 15, 1996), *vacated and remanded*, 117 S. Ct. 429 (1996). Illinois had lost two seats in Congress due to reapportionment under the 1990 census. *See id.* at *6.

236. *See id.* at *1. Five lawsuits were filed, seeking declaration that the existing redistricting plan was unconstitutional due to population and demographic changes. *See id.* Each of the plaintiffs prepared a plan and all five suits were consolidated for trial. *See id.* The parties agreed that the demographic changes in Chicago mandated creation of a majority-Hispanic district. *See id.* at *7. The court's role was limited significantly to determining which of two redistricting plans was constitutionally stronger, and deciding whether a majority-Hispanic district was required under section 2 of the Act. *See id.*

237. *See id.* at *9; *see also supra* text at note 80 (describing the test in *Thornburg v. Gingles* for determining whether a majority-minority district is required under section 2 of the Act).

238. *See King*, 1996 WL 130439, at *10.

239. *See id.* at *11-*12. The court noted that the district was approved before *Shaw I* and *Miller* had been decided, and it would therefore be necessary to review the plan de novo. *See id.* at *10.

240. *See id.* at *28.

241. *See id.* at *17.

242. *See id.* at *28. The court noted that the plan was warranted under section 2 of the Act because Hispanics historically had been blocked from elective office and the district was sufficiently geographically compact. *See id.* at *25. The court also found the plan to be narrowly tailored, in that it was no more drastic than required to remedy the nature of the section 2 violation. *See id.* at *28. Only one majority-Hispanic district was created, and its shape was warranted to preserve a Hispanic community of interest, while protecting nearby majority-African-American districts. *See id.*

in light of the Supreme Court's recent decisions in *Shaw II* and *Bush v. Vera*.[243]

IV. THE LESSONS IN A LIMITED SURVEY

Although federal courts have operated for nearly three decades under *Baker v. Carr*,[244] finding redistricting matters justiciable despite their inherently political nature, the Supreme Court in *Shaw I* dramatically altered the course of judicial activity in this area.[245] The result has been enormous changes in the roles of state legislatures, federal courts, and even the Supreme Court itself.

Case law illustrates a number of state legislatures that have been unable or unwilling to complete their redistricting responsibilities.[246] Though legislatures are the bodies best able to identify and reconcile the various interests and policies of those they represent,[247] they now claim the task has become impossible.[248]

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243. *See* King v. Illinois Bd. of Elections, 117 S. Ct. 429 (1996).

244. 369 U.S. 186 (1962).

245. *See* Maltz, *supra* note 36, at 722 (describing the judiciary's decision as no ordinary assertion of judicial authority, but rather as a significant new role for the judiciary in the reapportionment process). Not only have state legislatures been forced to draw districts that avoid the prohibitions of impermissible race-based redistricting while satisfying the requirements of the Voting Rights Act, but the authority granted to the Attorney General by Congress to implement section 5 of the Act has been changed significantly. *See id.* at 720. Once ruled to be unreviewable, the Attorney General's actions are now subject to intense judicial scrutiny. *See id.* at 721-22.

246. *See* King v. State Bd. of Elections, No. 95 C 827, 1996 WL 130439, at *1 (N.D. Ill. Mar. 15, 1996) (describing the Illinois General Assembly's failure to complete its redistricting plan, requiring a panel of the District Court for the Eastern District of Illinois to develop a new plan), *vacated and remanded*, 117 S. Ct. 429 (1996); Vera v. Bush, 933 F. Supp. 1341, 1344 (S.D. Tex. 1996) (noting that the Texas Governor refused to call a special session of the legislature to draw a new plan, following the Supreme Court's ruling that Districts 18, 29, and 30 were unconstitutional racial gerrymanders); Johnson v. Miller, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995) (*Johnson II*) (describing the Georgia General Assembly's failure, when the Supreme Court found the Second and Eleventh Districts unconstitutional, to develop a new redistricting plan, ultimately turning the task to the district court), *aff'd*, Abrams v. Johnson, 65 U.S.L.W. 4478 (1997); DeWitt v. Wilson, 856 F. Supp. 1409, 1410 (E.D. Cal. 1994) (describing the California legislature's deadlock during its redistricting process, and the California Supreme Court's appointment of a panel of special masters to complete the project), *aff'd in part*, 115 S. Ct. 2637 (1995).

247. *See generally* Connor v. Finch, 431 U.S. 407 (1977). Courts, by contrast, lack the authority to make these judgments because they stand outside the political process. *See id.* at 415.

248. *See* Jurisdictional Statement, *supra* note 159, at 2 (citing submission of defendants Miller, Cleland, and Howard in connection with the issue of remedy). For example, a member of the Georgia General Assembly, describing the legislature's inability to arrive at a new plan, said members no longer know what is constitutionally permissible. *See id.*

As legislatures have withdrawn from redistricting, judicial activity has increased along with a wide range of interpretations of *Shaw I* and *Miller*.[249] Some courts have refused to apply strict scrutiny to redistricting schemes in which race has appeared to be a substantial consideration.[250] Others have applied strict scrutiny, but have upheld the redistricting schemes, determining that the legislative plans were narrowly tailored to compelling state interests.[251] Still others have applied strict scrutiny, and eagerly invalidated majority-minority districts.[252] This range of judicial decisions indicates that no manageable standard yet exists which might provide some consistency in judicial decision making.[253]

To some extent, the varied approaches taken by state legislatures and federal courts are unavoidable. The Supreme Court has articulated a new cause of action under the Equal Protection Clause, and some time must pass before the lower courts shape an interpretation of that cause of action.[254] Nonetheless, the Supreme Court has contributed significantly to the confusion in three ways. First, it has created vague standards, which are difficult to apply,[255] and has applied these standards in-

249. *See infra* notes 253-54, *supra* note 122 and accompanying text (describing the variety of interpretations of *Shaw I* and *Miller* by lower courts).

250. *See DeWitt*, 856 F. Supp. at 1415 (concluding that the plan, drawn by a panel of special masters, was not a racial gerrymander but a careful application of traditional redistricting principles, and strict scrutiny did not apply).

251. *See* King v. State Bd. of Elections, 1996 WL 1390439 (N.D. Ill. Mar. 15, 1996), *vacated and remanded*, 117 S. Ct. 429 (1996) (determining that the plan was required to remedy a violation under section 2 of the Act, and that the remedy was proportioned appropriately to the violation); *see also* Shaw v. Hunt, 861 F. Supp. 408, 476 (E.D.N.C. 1994) (finding the plan narrowly tailored to the state's compelling interest because an overwhelmingly white legislature had enacted a deliberately race-based plan to comply with the Act and the Fourteenth and Fifteenth Amendments, and because the white voters challenging the plan had not been harmed in any legally cognizable way), *rev'd*, 116 S. Ct. 1894 (1996).

252. *See* Johnson v. Miller, 864 F. Supp. 1354, 1393 (S.D. Ga. 1994) (*Johnson I*) (finding that the racially motivated redistricting plan was not required under section 2 or section 5 of the Voting Rights Act and would therefore not withstand strict scrutiny), *aff'd and remanded*, 115 S. Ct. 2475 (1995); Vera v. Richards, 861 F. Supp. 1304, 1308 (S.D. Tex. 1994) (ruling that, of twenty-four challenged districts in Texas, three were unconstitutional race-based gerrymanders that could not withstand strict scrutiny), *aff'd*, Bush v. Vera, 116 S. Ct. 1941 (1996).

253. *See King*, 1996 WL 130439, at *28. The district court in *King* observed that the Supreme Court has not provided standards that would help states determine when a redistricting plan is narrowly tailored, and courts therefore have made inconsistent rulings. *See id.* The court in *King* found that it could defer to the judgment of the court that developed the Illinois plan. *See id.*

254. *See supra* notes 92-95 and accompanying text (discussing the Court's change of emphasis from protecting minorities to addressing social harms created by making distinctions among the races).

255. *See* Bush v. Vera, 116 S. Ct. 1941, 1998 (1996) (Souter, J., dissenting). Justice

consistently.[256] Second, since deciding *Shaw I*, the Court's opinions have been highly divided, failing to provide direction to the lower courts, and appearing arbitrary in equal protection rulings.[257] Finally, since *Shaw I*, the Court has never clarified the significance of the Voting Rights Act in creating majority-minority districts.[258]

Regarding vague standards, the Court ruled over thirty years ago that legislative redistricting decisions are justiciable,[259] but it has made clear

Souter noted that, when devising a new constitutional cause of action, the Court must identify an injury distinguishable from the consequences of constitutional conduct, and it should provide specific guidance that would give rise to such a claim. *See id.* at 1997. This will provide fair notice to those whose conduct might give rise to liability. *See id.* Justice Souter determined that the principles of justification, guidance, and notice have not been articulated since *Shaw*. *See id.* at 1998. Consequently, legislatures have been confused and have shifted responsibility for districting to the courts. *See id.* This could wholly eliminate states' discretion in redistricting. *See id.;* Shaw v. Hunt, 116 S. Ct. 1894 (1996) (*Shaw II*). The Supreme Court, after twice hearing arguments on the snakelike Twelfth District, found it unconstitutional. *See* Shaw II, 116 S.Ct. at 1899; *see also* Abrams v. Johnson, 65 U.S.L.W. 4478 (1997) (Breyer, J., dissenting) (stating that the decision increases the likelihood that the predominant factor standard would prove to be extremely confusing for lower courts to apply, that courts' roles in redistricting would be enlarged, and that legitimate uses of race in redistricting would be discouraged).

256. *Compare* Miller v. Johnson, 115 S. Ct. 2475, 2486 (1995) (applying strict scrutiny where race was shown to be the predominant factor motivating the design of Georgia's Eleventh District), *with* DeWitt v. Wilson, 115 S. Ct. 2637 (1995), *aff'g* 856 F. Supp. 1409 (E.D. Cal. 1994) (affirming, on the same day it decided *Miller*, a redistricting plan drawn by a panel of special masters who considered race along with other redistricting principles and the requirements of the Voting Rights Act).

257. *See Bush*, 116 S. Ct. at 1949. The opinion was written by Justice O'Connor, and joined by Chief Justice Rehnquist and Justice Kennedy. *See id.* at 1950. Justice Thomas wrote a concurring opinion, in which Justice Scalia joined, arguing that racial gerrymanders should always be subject to strict scrutiny. *See id.* at 1972 (Thomas, J., concurring). Justice O'Connor wrote a concurring opinion to supplement the majority opinion, emphasizing that compliance with the Voting Rights Act is a compelling state interest and that the results test of section 2 can coexist in principle and in practice with the goal of eliminating the use of racial stereotypes. *See id.* at 1968 (O'Connor, J., concurring). Justice O'Connor clearly expressed that states may create majority-minority districts intentionally, as long as they do not subordinate traditional redistricting criteria to race. *See id.* at 1969. The composition of the Court in this opinion is interesting. Apparently, Justice O'Connor's more moderate approach was too moderate even for those who joined the plurality opinion, necessitating that she express her views in a separate concurrence. Each of the districting cases heard by the Court since *Shaw I* has been won with only five votes, and within those five, factions exist. *See* Abrams v. Johnson, 65 U.S.L.W. 4478 (1997); *Bush*, 116 S. Ct. at 1948; *Shaw II*, 116 S. Ct. at 1898; *Miller*, 115 S. Ct. at 2482; Shaw v. Reno, 509 U.S. 630, 632 (1993) (*Shaw I*).

258. *See Miller*, 115 S. Ct. at 2493 (suggesting that improper applications of the Voting Rights Act call its constitutionality into question, but deciding that particular issue did not need to be addressed in the present case); *Shaw I*, 509 U.S. at 655-56 (finding that the Justice Department exceeded its authority under section 5 of the Act, but refraining from determining whether the district in question was required under section 2).

259. *See* Baker v. Carr, 369 U.S. 186, 187-98 (1962); *see also supra* notes 51-55 and

that judicial authority over redistricting is not unlimited. In *Baker*, and in a number of cases that followed, the Court emphasized that redistricting is a legislative function; courts should intervene with caution.[260] Primarily, judicial activism is appropriate only when courts can apply a judicially manageable standard to distinguish those who have been truly harmed from those who are merely dissatisfied.[261]

The standard articulated in *Shaw I* and broadened in *Miller* lacks manageability in several respects. The Court has extended equal protection to include all of society when it is affected by any governmental decision that reflects ideals contrary to public values.[262] The ambiguity of this definition is illustrated clearly even at the beginning of judicial inquiry, when a court determines whether a plaintiff has standing to bring an equal protection claim.[263] In cases involving majority-minority districts, the Court has ruled that individuals living in these districts have standing.[264] The concept of individualized harm in this context has nearly disappeared.[265]

Prior to *Shaw I*, the Court required anyone seeking to bring an equal protection claim to show concrete harm to an individual or identifiable class of persons.[266] A plaintiff seeking to prove the dilution of minority

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accompanying text (discussing the decision in *Baker*).

260. *See supra* notes 34-35 (describing the Supreme Court's decisions that have limited the lower courts' latitude in redistricting).

261. *See Bush*, 116 S. Ct. at 2001 (Souter, J., dissenting). Justice Souter observed that, until *Shaw I*, judicially manageable standards existed because the Court required that voting districts contain generally equal populations and because it applied the *Gingles* test to vote dilution claims. *See id.* Such standards helped "to separate victims of political 'inequality' from those who just happened to support losing candidates." *Id.*

262. *See* Pildes & Niemi, *supra* note 21, at 506-07. The constitutional injury is known as an "expressive harm" because it results from ideas or attitudes rather than the material consequences of governmental action. *See id.* at 507. If courts find constitutional causes of action in expressive harms, they must determine what social message is conveyed, or even merely perceived, by governmental action. *See id.* at 508. These claims bear almost no relation to a vote dilution cause of action under the Fourteenth Amendment, which requires a showing of material harm to an identified class of persons. *See id.* at 492-93.

263. *See supra* notes 17-18 (discussing the Court's rulings on standing, both generally and in the context of voting districts).

264. *See* United States v. Hays, 115 S. Ct. 2431, 2436 (1995) (determining that individualized harm cannot be shown, and therefore plaintiffs lack standing to bring an equal protection claim regarding a district if they do not reside in that district), *vacating* Hays v. State, 862 F. Supp. 119 (W.D. La. 1994).

265. *See* Karlan, *supra* note 15, at 292. Karlan argues that simply living in a majority-minority district does not prove a racial harm, because with respect to all but members of the minority the district is designed to serve, race is irrelevant. *See id.* In addition, Karlan points out that, by focusing exclusively on the harms of racial segregation, the Court overlooks the fact that the majority-minority districts are quite racially diverse. *See id.*

266. *See supra* notes 17-18 and accompanying text (describing the requirements for

voting strength must still show that there is a sufficient concentration of a minority population to form a district, the minority forms a cohesive voting bloc, and that the minority group is defeated consistently by majority bloc voting.[267] Since *Shaw I* and *Miller*, a voter can bring an equal protection claim against a majority-minority district simply if he or she lives in that district.[268] These plaintiffs need not prove substantive harm.[269]

Also unmanageable is the concept, introduced in *Miller*, of race as the predominant factor in redistricting.[270] The redistricting process is so fraught with competing interests and compromise that any single overriding factor is nearly impossible to discern.[271] *Shaw I* demonstrates this, and yet the Court chose this case to introduce its new strict scrutiny standard for majority-minority districts.[272]

The standard of bizarre shape, articulated in *Shaw I*, could provide

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standing); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (requiring a showing of concrete injury, a connection between the injury and the challenged action, and a probability that a judicial remedy can be provided); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 39 (1976) (requiring actual injury that is redressable by courts).

267. *See* Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986).

268. *See Hays*, 115 S. Ct. at 2436.

269. *See* Karlan, *supra* note 15, at 296. It is difficult to imagine what can be proven if the Supreme Court describes the harms caused by race-based redistricting as mere possibilities. *See id.* at 295.

270. *See* Bush v. Vera, 116 S. Ct. 1941, 2005 (1996) (Souter, J., dissenting) (observing that redistricting decisions comprise an array of compromises, deals, and principles, and many traditional redistricting principles cannot be used without including race).

271. *See* Abrams v. Johnson, 65 U.S.L.W. 4478, 4491 (1997) (Breyer, J., dissenting) (observing that a variety of influences shape the redistricting process, and some, such as consumer or business interests, should not be considered more legitimate than others, such as the interest of the Justice Department; *Bush*, 116 S. Ct. at 1976 (Stevens, J., dissenting) (describing the Texas redistricting process as one that encompassed a host of considerations, making a controlling influence, if one existed, difficult to discern).

272. *See* Shaw v. Hunt, 861 F. Supp. 408, 458 (E.D.N.C. 1994), *rev'd*, 116 S. Ct. 1894 (1996); *see also supra* notes 92-95 and accompanying text (discussing the Court's decision in *Shaw I*). The *Shaw* line of cases seems an ironic place for the Supreme Court to begin its crusade against majority-minority districts because, from the outset, racial considerations were mixed with, if not dominated by, party power struggles. *See Hunt*, 861 F. Supp. at 458. The district court observed that the legislature that developed the challenged plan was "heavily white by race, Democratic by party." *Id.* The General Assembly first submitted a plan with one majority-minority district, and the Justice Department rejected it. *See id.* at 461. The Justice Department proposed an additional majority-minority district, with fairly regular boundary lines, in the south-central to southeastern part of the state. *See id.* at 462. The General Assembly rejected this and several other more regular districts because they were "decidedly unfavorable to Democratic interests." *Id.* at 465. In the end, the notorious Twelfth District was shaped by a number of factors, including race, party interests, and protection of incumbents. *See id.* at 468. This district, while hardly compact, was contiguous and was comprised of minority residents of small urban centers, a community of interest. *See id.* at 469.

some guidance for judicial decisions, making it possible to determine when a district has become too disfigured.[273] This criterion, however, gives rise to arguments that a double standard is being applied; unlike majority-minority districts, bizarrely shaped majority-white districts need not withstand strict scrutiny because compactness is not a constitutional requirement.[274]

Regarding the Court's leadership, it is difficult for legislators and district courts to try to apply consistently a standard they do not understand;[275] however, a greater problem for the judiciary is the public perception of arbitrariness in its redistricting decisions.[276] Whatever the Court's hopes for a colorblind society, its rejection of majority-minority districts appears to demonstrate judicial resistance to the election of minority officials.[277]

Regarding the status of the Voting Rights Act after *Shaw I*, *Miller*, and *Abrams*, although the Supreme Court has not declared the Voting Rights Act unconstitutional, it has narrowed the scope of the Act significantly and has questioned the authority of the Attorney General, despite

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273. *But see* Issacharoff, *supra* note 34, at 1664 (observing that it is very difficult to determine at what point the shape of a district has actually become distorted).

274. *See* Gaffney v. Cummings, 412 U.S. 735, 752 n.18 (1973) (finding that the Constitution does not require a particular shape for a voting district); *see also* Davis v. Bandemer, 478 U.S. 109, 126-27 (1986) (holding that, while partisan gerrymanders are justiciable, they will not require strict scrutiny). The possibility that the Court is applying a double standard is evident in *Vera v. Richards*, 861 F. Supp. 1304, 1309 (S.D. Tex. 1994), *aff'd*, Bush v. Vera, 116 S. Ct. 1941 (1996), where the plaintiffs challenged thirty districts, but the court invalidated only three, which all had majority-minority populations. *See* McDonald, *supra* note 99, at 151. The other districts were justified on the ground they were drawn not to favor a racial group, but to protect incumbents. *See id.*

275. *See supra* note 122 (describing the variety of judicial responses to the Court's rulings in *Shaw I* and *Miller*).

276. *See* Connor v. Finch, 431 U.S. 407, 415 (1977) (observing that courts lack a mandate from the people to balance apportionment priorities; court involvement in redistricting must be cautious and free from any appearance of arbitrariness).

277. *See* McDonald, *supra* note 99, at 151-52. McDonald asserts that:

> To apply a different standard in redistricting to African Americans based upon speculative assumptions about segregation and harm, as did the majority in *Miller*, is to deny African Americans the recognition given to whites. It also denies racial minorities the same opportunities to organize politically that exist as a matter of right for Whites.

Id.; *see also* Karlan *supra* note 15, at 305 (observing that the Supreme Court's colorblind approach assumes that majority-white districts, no matter what their shape, are normal, and majority-minority districts are suspect); Issacharoff, *supra* note 34, at 1686 (arguing that, without an identifiable group for whom the courts must decide whether the political process has been fair, judicial review will simply degenerate into designs of plans favored by the courts, or favored by the political powers that put them in office).

the fact that Congress granted significant power to that office.[278] Since *Shaw I*, the Court has determined consistently that the Attorney General exceeds her authority by insisting on more majority-minority districts than the Act or the Constitution requires.[279] This creates the appearance that the Supreme Court seeks to impose its colorblind interpretation of equal protection on both the executive and legislative branches.[280]

V. COMMENT: THE FUTURE OF REDISTRICTING FOR COURTS, LEGISLATURES, AND VOTERS

The blurring of legislative and judicial boundaries since the Court's rulings in *Shaw I* and *Miller*[281] raises two central concerns that must be addressed to restore redistricting under the Act to its proper course. The first is the failure of the Supreme Court to identify standards by which to judge the constitutionality of majority-minority districts.[282] The second is the Court's loss of the appearance of neutrality, creating the potential for erosion of public confidence in the judiciary.[283] The dissenting voices of Justices Frankfurter and Harlan, who argued against judicial interference in redistricting matters, have a nearly prophetic quality in the context of these modern cases.[284]

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278. *See* Maltz, *supra* note 36, at 721. In *South Carolina v. Katzenbach*, 383 U.S. 301, 332-33 (1966), and *Morris v. Gressette*, 432 U.S. 491, 501 (1977), the Supreme Court had determined that preclearance decisions by the Attorney General were not subject to judicial review. The Court's rulings in *Shaw I, Miller,* and *Abrams* seem to conflict with Congress's intent to give the Justice Department authority for establishing and maintaining preclearance standards under section 5 of the Voting Rights Act. *See* Erickson, *supra* note 38, at 420-21. The result appears to be a trend among legislatures and courts to discount Justice Department preclearance decisions. *See id.* at 425-26.

279. *See* Miller v. Johnson, 115 S. Ct. 2475, 2491 (1995) (determining that states do not have a compelling interest in complying with Justice Department mandates where those mandates exceed constitutional requirements); Shaw v. Reno, 509 U.S. 630, 655 (1993) (*Shaw I*) (stating that a reapportionment plan that complies with section 5 of the Voting Rights Act may still be unconstitutional if it regulates beyond the requirements of section 5).

280. *See supra* notes 63-68 and accompanying text (describing the history of the Act as a manifestation of Congress's purpose that it protect and provide equal access for minority voters).

281. *See supra* notes 244-53 and accompanying text (discussing the judicial and legislative responses to redistricting problems since the Court's ruling in *Shaw I*).

282. *See supra* notes 270-72 and accompanying text (describing the vagueness of the predominant factor standard set out by the Supreme Court regarding unconstitutional racial gerrymanders).

283. *See supra* notes 275-77 and accompanying text (describing the public perception that the courts are making redistricting decisions in arbitrary or unfair ways).

284. *See supra* note 36 (describing the dissents of Justice Frankfurter in *Baker v. Carr* and Justice Harlan in *Reynolds v. Sims*).

The most obvious, but not necessarily simplest, response to the first concern is for the Court to develop clearer standards and apply them uniformly to all voting districts. The Court must establish the criteria to distinguish constitutional from unconstitutional districts.[285] The Court in *Miller* determined that when race is the predominant factor in the legislature's decision making, the district design is race-based.[286] Once that determination is made, the district will be held invalid unless it can withstand strict scrutiny.[287] But how can a court discern the predominant factor?[288] It is precisely the messiness and compromising nature of the redistricting process that has caused courts to limit intervention in this arena.[289]

Because the Supreme Court has ruled that plaintiffs need not show they have been harmed in a particular way, but may state an equal protection claim simply by residing in a majority-minority district,[290] the opportunities for litigation in this area have increased greatly. Under these circumstances, the Court must delineate something more manageable than the predominant factor standard for lower courts to follow.[291] Perhaps the *Shaw I* standard of bizarre shape is preferable.[292] Although it is not entirely objective,[293] inappropriate shape is, arguably, easier to dis-

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285. *See supra* notes 270-71 (observing that the predominant factor standard established in *Miller* offers little guidance to lower courts).

286. *See* Miller v. Johnson, 115 S. Ct. 2475, 2488 (1995).

287. *See id.* at 2490.

288. *See* Bush v. Vera, 116 S. Ct. 1941, 1975-76 (1996) (Stevens, J., dissenting) (arguing that the Texas districts invalidated in this decision were designed to protect incumbents and Democrats, as well as to provide electoral opportunities for minorities); *see also* Karlan, *supra* note 15, at 302-03 (observing that the irregular shape of District 30 in Texas resulted from the accommodation of numerous interests and the subordination of race to those other interests; if race had been the only consideration, the district would have been shaped in a much more traditional manner).

289. *See* Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (observing that when the Court disregards the inherent limits on judicial power, it not only becomes engaged in a futile intervention in clashing political forces, it sacrifices its position of respectable detachment).

290. *See supra* notes 17-18 (describing the requirements for standing to bring an equal protection challenge against a majority-minority district).

291. *See Bush*, 116 S. Ct. at 2004 (Souter, J., dissenting) ("As a standard addressed to the untidy world of politics, neither 'predominant factor' or 'substantial disregard' inspires much hope."). Race is often intertwined with other, more traditional redistricting considerations when district lines are drawn. *See id.* at 2005.

292. *See* Shaw v. Reno, 509 U.S. 630, 658 (1993) (*Shaw I*) ("[R]eapportionment is one area in which appearances do matter.").

293. *See* Karlan, *supra* note 15, at 301 (observing that the "bizarreness" standard is subjective and could therefore give trial courts license to apply strict scrutiny arbitrarily).

cern than race as the "predominant factor."[294] Shape is one of the considerations in the *Gingles* test,[295] and opponents of majority-minority districts currently argue that other redistricting principles should be subordinated to geography.[296]

The problem with shape as the controlling standard for majority-minority districts is that shape is not the controlling standard for any other type of district.[297] Applying strict scrutiny to bizarrely shaped majority-minority districts while applying a lower standard to bizarrely shaped majority-white districts creates an impression of bias and unfairness.[298] The answer is to apply the same standard to all gerrymandered districts. If non-minority individuals are harmed by being placed in a majority-minority district,[299] could it not be argued that Republicans are harmed when placed in majority-Democrat districts?[300] In such a case, a showing of actual, significant harm is required, and it could be required of anyone seeking to challenge any kind of gerrymandered district.[301] If

294. *See Bush*, 116 S. Ct. at 2004 (Souter, J., dissenting) (stating that it would be possible to develop a cause of action based on district shape that would give legislatures some notice as to the Court's definition of acceptable redistricting principles).

295. *See* Thornburg v. Gingles, 478 U.S. 30, 50 (1986) (requiring proof that a minority group is sufficiently large and geographically compact to constitute a majority in a single-member district).

296. *See* Butler, *supra* note 38, at 344-45 (arguing that it is legitimate to recognize communities of interest, including racial communities, as long as these communities have geographical integrity); Robert A. Blake, Jr., Note, *A Step Toward a Colorblind Society:* Shaw v. Reno, 29 WAKE FOREST L. REV. 937, 958 (1994) (stating that redistricting by neighborhood has been the standard in the United States political system; spreading a district geographically results in under-representation of many citizens because of their diverse interests).

297. *See* Davis v. Bandemer, 478 U.S. 109, 126-27, 132 (1986) (finding political gerrymanders justiciable, but not applying strict scrutiny; a political gerrymander is not unconstitutional unless it results in significant harm to the targeted party); *see also* Henderson, *supra* note 29, at 204 (observing that political gerrymandering generally is undertaken to favor incumbent politicians or political parties; it has a long history in this country and is generally considered to be constitutionally valid).

298. *See supra* notes 276-77 and accompanying text (describing the appearance of unfairness created when the Court invalidates majority-minority districts while ignoring majority-white districts).

299. *See supra* notes 92-95 (describing the Court's position that society is harmed when districts are drawn along racial lines).

300. *See Bandemer*, 478 U.S. at 125. In *Bandemer*, the Court acknowledged the potential for harm to those who are not able to elect representatives of their choice because of partisan gerrymanders, but, unlike racial gerrymanders, the harm must be proven to have been significant. *See id.* at 133.

301. *See supra* notes 17-18 (discussing the requirements of individuals seeking standing to bring suit). If an individual instituting a claim against a district gerrymandered for any reason was required to show actual, sustained harm as a result of having been placed in that district, this would be more in keeping with the Court's rulings on standing in areas

the requirements for standing were narrowed from mere residency to showing an actual harm, this would limit the numbers of potential litigants and provide clearer signals to legislators about acceptable redistricting practices, regardless of the interest they are seeking to protect.

In addition, the Court must reemphasize the need for strict limits on judicial intervention concerning majority-minority districts, which would help to restore the balance between legislative and judicial roles in redistricting.[302] One approach would be to follow the example of the federal district court in Texas. Following the Supreme Court's ruling in *Bush v. Vera*, the Texas court determined that three of the state's voting districts were unconstitutional.[303] The new redistricting scheme, while necessary because of the legislature's failure to act, was designed to avoid excessive disruption of the political process and required that the legislature construct and implement a new redistricting scheme.[304] The court accomplished its purpose while leaving ultimate responsibility for a permanent redistricting plan with the legislature.[305]

VI. CONCLUSION

The Supreme Court must set clear standards regarding the constitutionality of majority-minority districts to guide the lower courts and to limit their role. The proposals described above address this concern. The second concern, maintaining neutrality to keep intact the integrity of the judiciary, follows naturally if the first is addressed adequately. If the Supreme Court articulates a clear standard, such as geographically compact and contiguous district shapes for majority-minority districts as well as politically gerrymandered districts, legislatures will have a standard for appropriate district boundaries, and lower courts will be able to make decisions that are less susceptible to personal biases. Majority-minority districts and those gerrymandered to favor other interests will be treated equally, increasing public confidence in judicial fairness. Perhaps, at those times when courts must enter the political arena, if they limit their interventions strictly, they will demonstrate an objective distance from the politically charged redistricting process. This would enhance their

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other than majority-minority redistricting. *See id.*; *see also supra* notes 17-18.

302. *See supra* notes 51-54 and accompanying text (discussing the political question doctrine and the factors courts must consider before intervening in matters best settled by political bodies).

303. *See* Vera v. Bush, 933 F. Supp. 1341, 1342 (S.D. Tex. 1996); *see also supra* notes 220-26 and accompanying text (discussing the district court's interim plan which sought to follow the legislature's redistricting preferences while curing constitutional violations).

304. *See Vera*, 933 F. Supp. at 1342.

305. *See id.* at 1346.

credibility, and leave greater discretion to legislative bodies to fulfill their political responsibilities.

The standard of equal protection now articulated by the Supreme Court has greatly enlarged the role of federal courts in redistricting. This has removed both majority and minority citizens from political decision making because districts are being designed by courts instead of elected officials who are answerable to their constituencies. Developing clear standards that define unconstitutional districts will facilitate legislative redistricting. Limiting judicial intervention in this enormously political arena will return redistricting to legislatures, where the Court has acknowledged that it belongs.

Sue T. Kilgore