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## Refining the Racial Gerrymandering Claim: *Bush v. Vera*

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## NOTES

REFINING THE RACIAL GERRYMANDERING  
CLAIM: *BUSH v. VERA*

## I. INTRODUCTION

Supporters of the Voting Rights Act (VRA)<sup>1</sup> should find comfort in what so decisively divides the Supreme Court in *Bush v. Vera*,<sup>2</sup> one of its most recent racial gerrymander decisions. Until the announcement of *Bush v. Vera*, many commentators expressed legitimate concern that the racial gerrymander claim would roll back much of the VRA's progress.<sup>3</sup> The Court developed the racial gerrymander claim in *Shaw v. Reno (Shaw I)*<sup>4</sup> to place limits on the traditionally broad interpretation of the VRA. However, the racial gerrymandering claim has evolved since *Shaw v. Reno* into the Court's approach in *Bush v. Vera*, providing reassurance to VRA supporters and additional guidance to drafters of congressional districts.

Beginning with the first racial gerrymander case in *Shaw I*, the same five justices consistently voted together to comprise the same slim majority.<sup>5</sup> However, this unity ended in *Bush v. Vera* when two justices broke rank in objection to the plurality's position on whether the creation of a majority-minority

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1. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973gg-10 (1994)).

2. 116 S.Ct. 1941 (1996).

3. "The thrust of the Supreme Court's recent opinions is clearly threatening to minority groups, the Clinton Justice Department and others who have defended the new majority-minority districts as a means of empowering minority voters." Holly Idelson, *It's Back to Drawing Board On Minority Districts*, 53 CONG. Q. WKLY. REP. 3065, 3067 (1995). "[W]hat legislators once thought was their statutory obligation under the Voting Rights Act—to shape majority-minority districts where possible and to state their intention to do so—is now grounds for having all of their efforts struck down as unconstitutional." Jamie B. Raskin, *Affirmative Action and Racial Reaction*, 38 HOW. L.J. 521, 532 (1995).

4. 509 U.S. 630 (1993).

5. Until the decision in *Bush v. Vera*, Chief Justice Rehnquist, and Justices O'Connor, Kennedy, Thomas, and Scalia had always voted together in racial gerrymandering cases decided on the merits. See *Shaw*, 509 U.S. at 630 (5-4 decision); *Miller v. Johnson*, 115 S.Ct. 2475 (1995) (5-4 decision); *Shaw v. Hunt*, 116 S.Ct. 1894 (1996) (5-4 decision), and compare with *Bush*, 116 S.Ct. at 1941 (3-2-4 decision).

district would, in itself, constitute a racial gerrymander.<sup>6</sup> The decision also consisted of a number of concurring opinions, most significantly Justice O'Connor's concurring opinion to the plurality opinion she wrote. In her concurring opinion, Justice O'Connor revealed herself as the swing vote, emphasizing that she is prepared to vote in future racial gerrymander cases to protect majority-minority districts and the VRA.

## II. *BUSH V. VERA*

### A. *Facts and Procedural History*

The 1990 census revealed that Texas' increase in population entitled the state to three new Congressional seats.<sup>7</sup> Thus, the Texas Legislature proceeded with hearings and committee meetings to consider how they should incorporate the new congressional districts.<sup>8</sup> The Legislature chose a plan which designated all three of these new districts as majority-minority districts; two majority-Hispanic districts and one majority-African-American.<sup>9</sup> Of the two new majority-Hispanic districts, the Legislature located one in South Texas and another in Houston.<sup>10</sup> The Legislature established the new majority-African-American district in Dallas.<sup>11</sup> In addition to these newly created majority-minority districts, the Legislature also substantially augmented an existing congressional district in Houston to compensate its declining African-American population.<sup>12</sup> The Legislature accomplished this by drawing the new majority-Hispanic district in Houston adjacent to the existing African-American district and concentrating each minority into their own district.<sup>13</sup> The State rationalized that this segregation was necessary because the two groups had been voting differently, and the State feared that unless they segregated the African-Americans from the Hispanics, the two competing groups might not be able to elect a minority representative.<sup>14</sup> The three-judge District Court in *Vera v. Richards* referred to

6. Justice Scalia joined Justice Thomas' concurrence in the judgment but not in the reasoning. *See Bush*, 116 S.Ct. at 1972 (Thomas, J., concurring in the judgment).

7. "The increase in population from 1980 to 1990 (2,757,319 persons) entitled Texas to three additional seats in the United States House of Representatives, increasing the size of the delegation from 27 to 30." *Vera v. Richards*, 861 F.Supp. 1304, 1311 (S.D. Tex. 1994) *aff's sub nom.* *Bush v. Vera*, 116 S.Ct. 1941 (1996).

8. *See id.* at 1313-14.

9. *See id.* at 1315. The Legislature frankly explained the creation of the majority-minority districts in their § 5 submission to the Department of Justice "entitled *Narrative of Voting Rights Act Considerations in Affected Districts* prepared by the Texas Congressional Redistricting Staff. . . . As the document sets forth in its introduction, the *Narrative* functions to 'give an overview of the efforts made to address Voting Rights Act concerns.'" *Id.*

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.* at 1315-16.

14. *See id.* at 1316.

[The] breakdown of past coalitions [between African-Americans and Hispanics] prompted Hispanic strategists to argue that Hispanics and African-Americans should not be combined in a new Harris County Congressional district. As Houston City Councilman Ben Reyes testified at an outreach hearing held in Houston, combining minority groups in nearly equal numbers in a new Harris County district would be the "worst scenario" because "they will vote for members of their own ethnic

these four districts as the “voting rights districts.”<sup>15</sup> The Legislature relied on “Red Apple,” a sophisticated software program used to precisely draw maps of these new districts and to revise the lines of existing districts.<sup>16</sup>

This Congressional Redistricting Plan adopted in House Bill 1 (HB1)<sup>17</sup> led to litigation before it was passed into law. In *Terrazas v. Slagle*,<sup>18</sup> Republican plaintiffs sued officials of the State of Texas and the Texas Democratic Party in the U.S. District Court for the Western District of Texas claiming that HB1 diluted the votes of racial, ethnic, and political minorities.<sup>19</sup> Plaintiffs argued that the purpose of the plan was to dilute Hispanic and Republican voters in an effort to maximize the electoral success of Anglo-Democrat incumbents.<sup>20</sup> The District Court ruled for the defendants by holding that HB1 did not dilute the votes of racial, ethnic, and political minorities.<sup>21</sup>

Subsequently, the Legislature passed the reapportionment plan which the Governor signed into law in August, 1991.<sup>22</sup> Texas has been a covered jurisdiction under the VRA since 1975,<sup>23</sup> and as such, the State must submit for approval all changes that affect any voting procedure.<sup>24</sup> The Department of Justice approved the new reapportionment plan in November 1991, but the Attorney General expressed the following sentiments regarding the reapportionment plan: “While we are preclearing this plan under Section 5, the extraordinary convoluted nature of some districts compels me to disclaim any implication that the proposed plan is otherwise lawful or constitutional.”<sup>25</sup> In January 1994, six Republican voters<sup>26</sup> filed suit in the U.S. District Court for the Southern District of Texas seeking injunctions and declaratory judgment, claiming that 24 out of Texas’ 30 congressional districts were the product of racial gerrymandering.<sup>27</sup> The plaintiffs named state officers as defendants, including the Governor, Lieutenant Governor, the Attorney General, the Secretary

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group, making it more likely that a nonminority candidate will win.”

*Id.* (footnote omitted).

15. *Id.* at 1331.

16. *See id.* at 1314.

17. This bill adopted Plan C657. *See id.* at 1309, n1. However, other districting plans were available, most notably the following three: Dr. Weber’s plan, Plan C676 called for two African-American districts and six Hispanic districts; The Owens-Plate plan, Plan C606, called for up to two new African-American districts and two Hispanic districts; Senator Johnson’s plan, C500, would have disturbed a number of incumbents but according to one expert would have been “a fairer plan than the plan the legislature adopted.” *Id.* at 1330-31.

18. 821 F. Supp. 1162 (W.D. Tex. 1993).

19. *See id.*; *see also* Vera v. Richards, 861 F.Supp. 1304, 1314 (S.D. Tex. 1994).

20. *See Terrazas*, 821 F.Supp. at 1162.

21. *See id.*

22. *See Vera*, 1304 F.Supp. at 1309.

23. *See id.* at 1317. *See also* 28 C.F.R. § 51 app. (1995) (listing all of the covered jurisdictions in the nation).

24. *See* 42 U.S.C. § 1973c (1994).

25. *Vera*, 861 F.Supp. at 1309.

26. Al Vera, the first plaintiff is an Hispanic who taught high school for thirty years and who has been a political activist. In 1978, Al Vera ran for Congress in District 18, the majority-African-American district in Houston, and lost to an African-American candidate. “Vera ran as a protest candidate, saying that the districts amounted to segregation.” The plaintiffs referred to themselves as the “Coalition for a Color Blind Texas.” The group “include[d] blacks, Hispanics and an Asian American.” Alan Bernstein, “*Racial Gerrymandering*” *Trial Set this Week* *Lawsuit Has Implications for State, Nation*, HOUSTON CHRON., June 26, 1994.

27. *See Vera*, 861 F.Supp. at 1310.

of State and the Speaker of the Texas House of Representatives.<sup>28</sup>

Litigation ensued in 1994, and the three-judge district court<sup>29</sup> held in *Vera v. Richards* that three of the twenty-four challenged districts constituted unconstitutional racial gerrymandering.<sup>30</sup> All of the "Voting Rights Districts" were found unconstitutional except for District 28, the majority-Hispanic district in South Texas.<sup>31</sup> The district court determined that although District 28 was a majority-minority district, it was not racial gerrymandering because "District 28 is not highly irregularly shaped."<sup>32</sup>

At the trial level in *Vera v. Richards*, the district court heard testimony that the Texas Legislature did not use what are considered "traditional districting principles such as natural geographic boundaries, contiguity, compactness, and conformity to political subdivisions"<sup>33</sup> because Texas had never relied on these traditional districting principles in the past.<sup>34</sup> In lieu of traditional considerations, the state claimed that the Legislature's focus on incumbency protection, rather than on race, led to the bizarrely shaped districts. The state explained that race was only considered to the extent necessary to avoid liability under either section 2 or section 5 of the VRA.<sup>35</sup>

Among the items of evidence considered by the district court, the most telling were the bizarre drafting of congressional districts 18, 29, and 30, VRA § 5 submissions to the Department of Justice for preclearance proceedings, and testimony of a state senator in earlier litigation.<sup>36</sup> Based on this evidence, the district court concluded the *Shaw I* cause of action applied because the bizarre contours of congressional districts 18, 29, and 30 were unexplainable in terms other than race.<sup>37</sup> The district court dismissed the state's argument that the bizarre contours of the districts exist as an effort to protect incumbents, asserting that "[i]ncumbent protection is a valid state interest only to the extent that it is not a pretext for unconstitutional racial gerrymandering."<sup>38</sup> Upon establishing the excessive use of racial considerations, the district court determined that the three districts were the result of racial gerrymanders, and therefore according to *Shaw I*, strict scrutiny applied. The district court found that the challenged districts did not meet the narrow tailoring requirement of strict scrutiny, and the districts were ruled unconstitutional.<sup>39</sup>

28. See *id.* at 1310.

29. Whenever a case involves a constitutional challenge to congressional redistricting, a three-judge United States District Court is mandated. See 28 U.S.C. § 2284.

30. See *Vera*, 861 F.Supp. at 1344.

31. See *id.*

32. *Id.* "The Legislature took no extraordinary measures that rendered this district so out of line with traditional districting criteria as to raise a serious question about racial gerrymandering." *Id.*

33. *Id.* at 1333.

34. Due to the enormous size of the State of Texas, it is difficult for legislators "to fit Congressional districts perfectly within single geographic regions." *Id.*

35. Section 2 is found in Voting Rights Act, 79 Stat. 439, as amended, 42 U.S.C. § 1973a&b. Section 5 is found in Voting Rights Act, 79 Stat. 439, as amended, 42 U.S.C. §1973c.

36. See *Bush v. Vera*, 116 S.Ct. 1941, 1956-57 (1996).

37. See *Vera v. Richards*, 861 F.Supp. 1304, 1339-41 (S.D. Tex. 1994).

38. *Id.* at 1336.

39. See *id.* at 1342.

The defendant and intervenors appealed, which in cases involving redistricting of congressional seats calls for direct appeal to the Supreme Court.<sup>40</sup> By the time this case reached the Supreme Court, Texas had elected a new governor. The case name reflected this change by deleting former Governor Richard's name as the first defendant and replacing it with the name of the new governor, George Bush Jr., thus explaining the change of the case name from *Vera v. Richards* at the trial level to *Bush v. Vera* at the appellate level. Several additional parties<sup>41</sup> had intervened on the side of the defendants in *Vera v. Richards* but only two of these intervenors participated in *Bush v. Vera*: the United States and the NAACP.<sup>42</sup>

### *B. Issues on Appeal*

In *Bush v. Vera*, the Supreme Court reviewed the district court's decision in *Vera v. Richards* by addressing three issues. Although the Supreme Court affirmed, it defined the issues slightly differently because new precedent had been established since the district court issued its decision. First, the Supreme Court considered whether the plaintiffs had standing according to the recent decision in *United States v. Hays*,<sup>43</sup> which substantially narrowed the requirements for standing in racial gerrymander claims.<sup>44</sup> Next, the Supreme Court reviewed the district court record to determine whether race was the predominant factor in reapportionment of the challenged districts according to the recent decision in *Miller v. Johnson*.<sup>45</sup> Finally, if the challenged districts constituted racial gerrymanders, the Court had to decide whether the statute passed strict scrutiny.

The issues in *Bush v. Vera* were similar to the issues in previous racial gerrymandering cases, including the companion case *Shaw v. Hunt (Shaw II)*.<sup>46</sup> However, the facts of the case forced members of the Court to take positions that previous racial gerrymandering cases did not demand. A quick survey of voting rights jurisprudence before *Bush v. Vera* is necessary to understand the significance of the Court's decision in the case.

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40. See 28 U.S.C. § 1253.

41. See *Vera*, 861 F.Supp at 1310. Intervenors at the District Court included: the United States, the NAACP Legal Defence and Educational Fund, Inc. ("Lawson Intervenors"), The League of United Latin American Citizens ("LULAC"), and seven hispanic registered voter members of LULAC. *Id.*

42. See *Bush v. Vera*, 116 S.Ct. 1941, 1951 (1996).

43. 115 S.Ct. 2431 (1995).

44. See *id.*

45. 115 S.Ct. 2475 (1995).

46. 116 S. Ct. 1894 (1996).

## III. LAW PRIOR TO THE CASE

A. *The Sword & the Shield: Voting Rights Jurisprudence before Shaw I*

The VRA guaranteed meaningful minority participation in the voting process through a two step approach. The first step eliminated poll taxes,<sup>47</sup> literacy tests,<sup>48</sup> and other devices that hindered access to the polls.<sup>49</sup> However, this alone was meaningless if states and municipalities could draw electoral districts to dilute minority votes. Upon removing these barriers to the polls, the drafters of the VRA anticipated efforts to dilute minority votes would increase, so the VRA contained language providing for the vote dilution claim.<sup>50</sup>

The VRA offers protection against minority vote dilution, through sections 2 and 5, which commentators have referred to respectively as a "sword" and a "shield."<sup>51</sup> Section 2, the sword, provides a cause of action to challenge any electoral district that dilutes minority votes.<sup>52</sup> On the other hand, section 5 does not grant a cause of action, rather it provides for a preclearance procedure before a covered jurisdiction may change any aspect of its voting system.<sup>53</sup> Thus, section 5 functions as a shield against any retrogression to past discriminatory activities.

Together, sections 2 and 5 have attacked and guarded against minority vote dilution efforts, although the power of section 2 has increased significantly as a result of the 1982 Amendment to the VRA. The 1980 decision of *Mobile v. Bolden*<sup>54</sup> required proof of intentional discrimination before prevailing on a section 2 vote dilution claim. This requirement substantially hindered claims, so Congress amended the VRA in 1982 to require satisfaction of the results test only, eliminating the intent test required in *Mobile v. Bolden*.<sup>55</sup> Now a section 2 claim prevails if an electoral system simply "results" in minority vote dilution, regardless of the drafters' intent.<sup>56</sup> Multimember districts inherently have a dilutive effect,<sup>57</sup> so they have largely been eliminated through section 2 vote dilution claims.<sup>58</sup>

47. See 42 U.S.C. § 1973h (1994).

48. See 42 U.S.C. § 1973b (1994).

49. See *id.*

50. See 42 U.S.C. § 1973 (1994).

51. See, eg., Heather K. Way, Note, *A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2*, 74 TEX.L.REV. 1439 (1996).

52. See 42 U.S.C. §1973.

53. See 42 U.S.C. §1973c.

54. 446 U.S. 55 (1980)(superseded by statute).

55. See S. REP. No. 97-417, at 15-16, reprinted in 1982 U.S.C.C.A.N. 177, 192-193; Thornburg v. Gingles, 478 U.S. 30, 43-44 (1985).

56. See *Thornburg*, 478 U.S. at 71-74.

57. See Barbara L. Berry & Thomas R. Dye, *The Discriminatory Effects of At-Large Elections*, 7 FLA.ST.U.L.REV. 85 (1979).

58. See David F. Walbert, *Georgia's Experience with the Voting Rights Act: Past, Present, and Future*, 44 EMORY L.J. 979, 1023 (1995). See also Bernard Grofman, *Would Vince Lombardi Have Been Right if He Had Said: "When It Comes To Redistricting, Race Isn't Everything, It's The Only Thing"*, 14 CARDOZO L.REV. 1237, 1245 (1993) (explaining why single member districts are naturally the most appropriate remedy

Today, section 2 litigation increasingly involves single member districts, and has a greater likelihood of success than prior to 1982 Amendment.<sup>59</sup> As a result, states approached congressional redistricting after the 1990 census cautiously, attempting to avoid section 2 vote dilution claims.<sup>60</sup> At the same time, the Department of Justice applied pressure to states by withholding section 5 preclearance in an effort to compel them into drafting a larger number of majority-minority districts.<sup>61</sup> The caution on the behalf of states combined with the Department of Justice's coaxing led a number of states to create majority-minority districts with a total disregard to traditional districting principles.

## B. Round One: Creation Of The Racial Gerrymander Claim

### 1. The *Shaw I* Decision

*Shaw I*,<sup>62</sup> decided in 1993, constitutes the first of three rounds of litigation alleging that consideration of racial demographics in reapportionment schemes may be unconstitutional under the equal protection clause. Since the development of this racial gerrymandering claim, no challenged district has survived the Supreme Court's strict scrutiny review.<sup>63</sup> *Shaw I* arose from the North Carolina General Assembly's effort to avoid liability under section 5 of the VRA by creating two majority-minority congressional districts.<sup>64</sup> However, the drafters of these two districts went to extreme measures to create a majority number of African-Americans in each district, leading to bizarrely shaped districts.<sup>65</sup> Portions of one district were no wider than the highway it followed to connect pockets of densely populated African-Americans.<sup>66</sup>

to minorities submerged in a multimember district plan).

59. See Grofman, *supra* note 58, at 1240-41.

60. In the South, the number of majority-black congressional districts increased by a dozen in 1992 as a result of the 1982 Amendment to the VRA and states' efforts to avoid section 2 liability. See *Clinton Keeps Southern Wing On His Team in 1993*, 49 CONG. Q. ALMANAC app. C at 23 (1993). In 1994, fifty-two congressional districts were either majority-black or majority-hispanic. See *Electing Minorities*, 4 CONG. Q. RESEARCHER 697, 705 (Aug. 12, 1994). In 1994 majority-black congressional districts existed in: Alabama (1), Florida (3), Georgia (3), Illinois (3), Louisiana (2), Maryland (2), Michigan (2), Mississippi (1), Missouri (1), New Jersey (1), New York (3), North Carolina (2), Ohio (1), Pennsylvania (2), South Carolina (1), Tennessee (1), Texas (2), Virginia (1). See *id.* Majority-hispanic congressional districts exist in: Arizona (1), Florida (2), California (7), Illinois (1), New York (2), Texas (7). See *id.*

61. For example, the Louisiana legislature created a second majority-minority district out of a belief that the VRA compelled such action.

This belief was encouraged, if not demanded, by the Department of Justice, under an actual or implied threat of withholding Section 5 preclearance. The shield became a sword. Whether the Attorney General had the right to withhold pre-clearance may be open to question, but she certainly had the power, and the threat, whether issued by her or some middle level bureaucrat, was a matter of real concern to the State. Litigation in the District of Columbia, and everywhere else is expensive. We hold, however, that a real concern is not a compelling one.

*Hays v. Louisiana*, 862 F.Supp. 119, 123, n3. (W.D. La. 1994), *vacated*, *United States v. Hays*, 115 S.Ct. 2431 (1995)(holding that plaintiffs lacked standing).

62. *Shaw v. Reno*, 509 U.S. 630 (1993).

63. See generally *id.*; *Miller v. Johnson*, 115 S.Ct. 2475, (1995); *Shaw v. Hunt*, 116 S.Ct. 1894 (1996); *Bush v. Vera*, 116 S.Ct. 1941 (1996).

64. See *Shaw*, 509 U.S. at 633.

65. See *id.* at 635.

66. See *id.* at 635.



The three-judge district court dismissed appellant's claim for failure to state a claim, thus the Supreme Court's only consideration in *Shaw I* was whether the appellants had stated a cognizable claim.<sup>67</sup> The Court examined the facts and precedent to conclude that appellants "may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."<sup>68</sup> The Court recognized that harm occurs when a district is drafted solely according to race, thereby "reinforc[ing] racial stereotypes and threaten[ing] to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole."<sup>69</sup> The Court reversed the judgment of the district court and remanded the case to be considered according to their decision.<sup>70</sup> However, this case left many questions unanswered, namely "whether 'the intentional creation of majority-minority districts, without more,' always gives rise to an equal protection claim."<sup>71</sup>

## 2. Competing Principles Behind The Vote Dilution Claim & The Racial Gerrymandering Claim

Remarkably, voting rights litigation is just as common in the 1990s as it was in the 1960s; although the focus of voting rights litigation has changed. To fully appreciate the racial gerrymander claim and its inherent conflicts with the VRA, it is essential to examine the racial gerrymander's underlying rationales and how they sometimes conflict with the VRA. The most common points of contention are the validity of the harm addressed by the racial gerrymander claim and the tension between traditional districting principles and proportional representation.

Harm is a necessary element for any cause of action; however, the harm in a racial gerrymander is elusive and difficult for many to conceptualize. Before the racial gerrymandering claim, the only equal protection claim addressing apportionment was the vote dilution claim.<sup>72</sup> The vote dilution claim addressed "material harm to the voting strength of an identifiable (and constitutionally protected) group,"<sup>73</sup> i.e., when a minority group's votes are submerged to the extent that they could never elect a candidate with their own votes. On the other hand, the "expressive harm"<sup>74</sup> identified by the racial gerrymander claim

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67. See *id.* at 634.

68. *Id.* at 649.

69. *Id.* at 650.

70. See *id.* at 658.

71. *Id.* at 649 (quoting White, J., *dissenting*).

72. See Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluation Election-District Appearances After Shaw v. Reno*, 92 MICH.L.REV. 483 (1993).

73. Pildes & Niemi, *supra* note 72, at 493.

74. Pildes & Niemi, *supra* note 72, at 506-07 ("[A]n expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about.").

in *Shaw I* is not as concrete nor as easily explained as the material harm in a vote dilution case.<sup>75</sup> The expressive harm identified by the majority in *Shaw I* is comprised of “[s]ignificant deviations from traditional districting principles, such as the bizarre shape and noncompactness demonstrated by the districts . . . , caus[ing] constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial.”<sup>76</sup> A number of Justices and commentators view the harm addressed by the racial gerrymander claim as a pretext to undermine the VRA. Hence, validity of the harm is a point of contention in all racial gerrymander cases.

Two philosophical approaches to representation collide when state legislators draw electoral districts.<sup>77</sup> In the past, the aspiration was to draw electoral districts according to geography, and this served to unite constituents providing the basis for their representation.<sup>78</sup> However, with the advent of the VRA, geography has been downplayed to accommodate the VRA’s quasi-proportional representation demanding that some electoral districts be drawn to represent a minority interest group within the district.<sup>79</sup> In *Shaw I*, the traditional geographic approach to redistricting challenged the VRA’s goal of quasi-proportional representation, and the traditional approach prevailed.<sup>80</sup>

### C. Round Two: “Predominant Factor” Analysis & Standing Requirement

*Miller v. Johnson* expanded on the *Shaw I* doctrine. *Shaw I* established that bizarre districting, unexplainable but for race, will give rise to a racial gerrymandering claim. However, *Miller* explained that a racial gerrymander claim exists whenever it is determined that race was used as the “predominant factor” among other districting factors.<sup>81</sup> The challenged congressional district in *Miller* was not as bizarrely shaped as in *Shaw I*; nevertheless, the Court established that racial considerations “predominated” over traditional districting factors.<sup>82</sup>

Georgia is a “covered jurisdiction” under the VRA, and as such, it is subject to preclearance under section 5 of the VRA.<sup>83</sup> The Georgia Legislature submitted two proposals for preclearance to the Department of Justice, which denied both because they did not utilize a plan proposing at least three majori-

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75. See Pildes & Niemi, *supra* note 72, at 506-07.

76. Bush v. Vera, 116 S.Ct. 1941, 1962 (1996).

77. See Pildes & Niemi, *supra* note 72, at 483.

78. See *id.*

79. The VRA explicitly provides that no right exists to proportional representation. “[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” 42 U.S.C. § 1973(b). However, drafters of electoral districts seeking to avoid a vote dilution claim must employ proportional representation to a certain extent.

80. See Pildes & Niemi, *supra* note 72, at 484.

81. See *Miller v. Johnson*, 115 S.Ct. 2457, 2488 (1995).

82. See *id.* at 2490.

83. “In 1965, the Attorney General designated Georgia a covered jurisdiction under § 4(b) of the Voting Rights Act. In consequence, § 5 of the Act requires Georgia to obtain either administrative preclearance by the Attorney General or approval by the United States District Court for the District of Columbia of any change in a ‘standard, practice, or procedure with respect to voting’ made after November 1, 1964.” *Id.* at 2483 (citations omitted).

ty-minority districts.<sup>84</sup> The legislature could have submitted the preclearance application to the District Court for the District of Columbia rather than the Department of Justice, but the legislature chose not to seek judicial approval.<sup>85</sup> Instead, the legislature simply adopted the “max-black” plan suggested by the Department of Justice.<sup>86</sup> The “max-black” plan included the challenged district in *Miller*, which the Court held to be unconstitutional racial gerrymandering.

*Miller* explained that the Department of Justice inappropriately demanded that Georgia create a third majority-minority district to comply with section 5, and that to consider the Justice Department’s rejection as “compelling” would surrender the judiciary’s “role in enforcing . . . constitutional limits” to the Executive Branch.<sup>87</sup> The “nonretrogression” requirement of section 5 essentially provides that existing minority representation should not diminish under the new reapportionment plan.<sup>88</sup> As the Court accurately pointed out, section 5 does not require the creation of majority-minority districts where the minority representation has not diminished and where majority-minority districts did not exist before reapportionment.<sup>89</sup>

Section 5 is only invoked when minority representation suffers a setback through reapportionment. However, Georgia’s previously submitted plans—which required only two rather than three majority-minority districts—would not have served as a setback to existing minority representation. Therefore, the Court determined that the Justice Department inaccurately interpreted section 5 of the VRA, so that Georgia’s compliance with this interpretation was not narrowly tailored to meet strict scrutiny.<sup>90</sup>

*Miller* distinguishes itself from *Shaw I* because the challenged district in *Miller* was not as bizarrely shaped as the challenged district in *Shaw I*; actually, the challenged district in *Miller* was relatively compact.<sup>91</sup> However, evidence

84. See *id.* at 2483-84.

85. See *id.* at 2484. “The State did not seek a declaratory judgment from the District Court for the District of Columbia.” *Id.*

86. The “max-black” plan was one of the alternative plans proposing three majority-minority districts that the Department of Justice suggested Georgia adopt. See *id.* at 2484.

87. *Id.* at 2491. “The congressional plan challenged here was not required by the Voting Rights Act under a correct reading of the statute.” *Id.* “In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld.” *Id.* at 2493.

88. See *id.*

89. See *id.* at 2490-94.

90. “The undisputed loser in *Miller*, therefore, is the federal government, and especially the Justice Department. The direct association between the preclearance powers under Section 5 of the Voting Rights Act, the ‘max-black’ plan of the ACLU, and the black caucus of the Georgia legislature served to turn the Justice Department into a suspect interest group advocate no different from the Richmond City Council in *Croson*. While there is more than a touch of irony in the Justice Department under President Bush being depicted as a ‘captured’ agent of the ACLU, *Miller* is an integral part of the Court’s reevaluation of the role of the federal government’s presumed immunity from faction-dominated politics.” (citation omitted) Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45, 52-53 (1995).

91. When comparing the map of the challenged district in *Miller* to the map of the challenged district in *Shaw I*, each district has a distinctively different shape. The challenged district in *Shaw I* was long and thin, resembling a snake slithering between several districts and adjacent to many others. See *Shaw v. Reno*, 509 U.S. 630, app. (1993). Whereas, the challenged district in *Miller* was more cohesive and not as serpentine. See *Miller v. Johnson*, 115 S.Ct. 2475, app. (1995).

of preclearance efforts revealed that race was the “predominant factor” in drawing the district.<sup>92</sup> Thus, the racial gerrymander claim began to address not only districts that were bizarrely shaped but also those that utilized race as a “primary factor” in their drafting. However, this modified standard announced in *Miller* falls short of providing adequate guidance. As one commentator laments, “the use of ‘predominant’ to demarcate the measure of unconstitutionality does little to elucidate the exact notion of causation that triggers constitutional infirmity.”<sup>93</sup>

*United States v. Hays*, the companion case to *Miller*, provides virtually no additional guidance regarding the racial gerrymandering claim. *Hays* simply established that to have standing in a racial gerrymandering case the plaintiff must reside in the district that is challenged.<sup>94</sup> The plaintiffs in *Hays* did not reside in the challenged district so the Court remanded the case with instructions to dismiss for lack of standing.<sup>95</sup>

#### D. Round Three: *Bush v. Vera* and *Shaw v. Hunt*

*Bush v. Vera* and *Shaw v. Hunt* (*Shaw II*)<sup>96</sup> are companion cases. *Shaw II* is a continuation of the litigation initiated in *Shaw I*. In *Shaw I*, the Court considered the three-judge district court’s decision to dismiss for failure to state an equal protection claim.<sup>97</sup> Although the *Shaw I* Court resolved that an equal protection claim did exist and defined the parameters of the new cause of action, the Court remanded the case to be reevaluated according to the new law.<sup>98</sup>

*Shaw II* resulted from the remand of *Shaw I* by the Supreme Court. However, instead of considering both of the majority-minority districts that were challenged in *Shaw I*, only one of these districts, District 12, was challenged in *Shaw II* because appellants lacked standing in the other district.<sup>99</sup> Remarkably, the three-judge district court in *Shaw II* found that although the North Carolina’s reapportionment plan was subject to strict scrutiny, the plan indeed met the strict scrutiny standard.<sup>100</sup> The Supreme Court reversed the district court’s *Shaw II* decision holding that the challenged reapportionment plan was

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92. “It is apparent that it was not alleged shared interests but rather the object of maximizing the District’s black population and obtaining Justice Department approval that in fact explained the General Assembly’s actions.” *Id.* at 2490.

93. Issacharoff, *supra* note 90, at 57. “Unfortunately, by turning to tort-like concepts of causation, the Court is taking a difficult and unresolved area of constitutional law and saddling it with a segment of the common law that has been caustically termed the ‘last refuge of muddy thinkers.’” *Id.* (quoting Kenneth Vinson, *Proximate Cause Should Be Barred From Wandering Outside Negligence Law*, 13 FLA.ST.U.L.REV. 215 (1985)).

94. See *United States v. Hayes*, 115 S.Ct. 2431, 2436 (1995).

95. See *id.* at 2437.

96. *Shaw v. Hunt*, 861 F.Supp. 408 (E.D.N.C. 1994).

97. See *Shaw v. Reno*, 509 U.S. 630, 633-37 (1993).

98. See *id.*

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

100. See *Shaw*, 861 F.Supp. at 408.

not narrowly tailored under the strict scrutiny standard.<sup>101</sup>

#### IV. *BUSH V. VERA* DECISION

*Bush v. Vera* is a plurality opinion, followed by three concurring opinions and two dissenting opinions. The Court affirmed *Vera v. Richards* while borrowing language and doctrines developed in *Miller*.<sup>102</sup> Issued in 1994, *Vera v. Richards* was decided one year before the Court announced the modifications to the *Shaw I* cause of action in *Miller* (1995). The Court grappled with the twist that *Miller* added, and among other issues rendered the most fractured decision yet. This decision is the only one to date that considers the *Shaw I* cause of action without reaching a majority opinion. Even *Shaw II*, the companion case, is a majority opinion.

##### A. *Bush v. Vera*: Plurality Opinion

The plurality easily found standing since at least one of the six plaintiffs resided in each of the challenged districts to satisfy the bright line standing requirement announced in *Hays*.<sup>103</sup> Upon establishing standing, the plurality addressed the more complicated issues of the racial gerrymandering claim beginning with the predominant factor analysis.

##### 1. Predominant Factor Analysis

The plurality explained that using race as a factor in drawing congressional districts does not in itself give rise to strict scrutiny.<sup>104</sup> Rather, “[f]or strict scrutiny to apply, the plaintiffs must prove that other legitimate districting principles were subordinated to race.”<sup>105</sup> The plurality reviewed the district court’s determination that race had been the predominant factor in drawing the three challenged districts. The district court reached its conclusion with the assistance of, among other things, evidence including preclearance submissions to the Department of Justice,<sup>106</sup> the computer software with exacting compilations of racial data, and the neglect of traditional districting criteria.<sup>107</sup> The plurality concluded that all of this evidence in totality contributed to the determination that race was the primary factor in drawing each of the three challenged congressional districts.<sup>108</sup>

The plurality first examined District 30 in Dallas to determine conclusively

101. See *Shaw*, 116 S.Ct. at 1894.

102. See *Bush v. Vera*, 116 S.Ct. 1941 (1996).

103. See *id.* at 1951.

104. See *id.*

105. See *id.* (quoting *Miller v. Johnson*, 115 S.Ct. 2475, 2488 (1995)).

106. The VRA mandates that a number of states, including Texas, that have a history of denying political access to people based on race, must submit any changes in voting procedure to the department of Justice or the Federal District Court for the District of Columbia. See 42 U.S.C. § 1973c.

107. See *Bush*, 116 S.Ct. at 1953.

108. See *id.* at 1941.

whether race predominated as a consideration in drawing this district. Examination of the VRA section 5 submission to the Department of Justice and consideration of the testimony in an earlier political gerrymandering suit led to the determination that race was the predominant factor in drawing District 30.<sup>109</sup> The plurality asserted that the use of sophisticated computer software to draw the challenged congressional district was the most significant evidence,<sup>110</sup> and resolved that “[t]he combination of these factors compels us to agree with the District Court that ‘the contours of Congressional District 30 are unexplainable in terms other than race.’”<sup>111</sup>

The appellants claimed that incumbency protection, and not race, was the predominant factor in drafting District 30.<sup>112</sup> The plurality entertained this argument to a certain extent, but in the end found it self-defeating.<sup>113</sup> According to the plurality, even if incumbency protection was among the primary objectives in redistricting, District 30 would still be subject to strict scrutiny because race was improperly used as a proxy for incumbency protection and necessarily predominated over other considerations.<sup>114</sup> While the plurality acknowledged that they “have not subjected political gerrymandering to strict scrutiny”<sup>115</sup> in the past, this situation apparently distinguished itself because political gerrymandering used race as a proxy.

The plurality next considered the African-American district and the Hispanic district in Houston, and concluded that their shapes were so bizarre and unexplainable, on any grounds other than race, that they were presumptively unconstitutional.<sup>116</sup> The plurality stressed that these two districts in Houston were among the “three least regular districts in the country.”<sup>117</sup> This irregularity revealed a total disregard for traditional districting principles, and supported the plurality’s assertion that race was the predominant factor. The plurality reasoned that if traditional districting principles were not used, then the predominant factor must have been race.<sup>118</sup>

In contrast to the plurality’s consideration of the challenged district in Dallas, the plurality entirely dismissed the appellants’ argument that incumbency protection predominated in the creation of the two Houston districts.<sup>119</sup> The legislature’s division of African-Americans and Hispanics into two adjacent districts confirmed that race was the predominant factor in drawing the two challenged districts located in Houston.<sup>120</sup> The plurality resolved that the cre-

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109. *See id.* at 1957.

110. *See id.*

111. *Id.* at 1958.

112. *See id.* at 1955.

113. *See id.* at 1954-58.

114. *See id.* at 1957.

115. *Id.* at 1954 (referring to *Davis v. Bandemer*, 478 U.S. 109, 132 (1986)).

116. *See id.* at 1959-60.

117. *Id.* at 1958.

118. *See id.*

119. “The record evidence of the racial demographics . . . belies any suggestion that party politics could explain the dividing lines between the two districts.” *Id.* at 1959.

120. “[T]he district lines correlate almost perfectly with race.” *Id.*

ation of adjacent majority-minority districts, one for African-Americans and one for Hispanics, is "ultimately unexplainable on grounds other than racial quota established for those districts."<sup>121</sup>

## 2. Strict Scrutiny Analysis

Upon establishing that race was a predominate factor in drawing all three of the challenged districts and that each was thus a racial gerrymander, the plurality applied strict scrutiny.<sup>122</sup> For the purpose of analysis, the plurality assumed that a compelling government interest existed and then concentrated on whether the districts were narrowly tailored.<sup>123</sup> Without even reaching the question of whether the challenged districts met a compelling interest, the plurality determined the districts did not meet the narrowly tailored requirement.<sup>124</sup>

While acknowledging that avoiding a section 2 vote dilution claim was a compelling interest, the plurality determined that the Texas legislature had not narrowly tailored the challenged districts to avoid section 2 liability. Section 2 liability, i.e. vote dilution, exists when the *Gingles*<sup>125</sup> threshold requirements are met. Without evaluating the districts under all three of the threshold requirements, the plurality determined that none of the challenged districts even met the first threshold requirement.<sup>126</sup>

The first requirement of the *Gingles* criteria to establish a section 2 claim requires that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."<sup>127</sup> None of the minority groups occupying the three challenged districts exhibited the quality of being "geographically compact," so the Texas Legislature could not claim that it was necessary to create these bizarre districts to avoid a vote dilution claim under section 2.<sup>128</sup> Regardless of whether the other threshold requirements were met, the plurality concluded that the Texas Legislature had not narrowly tailored the challenged districts to avoid a section 2 vote dilution claim.<sup>129</sup> The plurality stated, "[section] 2 does not require a State to create, on predominately racial lines, a district that is not 'reasonably compact.'"<sup>130</sup>

Next the plurality addressed the appellants' argument that the compelling state interest in remedying past and present racial discrimination was narrowly

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121. *Id.* at 1960.

122. *See id.*

123. *See id.*

124. *See id.*

125. *See Thornburg v. Gingles*, 478 U.S. 30, 51 (1986). Not until the 1992 Term did the Supreme Court definitively hold that the *Gingles* criteria also control VRA challenges to single-member district plans. *See Pildes & Niemi supra* note 72, at 488.

126. *See Bush v. Vera*, 116 S.Ct. 1941, 1961 (1996).

127. *Thornburg*, 478 U.S. at 50.

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

129. *See id.*

130. *Id.*

tailored.<sup>131</sup> The appellants explained that remedial measures were necessary to counter Anglo voters who consistently “bloc” voted against Hispanic and African-American candidates.<sup>132</sup> The plurality found that this “bloc” voting resulted in the same harm as that created in vote dilution.<sup>133</sup> Subsequently, the Court analogized the interest in remedying past and present racial discrimination to the interest in avoiding section 2 vote dilution claims.<sup>134</sup> After making this comparison, the Court explained that just as the interest in avoiding section 2 vote dilution liability was not narrowly tailored, neither was the interest in remedying past and present racial discrimination.<sup>135</sup>

The last compelling interest offered by the appellants regarded the nonretrogression requirement of section 5 of the VRA.<sup>136</sup> Districts 29 and 30 were created after the 1990 census, but District 18 had been in existence for two decades. Thus, the section 5 nonretrogression standard, which applies to previously existing districts, only applied to District 18.<sup>137</sup> The plurality agreed with the appellants’ argument that avoiding section 5 liability can be a compelling interest.<sup>138</sup> However, the plurality asserted that the state went beyond the nonretrogression requirement of section 5 by seeking continued electoral success of minorities in District 18 even though section 5 does not mandate this.<sup>139</sup> According to the plurality, section 5 only demands “that the minority’s opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State’s actions.”<sup>140</sup> The Texas Legislature went beyond mere protection against nonretrogression, mandated by section 5, to actually insure the continued success of the majority-minority district.<sup>141</sup> Therefore, the plurality explained that the district is not narrowly tailored to avoid section 5 liability.<sup>142</sup>

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131. *See id.* Eliminating the effects of past racial discrimination is “a compelling interest entirely distinct from the Voting Rights Act.” *Shaw v. Reno*, 509 U.S. 630, 656 (1993). The Court has “previously recognized a significant interest in eradicating the effects of past racial discrimination.” *Id.*

132. *See Bush*, 116 S.Ct. at 1962.

133. *See id.* at 1962-63.

134. *See id.* at 1963.

135. *See id.* Regarding remedying past racial discrimination, the plurality states that they “have indicated that such problems will not justify race-based districting unless ‘the State employ[s] sound districting principles, and . . . the affected racial group’s residential patterns afford the opportunity of creating districts in which they will be in the majority.’” *Id.* (quoting *Shaw v. Reno*, 509 U.S. 630, 657 (1993)(quoting *United Jewish Organizations v. Carey*, 430 U.S. 144, 167-68 (1977)).

136. *See Bush*, 116 S.Ct. at 1963.

137. *See id.*

138. *See id.*

139. *See id.* “The problem with the State’s argument is that it seeks to justify not maintenance, but substantial augmentation, of the African-American population percentage in District 18.” *Id.*

140. *Id.*

141. *See id.*

142. *See id.* “A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression.” *Id.* (quoting *Shaw I*, 509 U.S. at 655).



### B. Array Of Concurring Opinions

Only when the Court determines that a legislature used race as the predominant factor in redistricting will the Court find a racial gerrymander.<sup>143</sup> Subsequently, the racial gerrymander is subjected to strict scrutiny.<sup>144</sup> Given the reputation for strict scrutiny to be "strict in scrutiny and fatal in fact," the critical issue is whether a racial gerrymander is identified. Until recently, all Supreme Court decisions left unanswered the question of whether the intentional creation of a majority-minority district in itself was prima facie evidence that race predominated in redistricting and that the district was thus a racial gerrymander.<sup>145</sup> To date, *Bush v. Vera* is the only Supreme Court decision to shed light on this issue.

Beginning with the initial racial gerrymander case, *Shaw I*, the Court has consistently decided every racial gerrymander case, but one, on the merits,<sup>146</sup> with the same five justices comprising the majority.<sup>147</sup> This consistent string of majority decisions ended with *Bush v. Vera*. Until *Shaw I*, none of these five justices had ever committed themselves one way or another as to whether the creation of a majority-minority district in itself was a racial gerrymander.<sup>148</sup> Their consideration of this issue led to the fractured opinion in *Bush v. Vera*.

Justice O'Connor wrote the plurality opinion, declaring that strict scrutiny does not "apply to all cases of intentional creation of majority-minority districts."<sup>149</sup> Thus the intentional creation of a majority-minority district alone will not qualify as a racial gerrymander unless additional evidence reveals that race was the predominant factor in redistricting. The plurality resolved any conflict between this conclusion and the holding of *Adarand Construction, Inc. v. Peña*<sup>150</sup> by referring to the different context. *Adarand* considers a statute that made specific references to race in an effort to establish set-aside programs.<sup>151</sup> In contrast, *Bush v. Vera* examines race neutral electoral lines, established through legislation that simply establishes the dimensions and coordinates of new congressional districts with no mention of race.<sup>152</sup> Any determination

143. See *id.* at 1951. See also *Miller v. Johnson*, 115 S.Ct. 2475 (1995) (establishing the predominant-factor analysis to determine whether an electoral district is a racial gerrymander).

144. See *Bush v. Vera*, 116 S.Ct. 1941, 1951 (1996). See also *Shaw I*, 509 U.S. at 630 (establishing the strict scrutiny standard for racial gerrymanders).

145. See generally *Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 115 S.Ct. 2475 (1995); *United States v. Hays*, 115 S.Ct. 2431 (1995).

146. *United States v. Hays*, was the only Supreme Court decision regarding racial gerrymandering that was not decided on the merits. The Court found that the plaintiffs lacked standing because they did not reside in the challenged district. See *United States v. Hays*, 115 S.Ct. 2431 (1995).

147. The five Justices in the majority are Rehnquist, O'Connor, Kennedy, Thomas, and Scalia.

148. "Since the holding here makes it unnecessary to decide whether or how a reapportionment plan that, on its face, can be explained in nonracial terms successfully could be challenged, the Court expresses no view on whether the intentional creation of majority-minority districts, without more, always gives rise to an equal protection claim." *Shaw I*, 509 U.S. at 631 (1996).

149. *Bush*, 116 S.Ct. at 1951 (referring to *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994)("[S]trict scrutiny did not apply to an intentionally created compact majority-minority district.")).

150. 515 U.S. 200 (1995).

151. See *id.* at 205.

152. See *Bush*, 116 S.Ct. at 1950.

of the use of race in drawing the congressional districts requires an investigation into the legislative history.<sup>153</sup> The plurality offers the explanation of these different contexts to show how *Bush v. Vera* and *Adarand* can coexist.

Justice O'Connor's conclusion, that the intentional creation of a majority-minority district alone does not automatically qualify as a racial gerrymander, fractured the Court's majority leading to a plurality decision.<sup>154</sup> While Justices Thomas and Scalia concurred in the judgment, they did not join the plurality's opinion because they specifically objected to "Justice O'Connor's assertion that strict scrutiny is not invoked by the intentional creation of majority-minority districts."<sup>155</sup> Justice Thomas wrote, and Justice Scalia joined, the concurring opinion which concurred in judgment but not in reasoning.

Although Justice Thomas acknowledged "the evidentiary difficulty of proving that a redistricting plan is, in fact, a racial gerrymander,"<sup>156</sup> he did not accept the plurality's explanation for not applying strict scrutiny "to all cases of intentional creation of majority-minority districts."<sup>157</sup> Justice Thomas explained that the intentional creation of majority-minority districts necessarily subordinates traditional race-neutral districting principles and that therefore the "legislature has classified persons on the basis of race."<sup>158</sup> In his concurrence, he reminds the plurality that "[s]trict scrutiny applies to all governmental classifications based on race, and we have expressly held that there is no exception for race-based redistricting."<sup>159</sup>

Addressing the same issue as Justice Thomas, but in a distinctly different way, Justice Kennedy also wrote a concurring opinion. Although Justice Kennedy joined the plurality opinion, in his concurring opinion he objected to the plurality even addressing the issue of whether the intentional creation of a majority-minority district in itself constituted a racial gerrymander.<sup>160</sup> According to Justice Kennedy, the facts in this case did not require the plurality to address this question, so it was not necessary to have elaborated.<sup>161</sup> Because in this case the plurality had found that race predominated with overwhelming evidence, regardless of the intentional creation of a majority-minority districts, the

153. While *Adarand* clearly states that "classifications based explicitly on race" will invoke strict scrutiny. See *Adarand*, 515 U.S. at 213. The plurality in *Bush* explained that "[e]lectorate lines are 'facially neutral,' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases." *Bush*, 116 S.Ct. at 1951. The "searching inquiry" referred to by the plurality is the "predominant factor" analysis initiated in *Miller* and is necessary because electoral district lines are not per se classifications of race, as set aside programs are in *Adarand*. See *Bush*, 116 S.Ct. at 1951. See also *Adarand*, 515 U.S. at 213; *Miller v. Johnson*, 115 S.Ct. 2475, 2488 (1995).

154. See *Bush*, 116 S.Ct. at 1951.

155. *Id.* at 1972 (Thomas, J., concurring in judgment).

156. *Id.* at 1973.

157. *Id.* at 1951. Thomas said, "We have never suggested that a racial gerrymander is subject to anything less than strict scrutiny." *Id.* at 1973 (Thomas, J., concurring in judgment).

158. *Id.* at 1973 (Thomas, J., concurring in judgment). "[A] majority-minority district is created 'because of,' and not merely 'in spite of' racial demographics. When that occurs, traditional race-neutral districting principles are necessarily subordinated (and race necessarily predominates), and the legislature has classified persons on the basis of race. The resulting redistricting must be viewed as a racial gerrymander." *Id.*

159. *Id.*

160. See *id.* at 1971 (Kennedy, J., concurring in judgment).

161. See *id.*

plurality did not need to address whether the intentional creation of a majority-minority district created a racial gerrymander. In the plurality opinion, Justice O'Connor relied on the district court decision, *DeWitt v. Wilson*,<sup>162</sup> which held that "strict scrutiny did not apply to an intentionally created compact majority-minority district" to buttress her contention.<sup>163</sup> However, Justice Kennedy trivialized this support by explaining that this was not the issue in *DeWitt* and "that our summary affirmance in *DeWitt* stands for no proposition other than that the districts reviewed there were constitutional. We do not endorse the reasoning of the district court when we order summary affirmance of the judgment."<sup>164</sup>

In addition to writing the plurality opinion, Justice O'Connor concurred separately.<sup>165</sup> Her concurring opinion re-emphasized her commitment to the divisive principle which fractured the previously consistent majority in racial gerrymander cases.<sup>166</sup> In her concurrence, Justice O'Connor reiterated that "States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny."<sup>167</sup> Justice O'Connor also addressed an additional issue which was not in the case, but that nevertheless she believed needed clarification.<sup>168</sup>

The Court has always assumed that there was a compelling interest in compliance with section 2 of the VRA when conducting the strict scrutiny analysis of a racial gerrymander. However, because the narrowly tailored requirement has never been satisfied, the issue of whether the assumed compelling interest in compliance with section 2 could ever be an actual compelling interest has never been reached.<sup>169</sup> Justice O'Connor identified this unanswered question as deserving attention and asserted "that States and lower courts are entitled to more definite guidance as they toil with the twin demands of the Fourteenth Amendment and the Voting Rights Act."<sup>170</sup> Justice O'Connor briefly examined the history of section 2 and concluded that it is not only constitutional but also that "the States have a compelling interest with the results test as this Court has interpreted it."<sup>171</sup> Although her explanation addressed the compelling interest of section 2 with favorable terms, neither Justice O'Connor nor any other member of the plurality addressed whether compliance with section 5 or remedying past racial harm could also be legitimate compelling interests. In addition to compliance with section 2, compliance with section

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162. 856 F.Supp. 1409 (E.D. Cal. 1994), summarily aff'd in part and dism'd in part, 115 S.Ct. 2637 (1995).

163. *Bush v. Vera*, 116 S.Ct. 1941, 1951 (1996).

164. *Id.* at 1971 (Kennedy, J., concurring in judgment).

165. *See id.* at 1968 (O'Connor, J., concurring in judgment). Justice O'Connor had the most insightful view into the redistricting process among all of her colleagues, because as of 1995, she was the only Supreme Court Justice to have also been a state legislator. *See Issacharoff, supra* note 90, at 66.

166. *See Bush*, 116 S.Ct. at 1968 (O'Connor, J., concurring in judgment).

167. *See id.* at 1969.

168. *See id.*

169. *See id.* at 1968.

170. *Id.*

171. *Id.* at 1969.

5 and remedying past and present racial discrimination have both been regularly pled in a number of racial gerrymandering cases; however, the plurality's silence will certainly have a chilling effect on states considering compliance with section 5 and remedying past and present racial discrimination. Nonetheless, Justice O'Connor exposed herself as a moderate in this racial gerrymander case by qualifying the significance of intentionally created majority-minority districts and reassuring that compliance with section 2 is a legitimate compelling interest, while remaining steadfast in her commitment to the *Shaw I* cause of action.<sup>172</sup>

### C. Dissenters Stay Their Ground

Not surprisingly, the dissent in *Bush v. Vera* consisted of the same justices who have dissented in all previous racial gerrymander claims, decided on the merits.<sup>173</sup> Justices Stevens and Souter wrote separate dissenting opinions and each were joined by Justices Ginsburg and Breyer. Each dissent objected to the racial gerrymandering claim in one form or another, but both expressed approval of the plurality opinion's assertion that the intentional creation of a majority-minority district alone does not qualify it as a racial gerrymander.<sup>174</sup> Justice Souter also expressed comfort in Justice O'Connor's concurring opinion which explained forcefully that compliance with section 2 is a compelling interest.<sup>175</sup>

Justice Stevens' dissent primarily objected to the plurality's conclusion that race and not politics was the predominant factor in redistricting.<sup>176</sup> He claimed that incumbency protection was the predominant factor in creating District 30, the majority African-American district in Dallas.<sup>177</sup> Additionally, he asserted that even if race were used as a proxy to ensure incumbency protection in District 30 that this was not an improper classification because it would not have been an irrational classification.<sup>178</sup> After all, race often is an accurate indication of a person's political affiliation.<sup>179</sup>

However, Justice Stevens was "willing to accept *arguendo* the plurality's

172. *See id.* "Although I agree with the dissenters about §2's role as part of our national commitment to racial equality, I differ from them in my belief that that commitment can and must be reconciled with the complementary commitment of our Fourteenth Amendment jurisprudence to eliminate the unjustified use of racial stereotypes. At the same time that we combat the symptoms of racial polarization in politics, we must strive to eliminate unnecessary race-based state action that appears to endorse the disease." *Id.*

173. *But see* *United States v. Hays*, 115 S.Ct. 2431 (1995)(not decided on the merits).

174. *See, e.g., Bush v. Vera*, 116 S.Ct. 1941, 1978 & 2003 (1995)("[T]he plurality reasonably concludes that race-conscious redistricting is not always a form of 'discrimination' to which we should direct our most skeptical eye.")(Stevens, J., dissenting); ("The Court's move . . . is a sound one, as is its continuing recognition (despite its broad definition of harm) that not every intentional creation of a majority-minority district requires strict scrutiny.")(Souter, J., dissenting).

175. *See id.* at 1998 (Souter, J., dissenting in judgment). "Today's opinions do little to solve *Shaw's* puzzles or return districting responsibly to the States. To say this is not to denigrate the importance of Justice O'Connor's position in her separate opinion, *ante*, at 1968-1969, that compliance with § 2 of the Voting Rights Act is a compelling state interest; her statement takes a very significant step toward alleviating apprehension that *Shaw* is at odds with the Voting Rights Act." *Id.*

176. *See id.* at 1988 (Stevens, J., dissenting in judgment).

177. *See id.*

178. *See id.*

179. *See id.*

conclusion that the Houston districts should be examined with strict scrutiny.”<sup>180</sup> Justice Stevens asserted that the districts in Houston were more likely to have been drawn with race as a primary factor because the legislature deliberately separated Hispanics from African-Americans.<sup>181</sup> These districts were adjacent in some instances and they were purposely drawn to accommodate black voters in one electoral district and Hispanic voters in another.<sup>182</sup> Nonetheless, Justice Stevens asserted that even though the two districts may be subject to strict scrutiny under *Shaw I*, they should have passed this standard.<sup>183</sup> His claim that they should have passed strict scrutiny was explained as follows; “if there is no independent constitutional duty to create compact districts in the first place, and the Court suggests none, there is no reason why noncompact districts should not be a permissible method of avoiding violations of law.”<sup>184</sup> Justice Stevens evinced his frustration with the whole racial gerrymandering claim by asserting that the Court should not even be addressing this case today because the issues should be left to “the political branches of our government.”<sup>185</sup> He stated the political gerrymandering in Texas that sought to protect partisan interest and incumbents was the “real problem”<sup>186</sup> which should have been addressed by the Court in this case.

On the other hand, Justice Souter explained at length that the Court should not even be considering this case because no definable injury exists.<sup>187</sup> Justice Souter also criticized the plurality for not refining the racial gerrymander cause of action and developing a clearer standard to aid legislatures seeking to avoid liability.<sup>188</sup> He urged the Court to develop a clearer definition of the cause of action or a more understandable standard. As an illustration, Justice Souter referred to *Baker v. Carr*<sup>189</sup> and its progeny, *Reynolds v. Sims*.<sup>190</sup> *Baker v. Carr* established the justiciability of malapportionment without defining exactly what comprised a malapportioned electoral district.<sup>191</sup> Two years later, in *Reynolds v. Sims*, the Court created the “one person, one vote” bright line standard to evaluate malapportionment claims.<sup>192</sup> Justice Souter insisted that the present Court should likewise strive to develop clear guidelines to identify racial gerrymanders.<sup>193</sup>

Justice Souter was adamant in his opposition to conservative members of

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180. *See id.* at 1989.

181. *See id.*

182. *See id.*

183. *See id.*

184. *Id.*

185. *Id.* at 1990.

186. *Id.* at 1992.

187. *Id.* at 2000-03.

188. “[T]he combined plurality, minority, and Court opinions do not ultimately leave the law dealing with a *Shaw* claim appreciably clearer or more manageable than *Shaw I* itself did.” *Id.* at 1998 (Souter, J., dissenting).

189. 369 U.S. 186 (1962).

190. 377 U.S. 533, (1964).

191. *See id.*

192. *Bush v. Vera*, 116 S.Ct. 1941, 2001 (1996).

193. *See id.*

the Court who suggest that the Court should adopt the principle of colorblindness in this and similar cases.<sup>194</sup> Justice Souter expressed his concern over Justice Scalia's call for the acceptance of the Court's colorblindness,<sup>195</sup> but was reassured by Justice O'Connor's assertion that "race-conscious redistricting is not always unconstitutional."<sup>196</sup> In addition to explaining his discomfort with the amorphous standard that continues in *Bush v. Vera*, Justice Souter claimed that there are only two solutions: either "confine the cause of action by adopting a quantifiable shape test or . . . eliminate the cause of action entirely."<sup>197</sup> Justice Souter asserted that a shape test would provide guidance by establishing a standard "calculated on the basis of a district's dispersion, perimeter, and population."<sup>198</sup>

## V. ANALYSIS

### A. *The Racial Gerrymander Harm Is Real*

The plurality arrived at the correct decision in *Bush v. Vera*. The "expressive harm"<sup>199</sup> identified in *Shaw I* is real. Harm exists when electoral districts are primarily drawn according to race; the message sent to the elected officials and their constituency is that the elected official represents the interests of the group rather than the interests of all the constituents as a whole. If our democracy wishes to have elected officials represent groups of people based on interests rather than geography, then a true form of proportional representation should be created, similar to the ones used by the national parliaments in most European countries.<sup>200</sup> However, at the moment, a public outcry for a true national proportional representation system does not exist, and until such a demand for proportional representation exists, electoral districts should exist to represent the entire constituency rather than only one interest group in the district, leaving those not in the interest group effectively unrepresented.

The three challenged districts in *Bush v. Vera* impress most commentators as well as the plurality of the Court as incomprehensible to the constituents of the districts. These districts are jagged, elongated, and inconsistent. Constituents who live in these districts surely are confused as to which district they reside

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194. *Id.* at 2010. Justice Souter revealed his strong opposition by referring to "the irony that the price of imposing a principle of colorblindness in the name of the Fourteenth Amendment would be[,] submerging the votes of those whom the Fourteenth and Fifteenth Amendments were adopted to protect[.]" *Id.*

195. *See id.* at 2011 (Souter refers to Scalia's concurrence in *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520-521 where he criticizes "the majority for rejecting a strict principle of colorblindness" according to Justice Souter).

196. *Id.* (quoting Justice O'Connor in *Shaw I*).

197. *Id.*

198. *Id.* at 2010.

199. *See supra* notes 72-76 and accompanying text.

200. The United States is unique among Western democracies by not utilizing proportional representation to elect the national parliamentary body. Countries of English heritage are typically the only countries that do not use proportional representation, whereas almost all the democracies in continental Europe use some form of proportional representation to elect their national parliament.

in, i.e., the districts lack “cognizability”.<sup>201</sup> A large number of the constituents who live on the perimeter (which is exceptionally long due to the erratic drawing of it) of these electoral districts may talk to their neighbors about their voting preferences not realizing that they are represented by a different elected official than their neighbor across the street.<sup>202</sup> Even worse, they may not know for which candidates they are voting.<sup>203</sup> Confusion is a concern because as one commentator suggests, the “districts can be so far from cognizable that they violate what we might think of as a due process component of equal protection by damaging the potential for ‘fair and effective representation.’”<sup>204</sup> This confusion could be avoided if districts were drawn with the traditional respect for geography.

However, of a greater concern than voters’ confusion about the district in which they reside is the racial gerrymander’s role in compromising minority representation. It has suggested that effective representation of minorities in Congress is at an all time low despite the record number of minorities in Congress today.<sup>205</sup> The explanation for this paradox rests in the attitudes of the present Congress. Though “[b]etween 1982 and 1992, the number of congressional districts in which minorities constituted a numerical majority doubled, from twenty-six to fifty two,”<sup>206</sup> the increase is largely attributed to the larger number of majority-minority districts. The creation of a large number of majority-minority districts after the 1990 decennial census involved race-conscious gerrymandering that took black constituents out of districts which used to be represented by a white congressman.<sup>207</sup> Now these white congressmen are often not as responsive to the remaining minority constituents who do not exist in adequate numbers to determine the outcome of primaries and general elections. Whereas, in the past, many white congressmen were concerned about adequately representing their minority constituents, they now are not as concerned about earning minority support for reelection. The added number of minority con-

201. “[C]ognizability’ [means] the ability to characterize the district boundaries in a manner that can be readily communicated to ordinary citizens of the district in common sense terms based on geographical referents.” Bernard Grofman, *supra* note 58, at 1262.

202. “Permitting the construction of districts, whose boundaries are simply not definable in commonsense terms, vitiates the principle that representatives are to be elected from geographically defined districts and vitiates the advantages of such districts as the basis of electoral choice.” *Id.* at 1263.

203. The plurality illustrated this problem with examples. “Campaigners seeking to visit their constituents ‘had to carry a map to identify the district lines, because so often the borders would move from block to block’; voters ‘did not know the candidates running for office’ because they did not know which district they lived in.” *Bush*, 116 S.Ct. at 1959 (quoting *Vera v. Richards*, 861 F.Supp. 1304, 1340 (S.D. Tex. 1994)).

204. Grofman, *supra* note 58, at 1262.

205. Interview with Gary Allison, Professor of Law, University of Tulsa College of Law, in Tulsa, Okla. (Sept. 1996)

206. Jamie B. Raskin, *supra* note 3, at 526.

207. Two prominent explanations exist to explain the reasoning behind grouping minorities like this:

First, commentators in national news journals, editorials, and op-ed articles have claimed that the Voting Rights Act-as enforced by the DOJ-is a “Republican conspiracy” to siphon off black voters into heavily black districts in order to “whiten” the remaining districts so as to make it more likely that Republicans will be elected. Second, others claim that the Voting Rights Act has been used to maximize the number of seats in which a minority candidate will virtually be assured of election, and thus has become a kind of quota system.

Bernard Grofman, *supra* note 58, at 1248. (footnotes omitted).

gressmen failed to compensate for the influence lost when a number of white congressmen no longer concerned themselves with the needs of their smaller minority constituency.<sup>208</sup>

Additionally, the practice of drawing electoral districts with race as the primary factor may lead to the Balkanization of races, which is hardly a forward motion in the nation's effort to encourage a harmonious multiracial society. *Shaw I* previously alluded to this and described it as "uncomfortable resemblance to political apartheid."<sup>209</sup> When electoral districts are drawn with race as the primary factor it may encourage African-Americans to continue to live or congregate in all black neighborhoods rather than to risk losing their political power.<sup>210</sup> The *Bush v. Vera* plurality appropriately points out that "[i]f our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury."<sup>211</sup>

The *Bush v. Vera* plurality opinion reassures state legislatures that race may be a consideration when conducting reapportionment and will not be subject to strict scrutiny as long as it is not the prevailing consideration.<sup>212</sup> This approach is reasonable because it allows race to be utilized as a factor in reapportionment plans—in an effort to abide by the mandates of the VRA of color-conscious districting—while also providing a reasonable limit to restrict the abuse of color-conscious districting. Additionally, the *Shaw I* harm is avoided, whereby elected officials represent only a group's interest rather than their whole constituency.

### *B. Uniqueness of the Bush v. Vera Decision Provides Guidance*

*Bush v. Vera* and *Shaw II* are companion cases in that the Court considered the same three compelling interests in each case. Nonetheless, significant distinctions exist between the two cases. *Bush v. Vera* deals with more issues and provides significantly more guidance than *Shaw II* and all previous racial gerrymander cases. This is due partly to the unique circumstances surrounding the challenged districts in *Bush v. Vera*.

Most significantly, *Bush v. Vera* is the first Supreme Court decision regarding racial gerrymandering which resulted in a plurality.<sup>213</sup> With the excep-

208. Interview with Gary Allison, Professor of Law, University of Tulsa College of Law, in Tulsa, Okla. (Sept. 1996).

209. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

210. Interview with Gary Allison, Professor of Law, University of Tulsa College of Law, in Tulsa, Okla. (Sept. 1996).

211. *Bush v. Vera*, 116 S.Ct. 1941, 1964 (1996)(quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991)).

212. "Strict scrutiny does not apply merely because redistricting is performed with consciousness of race." *Id.* at 1951 (quoting *Shaw I*, 509 U.S. at 630). "Nor does it apply to all cases of intentional creation of majority-minority districts." *Id.*

213. Justice O'Connor wrote the *Bush v. Vera* plurality opinion, joined by Chief Justice Rehnquist and Justice Kennedy. *See id.*, (plurality opinion). The Court decided the following racial gerrymandering cases by a majority: *Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995); *United States v. Hays*, 515 U.S. 737 (1995); and *Shaw v. Hunt*, 116 S.Ct. 1894 (1996).



tion of *Bush v. Vera*, all Supreme Court opinions regarding racial gerrymandering claims have been majority opinions. Of those determined on the merits,<sup>214</sup> all included a bare majority of the same five justices.<sup>215</sup> In *Bush v. Vera*, Justices Thomas and Scalia broke rank, objecting to the plurality's view that the creation of a majority-minority district in itself does not call for strict scrutiny.<sup>216</sup> The plurality's position on this issue dissolved the consistent majority that had existed in every racial gerrymander case prior to *Bush v. Vera*, revealing the swing votes in future racial gerrymander cases.

The lower court decision from which *Bush v. Vera* originates, *Vera v. Richards*, may have contributed to the plurality's new approach to the racial gerrymander claim. In *Vera v. Richards*, a panel of judges examined four majority-minority districts, finding only three to be racial gerrymanders.<sup>217</sup> The panel found that Congressional District 28 was not a racial gerrymander, although it was intentionally created as a majority-minority district for the large Hispanic population in South Texas.<sup>218</sup> On appeal, the Supreme Court in *Bush v. Vera* did not directly address Congressional District 28 on the merits because it was not appealed as an issue.<sup>219</sup> However, it may have served as an impetus for the plurality's bold statement that not all majority-minority districts will automatically be racial gerrymanders. In any event, Congressional District 28 appears to be a prime example of the principle announced in the plurality opinion—that the intentional creation of a majority-minority district in itself does not establish a racial gerrymander—and serves as an example of what Justice O'Connor may have had in mind as a constitutionally drawn majority-minority district.

In *Bush v. Vera*, for the first time ever, Justice O'Connor stressed her contention that compliance with section 2 of the VRA is a compelling state interest.<sup>220</sup> This reassurance did not exist in the plurality opinion, but it did in Justice O'Connor's concurring opinion. In every racial gerrymandering decision

214. For example, *United States v. Hays* included the same five justices and others, but concluded that the plaintiffs did not have standing and left the issue of racial gerrymandering unresolved. *See Hays*, 515 U.S. at 747.

215. Chief Justice Rehnquist, and Justices O'Connor, Kennedy, Thomas, and Scalia constituted the majority in *Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 115 S.Ct. 2475 (1995); and *Shaw v. Hunt*, 116 S.Ct. 1894 (1996).

216. "I can not agree with Justice [O'Connor's] assertion that strict scrutiny is not invoked by the intentional creation of majority-minority districts." *Bush*, 116 S.Ct. at 1972 (Thomas, J., concurring in judgment). When the Court first acknowledged the racial gerrymandering claim in *Shaw I*, it explained that "the Court expresses no view on whether the intentional creation of majority-minority districts, without more, always gives rise to an equal protection claim." *Shaw*, 509 U.S. at 631. However, the plurality opinion in *Bush v. Vera* does express a view on the intentional creation of majority-minority districts by stating: "[Strict scrutiny does not] apply to all cases of intentional creation of majority-minority districts." *Bush*, 116 S.Ct. at 1951 (plurality opinion). Although Justice Kennedy joined the plurality decision in *Bush v. Vera*, he did not consider himself bound to the statement and objected to its discussion in the plurality opinion. *See id.* at 1971 (Kennedy, J., concurring).

217. *See Vera v. Richards*, 861 F.Supp. 1304, 1344 (S.D. Tex. 1994), *aff'd. sub nom. Bush v. Vera*, 116 S.Ct. 1941 (1996).

218. *See id.*

219. *See Bush v. Vera*, 116 S.Ct. 1941 (1996) (plurality opinion).

220. "I write separately to express my view on two points. First, compliance with the results test of § 2 of the Voting Rights Act (VRA) is a compelling interest." *Id.* at 1968 (O'Connor, J., concurring).

except for *Bush v. Vera*, no such assurance existed in the Court's majority opinion or even in the concurring opinion of a majority member writing separately.<sup>221</sup> It appears that Justice O'Connor is prepared to align herself with the four justices who disapprove of the racial gerrymander claim, in order to protect section 2 of the VRA.

*Bush v. Vera* also has the distinction of being the first case where the Supreme Court declared a majority-Hispanic district to be a racial gerrymander.<sup>222</sup> To date, the Supreme Court has only considered majority-African-American districts under the *Shaw I* claim.<sup>223</sup> Although the Court's consideration of a majority-Hispanic district is significant, even more noteworthy is the Court's evaluation of adjacent majority-minority districts, each composed of a different minority group. A majority of the members of the Court apparently agree that the purposeful division of one minority group from another by carefully drafting them into adjacent majority-minority districts provides conclusive proof that race was a predominant factor in drafting each district.<sup>224</sup>

By expanding on the *Shaw I* claim through new principles announced in the plurality decision and Justice O'Connor's concurring opinion, *Bush v. Vera* reflects the Court's rational approach to majority-minority districts. In addition, the unique characteristics of the case, including the consideration of Hispanic districts in the racial gerrymandering context, led the Court to conclusions never reached before. By reading the decision both literally, and between the lines, legislatures receive additional guidance to assist them in meeting the demands of the VRA on the one hand, and avoiding liability through a racial gerrymander claim on the other.

## VI. IMPLICATIONS

While color-conscious districting (commentators differ on whether this is actually affirmative action<sup>225</sup>) has served the useful purpose of enabling minor-

221. See, e.g., *Shaw v. Hunt*, 116 S.Ct. 1894 (1996). "Just as in *Miller*, this Court does not here reach the question whether compliance with the Act, on its own, can be a compelling state interest under the proper circumstances." *Id.* at 1898.

222. See *Bush*, 116 S.Ct. at 1941(plurality opinion)(regarding two majority-African-American districts and one majority-Hispanic district).

223. See *Shaw v. Reno*, 509 U.S. 630 (1993) (regarding two majority-African American districts); *Miller v. Johnson*, 515 U.S. 900 (1995) (regarding one majority-African-American district); *United States v. Hays*, 515 U.S. 737 (1995) (regarding one majority-African-American district); *Shaw*, 116 S.Ct. at 1894 (regarding one majority-African-American district).

224. See *Bush*, 116 S.Ct. at 1958-60 (plurality opinion). Even one of the dissenters, Justice Stevens, likewise summarizes the apparent implications of these adjacent majority-minority districts separating two different ethnic groups: "The Houston districts present a closer question on the application of strict scrutiny. . . . [T]here is . . . evidence that the interlocking shapes of the Houston districts were specifically, and almost exclusively, the result of an effort to create, out of largely integrated communities, both a majority-black and a majority-Hispanic district." *Id.* at 1989 (Stevens, J., dissenting).

225. "[I]f 'affirmative action' means, as it often has come to mean, not just *equal* treatment, but that the claims of minorities are given *more* weight than those of identically situated whites, then it is clearly inaccurate to characterize voting rights remedies as affirmative action." Bernard Grofman, *supra* note 58, at 1247. Affirmative Action in the context of voting rights would entail that an advantage be given to minorities. In these cases, minorities do not receive an advantage but simply the same chance to elect minorities as whites

ities to participate effectively in the political process, race-conscious districting has the potential to be abused.<sup>226</sup> Justice O'Connor expresses this concern and her belief that state legislatures can use race appropriately in her concurring opinion in *Bush v. Vera*, but that the use of race should be kept in check.<sup>227</sup> With this in mind, it is appropriate that beneficial race consciousness of government action should receive strict scrutiny, especially in cases of race-conscious district drawing.

If a legitimate goal necessitates race-conscious districting, it should survive strict scrutiny.<sup>228</sup> In Justice O'Connor's opinion in *Adarand*, where she stated her desire to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact,'" she reassured that strict scrutiny may be satisfied in appropriate circumstances.<sup>229</sup> She likewise reassured the drafters of congressional districts that if race is determined to be the primary factor in drawing congressional districts, it may satisfy strict scrutiny upon a showing the existence of a compelling interest, narrowly tailored.<sup>230</sup> The standards for satisfying the narrow tailoring requirement are high but they are not impossible to achieve. The plurality is not looking for perfection in narrow tailoring; they are simply looking for a good faith effort and something close to this will likely satisfy strict scrutiny.<sup>231</sup> Despite claims to the contrary,<sup>232</sup> Justice O'Connor maintains a moderate position on racial issues and her position as a swing vote should reassure those who are concerned about the future validity of the VRA.<sup>233</sup>

have to elect a white official.

226. A prominent commentator in this field eloquently explains in his own words, "Certainly, I do not wish to reduce the protections now afforded minorities by the Voting Rights Act. . . . Still, I believe that it is undesirable to draw districts that run helter-skelter the course of a state, picking up noncontiguous pockets of minorities, cutting up cities as with a scalpel, in the fashion of North Carolina's 12th Congressional District; there may even be circumstances where such districts violate due process or equal protection." Bernard Grofman, *supra* note 58, at 1260-61. Bernard Grofman published this article just before the Court announced the *Shaw I* cause of action, and in this sense seemed to predict accurately the development of the essence of a *Shaw I* claim.

227. "I believe that the States, playing a primary role, and courts, in their secondary role, are capable of distinguishing the appropriate and reasonably necessary uses of race from its unjustified and excessive uses." *Bush*, 116 S.Ct. at 1970.

228. "[W]e subject racial classifications to strict scrutiny precisely because that scrutiny is necessary to determine whether they are benign." *Id.* at 1963.

229. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995).

230. "I write separately to express my own view on two points. First, compliance with the results test of § 2 of the Voting Rights Act (VRA) is a compelling state interest. Second, that test can co-exist in principle and in practice with *Shaw v. Reno*, 509 U.S. 630 . . . (1993), and its progeny, as elaborated in today's opinions." *Bush v. Vera*, 116 S.Ct. 1941, 1968 (O'Connor's concurring opinion).

231. An example of this flexibility is in the plurality's statement: "We also reaffirm that the 'narrow tailoring' requirement of strict scrutiny allows the States a limited degree of leeway in furthering such interest. . . . We thus reject, as impossibly stringent, the District Court's view of the narrow tailoring requirement, that 'a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria.'" *Id.* at 1960.

232. "The cover story for the undercover operation of restoring white political supremacy is the almost comical constitutionalization by Justice O'Connor of the empty platitude that 'appearances do matter.'" Jamie B. Raskin, *supra* note 3, at 529 (footnote omitted)(referring to Justice O'Connor's opinion in *Shaw v. Reno*, 509 U.S. 630 (1993)).

233. "If you look closely at O'Connor's opinions, you will find that she has taken significantly more moderate positions in all of the cases than those of her more conservative colleagues. In her concurrence in the redistricting decision, *Miller v. Johnson*, for example, O'Connor made the point that 'customary and traditional' factors could legitimately be taken into consideration in redistricting as well as could race." James

Commentators claiming that the VRA may be ruled unconstitutional or virtually ineffective are exaggerating the effects of *Shaw I* and its predecessors.<sup>234</sup> Under *Bush v. Vera*, the VRA is preserved in its original form, and section 2 still exists as an effective tool for minorities to challenge redistricting that amounts to vote dilution. The four dissenters would certainly align themselves with Justice O'Connor to form a majority in an effort to insure that section 2 does not become a dead letter.<sup>235</sup> On the other hand, although O'Connor did not express the same commitment to section 5, there should be no question whether section 5 will be upheld as a compelling interest to insure that the covered states do not revert to the old and contemptible methods of denying minorities an opportunity to participate in the political process. Section 5 remains effective within the limited use envisioned by Congress, but it was never intended to be a reason to create majority-minority districts. Previous racial gerrymandering decisions do not accept the interpretation of some states and the Department of Justice that compliance with section 5 would ever require the creation of a majority-minority district, but the Court has never stated or implied that the nonretrogression requirement might be unconstitutional.

Justice O'Connor's concurring opinion evidences that she will continue to be the swing vote and that she fortunately maintains a rational approach towards the balancing of the twin demands of the VRA and the equal protection clause.<sup>236</sup> She is steadfast in her commitment to racial equality,<sup>237</sup> and the dissenters would certainly vote with O'Connor to uphold the principle announced by the plurality that the intentional creation of a majority-minority district in itself does not invoke strict scrutiny. Thus while ardent supporters of the VRA claim that the Court would possibly render it ineffective,<sup>238</sup> Justice O'Connor has made it clear that the VRA should remain a powerful tool but also explains that necessary limits must exist to restrain its improper use.

Justice Thomas and Justice Scalia are the leading advocates on the Court for a colorblind society.<sup>239</sup> In *Bush v. Vera*, Justice Thomas objected to the

F. Simon, *Politics and the Rehnquist Court*, 40 N.Y.L.SCH.L. REV., 863, 872-73 (1996) (citations omitted).

234. "The critical cases eroding the Voting Rights Act have been *Shaw v. Reno* and, even more decisively, *Miller v. Johnson*." Jamie B. Raskin, *supra* note 3, at 526 (referring to principal racial gerrymander cases)(citations omitted).

235. Justice O'Connor's "view that compliance with § 2 is (not just *arguendo*) a compelling state interest and her statement of that position virtually insulate the Voting Rights Act from jeopardy under *Shaw* as such." *Bush v. Vera*, 116 S.Ct. 1941, 2007 (1996)(Souter, J., dissenting).

236. Justice O'Connor has earned a reputation as the pivotal vote in previous racial gerrymander cases. One commentator succinctly summarizes her position as "[u]nwilling to call a halt to all beneficial uses of racial classifications to remediate societal inequities, but also deeply troubled by the increasing evidence of racial factionalism, O'Connor demands primarily that the use of race not be excessive." Samuel Issacharoff, *supra* note 90, at 64.

237. "I agree with the dissenters about §2's role as part of our national commitment to racial equality[.]" *Bush*, 116 S.Ct. at 1969 (O'Connor's concurring opinion).

238. "[W]hat legislators once thought was their statutory obligation under the Voting Rights Act-to shape majority-minority districts where possible and to state their intention to do so-is now grounds for having all their efforts struck down as unconstitutional." Jamie B. Raskin, *supra* note 3, at 532.

239. "Of the present Court majority, only Justices SCALIA and THOMAS are on record as concluding that any intentional creation of a majority-minority district is a forbidden racial gerrymander." *Bush*, 116 S.Ct. at 2011 (Souter, J., dissenting).

principle adopted by the plurality that the intentional creation of a majority-minority district alone does not qualify it as a racial gerrymander.<sup>240</sup> Unlike Justice O'Connor, Justice Thomas believed that the creation of a majority-minority district necessarily implies that race was the predominant factor and thus is an improper racial classification subject to strict scrutiny. In another opinion, Justice Scalia was also hostile to racial considerations, as revealed in his *Adarand* concurrence, where he asserts that "government can never have a 'compelling interest' in discrimination on the basis of race in order to 'make up' for past racial discrimination."<sup>241</sup>

Fortunately, most of the justices do not agree that to achieve a colorblind society we should become colorblind now. While a colorblind society is a worthy objective and may indeed be a possibility one day, it is not practical in today's society. Minorities are still dramatically under-represented in the political process, not to mention disadvantaged from an economic stand point. Race-consciousness is essential to understanding the realities of minority participation in our multiracial society and to encouraging the equal participation of minorities.

## VII. CONCLUSION

Race-conscious electoral districting advances the worthy objective of protecting and promoting the minority voting franchise, but can overstep its purpose and lead to the harm identified in *Shaw I*. The efforts to draw electoral districts with highly irregular boundaries will certainly be recognized by its current proponents in twenty years as egregious. The extremes that race-conscious redistricting reached after the 1990 census were excessive and represent an abuse of the VRA. However, the proper application of the *Shaw I* cause of action serves to insure the VRA's proper application and limit its abuse by overzealous proponents. Race may, and should, be considered in drawing electoral lines, but not to the excessive extent as in the racial gerrymandering cases recently considered by the Supreme Court.

Although little unanimity exists when considering racial gerrymander cases, the Supreme Court's recent decision in *Bush v. Vera* reveals enough votes exist to protect the VRA's progress. Justice O'Connor emphasized the principle that the intentional creation of a minority-majority district does not automatically qualify it as a racial gerrymander and that compliance with section 2 can be a compelling interest. The four dissenters in *Bush v. Vera* find the racial gerrymander claim objectionable, so they would certainly vote with Justice O'Connor to protect electoral districts that meet her relaxed standards. The fracture within

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240. "In my view, application of strict scrutiny in this case was never a close question. I cannot agree with Justice O'CONNOR's assertion that strict scrutiny is not invoked by the intentional creation of majority-minority districts. . . . Only last term, in *Adarand* . . . , we vigorously asserted that all government racial classifications must be strictly scrutinized." *Id.* at 1972 (footnotes omitted).

241. James F. Simon, *supra* note 233, at 873 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)).

*Bush v. Vera* actually serves as an effective way to check the VRA's proper application against the harm created by classifications that rely excessively on racial considerations.

*Nelson Ebaugh*

