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Turning the Page on Section 5: The Implication of Multiracial Coalition Districts on Section 5 of the Voting Rights Act

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NOTE

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INTRODUCTION

In 2001, responding to population shifts evidenced by the decennial census, the New Jersey legislature enacted a reapportionment plan that significantly altered the racial makeup of its state legislative and congressional districts.[1] In the litigation following the enactment of the plan, evidence showed that for key state legislative races during the 1990s, Democratic state legislators were elected

1. *See* Page v. Bartels, 144 F. Supp. 2d 346 (D.N.J. 2001) (per curiam) (rejecting a challenge to New Jersey's state legislative apportionment scheme); *see also* N.J. CONST. art. IV, § 3, ¶ 1 (outlining the process by which New Jersey reapportions legislative districts).

primarily because of their party and their stances on issues, as opposed to being elected as a result of race.[2] While encouraging, this evidence stands in stark contrast to the assumptions underlying the federal Voting Rights Act (VRA).[3]

Congress enacted the VRA in 1965, intending to remedy the nation's long history of voting discrimination.[4] With the social, political, and demographic forces of the 1960s at work, the VRA created a number of procedural and substantive mechanisms to protect the ability of African Americans to participate in, and effectuate change through, the political process.[5] Specifically, section 5, one of the VRA's key provisions, requires certain jurisdictions with histories of racially discriminatory voting structures and procedures to receive "preclearance" from the Justice Department or the United States District Court for the District of Columbia before enacting any change to voting policies and procedures, including changes to the apportionment of representatives.[6] Preclearance requires jurisdictions subject to section 5 to demonstrate that any changes to existing districting plans are not purposefully or effectually "retrogressive," meaning that such changes do not have the purpose or effect of worsening the position of minority voters in comparison to the jurisdiction's previous, or "benchmark," plan.[7]

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2. *Page*, 144. F. Supp. 2d. at 352-62. *See generally* Sam Hirsch, *Unpacking* Page v. Bartels*: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 7 (2002) (describing and analyzing the *Page* decision); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1556-61 (2002).

3. 42 U.S.C. § 1973 (2002). *See also* S. REP. NO. 97-417, at 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205-06 (implying that the white majority in the South not only disenfranchised the black minority, but also refused to vote for blacks simply because of their race).

4. S. REP. NO. 97-417, at 5-6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 182; *Voting Rights Act: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong. 60 (1965) (statement of Nicholas Katzenbach, Attorney General of the United States).

5. *See generally* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 546-47 (2d ed. 2001).

6. 42 U.S.C. § 1973c. Congress enacted section 5 with the express purpose of preventing jurisdictions from engaging in the common practice of rewriting explicitly discriminatory voting laws struck down by federal courts in facially harmless but effectively discriminatory ways. *See generally* Beer v. United States, 425 U.S. 130, 140 (1976) (holding that section 5 was intended to block voting changes that lead to a retrogression in the position of voting minorities). In 1973, the Supreme Court specifically held that changes to reapportionment necessitated the preclearance procedures outlined in section 5. Georgia v. United States, 411 U.S. 526, 541 (1973). Nine states are currently covered under section 5: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. 28 C.F.R. pt. 51 app. (2003). In addition to these states, five counties in California, five counties in Florida, two townships in Michigan, ten towns and townships in New Hampshire, five counties in New York, forty counties in North Carolina, two counties in South Dakota, and thirteen counties in Arizona are also covered under the Act. *Id.*

7. 28 C.F.R. § 51.54(b) (2004); *see also* Holder v. Hall, 512 U.S. 874, 883-84 (1994). Until an apportionment plan has been approved under section 5, assuming that the previous plan

Since the VRA's enactment, however, the racial and political makeup of the United States, as well as American attitudes about race, has shifted dramatically.[8] Various issues and political realities have encouraged the growth of new political identities among and within minority groups.[9] States and political subdivisions now confront a multiracial political landscape with laws established in response to a binary, white and black political framework.[10]

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was valid under section 2 of the VRA and the Constitution, the previously existing plan is considered the benchmark for section 5 purposes. Guidance Concerning Redistricting and Retrogression Under Section 5 of the VRA, 66 Fed. Reg. 5412 (Jan. 18, 2001). Additionally, the Supreme Court has noted the difficulty in ascertaining whether a new plan has worsened the relative ability of minority voters to effectuate change through the voting process. Varying political theories suggest varying definitions of retrogression. For example, it is unclear whether a minority group is more powerful by being able to effectively control the selection of one representative or by ensuring that the group can influence numerous elections. In *Georgia v. Ashcroft*, 123 S. Ct. 2498, 2512 (2003), the Court held that retrogression gives states "flexibility to choose one theory of effective representation over the other."

8. *See* Bruce E. Cain & Kenneth P. Miller, *Voting Rights Mismatch: The Challenge of Applying the Voting Rights Act to "Other Minorities," in* VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES 141, 141-42 (Mark E. Rush, ed., 1998); ERIC A. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 7 (1999) ("By the year 2000, the familiar characterization of black versus white will no longer describe race relations in the United States. In crucial respects, the twenty-first century will be a nation of minorities."); *see also* Cindy Rodriguez, *Activists Encouraged by Turnout of Latinos*, BOSTON GLOBE, Nov. 9, 2002, at B1 (noting that the voter turnout rates for Latino voters increased by forty-one percent in 2002 from the levels in 1998). While this article merely suggests that voter turnout rates are higher, as opposed to suggesting an increase in the number of eligible voters, increased turnout among minorities will arguably have a greater impact on the political process than increased numbers of minority voters will. *See* Jeffrey Pollock & Jeffrey Plaut, *The Latino Vote: Lessons from New York and New Jersey*, CAMPAIGNS & ELECTIONS, Apr. 2002, at 9 (discussing the importance of Latino voting blocs in New York and New Jersey political campaigns). *But see* John O. Calmore, *Race-Conscious Voting Rights and the New Demography in a Multiracing America*, 79 N.C. L. REV. 1253 (2001) (arguing that the increasingly multiethnic population in America will not necessitate changes in the VRA).

9. *See, e.g.*, Jack E. White, *Erasing Trent Lott's Legacy; Republicans Have a Chance to Chip Away at the Most Loyal of Democrats*, TIME, Jan. 13, 2003, at 35 (noting that while the Democratic Party has a "virtual monopoly on the black vote," a recent survey shows that sixty percent of blacks support public school vouchers, but almost all prominent Democrats are staunchly opposed to them); *see also* JOHN B. JUDIS & RUY TEIXEIRA, THE EMERGING DEMOCRATIC MAJORITY 117 (2002) ("Political majorities are always coalitions. They combine different, and sometimes feuding, constituencies, interest groups, religions, races, and classes often united by nothing other than greater dislike for the opposing party, candidate, and coalition."); Julie Mason, *Black Ministers Back Bush Plan; President Finds Unlikely Allies, Foes of Faith-Based Initiative Program*, HOUS. CHRON., Mar. 20, 2001, at A6 (discussing the support for President Bush's faith-based initiative program in the African-American community, despite the fact that ninety percent of black voters voted for Al Gore over George W. Bush); Steve Miller, *Suspicious Minds: Competition, Conflict Define Two Minorities*, WASH. TIMES, Feb. 26, 2003, at A1 ("Black and Hispanic activists . . . find common ground on some issues, such as . . . fair housing and opposition to racial profiling."); Pew Research Ctr. for the People & the Press, *Faith-Based Funding Backed, But Church-State Doubts Abound* (April 10, 2001), *at* http://people-press.org/reports/print.php3?ReportID=15 (last visited May 18, 2004).

10. Angelo N. Ancheta & Kathryn K. Imahara, *Multi-Ethnic Voting Rights: Redefining Vote Dilution in Communities of Color*, 27 U.S.F. L. REV. 815, 818-21 (1993); *Democracy in*

Because Congress enacted the VRA to protect the rights of a single minority group,[11] courts have been hesitant to address the growing multiracial makeup of political communities and have continued to view racial blocs independently.[12] Yet two recent cases suggest that courts may be willing to shift their focus and view multiracial voting coalitions in a new light.[13]

First, in response to New Jersey's 2001 reapportionment plan under section 2 of the VRA,[14] the U.S. District Court for the District of New Jersey, in *Page v. Bartels*,[15] acknowledged the changing nature of race in American politics. Ruling on the validity of the plan, a three-judge panel explicitly recognized that different minority groups frequently join together to create voting blocs to ensure a greater impact on the political process.[16] While the court "recogniz[ed] and

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a New America: A Symposium, 79 N.C. L. REV. 1203 (2001); *see also* League of United Latin Am. Citizens v. Midland Indep. Sch. Dist., 812 F.2d 1494 (5th Cir. 1987) (assuming African Americans and Mexican Americans could aggregate to pursue a vote-dilution claim) *vacated and rev'd en banc on other state law grounds*, 829 F.2d 546 (5th Cir. 1987); Page v. Bartels, 144 F. Supp. 2d 346, 369 (D.N.J. 2001) (upholding the idea of a multiethnic vote-dilution claim under section 2 of the VRA). *See also* Cain & Miller, *supra* note 8, at 145 (noting that between late-1985 and mid-1997, there were forty-eight cases of either section 2 vote dilution claims or equal protection claims involving non-African-American minorities). Of these cases, sixteen solely involved Latinos and thirty involved Latinos along with an additional minority group. Ancheta & Imahara, *supra*, at 821. *See also*, *e.g.*,. Frank v. Forest County, 336 F.3d 570 (7th Cir. 2003) (rejecting a vote-dilution claim and an equal-protection challenge brought by a coalition of Native-American and African-American voters). The Seventh Circuit did not decide on the validity of coalition suits, noting only that there are "cases that support the argument" for coalition suits. *Id.* at 575.

11. *See generally* S. REP. NO. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 (noting the historical disenfranchisement of the black minority at the hands of the white majority).

12. *See*, *e.g.*, Nixon v. Kent County, 76 F.3d 1381 (6th Cir. 1996) (denying protection under the VRA because a coalition of two separate minority groups did not constitute a protected group under the VRA). Bloc voting is a term used to describe instances in which members of a particular group — racial, ethnic, language, religious, etc. — vote similarly or identically to other members of that group, such that the existence of a group vote can be discerned. *See generally* Thornburgh v. Gingles, 478 U.S. 30 (1986) (discussing bloc voting and detailing the requirements for a vote-dilution claim under section 2 of the VRA).

13. Georgia v. Ashcroft, 123 S. Ct. 2498 (2003); *Page*, 144 F. Supp. 2d. 346 (D.N.J. 2001). *See also* Cain & Miller, *supra* note 8, at 157-59 (discussing claims under the VRA brought by multiracial coalitions).

14. The *Page* litigation considered section 2 of the VRA, which declares unlawful all voting procedures that "result[] in a denial or abridgment of the right of any citizen . . . to vote on account of race or color . . . ." *Page*, 144 F. Supp. 2d at 362. Section 2 is a separate and distinct cause of action from section 5. Georgia v. Ashcroft, 123 S. Ct. at 2510. Following *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997) [hereinafter *Bossier Parish I*], a plan that violates section 2 is not necessarily retrogressive under section 5. Likewise, a retrogressive plan need not violate section 2. Georgia v. Ashcroft, 123 S. Ct. at 2510-11 (noting the Court's refusal "to equate a § 2 vote dilution inquiry with the § 5 retrogression standard"). Finally, section 2 is universally applicable; it does not simply apply to those jurisdictions with a history of discriminatory voting practices. 42 U.S.C. § 1973(a) (2004).

15. 144 F. Supp. 2d 346 (D.N.J. 2001).

16. *Page*, 144 F. Supp. 2d. at 355-56.

respect[ed] that the African-American and Hispanic communities have several differing sociological and political interests," it also found that the evidence presented at trial "by both Hispanic and African-American legislators strongly suggests . . . that the African-American and Hispanic communities often vote as a bloc — a fact which may be considered in assessing the ability of either community to elect the candidate of its choice."[17]

Though the decision in *Page v. Bartels* did not consider section 5 of the VRA,[18] the court emphasized that the VRA focuses on the "effective" voting power of minority groups, rather than on a relatively simple, objective determination of whether one minority group comprises more than fifty percent of eligible voters in a given district.[19] By focusing on "effective" minority districts, the court highlighted the ability of districts to elect minority-favored candidates and effectively control the outcome of the election, not the ability of a minority group to simply objectively influence the results of the election. The statement in *Page*, however, that the critical inquiry is into the effective minority districts rather than the achievement of strict numerical proportionality, is both correct and vital to the notion of coalition districts. Translated into the section 5 context, the focus on effective representation could profoundly impact the use of coalition districts.[20]

Second, a more dramatic example of the recent desire to give jurisdictions flexibility in redistricting under section 5 stemmed from post-2000 census redistricting in Georgia.[21] Georgia's 2000 State Senate plan maintained the number of majority-African-American districts (though with decreased percentages of African-American

17. *Id.* at 358.

18. New Jersey does not meet the standards outlined in section 4 of the VRA and thus is not subjected to the requirements of section 5. Section 4 of the VRA contains a triggering provision, under which any jurisdiction that meets the enumerated requirements must then comply with the nonretrogression principles in section 5. The triggering formula is designed to include jurisdictions that have a history of using discriminatory voting practices or have historically low minority-voter turnout rates. *See* 42 U.S.C. § 1973b (2002); 28 CFR § 51.67 (2003); 28 C.F.R. pt. 51 app. (2003).

19. *Page*, 144 F. Supp. 2d at 365 (noting that "the Bartels plan will ensure that the minority age population remains an effective political force); *see also* Cain & Miller, *supra* note 8, at 142 ("The VRA quite explicitly defines 'fairness' and 'equal opportunity' rather than 'proportionate division.' In practice, however, courts often use the latter as an indicator of the former."); Hirsch, *supra* note 2, at 8 (arguing that the court's holding recognized that the VRA focuses "on *effective* minority districts rather than on a simple tally of districts that are more than 50% African-American or more than 50% Hispanic") (emphasis in original).

20. Pildes, *supra* note 2, at 1556-61.

21. *See generally* Georgia v. Ashcroft, 123 S. Ct. 2498 (2003) (granting jurisdictions increased flexibility to reapportion under section 5 of the VRA). Note that the facts of *Georgia v. Ashcroft* limit the reach of the Court's opinion to preclearance matters involving the more traditional black/white political dichotomy, rather than those involving multiracial coalitions.

voters) and increased the number of "influence" districts, where black voters would be able to play a major, though not independently decisive, role in the electoral process.[22]

Because Georgia is a covered jurisdiction under section 5, it submitted its redistricting plan to the United States District Court for the District of Columbia to receive judicial preclearance. In the ensuing litigation, a three-judge panel denied preclearance to the Georgia State Senate apportionment scheme.[23] The panel disagreed about whether section 5 of the VRA required the drawing of "safe minority districts"[24] or if a state is allowed to draw districts where minorities simply have equal opportunities to participate in the political process, but are not guaranteed victory.[25] Ultimately, the panel denied preclearance to the apportionment plan because decreasing the percentages of African-American voters in certain districts diminished the effective voting power of these minority voters in comparison to the benchmark plan.[26]

The Supreme Court disagreed with the panel's retrogression analysis, and reversed the district court's decision.[27] The Court held that states should have greater flexibility in designing apportionment schemes under section 5.[28] So long as there is no "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," covered jurisdictions may use one of a number of reapportionment methods.[29] Under the outlined definition of "effective," reviewing courts should consider the "totality of the circumstances" to determine the relative ability of a minority group to impact an election.[30] Some jurisdictions may create "safe" districts, in

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22. *Georgia v. Ashcroft*, 123 S. Ct. at 2505-07.

23. Georgia v. Ashcroft, 195 F. Supp. 2d 25 (D.D.C. 2002), *vacated by* 123 S. Ct. 2498 (2003). Under the section 5 of the VRA, judicial preclearance may only be granted by a three-judge panel of the District Court for the District of Columbia. 42 U.S.C. § 1973c (2000). Appeals of the panel's decisions are made directly to the United States Supreme Court. *Id.* The district court denied preclearance to the state senate redistricting plan, but approved the preclearance of the congressional and state house plans.

24. A "safe minority district" is a district in which it is highly likely that minority voters will be able to elect a candidate of their choice.

25. *See generally* Georgia v. Ashcroft, 195 F. Supp. 2d 25 (D.D.C. 2002) (denying preclearance to the state senate redistricting plan, but approving the congressional and state house plans).

26. *Id.* at 95-97.

27. Georgia v. Ashcroft, 123 S. Ct. 2498 (2003) (remanding the decision to the district court). The Supreme Court only addressed the issue of whether the district court correctly denied preclearance of the state senate plan; the Court did not address the validity of the retrogression analysis of the congressional plan and state house plan. *Id.* at 2498.

28. *Id.* at 2511.

29. *Id.* (quoting Beer v. United States, 425 U.S. 130, 141 (1976)).

30. *Georgia v. Ashcroft*, 123 S. Ct. at 2512.

which it is very likely that minority voters will be able to elect the candidates of their choice,[31] while others may choose to create a greater number of "influence" districts, in which it is likely that minority voters will have the ability to exert a strong force on the outcome of the election.[32] Section 5, the Court reasoned, "does not dictate that a State must pick one of these methods of redistricting over another."[33] Instead, it "gives States the flexibility to choose one theory of effective representation over the other."[34]

The *Page* court's acceptance of coalition districts under section 2 of the VRA,[35] as well as the flexibility brought to the section 5 process in *Georgia v. Ashcroft*, suggests that future reapportionment can include the use of multiracial coalitions to achieve nonretrogression under section 5.[36] Yet both *Page* and *Georgia v. Ashcroft* have evoked criticism from those who feel that racially driven apportionment schemes violate the Equal Protection Clause of the Fourteenth Amendment.[37]

The U.S. Supreme Court has recognized two "analytically distinct" equal-protection challenges to apportionment schemes.[38] First, prior to *Shaw v. Reno*,[39] the Court held that a state may not enact a particular apportionment scheme to purposefully "minimize or cancel out the voting potential of racial or ethnic minorities."[40] Second, in *Shaw* the Court articulated a new type of equal protection claim, holding that a reapportionment plan violates principles of equal protection when it "cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without

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31. *Id.* at 2511 (citing Thornburg v. Gingles, 478 U.S. 30, 48-49 (1986)).

32. *Georgia v. Ashcroft,* 123 S. Ct. at 2512.

33. *Id.* at 2511.

34. *Id.* at 2512.

35. *See supra* note 14.

36. *See* Pildes, *supra* note 2, at 1556-61 (suggesting that courts will soon have to address the issue of whether section 5 permits coalitional districts to avoid retrogression). *See generally* J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 GEO. MASON L. REV. 431, 440-46 (2000) (analyzing recent developments in voting-rights jurisprudence).

37. *Georgia v. Ashcroft*, 123 S. Ct. at 2517 (Kennedy, J., concurring) (arguing that while the use of race can render a redistricting plan unconstitutional under the Equal Protection Clause, the use of race "saves" a plan under section 5). As interpreted by the Court in *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995), race may be used as the predominant factor in redistricting, as distinguished from one factor among many, only if the use is narrowly tailored to achieve a compelling governmental interest. *Miller*, 515 U.S. at 911-16.

38. *Miller*, 515 U.S. at 911.

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

40. Mobile v. Bolden, 446 U.S. 55, 66 (1980); *see also* United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 165 (1977).

sufficient justification."[41] In so holding, the Court noted that the Equal Protection Clause only permits the use of race as a predominant factor in redistricting if its use is narrowly tailored to achieve a compelling state purpose.[42]

This Note analyzes the use of coalition districts in light of current section 5 and equal protection jurisprudence and argues that, in some circumstances, the Equal Protection Clause compels the use of coalition districts to achieve nonretrogression under section 5. Part I examines the use of coalition districts, using the litigation in *Page v. Bartels* as an example. It then argues that the Supreme Court's opinion in *Georgia v. Ashcroft* permits jurisdictions to create viable[43] racial coalition districts to comply with section 5. Part II argues that while *Georgia v. Ashcroft* permits the use of coalition districts to achieve section 5 compliance, the doctrine of strict scrutiny review under the Equal Protection Clause mandates the use of such districts. Because coalition districts minimize the harms resulting from race-based classifications, strict scrutiny's narrow-tailoring prong requires jurisdictions to create coalition districts, so long as the coalitions are viable and the new apportionment scheme otherwise meets the requirements of strict scrutiny. Finally, this Note concludes by cautioning that, in some areas, coalition districts will not be viable, and that some jurisdictions may enact racially discriminatory apportionment schemes under the guise of creating coalitions. As such, this Note argues that courts and the Justice Department must be cautious in permitting the use of coalition districts, and must therefore rigorously scrutinize whether true coalitions exist.

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41. *Shaw v. Reno*, 509 U.S. at 652; *see also Miller*, 515 U.S. at 915 (rejecting the contention that prior decisions indicate "that a State's assignment of voters on the basis of race would be subject to anything but [the] strictest scrutiny"). The Court has articulated two ways in which a plaintiff challenging a reapportionment scheme can bring a *Shaw*-style equal protection Claim. First, if a plaintiff demonstrates that a new district is geographically irregular, and thus cannot be viewed as anything other than a means of separating voters into different districts because of their respective races, the court must apply strict scrutiny. Where lines are drawn with no compelling purpose other than achieving racial segregation, the lines are "antithetical to our system of representative democracy" and unconstitutional. *Shaw v. Reno*, 509 U.S. at 647-49. Second, strict scrutiny must also be applied if plaintiffs demonstrate that traditional, legitimate districting principles — including compactness, contiguity, and respecting existing political boundaries — were "subordinated" to race. Bush v. Vera, 517 U.S. 952, 959 (1996) (quoting *Miller*, 515 U.S. at 916).

42. Shaw v. Reno, 509 U.S. at 653; *see also Miller*, 515 U.S. at 916 ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."). *Miller* thus accepts that jurisdictions will use race as one of many factors in redistricting, and invokes strict scrutiny only where race predominates over other traditional districting principles such as "compactness, contiguity, and respect for political subdivisions." *Id.*

43. I use the term "viable" throughout this Note to refer to those districts in which it can be empirically demonstrated that members of an ethnic minority group exhibit racial bloc voting, and also vote en bloc with a different ethnic minority.

I. CHANGING DEMOGRAPHICS AND VOTING TRENDS: COALITION DISTRICTS AS A NEW APPROACH TO RACE AND VOTING

The changing nature of race relations and demographics has forced a new debate on the formation and prevalence of cross-racial voting coalitions in American politics.[44] While some jurisdictions remain in the binary racial world understood by the framers of the VRA,[45] others have demographics that indicate the ability to create multiracial political communities.[46] In some communities with multiracial populations, ethnic groups are unable to forge political coalitions across racial lines.[47] In these instances, the Supreme Court has acknowledged "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity . . . ."[48] In other instances, communities exist

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44. Pildes, *supra* note 2, at 1551-67; *see also* John Hart Ely, *Policing the Process of Representation: The Court as Referee*, *in* MODERN CONSTITUTIONAL THEORY: A READER 18, 24 (John H. Garvey et al. eds., 5th ed. 2004) (noting that "effective majorities can usually be described as clusters of cooperating minorities").

45. *See* Calmore, *supra* note 8, at 1255-56 (arguing that southern states have maintained the biracial demographics underlying the Voting Rights Act); *see generally* Ancheta & Imhara, *supra* note 10 (discussing a multiracial approach to voting-rights jurisprudence).

46. *See, e.g.*, Peter W. Wielhouwer, *White Cities Electing Black Mayors? Challenging Preconceived Notions of Racial Voting Patterns* (2000), *at* http://www.regent.edu/acad/schgov/petewie/articles/home.html (last visited May 18, 2004). Regardless of the viability of multiethnic voting coalitions under the VRA, multiracial coalitions exist in states and localities across America. *Id.* For example, in 1999, among the 29 cities with both populations greater than 100,000 and with an African-American mayor, 12 cities had populations that were more than 50% white. *Id.* For example, in Minneapolis, which is 77% white, Sharon Belton served as mayor. *Id.* In Des Moines, a city that is more than 87% white, Preston Daniels was elected mayor. *Id.* Mayors Belton and Daniels are both African American. *Id.* Additionally, of the African-American mayors serving in these twenty-nine cities, eighteen (62%) of them serve cities that do not have a majority African-American population, and thirteen (45%) of the mayors served cities with less than 40% African-American population. Seven of the African-American mayors were elected in cities that were more than 60% white. *Id.* Furthermore, in the 2001 New York City mayoral election, Democratic candidate Fernando Ferrer, a Puerto Rican, received strong support from black voters and the endorsement of African-American Rev. Al Sharpton. Miller, *supra* note 9. Additionally, in the 2000 mayoral election in Philadelphia, black Democrat John Street was elected with vast support from the city's Hispanics. *Id.* In 1998, African-American Senator Carol Moseley-Braun received 83% of the Hispanic vote in her failed reelection bid. *Id.*

47. Badillo v. City of Stockton, 956 F.2d 884, 886 (9th Cir. 1992) (holding that African-American and Hispanic communities were not a politically cohesive group); Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs, 906 F.2d 524, 526 (11th Cir. 1990) (noting that the African-American and Hispanic communities are not politically cohesive); Aldasoro v. Kennerson, 922 F. Supp. 339, 375 (S.D. Cal. 1995) (finding that African Americans and Whites were not sufficiently politically cohesive to be grouped as a single "non-Hispanic" voting bloc); *see also* Miller, *supra* note 9 (contrasting the national calls for black and Hispanic coalitions with frequent tension between the two groups at the local level).

48. Johnson v. DeGrandy, 512 U.S. 997, 1020 (1994) (construing Thornburgh v. Gingles, 478 U.S. 30 (1986)).

> in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but *minority voters are not immune from the obligation to pull, haul, and trade to find common political ground.*[49]

Political coalitions forged across racial and ethnic lines are thus a more ideal alternative to a majority-minority district composed of a single minority.[50] In other words, when feasible, jurisdictions are better served with apportionment schemes that promote, rather than inhibit, multiracial coalitions.[51]

As a result, racial-apportionment schemes that are feasible in some areas of the country are simply not viable in others.[52] For example, while demographic changes in the United States have not necessarily altered the operation of the VRA in many Southern, rural states, other regions have undergone (or will undergo) significant demographic changes that have yielded a multiracial, not biracial, society.[53] Courts reviewing claims under section 5, therefore, must engage in the same "intensely local appraisal" required under section 2 in order to ensure the viability of coalition districts to achieve nonretrogression.[54] Judges must study voter demographics in order to be assured that the coalition is both legitimate and preserves an effective exercise of the franchise. Following the 2000 census, a three-judge panel in New Jersey was able to make such an inquiry.[55]

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49. *Id.* at 1020 (emphasis added).

50. *Id.* at 1019-20 ("It bears recalling . . . that for all the virtues of majority-minority districts as remedial devices, they rely on a quintessentially race-conscious calculus aptly described as 'the politics of second best.'" (quoting BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 136 (1992)).

51. *Id.* at 1020.

52. William H. Frey, *Multiple Melting Pots*, 15 WORLD & I 3641, May 1, 2000, *available at* 2000 WL 9050850.

53. Calmore, *supra* note 8, at 1261-62 (citing Frey, *supra* note 52).

54. Thornburgh v. Gingles, 478 U.S. 30, 79 (1986) (mandating an intense, local appraisal of voting blocs for claims under section 2 of the VRA). Absent such an intensely local appraisal, it is difficult to even determine which of the section 5 jurisdictions are capable of creating coalitions. For example, in Arizona, which is a covered jurisdiction, comparing the demographics of Yavapai County (86.6% white, non-Hispanic/Latino; 9.8% Hispanic/Latino; and 1.6% American Indian/Alaska Native) with Graham County (55.2% white, non-Hispanic/Latino; 27% Hispanic/Latino; and 14.9% American Indian/Alaska Native) indicates that the viability of coalitions in covered jurisdictions cannot be ascertained absent a careful examination of local demographics. U.S. CENSUS BUREAU, ARIZONA QUICK-FACTS, *at* http://quickfacts.census.gov/qfd/states/04000.html (last modified July 9, 2004). Assuming white bloc voting, the likelihood of an effective coalition in Yavapai County is much lower than the likelihood of such a coalition forming in Graham County.

55. Other courts have engaged in similar inquiries as to the validity of multiracial coalitions. For example, in *League of United Latin American Citizens v. Midland Independent School District*, 812 F.2d 1494, 1500-01 (5th Cir. 1987), the Fifth Circuit found that an African-American group and a Hispanic group in west Texas "'have political goals that are

A. *Coalition Building in New Jersey: The Example of* Page v. Bartels

Page v. Bartels focused on the post-reapportionment rights of African-American voters in New Jersey State Senate Districts 27, 28, 29, and 34, which collectively elect four senators and eight assembly members to the New Jersey Legislature.[56] Following each decennial census, New Jersey creates a bipartisan reapportionment commission responsible for determining the "representation of the various geographic areas of the state."[57] After the Commission's acceptance of the plan submitted by the Democratic legislators, Republicans challenged it on the grounds that it had the purpose and effect of diluting minority (African-American) voting strength under section 2 of the VRA.[58]

The United States District Court for the District of New Jersey held that the plaintiffs did not conclusively demonstrate that the

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inseparable. As such, coalition formation will often prove to be mutually beneficial to the two groups. . . .' The bringing of this lawsuit by blacks and Hispanics is symbolic of their realization that, at least in Midland, Texas, they have common social, economic, and political interests which converge and make them a cohesive political group." *Id.* (quoting League of United Latin Am. Citizens, Council No. 4386 v. Midland Indep. Sch. Dist., 648 F. Supp. 596, 606 (W.D. Tex. 1987)), *vacated and rev'd on state law grounds by* 829 F.2d 546 (5th Cir. 1987) (en banc); *see also* Campos v. City of Baytown, 840 F.2d 1240, 1244 (5th Cir. 1988) (acknowledging the possibility for coalition suits under section 2 of the VRA), *reh'g denied*, 849 F.2d 934 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989). Additionally, although the Eleventh Circuit did not find the existence of a multi-racial coalition in the specific instance litigated under section 2 of the VRA, it held that "[t]wo minority groups . . . may be a single . . . minority if they can establish that they behave in a politically cohesive manner." Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs, 906 F.2d 524, 526 (11th Cir. 1990). The Supreme Court, however, expressly avoided resolving the status of coalition districts in *Growe v. Emison*, 507 U.S. 25 (1993). In *Growe*, a unanimous Supreme Court refused to decide whether minority groups can be aggregated for the purposes of section 2 challenges. *Growe*, 507 U.S. at 41 (reversing a finding that a Minnesota redistricting plan violated the VRA). *But c.f.* Nixon v. Kent County, 76 F.3d 1381 (6th Cir. 1996) (en banc) (holding that coalition districts are not legitimate under section 2 of the VRA). In *Nixon*, however, the Sixth Circuit did not hold that minority groups will not form de facto coalitions. The decision was based on the language used in section 2 of the VRA, which "does not mention minority coalitions, either expressly or conceptually. Moreover, § 2 consistently speaks of a 'class' in the singular." *Nixon*, 76 F.3d at 1386. Thus, regardless of whether the Court fashions a test that permits the use of cross-racial aggregation in the section 2 context, such an aggregation would seem to work in the section 5 context.

56. Page v. Bartels, 144 F. Supp. 2d 346 (D.N.J. 2001) (per curiam). Every citizen in New Jersey is represented by three legislators in the State House. Each of the forty legislative districts elects one senator and two assembly members at-large. N.J. CONST. art. IV, § 2, ¶¶1-4; *see also* Hirsch, *supra* note 2, at 8 (describing the factual background of *Page*).

57. N.J. CONST. art. IV, § 3, ¶ 1. The New Jersey Constitution mandates that the chairmen of the two major political parties each appoint five members to an Apportionment Commission. If the Commission becomes deadlocked, the state constitution provides that the Chief Justice of the state Supreme Court appoints a neutral eleventh member to the Commission. Following the 2000 census, and a subsequent deadlock by the Apportionment Commission, Chief Justice Deborah Poritz named Princeton University Professor Larry Bartels to serve as the eleventh member of the Commission. *See* Hirsch, *supra* note 2, at 9.

58. *Page*, 144 F. Supp. 2d at 349-50.

apportionment plan, which created multiple African-American/Hispanic coalition districts, "will impair minorities' ability to elect their preferred candidate."[59] While the implications of the plaintiff's section 2 claim are independently significant, both the facts of, and the reasoning behind the decision in *Page* provide insight into the debate over coalition districts. Viewed in the context of retrogression, the Court's findings could make a powerful imprint on the future of the section 5 jurisprudence.

Compared to the 1991 apportionment plan, the plan enacted pursuant to the 2000 census actually reduced the percentage of the African-American voting age population ("AAVAP") and, more generally, the percentage of voting-age minorities ("MVAP") in Districts 27, 28, and 29.[60] In exchange, however, District 34 gained a large number of African-American voters and nonminority Democratic voters.[61] Additionally, under the 1991 plan, the AAVAP in Districts 27 and 28 were greater than 50%, indicating that African-Americans had the opportunity to elect the candidate of their choice.[62] Following the 2001 apportionment, however, the AAVAP in these districts fell below 50%.[63]

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59. *Id.* at 364-65.

60. Under the 1991 apportionment plan, the white voting age population ("WVAP"), African-American voting age population ("AAVAP"), Hispanic voting age population ("HVAP"), total minority voting age population ("MVAP"), and Democratic voting age population ("DEM") were:

DISTRICT	WVAP	AAVAP	HVAP	MVAP	DEM
27	31.4%	52.8%	9.4%	68.6%	86.0%
28	20.4%	57.4%	16.8%	79.6%	87.1%
29	20.9%	48.2%	26.2%	79.1%	86.7%
34	76.8%	3.9%	11.3%	23.2%	43.2%

Page, 144 F. Supp. 2d at 353; Hirsch, *supra* note 2, at 14. Under the Bartels plan challenged in the litigation, the lines of these districts were redrawn and the minority voting percentages changed dramatically. The racial composition of the new districts was as follows:

DISTRICT	WVAP	AAVAP	HVAP	MVAP	DEM
27	58.0%*	27.5%	6.6%	42.0%	57.1%
28	30.3%*	48.3%	14.0%	69.7%	68.8%
29	22.5%*	39.2%	33.2%*	77.5%	85.5%
34	48.2%	35.3%*	9.8%	51.8%*	64.8%*

The percentages marked with an asterisk (*) represent increases in the respective voting age population category from the 1990 plan.

Page, 144 F. Supp. 2d at 353; Hirsch, *supra* note 2, at 14.

61. *Page*, 144 F. Supp. 2d at 353.

62. *Id.*

63. *Id.*

If New Jersey had been covered by section 5,[64] traditional principles of retrogression suggest that the 2001 plan would not have received preclearance from the Department of Justice. Because African-American voters in New Jersey had a reduced opportunity to dictate the outcome of the elections, the Bartels plan is retrogressive under a pre-*Page* and pre-*Georgia v. Ashcroft* analysis because it appears to have the effect of "denying or abridging the right to vote on account of race."[65]

The *Page* court, however, made a clear statement that while the AAVAP decreased in Districts 27, 28, and 29, the "Bartels plan . . . will *enhance and expand the opportunity for African Americans and Hispanics to participate in a meaningful way in the political process.*"[66] The court found that the reduction in AAVAP in District 27 from nearly 53% to 27% would not hinder the ability of minority groups to elect their favored candidates to the legislature.[67] The court relied heavily on testimony from minority legislators, who suggested that while African-American and Latino voters do not always agree, they frequently agree on public-policy issues and tend to prefer the same legislative candidates.[68] The court held that the Bartels plan sufficiently ensured that the minority voting population had an effective and forceful role in the political process.[69]

The hypothetical preclearance dilemma in *Page* is that while the actual voting strength of African-American voters decreased in each of the districts, the effective voting strength of African-American voters increased due to potential coalition voting blocs and the addition of District 34 with a majority-MVAP population. Additionally, in District 27, where both the AAVAP and MVAP were reduced to below 50% — potentially eliminating the ability of minority voters to control electoral outcomes — the percentage of Democratic voters remained above 50%.[70] While the voting strength of African-American voters in District 27 was, in effect, diminished, these same voters, largely Democrats, still had a partisan majority in the district,

64. Only jurisdictions that are specifically mentioned in section 4 of the VRA must comply with the principles of retrogression outlined in section 5. *See supra* note 18 and accompanying text.

65. 42 U.S.C. § 1973c (2000).

66. *Page*, 144 F. Supp. 2d at 365 (emphasis added).

67. *Id.*

68. Hirsch, *supra* note 2, at 8, 15 (noting that whites, African-Americans, and Latinos demonstrated the "significance of unity" throughout the redistricting process to avoid being left with a reapportionment plan that would have destroyed the possibilities of gaining majority in the state legislature); *see also Page*, 144 F. Supp. 2d at 366.

69. *Page*, 144 F. Supp. 2d at 365.

70. Where District 27 was 86% Democratic in the post-1990 census, it was 57.1% Democratic following the 2000 census. *See supra* note 60.

and New Jersey retained an equal number of districts capable of electing a minority candidate.[71]

If coalition districts, therefore, are found to enhance and expand the effective exercise of the electoral franchise for minority voters, even when there is a numerical reduction in individual minority voting populations, section 5 should be able to accommodate coalition districts without finding retrogression. In other words, had New Jersey been subjected to the requirements of section 5, under the *Page* court's interpretation of the *effective* minority voting power, as opposed to the *actual* voting power of minority groups, the Department of Justice likely would have granted preclearance to the apportionment plan.

A section 5 doctrine that ignores the possibility of multiracial voting coalitions is thus incomplete. While the tendency of courts and the Justice Department is to view reapportionment plans with an eye towards a binary political framework,[72] this dichotomy does not accurately represent the changing face of many voting populations. As the post-2000 Census redistricting process in New Jersey demonstrates, multiracial coalitions exist which must be considered by jurisdictions when redistricting.

B. Georgia v. Ashcroft*: A Subjective and Malleable Approach to Retrogression Analysis*

As *Page* indicates, multiracial coalitions can complicate traditional retrogression analysis. Fortunately, the analysis provided by the court in *Georgia v. Ashcroft* allows for a more detailed — though more difficult — determination of whether the effective voting strength of minority groups has been diminished, instead of whether the actual number or percentage of minority voters in a district has retrogressed.[73] *Georgia v. Ashcroft* provides jurisdictions with increased freedom to draw apportionment maps. Although the issue of coalition districts was not before the Court, the Court's analysis can easily be read to permit jurisdictions with the freedom to draw coalition districts to achieve section 5 compliance.[74]

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71. *See supra* note 56.

72. *See supra* note 12 and accompanying text.

73. *See supra* notes 21-34 and accompanying text. *See generally* Georgia v. Ashcroft, 123 S. Ct. 2498 (2003).

74. Georgia v. Ashcroft, 123 S. Ct. at 2511-12; *see also* Session v. Perry, 298 F. Supp. 2d 451, 480 (E.D. Tex. 2004) (arguing that *Georgia v. Ashcroft* permits the use of coalition districts to achieve nonretrogression under section 5); Ellen D. Katz, *Reinforcing Representation*, 101 MICH. L. REV. 2341, 2381 (2003) (assuming the applicability of *Georgia v. Ashcroft* to the coalition debate).

The problem, however, is one of proof. A state may not shift from majority-minority districts to coalition districts without demonstrating that either nonminority voters or voters of a different minority group will consistently vote with the benchmark majority-minority group.[75] Furthermore, where members of a minority group are placed into an "influence" district, the state must demonstrate that the minority group has effective influence rather than just some influence.[76] This is by no means an easy task, but it is possible. While Justice Souter argued in his dissent that the increased flexibility provided to section 5 analysis by *Georgia v. Ashcroft* leaves the nonretrogression principle "practically unadministrable," his concern fails to recognize that the Supreme Court has engaged in similar analyses under other voting rights doctrines.[77] For example, in *Thornburgh v. Gingles* the Court outlined three factors as part of a test by which it carefully examines the presence of minority-group bloc voting patterns.[78] The *Gingles* analysis, much like the analysis required by *Georgia v. Ashcroft*, requires courts to make a searching inquiry into racial voting patterns, demographics, and local political-voting patterns to determine whether minority groups have effective or some influence, or whether minority groups can form coalitions to create effective majority-minority districts.[79]

II. THE BATTLE BETWEEN *GEORGIA V. ASHCROFT* AND *SHAW V. RENO*: VIABLE COALITION DISTRICTS UNDER SECTION 5 AND THE EQUAL PROTECTION CLAUSE

Section 5 of the VRA prohibits covered jurisdictions from making racially retrogressive changes to their voting practices.[80] As argued in Part I, under *Georgia v. Ashcroft* courts must engage in a searching inquiry regarding racial voting patterns in order to determine whether or not coalition districts are viable to achieve section 5 compliance. Furthermore, the Equal Protection Clause proscribes jurisdictions

75. *Bossier Parish I*, 520 U.S. 471, 478 (1997); *see also* Georgia v. Ashcroft, 123 S. Ct. at 2518 (Souter, J., dissenting) (citing *Bossier Parish I*).

76. *Bossier Parish I*, 520 U.S. at 478; *see also* Georgia v. Ashcroft, 123 S. Ct. at 2518 (Souter, J., dissenting).

77. *Georgia v. Ashcroft*, 123 S. Ct. at 2518 (Souter, J., dissenting).

78. Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986). In order to make a claim for vote dilution under section 2, *Gingles* first requires the minority group to show that it is sufficiently large and geographically compact to constitute a majority in a single-member district. *Id.* at 50. Second, the minority group must demonstrate its political cohesiveness. *Id. at 51*. Finally, the minority group must illustrate that the majority groups votes as a bloc, so as to enable the majority to defeat the minority's preferred candidate. *Id.*

79. *See Georgia v. Ashcroft*, 123 S. Ct. at 2514 (noting the "fact-intensive" nature of the section 5 inquiry); *Gingles*, 478 U.S. at 50-51.

80. *See supra* notes 6-7 and accompanying text.

from using race as a predominant factor in redistricting if the use is not narrowly tailored to meet a compelling state interest.[81]

Current voting-rights jurisprudence, therefore, is inconsistent.[82] In essence, covered jurisdictions may not allow race to predominate over other factors, but redistricting plans must not be racially retrogressive under section 5 — a finding that frequently requires the use of race as a predominant factor. Even if a jurisdiction's use of race is predominant under *Shaw v. Reno* and its progeny, the Supreme Court has not sufficiently explained what constitutes narrow tailoring at the crossroads of *Shaw* and section 5.[83] This Part offers a solution to these inconsistencies in the context of multiracial coalition districts. By examining coalition districts in the broader context of voting-rights jurisprudence, this Part argues that where coalition districts can be created, narrow tailoring under the Equal Protection Clause requires their use in order to minimize the harms caused by race-based

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81. *See supra* notes 39-41 and accompanying text.

82. *See Georgia v. Ashcroft*, 123 S. Ct.. at 2517 (Kennedy, J., concurring) (noting the "discord and inconsistency between §§ 2 and 5"); *see also infra* note 88. Applying Justice Kennedy's rationale, similar discord is also apparent between section 5 and the Equal Protection Clause. *See, e.g.*, Shaw v. Reno, 509 U.S. 630 (1993).

83. In general, jurisdictions have two options for using race-based redistricting. First, if the government allows race to predominate traditional districting principles, reviewing courts will only approve such use of race if it is narrowly tailored to achieve a compelling state interest. Shaw v. Reno, 509 U.S. 630 (1993); *see supra* notes 38-42 and accompanying text. Although the application of strict scrutiny is not, doctrinally, fatal to all challenged plans, a review of Supreme Court jurisprudence indicates that such a scheme is destined to fail. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 1004, 1010 (1996) (Stevens, J., dissenting) (noting that strict scrutiny need not be "fatal" and dissenting from the majority's application of the heightened form of review); Clark v. Putnam County, 293 F.3d 1261 (11th Cir. 2002) (finding Putnam County's redistricting plan unconstitutional because the use of race predominated and was not narrowly tailored to a compelling state interest). Alternatively, jurisdictions can avoid allowing race to predominate in order to lure a reviewing court away from applying strict scrutiny. *See, e.g.,* Easley v. Cromartie, 532 U.S. 234, 242 (2001) (indicating that when race is one factor among many, and does not supercede all other factors, strict scrutiny will not apply). In *Easley*, the Court indicated that politics, not race, dominated in the creation of North Carolina's twelfth congressional district. *Id.* at 258 (finding that the district court's rejection of the apportionment scheme under strict scrutiny was "clearly erroneous"); *see also* Vieth v. Jubelirer, 124 S. Ct. 1769 (2004) (Scalia, J., plurality opinion) (indicating that the political question doctrine limits the ability of courts to review cases of partisan gerrymandering).

Under either of these two models, the intentional creation of coalition districts to achieve section 5 compliance might enable a jurisdiction to survive judicial review. While the juxtaposition of coalition districts and traditional strict scrutiny analysis is discussed earlier in Part II.B, the intentional creation of coalition districts can also be used to avoid strict scrutiny analysis altogether. Viewed under the lens of *Easley*, the intentional use of race to create coalition districts in order to avoid retrogression might be sufficiently political and nonracial to encourage the court to refrain from applying strict scrutiny. *See infra* notes 95-124 and accompanying text (comparing the relative harms of majority-minority districts and coalition districts). Regardless of whether coalition districts are seen as a means of complying with strict scrutiny or as a means of avoiding strict scrutiny, however, the crux of Part II.B is that viable coalition districts are less harmful under the Equal Protection Clause than are majority-minority districts.

classifications. This Part also argues that such an interpretation of the relationship between section 5 and the Equal Protection Clause is a justified encroachment on federalism principles, but requires courts to be very cautious in granting preclearance to jurisdictions creating coalition districts.

A. *Discord and Inconsistencies: Section 5 and Equal Protection*

Underlying the Court's early opinions interpreting section 5 is the idea that "the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5."[84] Yet in *Shaw v. Reno*, the Court backtracked, indicating that section 5 does not give "covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression."[85] The Court took this one step further in *Shaw v. Hunt*, indicating in dicta that section 5 compliance does not necessarily justify the use of race in redistricting.[86] While *Hunt* did not specifically hold that section 5 compliance is not a compelling state interest, the Court made clear that augmenting the effective power of minority voters under the guise of preventing retrogression is not a compelling interest.[87]

But any limitation on the ability to use race-based factors to achieve section 5 compliance in *Shaw v. Hunt* was at least implicitly

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84. United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 161 (1977) (plurality opinion); *see also* Beer v. United States, 425 U.S. 130, 141 (1976); City of Richmond v. United States, 422 U.S. 358, 370-71 (1975).

85. Shaw v. Reno, 509 U.S. 630, 655 (1993); *see also* Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-*Shaw *Era*, 26 CUMB. L. REV. 287, 308 (1996) (noting that the "abbreviated discussion [in *Shaw v. Reno*] of strict scrutiny at least suggested that compliance with either section 2's dilution principle or section 5's retrogression standard could justify race-conscious districting").

86. Shaw v. Hunt, 517 U.S. 899, 909-12 (1996).

87. *Id.*; *see also* Miller v. Johnson, 515 U.S. 900, 922 (1995) (rejecting "the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues"). That section 5 is not a compelling governmental purpose under strict scrutiny is also justified by one reading of the Supreme Court's decisions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Both cases involved remedial race-based classifications, where the use of race was designed to help, rather than hinder, minority groups. Together, these cases might be interpreted as standing for the proposition that remedying the *specific* effects of past discriminatory acts is the lone justification for race-conscious government action. The legislative history of section 5, however, indicates that its purpose is to remedy the *societal* effects of past discrimination. *See* Shaw v. Hunt, 517 U.S. 899, 909 (1996) (discussing *Croson*, 488 U.S. at 498-509); S. REP. NO. 97-417, at 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205-06. *But c.f.* Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (holding that the attainment of a diverse student body is a compelling justification for a state's intentionally race-conscious admissions program). While *Grutter* indicates that race-based classifications are permissible for reasons other than remedying the specific effects of past discrimination, it does not relieve remedial plans of the burden to remedy *specific* instances of discrimination.

questioned by the Court's decision in *Bush v. Vera*, decided the same day as *Hunt*.[88] In *Vera*, the Court held that the creation of Texas's 18th Congressional district was unconstitutional because it was "not narrowly tailored to the avoidance of § 5 liability."[89] The Court cited *Shaw v. Reno* for the proposition that a redistricting plan that "went beyond what was reasonably necessary to avoid retrogression" is not "narrowly tailored to the goal of avoiding retrogression."[90] This language indicates, contrary to the dicta in *Shaw v. Hunt*, that jurisdictions can consciously use race to comply with section 5 so long as the use of race is narrowly tailored to meet this goal.[91]

Taking into account the "reasonably necessary" language from the majority opinion in *Vera*, the Court's opinions present a view of strict scrutiny that enables states and localities to consciously create coalition districts in an effort to comply with section 5.[92] In some cases, coalition districts established to achieve section 5 compliance may

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88. Bush v. Vera, 517 U.S. 952 (1996) (indicating that section 5 compliance can be considered a compelling state purpose under equal protection analysis). *See* J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 GEO. MASON L. REV. 431, 454 (2000). Furthermore, a broad reading of the limitations implied by *Shaw v. Hunt* would raise doubt about the functional validity of section 5. *See, e.g.*, Georgia v. Ashcroft, 123 S. Ct. 2498, 2517 (2003) (Kennedy, J., concurring) (noting that the "considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5"). The Supreme Court has, however, indicated that the VRA continues to serve as a response to judicially recognized infringements of the constitutionally protected right to vote. *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640 (1999) (implying the validity of the VRA as a proper exercise of congressional authority under Section 5 of the Fourteenth Amendment); City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997) (limiting Congress' authority under Section 5 of the Fourteenth Amendment to remedial measures).

89. *Vera*, 517 U.S. at 983. Additionally, in a separately issued concurring opinion to her own plurality opinion, Justice O'Connor stated that all jurisdictions have a compelling interest in complying with section 2 of the VRA, and those covered jurisdictions have a compelling interest in complying with section 5. *Vera*, 517 U.S. at 990-95 (O'Connor, J., concurring). *See also* Katherine Inglis Butler, *Redistricting in a Post-*Shaw *Era: A Small Treatise Accompanied by Districting Guidelines for Legislators, Litigants, and Courts*, 36 U. RICH. L. REV. 137, 207-08 (2002). Although the four dissenting justices did not join her concurrence, Justice O'Connor's opinion lends credence to the idea that section 5 compliance is a compelling state interest. *Vera*, 517 U.S. at 990-95 (O'Connor, J., concurring); *see also* Georgia v. Ashcroft, 123 S. Ct. 2498, 2517 (2003) (Kennedy, J., concurring) (acknowledging the disregard for the tension between sections 2 and 5 of the VRA).

90. *Vera*, 517 U.S. at 983 (quoting Shaw v. Reno, 509 U.S. 630, 655 (1993)).

91. *Vera*, 517 U.S. at 983.

92. The creation of coalition districts arguably forces jurisdictions to consider race more stringently than does the creation of majority-minority districts, because creating viable coalitions requires jurisdictions to engage in highly detailed analyses of racial bloc voting and racial crossover voting. As such, the use of coalition districts to achieve section 5 compliance will likely force a court to invoke strict scrutiny under *Miller v. Johnson*. 515 U.S. 900, 916 (1995) (noting that strict scrutiny must be invoked where the plaintiff can demonstrate that the legislature "subordinated traditional race-neutral districting principles"). *But see supra* note 83 (noting that the creation of coalition districts might also enable courts to refrain from applying strict scrutiny in the first place).

satisfy *Shaw v. Reno* and its progeny, while majority-minority districts may not. So long as a coalition district is narrowly tailored to the goal of complying with section 5, the coalition district is constitutional under the Equal Protection Clause.

B. *The Equal Protection Clause: Narrow Tailoring and a Mandate of Viable Coalition Districts*

Given the Court's interpretation of the interplay between section 5 of the VRA and the Equal Protection Clause, if a jurisdiction is presented with the option of creating either coalition districts or equally effective majority-minority districts in order to comply with section 5, the Equal Protection Clause mandates the creation of coalition districts.[93] Coalition districts are more narrowly tailored under strict scrutiny than are majority-minority districts because they minimize the harms from racial classifications. By examining the harms that the Court has recognized in response to race-based classifications, both remedial[94] and otherwise, as well as the rationale behind applying heightened scrutiny for race-based classifications, coalition districts emerge, for several reasons, as a partial solution to the tension between section 5 and the Equal Protection Clause.

First, because race has been used for invidious purposes throughout America's past, the use of race-based classifications carries a stigmatic harm.[95] Historically, racial classifications have served no

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93. Critical to this analysis is the assumption that a jurisdiction can create a functioning coalition district with sufficient racial crossover voting such that the apportionment scheme will not impair the effective exercise of the franchise for any minority group.

94. Regardless of whether section 5 serves a compelling governmental purpose under a strict scrutiny analysis, section 5 is a remedial statute, and was specifically enacted as "a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." Beer v. United States, 425 U.S. 130, 140 (1976) (quoting H.R. REP. NO. 94-196, at 57 (1975)). *See generally* South Carolina v. Katzenbach, 383 U.S. 301, 315-16 (1966) (discussing the history of the VRA). First, in enacting the legislation, Congress decided "'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.'" *Beer*, 425 U.S. at 140 (quoting H.R. REP. NO. 94-196, at 57-58 (1975) (quoting South Carolina v. Katzenbach, 383 U.S. at 328, and 116 CONG. REC. 5519 (1970))). Second, section 5 is not universally applicable, indicating that Congress carefully targeted a response only to those districts that need it most. Third, Congress must reauthorize section 5 every twenty-five years. S. REP. NO. 97-417, at 101 (1982), *reprinted in* 1982 U.S.S.C.A.N. 177, 274. The time limitation establishes the legislation as "a temporary and exceptional remedy for problems of an exceptional character." S. REP. NO. 97-417, at 102 (1983), *reprinted in* 1982 U.S.S.C.A.N. 177, 275. Finally, section 5 does not require any affirmative action on behalf of jurisdictions and their political subdivisions; it merely places demands on the subdivisions once they have affirmatively acted.

95. *See generally* Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 9, 20 (2000) (proposing a "unified framework for strict scrutiny of race-conscious government action" and applying the framework to voting-rights cases).

purpose beyond degradation and humiliation.[96] The Supreme Court has noted "the policy of separating the races is usually interpreted as denoting the inferiority" of the minority group, especially where the separation has the "sanction of law."[97] Even in the context of remedial race-based classifications in voting-rights cases, the Court has found that harm results from the use of such classifications.[98] While the use of race-based classifications in a remedial context will be upheld if narrowly tailored to achieve a compelling interest, this does not eliminate harm. Under the Court's reasoning in *Shaw v. Reno*, the continued use of racial classifications, even in a benign context, serves to perpetuate the stigmatic harm created by such groupings.[99]

Coalition districts, however, are less stigmatic than majority-minority districts.[100] In an area in which the Court has explicitly stated "appearances *do* matter,"[101] coalition districts are less visually obvious than are majority-minority districts. Unlike the bipolar districts challenged in *Shaw v. Reno*, coalition districts, by virtue of their multiracial nature, do not bear the same "uncomfortable resemblance

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96. Plessy v. Ferguson, 163 U.S. 537, 559-60 (1896) (Harlan, J., dissenting).

97. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

98. Shaw v. Reno, 509 U.S. 630, 643 (1993) ("Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943))); United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part) ("[E]ven in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs.").

99. *Shaw v. Reno*, 509 U.S. at 643 (noting that racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility"). *But c.f.* Allen v. Wright, 468 U.S. 737, 755 (1984) (rejecting the notion that pure stigmatic harm to a member of a racial group can give that individual standing to challenge government action). While *Allen* indicates that a stigmatically harmed individual does not have standing, this does not necessarily mean that a harm does not exist for purposes of strict scrutiny and narrow tailoring.

100. *See* Paulette M. Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53, 68 (1999) ("[T]he dominant racial paradigm pits Blacks and Whites against each other."); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering*, 95 MICH. L. REV. 821, 890 (1997) ("An interracial praxis, moving beyond the white-black jurisprudential paradigm, addresses intergroup prejudices and resentments as well as possibilities for healing and reconciliation. It focuses on the obstacle of felt injustice in the struggles of groups endeavoring to 'live together peaceably [and] work together politically.'" (alteration in original) (quoting Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 UCLA ASIAN PAC. AM. L.J. 33 (1995))).

101. Shaw v. Reno, 509 U.S. at 647 (emphasis added), *quoted in* Duckworth v. State Admin. Bd. of Elections, 332 F.3d 769, 776 (4th Cir. 2003) (applying *Shaw* to a challenge of unlawful race-based redistricting); *see also* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506-07 (1993) (discussing the *Shaw* inquiry).

to political apartheid."[102] This minimizes the idea that members of the same racial group think alike,[103] and reduces the stigma that can be created by separating races into distinct categories.[104] As such, the use of coalition districts is less stigmatic to minority groups, even though the creation of coalition districts arguably demands that race be considered in a more detailed manner than does the creation of majority-minority districts.

Second, in analyzing *Shaw v. Reno*, Professors Pildes and Niemi argue that the Court recognized a collective, "expressive" harm.[105] This interpretation of *Shaw*, later welcomed by the Court in *Bush v. Vera*,[106] indicates that there is a constitutional harm "that results from the idea or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about."[107] Professors Pildes and Neimi interpret *Shaw v. Reno* to hold that where a government places too much emphasis on race, the state endorses the importance and usefulness of race-based classifications.[108] The expressive harm felt by individuals categorized primarily by race forces these individuals to act not simply as voters,

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102. *Shaw v. Reno*, 509 U.S. at 647 (discussing "reapportionment plan[s] that include[] in one district individuals who belong to the same race, but who are otherwise separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin"). The *Shaw* Court held that such a district "reinforces the perception that members of the same racial group . . . think alike." *Id.*

103. *See id.*

104. The stigmatic harm is no less constitutionally infirm for remedial race-based classifications than it is for nonremedial race-based classifications. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring). As Justice Thomas argued in *Adarand*, a benign classification "teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with [nonminorities] without their patronizing indulgence." *Id.* at 241. Justice Thomas's argument suggests that the harm of race-based classifications stretches beyond any individual and negatively affects the larger perception of the position of minorities in society. *Id.* (noting that remedial programs "engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race"). Thus, under Justice Thomas's argument, traditional racial classifications — in which one racial group is benefited at the expense of a different and unpopular racial group — are no different than remedial measures. Yet one can also argue that remedial race-based classifications appropriately acknowledge the differences between racial groups and the historical oppression of racial minorities, while supporting the idea that it is beneficial for society to work to remedy these past harms. *See infra* note 113 and accompanying text. Under this theory, coalition districts cause less stigmatic harm than do majority-minority districts. *See supra* notes 100-102 and accompanying text.

105. Pildes & Niemi, *supra* note 101, at 506-07.

106. Bush v. Vera, 517 U.S. 952, 984 (1996) (plurality opinion) ("[W]e also know that the nature of the expressive harms with which we are dealing, and the complexity of the districting process, are such that bright-line rules are not available.").

107. Pildes & Niemi, *supra* note 101, at 506-07.

108. *Id.*

but as racial voters.[109] This harm is separate and distinct from the pure stigmatic harm discussed above;[110] it stems from the "social perception" of the state-endorsed use of race in redistricting, rather than the harm felt by any particular voter placed into a district solely because of her race.[111] The harm "reinforces racial stereotypes [across society as a whole] and threatens 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."[112]

While the intentional creation of coalition districts does not eliminate the expressive harm felt via the intentional creation of majority-minority districts, the conscious use of race to create coalitions sends a better message.[113] Coalition districts simultaneously acknowledge the importance of race in society, and work to bridge the divide among the races. This type of pluralistic melting-pot theory contradicts the idea that all racial groups are distinct and polarized. Translating the expressive harm from *Shaw v. Reno* into the coalition context indicates that the social costs of the harm are outweighed by the social benefits. Coalition districts acknowledge that race matters and has played an important role in the socio-economic history of America, while also teaching that communities can recognize, appreciate, and overcome cultural differences between races.[114] This principle is further buttressed in a representational manner, when the elected official of one race has the full support of, and is able to effectively represent, coalition members of a different race.[115] As such,

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109. Shaw v. Reno, 509 U.S. 630, 647 (1993) (noting that race-based classification in redistricting "reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls").

110. *Vera*, 517 U.S. at 984 (recognizing the expressive harm). Professors Pildes and Niemi note that the expressive harm is separate and distinct from the purely stigmatic harm. Unlike the stigmatic harm, the expressive harm "is not concrete to particular individuals, singled out for distinct burdens. The harm instead lies in the disruption to constitutionally underwritten public understandings about the appropriate structure of values in some arena of public action." Pildes & Niemi, *supra* note 101, at 507.

111. *Shaw v. Reno*, 509 U.S. at 647-48 (emphasizing the "perception" created by race-based classification and the "message" it sends); Pildes & Niemi, *supra* note 101, at 516.

112. *Shaw v. Reno*, 509 U.S. at 650.

113. *See* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1087 (1991) (advocating the position that race-consciousness can help validate "the lives and experiences of those who have been burdened because of their race"); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 54 (1991) (arguing that color-blind constitutionalism has limited effectiveness in remedying racial discrimination). *See generally* Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (1990) (contrasting a commitment to integration with race-consciousness as models for breaking down racial barriers).

114. Aleinikoff, *supra* note 113.

115. *See supra* note 46. The idea of the "representational harm" comes from *Shaw v. Reno*, which notes that race-based redistricting will cause elected representatives to "believe that their primary obligation is to represent only the members of [the minority] group, rather

the expressive harm created by using race-based classifications in redistricting is reduced through the creation of coalition districts, and the societal gains are enlarged.

Third, *Shaw v. Reno* also indicates that race-based classifications in redistricting can cause a more concrete, representational harm.[116] Because *Shaw*-style plaintiffs can be of any race, so long as they reside within the challenged district,[117] minimizing the stigma or expressive harms for minority group members does not alleviate the burden felt by potential noncoalition plaintiffs. Those individuals who do not belong to the coalition are effectively deprived of voting power as a result of the race-based classifications. These, typically white, "filler people" experience a real, cognizable harm in the sense that their exercise of the franchise is effectively eliminated. Accordingly, race-based redistricting may lead to a representational harm felt by filler people because it may lead representatives to "believe that their primary obligation is to represent only the members of [the minority] group, rather than their constituency as a whole."[118]

The creation of coalition districts does not necessarily alleviate the representational harm felt by members of a district who are not part of the majority-minority group. Drawing a coalition district instead of a majority-minority district will not eliminate the problem of the effectively disenfranchised group. This problem, however, is not merely one expressed in the context of race; it is simply a consequence of majoritarian democracy. Where two groups of any type are districted together, one necessarily will win at the expense of the other. For example, the Court has effectively ruled that partisan gerrymanders are permissible — despite the fact that a particular group loses an effective exercise of the franchise.[119] That coalition

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than their constituency as a whole." *Shaw*, 509 U.S. at 648. *But c.f.* Heather Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1692 (2001) (arguing that the *Shaw* majority has "backed away" from the idea of the representational harm in recent years). This harm is not felt as strongly where coalitions are created because representatives will have the support of, and will be able to effectively represent, all members of the coalition.

116. *Shaw v. Reno*, 509 U.S. at 648 ("[E]lected officials are more likely . . . to represent only the members of [the majority] group."). The idea of a representational harm is also supported by the Supreme Court's holdings in *United States v. Hays*, 515 U.S. 737 (1995), and *Sinkfield v. Kelley*, 531 U.S. 28 (2000), which mandate that plaintiffs challenging apportionment schemes under the Equal Protection Clause reside within a challenged district in order to be "personally" harmed by an unconstitutional reapportionment. But while the Court acknowledged the possibility of expressive harms in *Shaw v. Reno*, it refrained from discussing whether representational harms actually exist. *See* Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2285 n.48 (1998).

117. United States v. Hays, 515 U.S. 737, 744-46 (1995).

118. *Shaw v. Reno*, 509 U.S. at 648.

119. *See* Davis v. Bandemer, 478 U.S. 109, 132 (1986) (plurality opinion) (holding that political gerrymandering is unconstitutional when the "electoral system is arranged in a

districts are more narrowly tailored under strict scrutiny does not require that the use of coalition districts mitigates all harms. Strict scrutiny in the section 5 reapportionment context requires that redistricting authorities not exceed what is "reasonably necessary" to avoid retrogression.[120]

Finally, at its inception, strict scrutiny was a response to the idea that there was a need to protect "discrete and insular" minorities from the rule of the majority.[121] In a famous footnote in *United States v. Carolene Products Co.*, Justice Stone indicated that a more stringent standard of review should apply to statutes directed at such minority groups.[122] These groups, he felt, were not adequately protected by the political process, and thus needed a more "searching judicial inquiry" to protect against prejudice.[123] Yet by definition, such districts indicate that component minority populations are no longer as discrete and insular as they once were; functioning coalition districts demonstrate that minority groups have successfully found at least some common political ground and can jointly serve to protect the interests of coalition members through the political process. The Court should not permit redistricting authorities to draw lines to keep a minority group discrete, when, in fact, its members have been able to forge common ground with other racial groups. Thus, while coalition members, by definition, no longer require the distinct and separate political protections afforded by majority-minority districts, coalition districts provide these groups with appropriate protections, while minimizing the harm caused by racial classifications.

Because the relative harm caused by the use of coalition districts is smaller than the harm caused by the use of majority-minority districts, coalition districts are more narrowly tailored to achieve section 5 compliance than are majority-minority districts. They are less blatant, less obvious, and less stigmatic than are majority-minority districts. By their very nature, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."[124] Coalition districts are the ideal that jurisdictions

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manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."). *But see* Vieth v. Jubelirer, 124 S. Ct. 1769 (2004) (Scalia, J., plurality) (overruling *Bandemer* and holding that partisan gerrymandering claims are nonjusticiable political questions). The *Vieth* plurality expressly noted, however, that partisan gerrymandering is perhaps incompatible with "democratic principles." *Id.* at 1785.

120. Bush v. Vera, 517 U.S. 952, 983 (1996) (plurality opinion) (quoting Shaw v. Reno, 509 U.S. at 655).

121. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

122. *Id.*

123. *Id.*

124. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) (quoting Fullilove v. Klutznick, 448 U.S. 448 (1980) (Stevens, J., dissenting)).

subject to section 5 should strive to attain. They present a more exact connection and are more narrowly tailored than majority-minority districts. In short, equal protection demands their use.

This Note does not imply that striving for coalition districts will be easy; as post-*Gingles* section 2 litigation has demonstrated, determining whether racial and ethnic groups forge coalitions is a very difficult task. As such, the Department of Justice and reviewing courts must bear in mind that the purpose of section 5 was to prevent districts from bending the rules to create racially discriminatory voting systems. Jurisdictions cannot be permitted simply to create coalition districts that mask racially discriminatory redistricting schemes when such districts are not viable. Such conduct would only continue to generate complex, lengthy, and statistically burdensome court battles.

C. *Back to the Beginnings: Federalism, Political Theories, and the Goals of Section 5*

The idea that the Equal Protection Clause mandates viable coalition districts raises two principal and related concerns. First, such a requirement expands an already large encroachment on states' rights.[125] Second, mandating coalition districts under section 5 conflicts with the goal, expressed in *Georgia v. Ashcroft*, of providing jurisdictions with increased flexibility to make their own political determinations under section 5.[126] This Section argues that while these two concerns do not preclude the mandate discussed in the preceding Section, they do give reason for courts to be cautious in conducting their analyses.

With regard to the first concern, if the Supreme Court mandates viable coalition districts because such districts are more narrowly tailored than are majority-minority districts, the Court is expanding an already large encroachment on states' rights.[127] As a general matter,

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125. Lopez v. Monterey County, 525 U.S. 266, 282 (1999) (acknowledging the "substantial 'federalism costs'" imposed by section 5) (quoting Miller v. Johnson, 515 U.S. 900, 926 (1995)). *See generally* Ellen D. Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 VILL. L. REV. 1179, 1181-82 (2001) (arguing that the Court's willingness to further encroach on state sovereignty reflects its concern about institutional overreaching by the Department of Justice). *But c.f.* Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (noting that the Supreme Court has "[s]triv[ed] to assure itself and the public that announcing rights . . . involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government . . . ."), *overruled by* Lawrence v. Texas, 123 S. Ct. 2472 (2003). By mandating coalition districts, the Supreme Court is not imposing its own political values onto states, but is simply indicating that coalition districts are more narrowly tailored under strict scrutiny than are majority-minority districts composed of a single race.

126. Georgia v. Ashcroft, 123 S. Ct. 2498, 2511-12 (2003).

127. Even without the introduction of multiethnic coalitions into voting-rights jurisprudence, section 5 has repeatedly been described as exacting "substantial 'federalism costs.'" Lopez v. Monterey County, 525 U.S. 266, 282 (1999) (quoting *Miller*, 515 U.S. at 926); Daniel Hays Lowenstein, *You Don't Have to be a Liberal to Hate the Racial*

the relative scrutiny for equal-protection challenges is inversely proportional to federalism concerns. Under the reconciliation of section 5 and the Equal Protection Clause proposed above, states will have less freedom to make their own political determinations regarding the viability of the coalitions. Although mandating viable coalition districts for compliance with section 5 involves a greater intrusion into state sovereignty, this intrusion remains in line with the goals of both the Fourteenth Amendment and the VRA because it works to eliminate the problematic race-based voting structures enacted by covered jurisdictions.[128] Because the Fourteenth Amendment can be read to require multiracial coalition districts, the intrusion on states rights is justified.

While the goals of the coverage formula under section 4 of the VRA indicate that coalition districts would be beneficial to race relations,[129] courts must also be aware of districts that attempt to use coalition districts in the section 5 context. Section 5 only burdens those states and subdivisions that have been selected for coverage because "specified criteria suggest[] the presence of voting discrimination in the jurisdiction."[130] These jurisdictions have histories of discrimination in voting; thus courts must look with a special eye at these jurisdictions when they attempt to use a coalition district. If covered jurisdictions can sufficiently demonstrate that multiracial coalitions exist, section 5 of the VRA should not be read to prohibit such coalitions. Such a prohibition, as noted in Justice Powell's dissent in *City of Rome v. United States*, would result in abuses of federalist principles and undermine the ability of states and political subdivisions to chart their own political course.[131]

Gerrymandering Cases, 50 STAN. L. REV. 779, 790 (1998) (stating that the preclearance process is "an unprecedented federal intrusion into the governing processes of the states."); *see also* Katz, *supra* note 125, at 1181-82 (noting that section 5 "dramatically shifts the balance of power between the federal government and the States and state subdivisions where it applies."); Mark E. Haddad, Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 Yale L.J. 131, 140 (1984) ("Section 5 embodies an extraordinary grant of federal authority.").

128. *See supra* notes 3-5 and accompanying text.

129. *See supra* note 18.

130. *Lopez v. Monterey County*, 525 U.S. at 269-70.

131. City of Rome v. United States, 446 U.S. 156, 201-02 (Powell, J., dissenting) (noting that the "encroachment [caused by section 5] is especially troubling because it destroys local control of the means of self-government, one of the central values of our polity. Unless the federal structure provides some protection for a community's ordering of its own democratic procedures, the right of each community to determine its own course within the boundaries marked by the Constitution is at risk." (footnote omitted)); *see also* Growe v. Emison, 507 U.S. 25, 34 (1993) (noting that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." (quoting Chapman v. Meier, 420 U.S. 1, 27 (1975)); Lawyer v. Dep't of Justice, 521 U.S. 567, 576 (1997) (noting in dicta that "[a] State should be given the opportunity to make its own

The second key problem results from the Court's recent decision in *Georgia v. Ashcroft*, in which it clearly held that states should have the flexibility to make their own determinations regarding different "theor[ies] of effective representation."[132] Yet while states might be free to choose among different apportionment theories under section 5, they are not released from the constitutional requirement of equal protection.[133] A redistricting plan that is permissible under section 5 is not necessarily in accord with equal-protection principles. While this ultimately suggests an outcome contrary to the Supreme Court's opinion in *Georgia v. Ashcroft*, that case is easily distinguished because the Court was asked to consider neither the role of multiracial populations nor the redistricting scheme under the Equal Protection Clause. As such, it remains an open question whether states really enjoy the amount of flexibility that *Georgia v. Ashcroft* implies, given equal-protection constraints.[134] Regardless, accepting the proposed reconciliation between section 5 and the Equal Protection Clause necessitates a choice between political theories: either jurisdictions should have the power to make race count in redistricting more than *Shaw v. Reno* and its progeny currently permit, or the federal government should further constrain the ability of states to make their own political determinations.[135]

CONCLUSION

Compliance with section 5 of the VRA is not an easy task given the additional constraints placed on redistricting by section 2 and the Equal Protection Clause. Because of changing racial demographics, the "discord and inconsistencies" between these doctrines continue to grow. The Supreme Court's decision in *Georgia v. Ashcroft* permits jurisdictions to draw multiracial coalition districts, while other doctrines suggest that reapportioning authorities are unable to

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redistricting decisions so long as that is practically possible and the State chooses to take the opportunity.").

132. Georgia v. Ashcroft, 123 S. Ct. 2498, 2512 (2003); *see also* Katz, *supra* note 74, at 2381 (noting the "unprecedented" discretion given to covered jurisdictions to shape their electoral districts in the preclearance process).

133. *Georgia v. Ashcroft*, 123 S. Ct. at 2517 (Kennedy, J. concurring) (noting that while section 5 precedent controlled the decision, future cases may raise similar issues within a broader context of equal protection and section 2 jurisprudence).

134. *Id.*

135. *But see* Colegrove v. Green, 328 U.S. 549, 553-54, 556 (1946) (arguing that courts should refrain from deciding controversies concerning "matters that bring courts into immediate and active relations with party contests. . . . It is hostile to a democratic system to involve the judiciary in the politics of the people," and consequently "[c]ourts ought not to enter this political thicket."). *But c.f.* Reynolds v. Sims, 377 U.S. 533, 566-67 (1964) (noting that "a denial of constitutionally protected rights demands judicial protection . . . . To the extent that a citizen's right to vote is debased, he is that much less a citizen.").

consider race in the redistricting process. This Note suggests that the Equal Protection Clause requires the use of multiracial coalition districts, where possible, in order to achieve section 5 compliance.[136] Yet courts must beware: the use of coalition districts in this manner may allow malintentioned districts to manipulate the political process.[137] The Justice Department and the courts must take careful note that in jurisdictions where multiracial voting coalitions are not viable, the reapportioning authority can, under the guise of creating properly functioning coalition districts, disperse the minority vote and functionally disenfranchise the minority voters. Despite this possibility, however, and given the inherent contradictions in much of the Court's voting-rights jurisprudence, viable coalition districts offer a functional means through which reapportioning authorities can navigate the murky waters of redistricting.

136. Such a reading would also enable Congress to reauthorize section 5 with the confidence that the statute continues to benefit minority voting rights. *See generally* Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of its Own Success*, 104 COLUM. L. REV. 1710 (2004) (questioning whether section 5 has served its purpose and should be allowed to lapse when it expires in 2007).

137. *See* Katz, *supra* note 7, at 2381-82 (questioning whether post-*Georgia v. Ashcroft* retrogression analysis will provide a "meaningful curb on racial discrimination"); Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L. J. 21, 36 (2004) (noting that "[g]utting section 5 ... is itself a retrogression in minority voters' effective exercise of the electoral franchise").