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# WHO DREW CONGRESSIONAL DISTRICT LINES: THE GEORGIA GENERAL ASSEMBLY OR THE UNITED STATES DEPARTMENT OF JUSTICE?

## INTRODUCTION

In the recent history of our country, and especially in the South, racial discrimination has tainted the electoral process.<sup>1</sup> At the mercy of methods such as the once popular “grandfather clause”<sup>2</sup> or the modern at-large election,<sup>3</sup> minority voters have suffered the effects of pervasive racial or ethnic discrimination at the polls.<sup>4</sup> However, due largely to the successful administration of the Voting Rights Act of 1965<sup>5</sup> (the Act), discrimination is no longer rampant and minority voting rights are recognized.<sup>6</sup> The Act goes beyond traditional Fourteenth Amendment Equal Protection statutes by establishing a test that identifies discrimination based on effect rather than intent.<sup>7</sup>

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1. See generally Howard Ball, *The Perpetuation of Racial Vote Dilution: An Examination of Some Constraints on the Effective Administration of the 1965 Voting Rights Act, as Amended in 1982*, 28 HOW. L.J. 433 (1985).

2. A “grandfather clause” is a provision used in statutes that exempts certain people from the new law because the people are “already in or a part of the existing system.” BLACK’S LAW DICTIONARY 699 (6th ed. 1990).

3. “At-large” is a term that refers to a district (or state) in which all representatives for that district are elected by all voters in the district as distinguished from single-member districts, drawn to accommodate only one representative for the pool of voters in that district. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 615 (1982); see also Ball, *supra* note 1, at 434-37.

4. Ball, *supra* note 1, at 434-37. In support of arguments against at-large election schemes, scholars point to studies indicating single-member districting schemes afford minorities a greater opportunity to elect minority candidates. *Id.* at 436 nn.20-21.

5. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (1988)).

6. John R. Dunne, Remarks at National Conference of State Legislators 8-9 (Aug. 13, 1991) [hereinafter Dunne Remarks] (transcript available in the Georgia State University College of Law Library); see also *Vera v. Richards*, No. H-94-0277, slip op. at 1 (S.D. Tex. Aug. 17, 1994); Ripley E. Rand, *The Fancied Line: Shaw v. Reno and the Chimerical Racial Gerrymander*, 72 N.C. L. REV. 725, 732, 735 (1994).

7. Bernard Grofman, *Would Vince Lombardi Have Been Right if He Had Said: “When it Comes to Redistricting, Race Isn’t Everything, It’s the Only Thing”?*, 14 CARDOZO L. REV. 1237, 1244-45 (1993). By amending Section 2 of the Act in 1982, Congress removed the traditional intent requirement for Fourteenth Amendment discrimination cases that had previously been articulated in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and expressed

Supporters of the Act argue the right to vote is fundamental and is therefore properly treated differently than other equal protection rights.<sup>8</sup> Opponents, however, argue that the Act is simply another affirmative action program or that it establishes a quota system for minority candidates and should be eliminated.<sup>9</sup> While affirmative action programs are traditionally those that place more weight on the rights of minorities, the Act attempts to provide minorities an equal opportunity in the electoral process, not to place their interests above those of other citizens.<sup>10</sup> Nevertheless, the current application of the Voting Rights Act fosters arguments that the United States Department of Justice may have surpassed its express authority and unconstitutionally administered the Act's provisions.<sup>11</sup>

In certain jurisdictions, all changes in voting practices and procedures are subject to review by the United States Department of Justice (DOJ) under Section 5 of the Act.<sup>12</sup> Part I of this Note will outline the history of the Voting Rights Act and the development of Section 5 standards. Part I will also discuss the evolution of Section 2 standards, noting particularly the unique relationship between Section 2 and Section 5. Part II will then analyze the State of Georgia's most recent redistricting<sup>13</sup> legislation in light of the United States Supreme Court's decision in *Shaw v. Reno*<sup>14</sup> and the mandates of Section 5 of the Act. Part III will focus on the interaction between the Georgia

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again in the voting rights context in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Grofman, *supra*; see *infra* notes 59-66 and accompanying text.

8. Grofman, *supra* note 7, at 1244.

9. *Id.* at 1246-48.

10. *Id.* at 1247; see also *Shaw v. Reno*, 113 S. Ct. 2816, 2846 (1993) (Souter, J., dissenting). Justice Souter points out that the use of race in the districting context is not similar to the use of race in ways that advantage one person and disadvantage another (i.e., affirmative action). *Shaw*, 113 S. Ct. at 2846. "[T]he mere placement of an individual in one district instead of another denies no one a right or benefit provided to others." *Id.*

11. See *infra* notes 180-208 and accompanying text.

12. 42 U.S.C. § 1973c (1988).

13. It is important to distinguish between "districting" or "redistricting" and "apportionment" and "reapportionment." "[A]pportionment and reapportionment involve the allocation [by Congress] of a finite number of representatives among a fixed number of pre-established areas. *Districting* and *redistricting* . . . refer to the processes by which the lines separating legislative districts are drawn [by states]." *Hays v. Louisiana*, 839 F. Supp. 1188, 1190 n.1 (W.D. La. 1993) (quoting Charles Backstrom et al., *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINN. L. REV. 1121, 1121 n.1 (1978)).

14. 113 S. Ct. 2816 (1993).

Attorney General's office and DOJ during Georgia's legislative redistricting process. Part IV will reveal the extent to which the Voting Rights Act, in practice, transgresses the standards imposed by the courts and Congress, while developing an argument that the intrusive nature of the Act results in the political district "gerrymandering"<sup>15</sup> common in states' redistricting plans today. Part V will analyze the recent decisions rendered by federal district courts in Georgia, Louisiana, North Carolina, and Texas, in which all four states' congressional redistricting legislation was subjected to strict scrutiny under Equal Protection challenges.<sup>16</sup>

Traditionally, Voting Rights Act litigation did not revolve around the problems of redistricting.<sup>17</sup> Nearly thirty years after its enactment, Voting Rights Act litigation involving districting is more common than ever before.<sup>18</sup> One reason for this development is that most of the litigation in the past dealt with the elimination of at-large elections.<sup>19</sup> Today, courts face new issues over the way district lines are being drawn for single-member districts.<sup>20</sup> Moreover, the potential scope of the Voting Rights Act has expanded due to the application of amended Section 2 standards in the administrative Section 5 preclearance decisions.<sup>21</sup>

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15. "Gerrymandering" is the term used to describe the practice of drawing political boundaries in odd fashions to accommodate a certain group of voters. *See Shaw*, 113 S. Ct. at 2823 (discussing racial gerrymandering). "A legislature creates a racially-gerrymandered districting plan when it *intentionally* draws one or more districts along racial lines or otherwise intentionally segregates citizens into voting districts based on their race." *Hays v. Louisiana*, 839 F. Supp. 1188, 1194 (W.D. La. 1993), *vacated*, 114 S. Ct. 2731 (1994) (citing *Shaw v. Reno*, 113 S. Ct. 2816 (1993), "in which [the phrases] 'racially gerrymandering' and 'intentional segregation of voters into separate voting districts' are used interchangeably throughout").

16. *See infra* notes 209-74 and accompanying text.

17. Grofman, *supra* note 7, at 1240. More traditionally, Voting Rights Act litigation involved challenges to at-large election schemes commonly used at all levels in the electoral process. *Id.*; *see, e.g.*, *Rogers v. Lodge*, 458 U.S. 613, 616 (1982) (striking down an at-large electoral system for County Board of Commissioners in a Georgia county). However, this elimination of at-large election schemes may spawn more litigation than ever before as jurisdictions struggle to redistrict in ways that comport with the Voting Rights Act, accommodate the rights of the minority population, and attempt to include traditional districting criteria in their decisions. *See Grofman, supra* note 7, at 1240 n.11.

18. *See Grofman, supra* note 7, at 1238-39.

19. *Id.* at 1240.

20. *Id.*

21. *See id.* at 1238-39; Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV.

## I. HISTORY OF THE VOTING RIGHTS ACT

The initial goal of the Voting Rights Act was to enfranchise minorities by registering minority voters.<sup>22</sup> The Act's immediate success was demonstrated by the addition of over one million African-American and other minority voters.<sup>23</sup> Unfortunately, to combat the Act's effectiveness, states developed more subtle tactics for diluting minority voting strength.<sup>24</sup> States commonly implemented at-large elections in districts in which whites constituted a majority of voters.<sup>25</sup> Given the racial bloc voting<sup>26</sup> which is common in the South, this at-large system effectively deprived minority voters of their right to elect a candidate of their choice.<sup>27</sup> Vestiges of state resistance continue to surface in redistricting legislation today.<sup>28</sup> Fortunately for minority voters, the Act did incorporate means for enforcing its regulations in the states considered "habitual violators" of minority voting rights.<sup>29</sup>

Although the goal of the Voting Rights Act is to eliminate discrimination in the entire electoral process, certain parts of the statute focus squarely on eradicating discrimination in the redistricting process.<sup>30</sup> Section 2 of the Act applies to every state and requires all state districting plans to provide an equal

652, 656 (1993); see also *infra* notes 59-71 and accompanying text.

22. Grofman, *supra* note 7, at 1238.

23. Laughlin McDonald, *Racial Fairness—Why Shouldn't it Apply to Section 5 of the Voting Rights Act?*, 21 STETSON L. REV. 847 (1992); see also *Shaw v. Reno*, 113 S. Ct. 2816, 2823 (1993).

24. McDonald, *supra* note 23, at 847.

25. *Id.*

26. "Racial bloc voting is systematic voting among an identifiable racial group." Ball, *supra* note 1, at 435 n.10. Coupled with an at-large election system, this bloc voting effectively eliminates the chances of minority candidates. *Id.* at 435.

27. Ball, *supra* note 1, at 434-35; see *Shaw*, 113 S. Ct. at 2823; *Rogers v. Lodge*, 458 U.S. 613, 616-17 (1982).

28. Georgia law requires elected officials to receive a majority of the vote to be elected. O.C.G.A. § 21-2-501 (Supp. 1994). This majority vote requirement has been cited as another subtle tool used by states to ensure minority voters are denied the opportunity to elect candidates of choice. Ball, *supra* note 1, at 435. For a recent challenge to this statute based on the Voting Rights Act, see *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga.), *aff'd* 992 F.2d 1548 (11th Cir. 1993) (involving Wyche Fowler and Paul Coverdell run-off election for the United States Senate in 1992).

29. See 42 U.S.C. § 1973c (1988); see also *infra* notes 34-48 and accompanying text. "Habitual violator" is used here by analogy to describe those states repeatedly found to have discriminated against minorities at the polls. McDonald, *supra* note 23, at 849. Georgia is among these states. See 28 C.F.R. pt. 51 app. (1994).

30. Dunne Remarks, *supra* note 6, at 3-7.

opportunity for minority voters to elect the candidates of their choice.<sup>31</sup> Section 5 of the Act applies only to those jurisdictions found to have histories of systematic racial discrimination.<sup>32</sup> Section 5 establishes a process by which DOJ reviews any proposed changes to the voting laws of the affected jurisdictions.<sup>33</sup>

#### A. Section 5 Standards

Congress enacted Section 5 of the Act in response to the pervasive discriminatory practices employed in some states' voting rights legislation.<sup>34</sup> The purpose of Section 5 is to identify and eliminate any new state voting requirements or procedures that have the purpose or effect of "denying or abridging the right to vote on account of race or color."<sup>35</sup> At the Act's inception, only the following seven states were subject to the provision: Alabama, Georgia, South Carolina, Mississippi, Louisiana, Virginia, and parts of North Carolina.<sup>36</sup> Today the provision applies to seventeen states or parts thereof.<sup>37</sup>

Section 5 is commonly referred to as the "preclearance section."<sup>38</sup> All covered jurisdictions must either submit proposals for voting changes to the United States Attorney General for an administrative preclearance or file for a declaratory judgment in the United States District Court for the District of Columbia that the proposal does not have the prohibited purpose or effect.<sup>39</sup> An

31. *Id.* at 6.

32. *Id.* at 4-5; see *infra* notes 36-37 and accompanying text.

33. See Dunne Remarks, *supra* note 6, at 4.

34. McDonald, *supra* note 23, at 849. "When it was enacted in 1965, Section 5 was a temporary, five-year measure and applied primarily in the South where discrimination in voting against African-Americans had been particularly blatant and systematic." *Id.* Congress sought to oversee those states it felt had "unclean hands" in the voting rights area. Grofman, *supra* note 7, at 1245.

35. 42 U.S.C. § 1973c (1988); see also Ball, *supra* note 1, at 438-39.

36. See 28 C.F.R. pt. 51 app. (1994). Only particular counties were included in North Carolina. *Id.*

37. *Id.*

38. See Dunne Remarks, *supra* note 6, at 4. All new state voting "qualification[s], prerequisite[s], standard[s], practice[s], or procedure[s]" must be approved by the Attorney General before implementation. 42 U.S.C. § 1973c (1988).

39. 42 U.S.C. § 1973c (1988). If the Attorney General rejects a particular voting change, the state retains the right to seek a declaratory judgment that the plan does not violate the Act. *Id.* Georgia filed such a challenge following the 1980 decennial census. See *Busbee v. Smith*, 549 F. Supp. 494, 497-98 (D.D.C. 1982). Alternatively, the state may simply make changes and resubmit its new proposal. See *infra* Part III.

approval, or preclearance, may be issued by either the United States Attorney General or the United States District Court.<sup>40</sup> Under Section 5, the proponent of the legislation must assume the burden of showing the absence of discriminatory purpose or effect with respect to changes in voting procedures or practices.<sup>41</sup>

The southern states protested the intrusion into state autonomy imposed by Section 5.<sup>42</sup> The section is noted as the most controversial section of the Act because it precludes states from enforcing voting changes until they are cleared with agencies of the federal government.<sup>43</sup> South Carolina immediately challenged the constitutionality of this provision in 1966 in *South Carolina v. Katzenbach*.<sup>44</sup> In that case, the United States Supreme Court upheld the provision, but conceded that it represented "an uncommon exercise of congressional power."<sup>45</sup> Justice Hugo Black wrote a dissenting opinion, which would later be referred to as his "conquered provinces" dissent.<sup>46</sup> In referring to the affected jurisdictions as conquered provinces, Justice Black argued that Section 5 was an unconstitutional invasion of state autonomy.<sup>47</sup> However, the primary justification for the provision, according to the majority, was the history of racial discrimination in the covered jurisdictions, taking into account the inability of the courts to eliminate discriminatory practices on a case-by-case basis.<sup>48</sup>

DOJ did not initially concentrate its efforts on Section 5 enforcement, and the provision was not placed into the *Federal Register* until the fall of 1971.<sup>49</sup> However, in 1969, the United

40. 42 U.S.C. § 1973c (1988).

41. Ball, *supra* note 1, at 438.

42. McDonald, *supra* note 23, at 852.

43. *Id.*

44. 383 U.S. 301 (1966).

45. *Id.* at 334; see McDonald, *supra* note 23, at 852.

46. *Katzenbach*, 383 U.S. at 359-60 (Black, J., dissenting); see, e.g., McDonald, *supra* note 23, at 852.

I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than *conquered provinces*.

*Katzenbach*, 383 U.S. at 359-60 (emphasis added).

47. See *Katzenbach*, 383 U.S. at 360.

48. *Id.* at 334-35; McDonald, *supra* note 23, at 852-53.

49. Ball, *supra* note 1, at 440.

States Supreme Court outlined the scope of the Act in *Allen v. State Board of Elections*.<sup>50</sup> In *Allen*, the Court mandated that the provision be construed as broadly as possible and required that even minor changes to state voting practices be subject to the preclearance requirement.<sup>51</sup>

Although the statutory language seemed clear, the Section 5 standard for reviewing state redistricting legislation was to come from the courts. In *Beer v. United States*<sup>52</sup> the United States Supreme Court announced its “nonretrogression test” for discriminatory effect under Section 5.<sup>53</sup> This case sparked debate and controversy surrounding Section 5 administration.<sup>54</sup> The Court held that the “effect” language in Section 5 prohibited only those voting changes that “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”<sup>55</sup> In other words, unless minority voting strength is actually diminished under the new plan, there is by definition, no retrogression. Today, few Section 5 violations arise in the context of this nonretrogressive test.<sup>56</sup>

Voting changes also violate Section 5 if they are the result of discriminatory purpose or intent.<sup>57</sup> A discriminatory purpose is a “design or desire to restrict a minority group’s voting strength,” or in other words, intent to reduce the ability of minorities to elect candidates of their choice.<sup>58</sup>

### B. Section 2 and Section 5 Combine Forces

In 1982, Congress amended Section 2 of the Act to prohibit racial discrimination in all forms, irrespective of discriminatory purpose.<sup>59</sup> This amendment established violations of the Act

50. 393 U.S. 544 (1969).

51. *Id.* at 566-67.

52. 425 U.S. 130 (1976).

53. *Id.* at 140-41.

54. See generally Ball, *supra* note 1, at 443-44; McDonald, *supra* note 23, at 854-59. See also *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982) (interpreting the *Beer* standard).

55. *Beer*, 425 U.S. at 141. In *Busbee v. Smith*, the court noted that if a district contains a higher African-American population under a new plan, there is no retrogression. 549 F. Supp. 494, 516 (D.D.C. 1982), *aff’d* 459 U.S. 1166 (1983).

56. Dunne Remarks, *supra* note 6, at 11.

57. *E.g.*, *Busbee*, 549 F. Supp. at 516.

58. Dunne Remarks, *supra* note 6, at 11; see *Busbee*, 549 F. Supp. at 516-17.

59. See Dunne Remarks, *supra* note 6, at 6. Although Congress amended the Voting Rights Act in 1982, the amendment came at a time when the recognized



when a state's redistricting plan merely *results* in discrimination.<sup>60</sup> The United States Supreme Court first construed the amendment in 1986 in *Thornburg v. Gingles*<sup>61</sup> and reiterated the congressional position that a redistricting plan would violate Section 2 if it resulted in discrimination.<sup>62</sup> The Court held, "[t]he 'right' question, as the [Senate] Report emphasizes repeatedly, is whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'"<sup>63</sup>

More importantly, in passing the Section 2 amendments, Congress specified that violations of this section are subject to Section 5 preclearance objections.<sup>64</sup> This means that a state's plan could not be cleared under Section 5 if it violated Section 2 standards. The measures taken by DOJ and Congress have not stopped the arguments from affected jurisdictions that Section 2 standards should be used in preclearance review.<sup>65</sup> It is clear, however, that DOJ will not hesitate to object to voting changes

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Supreme Court standard for a constitutional violation under Section 2 was defined in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Grofman, *supra* note 7, at 1240-41 n.14. The standard in *Bolden* required direct evidence of discriminatory intent in order to establish a Fourteenth Amendment violation. *Bolden*, 446 U.S. at 66. Grofman points out, however, that in amending Section 2, Congress may have reacted to the *Bolden* standard too quickly. Grofman, *supra* note 7, at 1240-41 n.14. The Supreme Court's decision in *Rogers v. Lodge* demonstrated the Court's "change of tack" regarding the applicable constitutional standard for equal protection violations. *See generally* *Rogers v. Lodge*, 458 U.S. 613 (1982). In *Rogers*, the Court allowed discriminatory intent to be inferred from a preponderance of plaintiffs' evidence. *Id.* at 618-21; Grofman, *supra* note 7, at 1240-41 n.14.

60. *See* Dunne Remarks, *supra* note 6, at 6. The test has become known as the "racial fairness" standard.

61. 478 U.S. 30 (1986).

62. *See id.* at 43-44.

63. *Id.* at 44 (quoting S. REP. NO. 97-417, 97th Cong., 2d Sess. 28 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206) (emphasis added). The *Thornburg* test, in the redistricting context, requires plaintiffs to make a three-pronged showing. The claimant must establish (1) a large and geographically compact minority population that could conceivably be grouped in a single district; (2) this group is politically cohesive; (3) the (white) majority consistently vote as a bloc and make it virtually impossible for minority candidates to be elected. *Id.* at 50-51.

64. *See generally* McDonald, *supra* note 23, at 859-60 (citing S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 189 n.31). Congress' intentions in passing the Voting Rights Act Amendments of 1982 are derived largely from House and Senate reports as well as from records of floor debate. *See id.* at 860 nn.97-101.

65. McDonald, *supra* note 23, at 848.

that go beyond the purpose or effect standard set forth in Section 5.<sup>66</sup>

In his remarks at the 1991 National Conference of State Legislators, John Dunne, Assistant Attorney General of the United States, outlined common redistricting practices the DOJ looks for in determining whether the Voting Rights Act has been violated.<sup>67</sup> He cited practices such as packing minority voters into one district to limit their voting strength or fragmenting the minority population into several districts to ensure they are a minority.<sup>68</sup> Factors cited that are important to the analysis of Georgia's 1992 redistricting process, discussed below, are the exclusion of minorities from the electoral process and arbitrary

66. "Indeed, the Attorney General is administering the statute in such a manner now." *Id.* at 869.

67. The factors outlined by Mr. Dunne are as follows:

- 1) Packing a racial or ethnic minority group into only one district where that minority might have been able to elect candidates in two or three less concentrated districts.
- 2) The obverse side of that issue: fragmenting or splitting a geographically compact minority group into 2 or more districts where they will constitute an electoral minority.
- 3) Reducing the percent of minorities in a district where the minority voters have previously been able to elect candidates of their choice by only a very slim margin.
- 4) Maintaining the re-election chances of those in control of the redistricting process by preserving the old district lines to the greatest extent possible at the expense of minority voters.
- 5) Altering district boundaries to shore up, for the majority group, previously marginal or competitive districts where minority voters were almost, but not quite, able to elect a preferred candidate.
- 6) In open districts, where there is no incumbent, drawing the boundaries of the district so that the minority group is at a distinct disadvantage in electing its preferred candidate.
- 7) Inexplicably deviating from the redistricting criteria that the state claims it used in drawing the boundary lines.
- 8) Excluding minority groups from the process of drawing the plan, or merely paying "lip service" to them by soliciting, but then ignoring, the minority group's input and then providing no rationale for rejecting the minority group's redistricting proposal and, finally,
- 9) The unexplained or arbitrary use of multi-member districts.

Dunne Remarks, *supra* note 6, at 13-15.

68. *Id.* Packing minorities into a few districts or fragmenting a minority population among several districts may constitute "vote dilution," and potentially subject a state's redistricting plan to a Section 2 challenge. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (outlining factors for prima facie vote dilution claim). For a recent challenge to a state's redistricting plan based on alleged vote dilution, see *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994). For a recent case analyzing a vote dilution claim based on the intentional packing of minority candidates, see *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993).

rejection of minority proposals.<sup>69</sup> A redistricting plan that violates one or more of these factors is not automatically rejected, but the state should re-examine its plan for a possible discriminatory effect.<sup>70</sup> DOJ's review of a state's plan is essentially a totality of the circumstances approach.<sup>71</sup>

### C. Georgia's 1982 Challenge: An Interesting Example

In 1981, DOJ rejected Georgia's congressional redistricting plan, alleging a violation of Section 5 of the Voting Rights Act.<sup>72</sup> The state sought a declaratory judgment pursuant to Section 5 arguing that the Georgia plan had neither a discriminatory effect nor purpose.<sup>73</sup> In *Busbee v. Smith*, the District Court for the District of Columbia applied the nonretrogression test to the Georgia legislation.<sup>74</sup> This case presents an interesting example of the ineffectiveness of the nonretrogression test outlined in *Beer*. Because Georgia's fifth congressional district contained a larger majority of African-American citizens under its new (1982) plan, the court held there was no retrogression of minority voting strength.<sup>75</sup> In other words, the court found no "discriminatory effect" under the *Beer* standard.<sup>76</sup> However, white voters constituted a 54% majority of the registered voters in the 5th district.<sup>77</sup> Thus, had *Busbee* been heard several years later, the court might have found the plan resulted in discrimination against African-American voters under the "racial fairness" standard promulgated in the 1982 congressional amendments to the Act.<sup>78</sup> In *Busbee*, despite the court's finding that the Georgia redistricting plan had no discriminatory effect, the court invalidated the plan after finding discriminatory intent with

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69. See *infra* notes 128-39 and accompanying text.

70. Dunne Remarks, *supra* note 6, at 15.

71. See *Thornburg*, 478 U.S. at 44 n.8.

72. *Busbee v. Smith*, 549 F. Supp. 494, 497 (D.D.C. 1982).

73. *Id.*

74. *Id.* at 516.

75. *Id.*

76. See *supra* notes 52-56 and accompanying text.

77. *Busbee*, 549 F. Supp. at 499 (1983).

78. See *supra* notes 59-63 and accompanying text. In other words, because the definition of "discriminatory effect" expanded in the years following this litigation, if the case had been decided after the 1982 amendments to the Act or after the decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the court likely would have found a discriminatory effect.

respect to Atlanta area districts.<sup>79</sup> Therefore, Georgia's 1982 challenge supports the argument that Section 2 standards should apply in Section 5 preclearance decisions as well.<sup>80</sup>

## II. *SHAW V. RENO* AND ITS IMPLICATIONS

In 1993, the United States Supreme Court addressed the issue of racial gerrymandering in *Shaw v. Reno*.<sup>81</sup> Five North Carolina residents challenged the state's redistricting plan, arguing that the plan was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment due to racial gerrymandering.<sup>82</sup> The plaintiffs did not assert that race-conscious legislation is per se unconstitutional.<sup>83</sup> Rather they argued that "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification," violates their Equal Protection rights.<sup>84</sup> The Court accepted plaintiffs' argument and held they had stated a cognizable claim under the Equal Protection Clause.<sup>85</sup>

The *Shaw* opinion makes clear that although the Supreme Court has held that Section 5 is facially constitutional, a

79. See *Busbee*, 549 F. Supp. at 517.

80. This is only to say that there might be cases in which a voting change resulted in discrimination, but was upheld under the Section 5 nonretrogression standard. See *id.* This was not the case in *Busbee* because the legislation was found to have a discriminatory purpose as well. See *id.*

81. 113 S. Ct. 2816 (1993). Specifically, the Court's opinion addressed the issue of whether five white plaintiffs had standing under the Equal Protection Clause to challenge North Carolina's redistricting legislation. *Id.* at 2820, 2824.

82. *Id.* at 2820; cf. *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.) (dismissing a claim alleging *partisan gerrymandering* under the same North Carolina plan), *aff'd* 113 S. Ct. 30 (1992). The United States Supreme Court attempted to distinguish political gerrymandering from race-based districting in *Davis v. Bandemer*, 478 U.S. 109 (1986). The Court established a test in *Davis* to determine whether plaintiffs had stated a claim of discriminatory vote dilution in the political gerrymandering context. *Davis*, 478 U.S. at 110.

83. *Shaw*, 113 S. Ct. at 2824. Justice O'Connor noted the plaintiffs' "wise" choice of not arguing that race-conscious redistricting is always unconstitutional. *Id.* The racial classification used by the legislature requires the redistricting plan to be "narrowly tailored to further a compelling governmental interest." *Id.* at 2825. For a discussion of the subsequent trial in the *Shaw* litigation, see *supra* notes 209-14, 248-61 and accompanying text.

84. *Shaw*, 113 S. Ct. at 2824.

85. *Id.*

redistricting plan precleared under Section 5 does not preclude a potentially successful constitutional challenge.<sup>86</sup> In fact, this was the very challenge the Supreme Court held viable in *Shaw*.<sup>87</sup> Although there was no holding in *Shaw* as to whether the reapportionment plan should be struck down on equal protection grounds, Justice O'Connor warned that without sufficiently compelling justification such racially motivated legislation is unconstitutional.<sup>88</sup>

Unfortunately, O'Connor's opinion in *Shaw* provides no real test for identifying impermissible racial gerrymandering. The opinion did, however, suggest certain criteria to be considered when evaluating a state's reapportionment plan.<sup>89</sup> The Court was primarily concerned with districts drawn solely to include members of a particular race.<sup>90</sup> The Court provided the example of including minorities in a single district "by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions" and thus creating a district where voters share no common associations other than their skin color.<sup>91</sup> In this situation, the legislation must further a compelling governmental interest to survive strict scrutiny.<sup>92</sup> O'Connor argues that this practice reinforces the perception that all persons of the same race "think alike, share the same political interests, and will prefer the same candidates at the polls."<sup>93</sup>

86. *Id.* at 2831; see also *Allen v. State Bd. of Elections*, 393 U.S. 544, 549-50 (1969).

87. The Attorney General had precleared North Carolina's revised plan under challenge in *Shaw*. *Shaw*, 113 S. Ct. at 2821.

88. *Id.* at 2832.

89. See *id.* at 2831-32.

90. *Id.* at 2827 (stating that districts drawn solely to include members of a particular race "bear[] an uncomfortable resemblance to political apartheid").

91. *Id.* The Court recognizes, however, that legislatures are always "aware" of race when redistricting. *Id.* at 2826. Awareness of race, in a context similar to being "aware" of religion or economic status, is a constant in the redistricting process and does not immediately permit an inference of discriminatory intentions. See *id.* Moreover, the impermissible use of race becomes nearly impossible to recognize from the face of a redistricting plan because typically the statutes use classifications such as tracts of land or individual addresses. *Id.*; cf. *id.* at 2845 (Souter, J., dissenting). "Recognition of actual commonality of interest and racially-polarized bloc voting cannot be equated with the 'invocation of race stereotypes' described by the [majority]." *Id.* at 2845 n.2 (Souter, J., dissenting). Justice Souter argues that legislators must necessarily take race into account in redistricting decisions because they must avoid diluting minority voting strength. *Id.* at 2845; see also *infra* notes 97-98 and accompanying text.

92. *Shaw*, 113 S. Ct. at 2825.

93. *Id.* at 2827.

According to the Court, redistricting legislation resulting from these practices “bears an uncomfortable resemblance to political apartheid.”<sup>94</sup>

Justice White dissented in *Shaw*, arguing that the plaintiffs failed to establish a cognizable injury and therefore did not have standing under the Equal Protection Clause.<sup>95</sup> Justice White contended that unless the plaintiffs could establish that North Carolina’s plan was adopted “with the intent, or had the effect, of unduly minimizing the white majority’s voting strength,” no Equal Protection challenge should stand.<sup>96</sup> Justice Souter also dissented in *Shaw*, arguing that the plaintiffs had failed to show a distinct constitutional harm to a group of which they were members.<sup>97</sup> Furthermore, Justice Souter argued that the standard for equal protection in the electoral districting context should be different from the standard in other contexts in which governmental entities use race as a classification.<sup>98</sup> This argument is consistent with the assertion that voting rights are fundamental and should be treated differently than other equal protection rights.<sup>99</sup>

Although the opinion in *Shaw v. Reno* does not analyze the application of the Voting Rights Act, it presents an important constitutional analysis that informs an examination of Georgia’s 1992 redistricting legislation. Georgia’s 1992 redistricting plan may be consistent with the Voting Rights Act, however, two

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94. *Id.* The Court cited other potential societal ills that may stem from impermissible racial gerrymandering, including the notion that elected officials need only represent the interests of the group comprising the majority of the district. *Id.*; see also *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986). The Court warned that this activity directly contradicts the ideals our Constitution attempts to effectuate. See *Shaw*, 113 S. Ct. at 2827. The Court quoted a part of Justice Douglas’ opinion in *Wright v. Rockefeller*, 376 U.S. 52, 67(1964): “When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist . . . .” *Id.*

95. *Shaw*, 113 S. Ct. at 2834 (White, J., dissenting).

96. *Id.* at 2837. Justice White cited *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 (1977) [hereinafter *UJO*], as controlling authority for his proposition. *Id.* In *UJO*, the Court held the intentional creation of a majority-minority district in New York had not denied the white plaintiffs an equal opportunity to influence the political process. *Id.* at 2834. For a thorough analysis of the issues surrounding standing in this context, see *Shaw v. Hunt*, No. 92-202-CIV-5-BR (E.D.N.C. Aug. 1, 1994) [hereinafter *Shaw II*].

97. *Shaw*, 113 S. Ct. at 2846 (Souter, J., dissenting).

98. *Id.* at 2848.

99. See *supra* note 8 and accompanying text.

questions remain: First, is Georgia's plan constitutional? Second, is DOJ applying the Voting Rights Act constitutionally?

### *Shaw v. Reno's Effect on Georgia*

Because Georgia's redistricting legislation segregates voters on the basis of race, the threshold question from *Shaw* is whether the state's redistricting decisions are grounded in a compelling justification and are narrowly tailored to further this justification.<sup>100</sup> Georgia's 1992 redistricting plan is not race-neutral.<sup>101</sup> In fact, racial concerns underlie virtually every decision made within the congressional plan, and many of the districts redrawn in the new plan simply cannot be described in any way other than race.<sup>102</sup> The *Shaw* opinion did not rule out the possibility that there was a sufficiently compelling justification for North Carolina's redistricting plan.<sup>103</sup> The Court recognized that the redistricting plan might be justified on the basis of past racial discrimination in North Carolina.<sup>104</sup> As we will see, the United States District Court for the Southern District of Georgia found the 1992 Georgia redistricting plan unconstitutional because it is not narrowly tailored to further compelling state interests.<sup>105</sup> Although the district court in Georgia initially enjoined the November 1994 general election for Georgia's congressional races,<sup>106</sup> the United States Supreme Court reversed the injunction and the election went forward.<sup>107</sup>

100. See *Shaw*, 113 S. Ct. at 2825. The Court stated there must be a "sufficient justification" for segregating voters based solely on race. *Id.* at 2828.

101. See *Johnson v. Miller*, No. 194-008, slip op. at 6-23 (S.D. Ga. Sept. 12, 1994).

102. See *infra* notes 123-79 and accompanying text. This comment is primarily true of Georgia's eleventh and second congressional districts. The eleventh district encompasses a dispersed group of African-American citizens from four major cities and stretches from Atlanta to Savannah. See Appendix, Exhibit 3. The second district is located in southwest Georgia and carves out significant African-American populations from the cities of Macon, Columbus, Albany, and Valdosta while jettisoning the white citizens of these cities into the eighth congressional district. See Appendix, Exhibits 1 and 2.

103. *Shaw*, 113 S. Ct. at 2832.

104. See *id.* The decision in *Shaw II* answers this question for North Carolina. The court in *Shaw II* held that the state had a compelling justification for intentionally drawing the majority-minority districts being challenged. The compelling justifications were twofold, complying with the Voting Rights Act and eradicating effects of past racial discrimination. *Shaw II*, No. 92-202-CIV-5-BR, slip op. at 12 (E.D.N.C. Aug. 1, 1994).

105. See *infra* notes 233-36 and accompanying text.

106. *Miller v. Johnson*, No. 194-008, slip op. (S.D. Ga. Sept. 12, 1994).

107. *Miller v. Johnson*, 115 S. Ct. 36 (Sept. 23, 1994) (No. A-190, A-200, A-203).

Currently, an appeal to the Supreme Court from the State of Georgia has been granted.<sup>108</sup>

### III. THE 1992 CONGRESSIONAL REDISTRICTING PLAN FOR GEORGIA

During the preclearance process in the spring of 1993, Georgia submitted three congressional plans to DOJ.<sup>109</sup> The third plan, which DOJ eventually precleared, is the subject of the appeal pending in the United States Supreme Court.<sup>110</sup>

This Note will specifically focus on problem areas in the state identified by the United States DOJ office in letters to Georgia during the review process.<sup>111</sup> This Note will limit its analysis to Georgia's redistricting plan for the United States congressional districts for the State of Georgia by examining the proposed changes submitted by Georgia, and the corresponding objections made by DOJ. The conduct of DOJ during the preclearance process suggests needed reform in Voting Rights Act administration and potentially unconstitutional application of the Act by DOJ during Georgia's battle for preclearance.

The Georgia Attorney General's office (Georgia) mailed its original submission to DOJ on October 1, 1991.<sup>112</sup> In a letter dated November 22, 1991, DOJ requested that Georgia provide more information concerning the proposed voting changes,<sup>113</sup>

108. *Johnson v. Miller*, No. 194-008, slip op. (S.D. Ga. Sept. 12, 1994), *cert. granted*, *Miller v. United States*, 63 U.S.L.W. 3314 (U.S. Jan. 6, 1995) (No. 94-631, 94-797, 94-929).

109. Interview with Linda Meggers, Director of Reapportionment Services for the State of Georgia (Oct. 15, 1993).

110. *Johnson v. Miller*, No. 194-008, slip op. (S.D. Ga. Sept. 12, 1994), *cert. granted*, *Miller v. United States*, 63 U.S.L.W. 3314 (U.S. Jan. 6, 1995) (No. 631, 94-797, 94-929).

111. These problem areas represent the more controversial aspects of the plan and will serve as fuel for the argument that the Voting Rights Act infringes on states' autonomy in the redistricting process. *See infra* text accompanying notes 180-208.

112. Act No. EX27, 1991 Extraordinary Session of the Georgia General Assembly [hereinafter Act No. EX27] (available in Georgia State University College of Law Library). The submission was mailed along with a cover letter. Letter from Michael J. Bowers, Attorney General, State of Georgia, to John R. Dunne, Assistant Attorney General, United States Department of Justice, Civil Rights Division (Oct. 1, 1991) (available in Georgia State University College of Law Library) [hereinafter Letter of Oct. 1].

113. Letter from John R. Dunne, Assistant United States Attorney General, United States Department of Justice, Civil Rights Division, to Mark H. Cohen, Senior Assistant Attorney General, State of Georgia, Department of Law (Nov. 22, 1991) (available in Georgia State University College of Law Library) [hereinafter Letter of



including lists of incumbent districts, alternative congressional districting plans,<sup>114</sup> and early congressional drafts that attempted to draw African-American majority districts.<sup>115</sup>

The standard to be utilized by DOJ in reviewing Georgia's proposed redistricting legislation under Section 5 was plainly stated early in the process.

With regard to the statewide redistricting plans, we would note that, as it applies to the redistricting process, the Voting Rights Act requires [DOJ] to determine whether the submitting authority has sustained its burden of showing that the legislative choices made under a proposed plan are free of *racially discriminatory purpose or retrogressive effect and whether the submitted plan will result in a clear violation of Section 2 of the Act.*<sup>116</sup>

As is evident from this language, DOJ makes it clear that Section 2 violations will result in objections under Section 5 review.<sup>117</sup> DOJ further stated that the Act not only requires a review of the overall effect of the plan on minority voters, but also requires inquiries into the reasons for Georgia's legislative choices.<sup>118</sup> DOJ also noted the Act does not require a jurisdiction to guarantee proportional representation.<sup>119</sup>

Nov. 22].

114. *Id.* at 2-3. According to John R. Dunne, in his remarks to the National Conference of State Legislators, modern technology has greatly increased the ability of the Attorney General to review alternative districting plans. This no doubt puts pressure on state legislatures to sincerely consider alternative proposals made during debate.

Due to the wonders of computer technology, legislators, as well as those outside the legislative process, will have a much wider selection of alternative districting plans than in the past. These alternative plans will be susceptible of faster and more specific political analysis, not only by legislative players, but also by those players on the outside trying to influence the process. Everyone involved will have access to more knowledge about the political and racial implications of every redistricting option. And the states must be prepared to explain and defend their plans in light of that heightened scrutiny. That means justifying their rejection of certain alternatives as well as the adoption of a specific plan.

Dunne Remarks, *supra* note 6, at 9.

115. Letter of Nov. 22, *supra* note 113, at 3.

116. Letter from John R. Dunne, Assistant United States Attorney General, United States Department of Justice, Civil Rights Division, to Mark H. Cohen, Senior Assistant Attorney General, State of Georgia, Department of Law 1-2 (Jan. 21, 1992) (emphasis added) (available in Georgia State University College of Law Library) [hereinafter Letter of Jan. 21].

117. *See supra* notes 59-71 and accompanying text.

118. Letter of Jan. 21, *supra* note 116, at 2.

119. *Id.* Proportional representation would mean that minority citizens were

*The Battle Between State and Federal Officials*

The 1990 United States census data revealed significant population deviations among Georgia's ten congressional districts drawn under the previous plan.<sup>120</sup> As a result, Georgia was required to redistrict in order to comply with the "one man-one vote" standard.<sup>121</sup> In addition, Georgia was required to draw an eleventh congressional district due to the population increase statewide.<sup>122</sup>

Georgia's 1982 congressional plan contained only one majority-minority district, the fifth.<sup>123</sup> Therefore, when Georgia legislators created the new eleventh district, they created a second majority-minority district. Georgia seemed proud that such a bold initiative had been introduced in its redistricting plan. In the submission letter, the State proclaimed: "Therefore, the State of Georgia is pleased to present a Congressional plan which has increased the number of majority Black Congressional districts from one to two."<sup>124</sup>

Unfortunately, DOJ, as well as many African-American leaders in Georgia, were not so pleased.<sup>125</sup> Georgia had created a third district in the southwest (second district), which was not a majority-minority district, but was in the state's terms, a "significant area of influence" for minority voters.<sup>126</sup> Alternative plans presented during the legislative process that created a

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represented in each legislative body in a manner that was directly proportional to their percentage of the population in the state. *Id.*

120. Letter of Oct. 1, *supra* note 112, at 8.

121. *Id.* This standard was originally adopted by the Supreme Court in *Reynold v. Sims*, 377 U.S. 533, 557 (1964). In essence the standard requires all districts to be as nearly equal in population as possible in order to give equal weight to each vote cast. *Id.*

122. Act No. EX27, 1991 Extraordinary Session of the Georgia General Assembly (available in Georgia State University College of Law Library).

123. *See id.* The fifth district was the subject of the 1982 litigation involving Georgia and the Attorney General. *See Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd* 459 U.S. 1166 (1983). "Majority-minority district" is a term of art that has become the most common way to describe a political district containing a majority of minority constituents. *See, e.g., Johnson v. Miller*, No. 194-008, slip op. at 18 (S.D. Ga. Sept. 12, 1994).

124. Letter of Oct. 1, *supra* note 112, at 9.

125. *See infra* notes 127-39 and accompanying text. Rep. Tyrone Brooks, House District No. 54, was particularly vocal in denouncing Georgia's original submission to the Attorney General. *Johnson*, No. 194-008, slip op. at 6 (S.D. Ga. Sept. 12, 1994).

126. Act No. EX27, *supra* note 112, at 9-10. This district contained a African-American voting age population of 35%. *Id.* at 10.

third majority-minority district in the southwestern part of the state had been rejected.<sup>127</sup>

In the first letter of objection to Georgia, on January 21, 1992, DOJ outlined the problems in the first redistricting plan.<sup>128</sup> However, before outlining these specific objections to the congressional plan, DOJ made some important preliminary remarks regarding Georgia's voting rights history. DOJ noted Georgia's pattern of racially polarized voting, citing Georgia's requirement that a candidate receive a majority of the vote to be elected as a primary cause.<sup>129</sup> DOJ also raised concerns that the Georgia General Assembly had attempted to exclude the presentation of alternative redistricting plans.<sup>130</sup>

In addition, DOJ responded that the first submitted congressional plan raised concerns that leaders in the Georgia General Assembly were "predisposed to limit black voting potential to two black majority districts."<sup>131</sup> This concern had also been raised in correspondence from the ACLU.<sup>132</sup> Specific

127. Letter of Jan. 21, *supra* note 116. The Attorney General no doubt refers to the alternative plans that were made known by the letter from the ACLU. The highlighted plans in that correspondence were:

- (1) the McKinney/Brooks plan, which was reintroduced in both the House and Senate Committees, and which had been unanimously endorsed by the Legislative Black Caucus House members during the previous session; it created three majority black districts, at 64.74% (5th), 64.13% (11th) and 58.51% (2nd) [also known as the "max-black plan"];
- (2) the Holmes "three black" plan, which had also been presented to the Congressional Conference committee during the first round of congressional reapportionment, creating three majority black districts at 64.39% (5th), 62.34% (11th) and 57.6% (2nd);
- (3) Sanford Bishop's plan, introduced in Senate Committee, which created three majority black districts at 63.24% (5th), 61.87% (11th) and 53.65% (2nd); and
- (4) a reconfiguration of the second district (BMC/MODCON1792), offered by Rep. John White on the House floor, with a black population of 53.26%; the plan did not split a single precinct, and was the most compact of the alternative configurations proposed.

Letter from Kathleen L. Wilde, American Civil Liberties Union, Staff Counsel, to John R. Dunne, Assistant Attorney General, United States Department of Justice, Civil Rights Division 2 (Mar. 4, 1992) (available in Georgia State University College of Law Library) [hereinafter Letter of Mar. 4]; *see also* Appendix, Exhibit 4 (showing max-black plan).

128. Letter of Jan. 21, *supra* note 116.

129. *Id.* at 2.

130. *Id.* The comments made by the Attorney General were identical to those advocated by ACLU correspondence. *See generally* Letter of Mar. 4, *supra* note 127.

131. Letter of Jan. 21, *supra* note 116, at 5.

132. Letter of Mar. 4, *supra* note 127, at 2-3. In *Johnson v. Miller*, the court cites

problem areas noted by DOJ were: the existing fifth district, a majority-minority district; the new eleventh district, a majority-minority district; and the second district, drawn initially as an influential African-American district.<sup>133</sup> DOJ objected to the boundaries of the fifth and sixth districts, finding no sufficient state justification for including white Fayette County residents in the fifth district at the expense of excluding African-American residents of Cobb County.<sup>134</sup> DOJ contended the African-American residents in the neighboring counties shared a community of interests.<sup>135</sup> DOJ also objected to the exclusion from the eleventh district of a certain African-American concentration in Baldwin County, bordering the proposed eleventh district.<sup>136</sup> DOJ again noted that these voters had a community of interests with the African-American citizens in the surrounding counties that were already included in the new eleventh district.<sup>137</sup> With respect to the second district, DOJ found that Georgia had not made a "good faith attempt to recognize the concentrations of black voters in the southwest."<sup>138</sup> DOJ characterized the second district as a "minimization" of African-American voting potential.<sup>139</sup>

The State quickly remedied the problems with the fifth and sixth districts by removing the white citizens of Fayette County from the fifth and including two adjacent African-American precincts in Cobb County.<sup>140</sup> Interestingly, the new

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specific evidence establishing that the Black Caucus and the ACLU were communicating on a steady basis with the Attorney General. Quite often, the concerns and comments mentioned in the correspondence from Washington were the exact concerns being advanced by local black leaders and elected officials. *See Johnson v. Miller*, No. 194-008, slip op. at 27-28 (S.D. Ga. Sept. 12, 1994).

133. Letter of Jan. 21, *supra* note 116, at 5; *see also* Appendix, Exhibits 1 and 2.

134. Letter of Jan. 21, *supra* note 116, at 6.

135. *Id.*

136. *Id.* at 5.

137. *Id.*

138. *Id.*

139. *Id.*

140. Letter from Michael J. Bowers, Attorney General, State of Georgia, to Gerald W. Jones, Chief, Voting Section, United States Department of Justice, Civil Rights Division, at 4 (Mar. 3, 1992) (available in Georgia State University College of Law Library) [hereinafter Letter of Mar. 3]. The Attorney General raised concerns initially because the original plan purportedly would have had a retrogressive impact on African-American voters' opportunities for representation on the Department of Transportation Board. Letter of Jan. 21, *supra* note 116, at 6. Under the state's second proposed configuration, however, this concern was not raised, and the level of African-American representation was left unchanged. Letter of Mar. 3, *supra*.

configuration for the fifth district, and the one eventually adopted, did not substantially alter the African-American population percentage. African-American population increased from 62.13% to 62.27% while African-American voting age population dropped from 57.84% to 57.47%.<sup>141</sup>

Georgia faced significant difficulty in its attempts to comply with DOJ's objections to the second and eleventh districts. These two objections and the subsequent remedies will be discussed together because they are not mutually exclusive.

The objection to the second district was that the African-American voters of southwest Georgia were not "recognized."<sup>142</sup> Under Georgia's first proposed redistricting plan, the population of African-American residents of voting age in the second congressional district (southwest Georgia) increased from roughly 33% to more than 35%.<sup>143</sup> The second district, under this first plan, contained a higher percentage of African-American citizens than any other congressional district in the State with the exception of the fifth and the eleventh.<sup>144</sup>

Within the framework of the Section 5 preclearance standards, Georgia's first submission was reviewed by DOJ as follows. First, the second district passed the nonretrogression test because no new districting decision had led to a retrogression of minority voting strength. Second, the plan had to pass scrutiny under the discriminatory intent standard. "Purposeful discrimination" results even if, for example, legislators "harbor no ill will at all toward minorities" but African-American communities are fragmented to protect incumbent candidates.<sup>145</sup> To satisfy its burden under Section 5, the state must show a valid, nonracial reason for not adopting another plan that would avoid fragmenting the minority community.<sup>146</sup> DOJ did not object to the second district on grounds of purposeful discrimination. Instead, DOJ contended the district resulted in a minimization of African-American voting strength in the area.<sup>147</sup> This is essentially a vote-dilution argument.<sup>148</sup>

141. Letter of Mar. 3, *supra* note 140, at 4.

142. Letter of Jan. 21, *supra* note 116, at 5.

143. Act No. EX27, *supra* note 112.

144. Letter of Mar. 3, *supra* note 140.

145. Dunne Remarks, *supra* note 6, at 12.

146. *Id.*

147. Letter of Jan. 21, *supra* note 116, at 5.

148. See *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986). "Dilution of racial

Thus, finally, consideration is given to whether the proposed second district violates Section 2 of the Act by diluting minority voting strength. If so, it must deny minority citizens an equal opportunity to participate in the political process and the opportunity to elect representatives of their choice.<sup>149</sup> Section 2 contains no intent requirement. A plan may be rejected if it results in discrimination.<sup>150</sup> Because alternative plans<sup>151</sup> were readily available which created the second district as a majority-minority district, DOJ objected and stated there was no “good faith attempt” to recognize the African-American voters in southwest Georgia.<sup>152</sup> As previously mentioned, DOJ used the word “minimization” to describe the African-American voting potential in southwest Georgia.<sup>153</sup> Georgia’s second district thus violated Section 2 standards according to DOJ.<sup>154</sup> The eventual configuration of Georgia’s second congressional district proves just how far states must go to comply with DOJ’s Section 2 standards as interpreted by DOJ.<sup>155</sup>

The only objection initially raised with respect to the eleventh district was that it limited the African-American percentage of the district by excluding the African-American voters of Baldwin County.<sup>156</sup> Because the eleventh was drawn as an entirely new district, many of the usual districting concerns were absent. There was no incumbent to protect and no retrogressive effect to worry about. The original configuration left African-American population at 60.63% and African-American voting age population at 56.61%.<sup>157</sup> Although not explicitly stated, DOJ’s objection appears to fall under Section 2 because the proposed eleventh district limited minority voters’ ability to elect representatives of their choice.

In its response to DOJ’s objections, Georgia outlined its predicament with respect to the eleventh and second

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minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority.” *Id.*

149. 42 U.S.C. § 1973b (1988).

150. *See supra* notes 59-63 and accompanying text.

151. *See supra* note 127.

152. Letter of Jan. 21, *supra* note 116, at 5.

153. *Id.*

154. *See id.*

155. *See infra* notes 170-79 and accompanying text.

156. Letter of Jan. 21, *supra* note 116, at 5.

157. Letter of Mar. 3, *supra* note 140, at 6.

districts.<sup>158</sup> The State had two choices. First, a third majority-minority district could be created in southwest Georgia. This choice would require the legislature to include sections of Bibb County (Macon), negatively affecting the African-American majority in the proposed eleventh district. Under this scenario, the State complained that the eleventh district would have to extend into parts of Savannah to compensate for its minority population loss.<sup>159</sup> The second choice was to maintain the second district as an influential minority district, but to substantially increase the African-American voting age population from 35% to 45%.<sup>160</sup> The increase in African-American population would come from adding neighboring counties with greater than 40% African-American populations and excluding the white residents of Dougherty County (Albany) and Lowndes County (Valdosta).<sup>161</sup> Georgia chose option number two.

Georgia's rationale for choosing to draw only an influential African-American district was two-fold. First, Georgia expressed concern that if the eleventh district included parts of four major metropolitan areas, a candidate would be faced with operating campaigns in four media markets.<sup>162</sup> Georgia further noted that proponents of many of the alternative plans also expressed this concern.<sup>163</sup> Second, even if the second district was drawn to include a majority of the African-American population, the African-American registered voters would not surpass 50% of the population.<sup>164</sup> Georgia continually criticized the alternative plans as requiring a "maximization" of minority voting strength that simply could not be achieved in a way that comported with its stated districting criteria.<sup>165</sup> Georgia further explained that if the second district extended into Bibb County, the eleventh district would have to be extended into Chatham County

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158. *Id.* at 6-7.

159. *Id.* at 7.

160. *Id.*

161. *Id.*

162. *Id.* at 7-8. The state's argument was that a candidate would be forced to campaign in Atlanta, Macon, Augusta, and Savannah. *Id.*

163. *Id.* at 8.

164. *Id.*

165. *Id.* Interestingly, one of the more prominent plans being pushed by the Black Caucus and the ACLU was nicknamed a "max-black" plan by its authors. *Johnson v. Miller*, No. 194-008, slip op. at 6 (S.D. Ga. Sept. 12, 1994); see Appendix, Exhibit 4.

(Savannah).<sup>166</sup> This, the State said, would “violate all reasonable standards of compactness and contiguity.”<sup>167</sup> The State, therefore, submitted its second proposal, which once again provided the second district as merely an influential district.<sup>168</sup> This proposal included the African-American population of Baldwin County in the eleventh district. The result of adding the “heavy black concentrations of voters” of Baldwin County left the eleventh district with a African-American population increase from 60.63% to 61.86% and a African-American voting age population increase from 56.61% to 57.97%.<sup>169</sup>

The letter from DOJ on March 20, 1992 once again outlined objections to Georgia’s second congressional redistricting plan.<sup>170</sup> This letter reiterated that Georgia had minimized the electoral potential of several concentrations of African-American voters in the state.<sup>171</sup> DOJ complained that the African-American voters in Screven, Effingham, and Chatham counties (Savannah and the Georgia seacoast) had been excluded without reason from the eleventh district.<sup>172</sup> DOJ also stated that Georgia should have included the African-American populations in Meriwether, Houston, and Bibb counties (Macon and central Georgia) in the second district.<sup>173</sup> The primary rationale for both objections appeared to be that there were alternative plans in existence which incorporated the changes and for which the state could not adequately explain its rejection.<sup>174</sup> DOJ

166. Letter of Mar. 3, *supra* note 140, at 7.

167. *Id.* at 8.

168. See Letter from John R. Dunne, Assistant Attorney General, United States Department of Justice, Civil Rights Division, to Mark H. Cohen, Senior Assistant Attorney General, Georgia Department of Justice, Department of Law (Mar. 20, 1992) (available in Georgia State University College of Law Library) [hereinafter Letter of Mar. 20].

169. Letter of Mar. 3, *supra* note 140, at 5-6.

170. Letter of Mar. 20, *supra* note 168.

171. *Id.*

172. *Id.* at 3. Initially, the Attorney General did not object to Georgia’s proposed eleventh district other than in the area of Baldwin County. Letter of Jan. 21, *supra* note 116, at 5. In its second objection, however, the Attorney General stated that Georgia had excluded the African-American voting population living along its seacoast without reason. However, Georgia had fully explained its predicament regarding the extension of the eleventh district into Savannah and had cited several sound reasons for deciding not to do so. Georgia had been concerned about the four media markets a candidate would face as well as the disregard of traditional districting criteria. Letter of Mar. 20, *supra* note 168.

173. Letter of Mar. 20, *supra* note 168, at 3.

174. *Id.* at 3-4. “[G]iven the innumerable plans that might be drawn, there will



concluded that Georgia's argument against splitting counties to reach a African-American majority in the second district was pretextual.<sup>175</sup> DOJ remarked that the Georgia legislative leadership had stated that such concerns should not prevent the creation of viable African-American districts.<sup>176</sup> Because Georgia was willing to split counties in other areas of the state, DOJ argued, the failure to do so for the second district "suggests an uneven application of its own stated criteria which appears designed to minimize black voting potential."<sup>177</sup> DOJ concluded that the state had failed to carry its burden of showing an absence of discriminatory effect on minority voters.<sup>178</sup> Georgia eventually made these changes and adopted its present plan that incorporates DOJ's "recommendations."<sup>179</sup>

#### IV. THE GEORGIA EXPERIENCE WITH THE VOTING RIGHTS ACT

This Note now attempts to answer one of the two questions posed in Part II. Is the Voting Rights Act being constitutionally applied by DOJ? The initial inquiry is whether DOJ follows its own stated criteria when reviewing proposed redistricting changes, or whether it exceeds the scope of the Act by applying it unconstitutionally? Although the Act has never been interpreted to require maximization of minority voting strength, it appears that this is what DOJ really requires for modern redistricting legislation. As far back as 1982, the courts have held that "the Voting Rights Act does not require a State to maximize minority voting strength."<sup>180</sup> Moreover, DOJ reiterated this same

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usually be some feature of a plan that might be improved upon from the perspective of a minority community or particular minority candidates." Grofman, *supra* note 7, at 1240 n.11.

175. Letter of Mar. 20, *supra* note 168, at 3-4.

176. *Id.* This evidence was also revealed at trial in the *Johnson v. Miller* litigation. Georgia admitted that its redistricting guidelines did not prohibit splitting counties or even precincts if necessary. Moreover, Georgia admitted having split counties in other areas of the state to protect incumbent candidates. Trial Transcript, *Johnson v. Miller* (1994) (CV-194-8); see also *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd* 459 U.S. 1166 (1983) (requiring uniform application of redistricting guidelines across the state).

177. Letter of Mar. 20, *supra* note 168, at 4.

178. *Id.*

179. See Appendix, Exhibit 1. Georgia legislators and staff members met in Washington with DOJ officials who apparently told the Georgia officials to "subordinate their economic and political concerns to the quest for racial percentages." *Johnson v. Miller*, No. 194-008, slip op. at 16 n.8 (S.D. Ga. Sept. 12, 1994).

180. See *Busbee v. Smith*, 549 F. Supp. 494, 517 (D.D.C. 1982), *aff'd* 459 U.S. 1166

interpretation during the preclearance review of Georgia's submissions. DOJ also repeatedly stated that it would not mandate that a particular district be drawn.<sup>181</sup>

In Georgia, it appears that an agency of the federal government has done nothing but mandate that a particular plan be adopted.<sup>182</sup> Georgia's second district provides fuel to the argument that the Act, as interpreted and applied by DOJ, requires a maximization of minority voting strength.<sup>183</sup> From the perspective of DOJ, the argument seems to boil down to one key question: Is there a plan in existence which will increase minority voting strength beyond the level of the plan being considered? The follow-up question is: If so, does the state have an adequate justification for not adopting this plan?<sup>184</sup> Georgia's recent experience seems to demonstrate that (1) a district's compactness, contiguity, or respect for political subdivisions are not adequate justifications; (2) a candidate's disadvantage of campaigning in four major media markets is not an adequate justification; and (3) protection of incumbents is not an adequate justification.<sup>185</sup>

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(1983).

181. Letter of Jan. 21, *supra* note 116, at 5. "While Section 5 considerations certainly do not dictate that the state adopt any particular configuration, we note that several alternative redistricting approaches were suggested to the legislature during the process." *Id.*

182. *Johnson*, No. 194-008, slip op. at 16 (S.D. Ga. Sept. 12, 1994). "[I]t is disingenuous to submit that DOJ's objections were anything less than implicit commands." *Id.*

183. *See supra* notes 170-79 and accompanying text. The second congressional district in Georgia was initially drawn as an influential minority district. However, as DOJ continued to reject all plans that did not draw the second district as a majority-minority district, the state was forced to manipulate the district lines to include enough African-Americans and exclude enough whites to create a majority-minority district. *See* Letter of Mar. 20, *supra* note 168. Although DOJ insisted the African-American population in southwest Georgia would not be recognized unless the state drew a majority-minority district, the state was forced to shuffle African-American voters all around the state in order to achieve the African-American population percentage desired. *See id.*

184. As noted by the court in *Johnson v. Miller*: "For DOJ, if these alternative plans had discovered heretofore untapped wells of racial voting power absent from the submitted plan, the inescapable conclusion was that the State's proffered reasons for the submitted configurations were 'pretextual' ones." No. 194-008, slip op. at 25-26 (S.D. Ga. Sept. 12, 1994).

185. In fact, Judge Kozinski wrote in *Garza v. County of Los Angeles*, "Where, as here, the record shows the ethnic or racial communities were split to assure a safe seat for an incumbent, there is a strong inference—indeed a presumption—that this was the result of intentional discrimination. . . ." 918 F.2d. 763, 779 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991) (Kozinski J., concurring in part and dissenting in

This is not to say that all alternative plans which incorporate more majority-minority districts are always supported by DOJ.<sup>186</sup> The justification, however, would have to be free of racially motivated concerns.<sup>187</sup> Moreover, any adequate justification would need to be fact specific for a particular plan. DOJ has denied preclearance for state submissions in instances in which alternative plans have created an increased number of majority-minority districts.<sup>188</sup> Georgia, however, presents a unique situation with respect to its new majority-minority districts. Violations have most often occurred because legislators have fragmented African-American communities into separate districts in order to dilute their voting strength.<sup>189</sup> Therefore, alternative plans which present configurations that keep viable African-American concentrations in one district are more likely to be accepted.<sup>190</sup> This was the situation with Georgia's fifth district.<sup>191</sup> But when cities, towns, and counties must be fragmented in order to recognize the African-American voting power in a particular area then this too is wrong.<sup>192</sup> DOJ spoke of preserving the community of interest shared among African-American citizens in the Atlanta area when objecting to Georgia's first configuration of the fifth congressional district.<sup>193</sup> This rationale was also advanced with respect to the eleventh

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part).

186. Intentional packing of minority citizens into legislative districts will, at some point, give rise to a Section 2 violation. See *Johnson v. Miller*, No. 194-008, slip op. at 77 (S.D. Ga. Sept. 12, 1994) (citing *Thornburg v. Gingles*, 478 U.S. 30 (1986)). The struggle comes in finding the zone in which there are enough but not too many minority citizens to comport with Section 2 standards. See *id.*

187. See Dunne Remarks, *supra* note 6, at 17-18.

188. See generally *id.* at 17-24.

189. *Id.*

190. *Id.*

191. See Appendix, Exhibit 1.

192. It would seem logical that some of the African-American communities included in Georgia's eleventh district, or Georgia's second district, are by definition, not compact. Unfortunately, there is no accepted definition or test for a district's compactness. See *Johnson v. Miller*, No. 194-008, slip op. at 80 (S.D. Ga. Sept. 12, 1994). One recent article has suggested that "compactness" after the *Shaw v. Reno* decision is "territorial contiguity with the addition of the rather vague and, one is bound to suspect, meaningless criterion of 'community of interest.'" Polsby & Popper, *supra* note 21, at 663. If the compactness criterion needed anything more to confuse the state of redistricting, *Shaw v. Reno's* pronouncement that "appearances do matter" certainly fills the void. See *Shaw v. Reno*, 113 S. Ct. 2816, 2827 (1993); see also Polsby & Popper, *supra* note 21.

193. Letter of Jan. 21, *supra* note 116, at 5.

district.<sup>194</sup> Are communities of interest only shared among those of a particular race? Does not a county or a city have a community of interest?<sup>195</sup>

Valid reasons exist for drawing districts which violate traditional districting principles.<sup>196</sup> However, must DOJ use the Voting Rights Act to dictate specific districting changes among the states? Although states retain the ultimate power to decide and pass new voting changes, DOJ did not give Georgia much opportunity to do so.<sup>197</sup>

### *DOJ Stretched the Act Too Far*

DOJ used its powers under Section 5 preclearance without regard for the Act's statutory limits. Although DOJ incorporates a Section 2 standard in its Section 5 review, DOJ's authority to deny preclearance is checked by the potential for vote dilution under Section 2.<sup>198</sup> In other words, DOJ should object to a

194. *Id.*

195. *But see* *Busbee v. Smith*, 549 F. Supp. 494, 517-18 (D.D.C. 1982), *aff'd* 459 U.S. 1166 (1983). In Georgia's 1982 redistricting plan, the court found that the "community of interests" standard was used inconsistently in different areas of the state. *Id.* at 517. The court warned that in many instances states might cite "community of interests" as support for a particular redistricting decision in a subtle attempt to minimize the voting strength of minorities. *Id.* In *Busbee*, the evidence establishing the inconsistent application of the community of interest standard led the court to strike down Georgia's redistricting plan. *See id.* The District Court struck down Georgia's 1982 redistricting plan under Section 2 of the Act at a time when the standard for a Section 2 violation required intentional discrimination. *See supra* notes 79-80 and accompanying text. With respect to Georgia's new eleventh district, the court in *Johnson v. Miller* noted that the African-American communities included in the district are "so far apart that DOJ's insistence that they are 'compact' renders the term meaningless." *Johnson v. Miller*, No. 194-008, slip op. at 84 (S.D. Ga. Sept. 12, 1994). The court further noted compelling evidence presented at trial that indicated no recognizable communities of interest encompassing the hundreds of miles of the eleventh district. *Id.*

196. The Voting Rights Act has traditionally been the reason states stray from the recognized districting criteria. If applied constitutionally, the Act should cause states to violate certain districting principles in the name of protecting minorities right to vote. Dunne Remarks, *supra* note 6.

197. *Johnson*, No. 194-008, slip op. at 21-28 (S.D. Ga. Sept. 12, 1994). In the Georgia redistricting litigation, evidence surfaced that substantiates the role the "Republican conspiracy" may have played in the 1990s round of redistricting. *See Grofman, supra* note 7, at 1248. Commentators have argued that this conspiracy is an attempt to "siphon off black voters into heavily black districts in order to 'whiten' the remaining districts." *Id.* Considering the Republican sweep across the nation on November 8, 1994, especially in Georgia (electing seven out of eleven Republicans to Congress), this conspiracy may have come to fruition.

198. *See Johnson*, No. 194-008, slip op. at 78 (S.D. Ga. Sept. 12, 1994).

redistricting plan only when it believes the plan violates the mandates of Section 2 of the Act. As outlined in *Thornburg v. Gingles*, the primary factors to be considered for a vote-dilution claim are: (1) the minority population is sufficiently large and compact to constitute a majority in a single member district; (2) the minority population is politically cohesive; and (3) the majority votes as a bloc and usually enables the defeat of minority candidates.<sup>199</sup> If these elements are established, secondary factors such as the state's history of discriminatory voting practices may be considered.<sup>200</sup> However, the court in *Johnson v. Miller* concluded that the current eleventh district in Georgia was not required under Section 2 of the Act.<sup>201</sup> In essence, the court concluded that the concentrations of the African-American voters now grouped in the eleventh district are not sufficiently geographically compact to warrant inclusion in one congressional district.<sup>202</sup> This conclusion buttresses the argument that DOJ has stepped over the line when analyzing the potential for vote-dilution during its preclearance review.<sup>203</sup>

If DOJ reasonably believes that a state's submission violates Section 2 standards, DOJ should not clear the plan.<sup>204</sup> By contrast, if the standards are met, even minimally, DOJ should defer to state legislative judgment.<sup>205</sup> Otherwise, DOJ acts outside its explicit congressional authority.

Perfectly legitimate, alternative plans that are cited by DOJ as evidence of the possibility of a different approach are not necessarily inappropriate. However, DOJ should not dictate policy decisions that should be left to states through the Section 5 preclearance provision of the Act. Moreover, DOJ should be careful not to overstep its authority to review the legislative choices of jurisdictions subject to Section 5 review. Creating

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

200. *Johnson*, No. 194-008, slip op. at 78 (S.D. Ga. Sept. 12, 1994).

201. *Id.* at 75-93.

202. *Id.* at 80-85.

203. Although Georgia's second congressional district has not been challenged, the intentional creation of the majority-minority district must be analyzed similarly. The creation of the second and eleventh districts was a give and take process. See *supra* notes 158-79 and accompanying text. The sheer difficulty presented in drawing the two districts as majority-minority districts is strong evidence that the African-American population in Georgia is not sufficiently compact to support two additional majority-minority districts.

204. *Johnson*, No. 194-008, slip op. at 75-93 (S.D. Ga. Sept. 12, 1994).

205. See *id.*

majority-minority districts is a legitimate enterprise and should be employed when reasonable.<sup>206</sup> States must articulate compelling interests for using racial criteria when drawing district lines. Whether compliance with the Voting Rights Act will suffice to justify such state action has surfaced as an extremely controversial issue in the courts.<sup>207</sup> Concern for the evils expressed by Justice O'Connor in *Shaw*, however, should not be lost. Racial discrimination in the voting process is arguably exacerbated by elevating race to such an important factor when drawing district lines.<sup>208</sup>

#### V. THE NEW EQUAL PROTECTION CHALLENGES UNDER *SHAW V. RENO*

In 1993, the Supreme Court in *Shaw v. Reno* remanded to the Eastern District of North Carolina the constitutional challenge to North Carolina's redistricting plan.<sup>209</sup> On remand, the court concluded North Carolina's redistricting plan passed constitutional muster under strict scrutiny because it was narrowly tailored to further the compelling state interest of complying with the Voting Rights Act.<sup>210</sup> Plaintiffs' claim in *Shaw II* was characterized by the court as a "newly recognized one in voting rights jurisprudence."<sup>211</sup> Once a claimant

206. Creating majority-minority districts was held not per se unconstitutional in *United Jewish Org., Inc. v. Carey*, 430 U.S. 144, 161-68 (1977).

207. See *infra* Part V.

208. See generally *Shaw*, 113 S. Ct. at 2816.

209. *Id.*

210. *Shaw II*, No. 92-202-CIV-5-BR (E.D.N.C. Aug. 1, 1994). The defendants in *Shaw II* argued on remand that the redistricting plan should not be subject to strict scrutiny under *Shaw v. Reno* because the plan did not segregate voters solely on the basis of race. *Id.* at 12. Defendants contended the plan drew integrated districts that "were the product of legitimate non-racial redistricting considerations, including compliance with constitutional 'one person, one vote' requirements; the creation of communities of interest based on shared historical, social, and economic interests; and the protection of incumbents." *Id.* at 12 (citing Defendant's Answer to Amended Complaint).

211. *Id.* at 16. The *Shaw II* court explained that prior to *Shaw v. Reno*, no majority opinion of the Supreme Court had ever approved standing under the Equal Protection Clause for plaintiffs challenging a redistricting plan unless the plaintiffs could establish "concrete, material harm to the voting strength of an identifiable group of citizens." *Id.* at 16-17 (emphasis added). Moreover, the North Carolina District Court stressed the importance of the Supreme Court's opinion in *United Jewish Org., Inc. v. Carey*, 430 U.S. 144 (1977), in which the Court expressly approved the intentional creation of majority-minority districts in order to comply with the Voting Rights Act so long as the state does not unfairly diminish the voting strength of any other racial

establishes that a districting plan is designed "to separate voters into different districts on the basis of race," and the state fails to rebut this averment with a "sufficient justification" for its actions, the court may strike down the redistricting scheme under the Fourteenth Amendment.<sup>212</sup> The cause of action approved in *Shaw v. Reno* significantly broadened the ability to bring an Equal Protection challenge in the districting context.<sup>213</sup> The new cause of action has spurred constitutional challenges to state congressional redistricting legislation from voters in five states.<sup>214</sup>

The new cause of action created in *Shaw v. Reno* might seem offensive to traditional standing requirements under the Equal Protection Clause.<sup>215</sup> One commentator has suggested that the Supreme Court has "reversed the social roles that shaped the history of American racism: whites have become the presumed victims and African-Americans the presumed racists."<sup>216</sup>

group. *Id.* at 17.

212. *Shaw*, 113 S. Ct. at 2828; see *Shaw II*, No. 92-202-CIV-5-BR at 18 (E.D.N.C. Aug. 1, 1994). The court in *Shaw II* analogized the plaintiffs' claim to "affirmative action" claims recognized in other contexts in which state actors are accused of violating equal protection by using "race-based remedial measures." *Shaw II*, No. 92-202-CIV-5-BR at 19; see, e.g., *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (affirmative action in context of admission to higher education institution).

213. See *Shaw II*, No. 92-202-CIV-5-BR at 16-19 (E.D.N.C. Aug. 1, 1994); *Johnson v. Miller*, No. 194-008, slip op. at 33 (S.D. Ga. Sept. 12, 1994) ("*Shaw v. Reno's* expanded notion of harm liberalizes the standing requirement.").

214. See *Johnson v. Miller*, No. 194-008, slip op. (S.D. Ga. Sept. 12, 1994); *Vera v. Richards*, No. H-94-0277, slip op. (S.D. Tex. Aug. 17, 1994); *Shaw II*, No. 92-202-CIV-5-BR (E.D.N.C. Aug. 1, 1994); *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994); *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993). In *DeWitt*, the court did not apply strict scrutiny to California's redistricting scheme because the court found that race was used permissibly as a redistricting concern along with traditional districting concerns and the requirements of the Voting Rights Act. *DeWitt*, 856 F. Supp. at 1415. Thus, the *DeWitt* opinion will not be discussed because this Note focuses on the strict scrutiny strand of the constitutional analysis employed by the courts in the remaining four challenges.

215. See *Shaw II*, No. 92-202-CIV-5-BR at 29-30 (E.D.N.C. Aug. 1, 1994). For a general discussion of standing under the Equal Protection Clause, particularly with respect to redistricting, see *id.*, at 20-30. Although concededly the Supreme Court in *Shaw v. Reno* has seemingly broadened standing principles beyond that recognized in traditional equal protection context, for the purposes of this Note, the new standing principles recognized in *Shaw v. Reno*, analyzed in *Shaw II*, and adopted by reference in *Johnson*, No. 194-008, slip op. (S.D. Ga. Sept. 12, 1994) will not be discussed or analyzed.

216. David Kairys, *Race Trilogy*, 67 TEMP. L. REV. 1, 12 (1994). Mr. Kairys argues that the North Carolina redistricting scheme was not "race-specific" and that it did not harm white voters. *Id.* The conclusion that the North Carolina congressional redistricting plan was not "race-specific" is in direct contradiction to the admissions

Federal district courts in North Carolina, Georgia, Louisiana, and Texas, however, have now heard challenges to redistricting legislation under this new principle. The analysis embodied in these Equal Protection challenges has become less straightforward, and at times inconsistent, when the courts have analyzed (1) the required showing for strict scrutiny; (2) the compelling state interests potentially validating the race conscious plans; and (3) the definition and application of narrowly tailored in the redistricting context.<sup>217</sup> Currently, federal courts in Georgia, Louisiana, and Texas have struck down congressional redistricting plans as violative of the Equal Protection Clause under a *Shaw v. Reno*-based challenge while a federal district court upheld North Carolina's congressional plan.<sup>218</sup>

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made by both parties in the case that race was a primary factor motivating the legislature to draw the twelfth district. See *Shaw II*, No. 92-202-CIV-5-BR at 34 (E.D.N.C. Aug. 1, 1994). Furthermore, particularized harm to the plaintiffs or a group of white voters was not the basis for standing in *Shaw v. Reno*. Standing under *Shaw v. Reno* is based rather on classifying citizens by race for the purposes of voting. See *Johnson*, No. 194-008, slip op. at 32 (S.D. Ga. Sept. 12, 1994) (citing *Shaw v. Reno*).

217. Polsby & Popper, *supra* note 21, at 662. Part of the inconsistency stems directly from the *Shaw v. Reno* opinion. *Id.* The Court accorded standing to plaintiffs so that they could challenge North Carolina's redistricting plan as an unconstitutional racial classification under the Equal Protection Clause and in so doing required North Carolina to come forward with evidence of a narrowly tailored plan that furthered some compelling state interest. *Shaw v. Reno*, 113 S. Ct. 2816, 2824-25 (1993). The opinion suggests that the state's interest in complying with the Voting Rights Act would not necessarily validate the twelfth congressional district in North Carolina even though "[s]tates . . . have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid *as interpreted and as applied.*" *Shaw v. Reno*, 113 S. Ct. 2816, 2830 (1993) (emphasis added); see also *Johnson*, No. 194-008, slip op. at 61 (S.D. Ga. Sept. 12, 1994) ("Fully steeped in the argot of constitutional law, we do not doubt that the Court intentionally avoided the word 'compelling,' instead opting for the more cautious 'very strong.'"). However, if the Voting Rights Act required North Carolina to craft a second majority-minority district, as DOJ apparently "suggested," and to accept the court's reasoning that the potentially impermissible racial classification might enjoin the North Carolina plan, either the Act or the Constitution must yield. Polsby & Popper, *supra* note 21, at 662. This rationale dictates that DOJ has unconstitutionally applied the Voting Rights Act. *Id.* Perhaps Mr. Polsby and Mr. Popper's argument regarding the potential *Shaw v. Reno* aftermath, which, as they state, would leave the "riddle [for] the undoubtedly bemused district judge [to] resolve," lends itself to Georgia's redistricting litigation, in which a majority of the three-judge panel thought the Act had been unconstitutionally applied, rather than to North Carolina's redistricting litigation, in which the panel upheld North Carolina's plan as narrowly tailored to further the compelling interest of complying with the Voting Rights Act. *Id.* Compare *Shaw II*, No. 92-202-CIV-5-BR (E.D.N.C. Aug. 1, 1994) with *Johnson*, No. 194-008, slip op. (S.D. Ga. Sept. 12, 1994).  
218. Compare *Johnson*, No. 194-008, slip op. (S.D. Ga. Sept. 12, 1994) and *Hays v.*



The most difficult question the courts have faced seems to fall under the “narrowly tailored” strand of the Equal Protection analysis. The difficulty stems from the lack of clear guidelines regarding the degree and extent to which racial factors may be used by state legislatures while considering redistricting legislation and perhaps more importantly, *how* the racial factors may be used to bring about the desired result.<sup>219</sup> Because the Court in *Shaw v. Reno* recognized that compactness, contiguity, and respect for political subdivisions were “objective factors” that could be used to rebut a claim of racial gerrymandering, the courts have struggled to understand whether these objective criteria, though not “constitutionally required,” are on an equal playing field with race in the redistricting process.<sup>220</sup>

At the strict scrutiny stage, in the cases in Georgia, Louisiana, North Carolina, and Texas, the arguments proffered by the state defendants—or sometimes the Justice Department intervenors—and the arguments of the plaintiffs have been

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Louisiana, 839 F. Supp. 1188 (W.D. La. 1993), and *Vera v. Richards*, No. H-94-0277, slip op. (S.D. Tex. Aug. 17, 1994) with *Shaw II*, No. 92-202-CIV-5-BR (E.D.N.C. Aug. 1, 1994).

219. *Vera v. Richards*, No. H-94-0277, slip op. at 4 (S.D. Tex. Aug. 17, 1994) (“We do not hold that the state may only draw Congressional boundaries with a blind eye toward race, a goal which would be impossible, nor that it is altogether prohibited from creating majority-minority districts.”); *Johnson*, No. 194-008, slip op. at 40 (S.D. Ga. Sept. 12, 1994) (“In contrast to *Hays I* and *Shaw [III]*, race can be a factor for the legislature, meaning one factor given no more prominence than various others, without triggering strict scrutiny. The legislature may intentionally consider race in redistricting—and even alter the occasional line in keeping with that consideration—without incurring constitutional review. It is the *abuse* of that privilege, exposed to the world via perverse district shapes ‘unexplainable on grounds other than race,’ that sparks further examination.”); *Shaw II*, No. 92-202-CIV-5-BR at 45 (E.D.N.C. Aug. 1, 1994) (“The Supreme Court’s equal protection cases have long recognized that there is a critical distinction between ‘race-conscious’ action and ‘race-based’ action, and that the ‘intentional’ use of race required to trigger strict scrutiny of legislative action cannot be established simply by showing that the legislature adopted a particular course of action with knowledge that it was likely to have a particular racial impact.”). Although the courts do not all agree on the “compelling interest” strand of equal protection analysis, this Note is limited to a discussion of the “narrow tailoring” strand in an attempt to squarely focus on the issue of the constitutionality of using race as a factor in redistricting.

220. *Shaw*, 113 S. Ct. at 2827; see, e.g., *Vera*, No. H-94-0277, slip op. at 66-7 (S.D. Tex. Aug. 17, 1994) (“*Shaw* implicitly reaffirms the important interconnection of community and geography and effective representative government in drawing its distinction between those ideal districting criteria and a racial gerrymander that ignores them.”). *Hays v. Louisiana*, 839 F. Supp. 1188, 1209 (W.D. La. 1993) (“[T]he Plan unnecessarily violates a host of historically important redistricting principles, thereby adversely affecting countless third party interests.”).

nearly identical.<sup>221</sup> The courts' analysis of each challenge, however, has taken on several forms and stressed varying strands of the constitutional analysis. Defendants have argued primarily that the various plans were necessary to achieve compelling state interests of compliance with the Voting Rights Act and eradicating the effects of past racial discrimination.<sup>222</sup> Defendants have further contended that the redistricting plans adopted are narrowly tailored to achieve these compelling interests.<sup>223</sup> By contrast, plaintiffs have argued that although these interests may be compelling, the states' plans are not narrowly tailored to further the compelling interests because the plans go beyond what is reasonably necessary to achieve these interests.<sup>224</sup>

The district court in Georgia in *Johnson v. Miller* recognized that the "narrow tailoring stage" of the equal protection analysis "logically overshadows the compelling interest stage as the vital point of contention."<sup>225</sup> Moreover, the courts in Georgia, Louisiana, and North Carolina devote much of the discussion in the constitutional challenges to the narrow tailoring stage of the analysis. These discussions should be the focal point for a solution to two questions. First, to what extent may states permissibly use racial criteria in drawing electoral districts? Second, to what extent has the Justice Department forced states, through application of Section 5 procedures, to make race, ipso facto, the primary factor to be considered when drawing electoral districts?<sup>226</sup>

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221. See *infra* notes 222-24 and accompanying text.

222. See, e.g., *Johnson*, No. 194-008, slip op. at 56-66 (S.D. Ga. Sept. 12, 1994).

223. See, e.g., *id.* at 78-93 (S.D. Ga. Sept. 12, 1994); *Vera*, No. H-94-0277, slip op. at 84 (S.D. Tex. Aug. 17, 1994).

224. See, e.g., *Johnson*, No. 194-008, slip op. at 78-93 (S.D. Ga. Sept. 12, 1994).

225. *Id.* at 63; see also *Shaw II*, No. 92-202-CIV-5-BR at 56 (E.D.N.C. Aug. 1, 1994) (pointing out that rarely will a state not have an easily articulable "compelling interest" when there is a "strong basis in evidence" supporting the conclusion that action is "necessary" to prevent a redistricting scheme from violating the Voting Rights Act). The court in *Johnson v. Miller* pointed out before engaging in its "narrow tailoring" inquiry: "[T]he Plan will live or die on the results of our narrow tailoring inquiry." *Johnson*, No. 194-008, slip op. at 66 (S.D. Ga. Sept. 12, 1994).

226. When answering these questions, this Note will assume that challenges to an electoral districting scheme require the court to invoke a strict scrutiny analysis. In the challenges to the redistricting plans in Georgia, Louisiana, North Carolina, and Texas, the defendants virtually concede that race was a significant factor in the redistricting process. See, e.g., *Vera*, No. H-94-0227, slip op. at 72 (S.D. Tex. Aug. 17, 1994). Moreover, in the modern redistricting arena the extent of knowledge possessed by those involved in the actual configuring of the plans would seem to warrant

Thus, the key question centers on the interpretation of narrowly tailored. "A congressional districting plan is not narrowly tailored if it affects the rights and interests of citizens more than 'reasonably necessary' to further the compelling state interest advanced by the state."<sup>227</sup> The district court in Georgia concluded that unless the particular districts were "reasonably necessary" to comply with the Act, no compelling interest would exist and thus, the districts would be unnecessary.<sup>228</sup> The Georgia court concluded that states will always initially have an articulable compelling interest because plans may not be enacted absent compliance with the Act.<sup>229</sup> Thus, the crux of the constitutional analysis is properly focused on the narrow tailoring stage.<sup>230</sup>

The district court in Louisiana in *Hays v. Louisiana* determined that Louisiana's redistricting plan was not narrowly tailored because the plan packed more African-American voters into one district than was "reasonably necessary" to provide African-American citizens an opportunity to elect candidates of choice.<sup>231</sup> Moreover, under a traditional analysis of the narrow

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blanket application of strict scrutiny for constitutional challenges to redistricting schemes. That is, technology is so advanced that the potential for abuse begs for heightened scrutiny. Legislatures and others with the modern software are privy to information so detailed that every square block of every city or town in the state can be viewed on a computer screen and citizens can be segregated by race, age, gender, etc. See Dunne Remarks, *supra* note 6, at 9. This ability necessarily carries with it a heavy responsibility. Moreover, the presence of this technology no doubt means that information concerning the racial make-up of electoral districts has become a part of the redistricting process and therefore race as a factor in redistricting will likely continue to play a substantial role in redistricting in the near future. *Id.* This argument may seem an affront to our country's goal of a "color-blind society" yet as a practical matter courts should examine closely the exercise of power exerted by elected officials when grouping citizens for the purposes of voting. *Id.* John Dunne, Assistant United States Attorney General, in his remarks to the National Conference of State Legislators stated that because of the "wonders of computer technology . . . states must be prepared to explain and defend their plans in light of [the] heightened scrutiny" from all those involved in the process. *Id.*

227. *Johnson*, No. 194-008, slip op. at 67 (S.D. Ga. Sept. 12, 1994). The "reasonably necessary" language comes from *Shaw v. Reno*, 113 S. Ct. 2816, 2831 (1993).

228. *Johnson*, No. 194-008, slip op. at 64 (S.D. Ga. Sept. 12, 1994).

229. *Id.*

230. See *Hays v. Louisiana*, 839 F. Supp. 1188, 1205-06 (W.D. La. 1993) (assuming defendants had advanced a compelling state interest and thus analyzing the plan under a narrow tailoring inquiry).

231. *Id.* at 1209, *vacated*, 114 S. Ct. 2731 (1994). The *Hays* decision invalidated Louisiana's congressional redistricting plan on Dec. 28, 1993. While an appeal was pending in the United States Supreme Court, the Louisiana legislature called an extraordinary session and repealed the first congressional plan and enacted a second.

tailoring requirement, the Louisiana court found the plan adversely affected more interests (rights of third parties and traditional districting criteria) than was necessary to accomplish the compelling state interest.<sup>232</sup>

The *Johnson v. Miller* litigation centered on Georgia's new eleventh congressional district.<sup>233</sup> The discussion of the *Johnson* case essentially becomes the answer to the question previously posed in Part II of this Note: Is Georgia's 1992 congressional redistricting plan constitutional? The court's analysis under strict scrutiny turned to a discussion of whether the plan was narrowly tailored to further the compelling state interest of complying with the Act.<sup>234</sup> Like the Louisiana district court, the court determined that Georgia's redistricting scheme was not narrowly tailored to further the compelling state interest of complying with Section 5 of the Act because the plan created more majority-minority districts than was necessary to avoid retrogression under the *Beer* standard.<sup>235</sup> However, the more important question for the court, was whether the Georgia plan was narrowly tailored to further the compelling state interest of complying with Section 2 of the Act. The court dismissed defendants' contentions that the plan was narrowly tailored by finding (1) that the African-American population in south-central Georgia was not sufficiently large or compact to warrant an intentionally crafted majority-minority district; (2)

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The plaintiffs filed supplemental pleadings seeking to amend their complaint in the Supreme Court. Instead, the Supreme Court entered an order vacating the judgment of Dec. 28 and remanded the appeal to the district court for review in light of the new congressional districting plan. *Shaw II*, No. 92-202-CIV-5-BR at 31 n.15 (E.D.N.C. Aug. 1, 1994); see *Hays*, 862 F. Supp. 119 (W.D. La. 1994). The district court then permitted the plaintiffs to amend their complaint and struck down the second plan as unconstitutional. *Hays*, 862 F. Supp. 119. The second district court opinion expressly adopted the reasoning of the first and so for the purposes of this Note, the first *Hays* opinion will continue to be cited. *Id.* at 121.

232. *Hays*, 839 F. Supp. at 1209. The court cited the traditional factors used in a narrow tailoring inquiry, i.e., (1) necessity of measure; (2) efficacy of alternatives; (3) availability of more narrowly-tailored options; (4) flexibility and duration of measures; and (5) impact of third-party rights. *Id.* at 1208; see also *Johnson*, No. 194-008, slip op. at 67 n.34 (S.D. Ga. Sept. 12, 1994); *Shaw II*, No. 92-202-CIV-5-BR, slip op. at 72-73 (E.D.N.C. Aug. 1, 1994).

233. *Johnson*, No. 194-008, slip op. at 1 (S.D. Ga. Sept. 12, 1994); see Appendix, Exhibit 3.

234. *Johnson*, No. 194-008, slip op. at 55 (S.D. Ga. Sept. 12, 1994). "It is clear to us that the only interest the General Assembly had in mind when drafting the current congressional plan was satisfying DOJ's preclearance requirements." *Id.*

235. *Id.* at 71.

that the voting patterns among African-Americans and whites in Georgia did not reveal racially polarized voting warranting remedy; and (3) that the probability for a minority candidate to be elected from the eleventh district represented more than the "equal" opportunity called for by Section 2 of the Act.<sup>236</sup>

The court in the Texas challenge placed the burden of proof on the state to explain how the congressional plan was narrowly tailored to further a compelling state interest.<sup>237</sup> The Texas defendants took a different approach from the defendants in Georgia, Louisiana, and North Carolina when outlining the state's compelling interests. The defendants argued that although districts doing less damage to the traditional districting criteria of compactness, contiguity, geography, and neighborhood preservation could have been fashioned, the interest of incumbent protection weighed in favor of the configuration ultimately adopted.<sup>238</sup> The United States, as a defendant-intervenor, did argue that Texas had a compelling interest in complying with the Act and that the plan was narrowly tailored to further this compelling interest.<sup>239</sup> Moreover, the United States asserted that as long as Texas could attribute the shape of the irregular districts to incumbent protection or any other race-neutral factor, the districts would be justified.<sup>240</sup>

But, as the court pointed out, this argument necessitates elevating incumbent protection to a compelling state interest capable of justifying the bizarrely-shaped districts.<sup>241</sup> The court flatly rejected this argument.<sup>242</sup> Thus, the court adopted the view that to be narrowly tailored under a *Shaw v. Reno* claim, "a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria."<sup>243</sup> The Texas court further concluded that the congressional districts in issue<sup>244</sup> went beyond what was necessary to achieve

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236. *Id.* at 93. An interesting, but inevitable, aspect of redistricting litigation is the polar reverse of the state's position with regard to a redistricting plan. For example, Georgia officials fought DOJ every step of the way during the preclearance process, but in *Johnson v. Miller* the state vigorously defended the same redistricting plan it fought so strongly against.

237. *Vera v. Richards*, No. H94-0277, slip op. at 85 (S.D. Tex. Aug. 17, 1994).

238. *Id.* at 85-86.

239. *Id.* at 86.

240. *Id.* at 87-88.

241. *Id.* at 88.

242. *Id.*

243. *Id.*

244. Several congressional districts were in issue in *Vera v. Richards*, however, the

the compelling interest of compliance with the Voting Rights Act.<sup>245</sup> Furthermore, the court attacked DOJ for deferring to the state's choice of district boundaries.<sup>246</sup> "Where obvious alternatives to a racially offensive districting scheme exist, the bizarre districts are not narrowly tailored."<sup>247</sup>

The litigation in North Carolina, by contrast, reached a different conclusion.<sup>248</sup> As noted by the judges in *Shaw II*, no decision of the Supreme Court has ever applied strict scrutiny to redistricting legislation subject to challenge under the Equal Protection Clause.<sup>249</sup> Interestingly, the *Shaw II* panel may have applied a level of scrutiny slightly below that of the courts in Georgia and Louisiana.<sup>250</sup> Moreover, the court in North Carolina placed the burden of persuasion on the plaintiffs to show that the redistricting plan was not narrowly tailored.<sup>251</sup> The court looked to Supreme Court precedent in the affirmative action context<sup>252</sup> for how to apply the strict scrutiny standard and noted that a voluntarily-adopted, race-based districting plan might not require the same level of justification as a judicially-imposed plan.<sup>253</sup> However, this application of strict scrutiny would seem to be inconsistent with the holding in *Shaw v. Reno*, in which a majority of the Supreme Court suggested that the remedial nature of the race-based actions would not protect the North Carolina plan.<sup>254</sup> *Shaw II* distinguishes the racial preferences in other remedial contexts by reasoning that drawing district lines in order to strengthen minority voting power "does not necessarily disadvantage members of other racial groups."<sup>255</sup>

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court concluded that only three violated Equal Protection. *See id.* at 89-92.

245. *Id.* at 89.

246. *Id.*

247. *Id.*

248. *See Shaw II*, No. 92-202-CIV-5-BR, slip op. (E.D.N.C. Aug. 1, 1994).

249. *Id.* at 47-48.

250. *See id.* at 48 n.21; *see also infra* notes 253-56 and accompanying text.

251. *Shaw II*, No. 92-202-CIV-5-BR, slip op. at 52 (E.D.N.C. Aug. 1, 1994).

252. Specifically the court referred to cases involving race-based remedial measures. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978).

253. *Shaw II*, No. 92-202-CIV-5-BR, slip op. at 48 n.21 (E.D.N.C. Aug. 1, 1994). The court in *Johnson v. Miller* would certainly take issue with the contention that Georgia's redistricting plan was "voluntarily-adopted." *See Johnson v. Miller*, No. 194-008, slip op. at 66 (S.D. Ga. Sept. 12, 1994).

254. *Shaw v. Reno*, 113 S. Ct. 2816, 2828 (1993).

255. *Shaw II*, No. 92-202-CIV-5-BR at 50 (E.D.N.C. Aug. 1, 1994).

Nevertheless, *Shaw II* also recognizes the narrow tailoring inquiry as the crux of the strict scrutiny analysis.<sup>256</sup> The narrow tailoring inquiry according to *Shaw II*, in the redistricting context, is reduced to two primary inquiries: (1) whether the plan contains more majority-minority districts than necessary to comply with the Act; and (2) whether the existing African-American majority-minority districts contain larger concentrations of minority voters than is "reasonably necessary" for minorities to have a realistic opportunity to elect candidates of their choice.<sup>257</sup> The court in North Carolina took a different, perhaps deferential, approach to the narrowly tailored inquiry than the courts in Georgia and Louisiana. The judges in *Shaw II* appear to defer to the Voting Rights Act<sup>258</sup> and to defer to the state legislature.<sup>259</sup> The opinions coming from federal courts in Georgia and Louisiana attack the constitutionality of the Act as applied to the recent redistricting legislation<sup>260</sup> and conclude that state legislatures were more or less forced into adopting the specific district lines eventually crafted.<sup>261</sup>

The courts are similarly split regarding the weight to be accorded the traditional districting principles. The court in North Carolina found that because these principles are not "constitutionally-mandated," a state plan that could be drawn differently and do less damage to geographical compactness or contiguity does not require a court to invalidate a plan, even

256. *Id.* at 55-68 (adopting express compliance with Voting Rights Act as compelling interest). In considering the other proffered compelling state interest of eradicating the effects of past racial discrimination, the court in *Shaw II* further recognized that rarely would a state not have evidence to justify the more compelling interest of complying with Section 2 of the Voting Rights Act. *Id.* at 71. The court cited several instances in which a state may have compelling interests apart from the Voting Rights Act and thus specifically recognized the eradication of the effects of past discrimination as an independent compelling interest. *Id.*

257. *Johnson*, No. 194-008, slip op. at 67 (S.D. Ga. Sept. 12, 1994); *Shaw II*, No. 92-202-CIV-5-BR, slip op. at 75 (E.D.N.C. Aug. 1, 1994); *Hays v. Louisiana*, 839 F. Supp. 1188, 1207-08 (W.D. La. 1993).

258. "A state that has a compelling interest in engaging in race-based redistricting to comply with the Voting Rights Act obviously has no *completely* race-neutral alternative means of accomplishing that end." *Shaw II*, No. 92-202-CIV-5-BR at 74 (E.D.N.C. Aug. 1, 1994); *cf. Johnson*, No. 194-008, slip op. at 68 (S.D. Ga. Sept. 12, 1994) (arguing DOJ stretched the Act too far and required maximization of minority voting strength).

259. *See Shaw II*, No. 92-202-CIV-5-BR at 82-84 (E.D.N.C. Aug. 1, 1994).

260. *See, e.g., Johnson*, No. 194-008, slip op. at 68 (S.D. Ga. Sept. 12, 1994) (arguing DOJ took Voting Rights Act too far).

261. *Id.* at 72-73.

under heightened scrutiny.<sup>262</sup> By contrast, the courts in Georgia and Louisiana concluded that a state's plan *fails* under heightened scrutiny if it goes beyond what is reasonably necessary and begins to place an unacceptable burden on third parties by deviating from traditional districting principles.<sup>263</sup> In sum, the North Carolina decision would suggest that so long as no constitutionally-mandated districting requirements are violated and a state's plan is otherwise grounded in compelling justifications (the Act), strict scrutiny does not require invalidation.<sup>264</sup> The decisions of the courts in Georgia and Louisiana, however, indicate a state's plan should fail strict scrutiny if it goes beyond what is reasonably necessary to satisfy the compelling interest, including disregarding traditional districting principles.<sup>265</sup>

### *What Gives?*

Where does this leave race as a criterion? Or, perhaps more appropriately, where does this leave remedial districting as required by the Act? The answer to these questions seems to turn on whether the practices employed by DOJ in applying the Act are constitutional. If state legislation cannot pass strict scrutiny under the Equal Protection Clause because the plans are not narrowly tailored, but DOJ continues to "require" specific district changes that in effect *cause* the failure under strict scrutiny, something must yield. Under the reasoning of *Shaw II*, which subordinates everything but constitutionally mandated districting principles to the Act, DOJ essentially usurps the states' legislative function of enacting their own voting laws. Perhaps the solution lies in congressionally-mandated policies for Voting Rights Act enforcement by DOJ. However, currently Congress has promulgated regulations which require DOJ to consider:

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262. See *Shaw II*, No. 92-202-CIV-5-BR 82-83 (E.D.N.C. Aug. 1, 1994).

263. *Hays v. Louisiana*, 839 F. Supp. 1188, 1208 (W.D. La. 1993).

264. *Vera v. Richards*, No. H94-0277, slip op. at 88 n.55 (S.D. Tex. Aug. 17, 1994). The court in *Vera* explained that the district judges in *Shaw II* concluded that "the *only* factors pertaining to the shape and size of a district that bear on narrow tailoring are constitutional limits." *Id.* The court specifically referenced the one person-one vote requirement and "the right of nonminorities not to have their votes diluted." *Id.*

265. *Johnson*, No. 194-008, slip op. at 67 (S.D. Ga. Sept. 12, 1994); *Hays*, 839 F. Supp. 1188, 1206-07 (W.D. Ga. 1993).



The extent to which available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered.

The extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries.<sup>266</sup>

The importance of traditional districting criteria is somewhat reinforced by *Shaw v. Reno*.<sup>267</sup> The Court essentially holds that if race becomes the sole driving force behind a redistricting plan—in disregard of other criteria—a court should review the plan under strict scrutiny. The Court recognizes the possibility that the state may put forth enough evidence to rebut the claim that race was the only basis for the particular plan.<sup>268</sup> Thus, it seems logical that there must be some interplay between “race-consciousness” and consciousness of other traditional districting criteria in all redistricting attempts. However, to blindly accept what DOJ “suggests” for Voting Rights Act compliance in total disregard of other districting concerns is not constitutional.<sup>269</sup>

As pointed out previously, the narrowly tailored strand of the equal protection analysis has become the ultimate question posed to the courts in most of the post-*Shaw v. Reno* congressional redistricting cases.<sup>270</sup> More specifically, the question presented is: At what point will racial considerations become so overriding that the courts will find that states have not narrowly tailored congressional redistricting plans to further any compelling state interest?

The consensus in the federal district courts in Georgia, Louisiana, and Texas is that the traditional districting criteria of compactness, contiguity, and respect for political subdivisions should at some point check the use of racial considerations in the redistricting process. Therefore, if the compelling state interest for drawing the districts that currently exist in these states is compliance with the Voting Rights Act, traditional districting criteria must be incorporated into the Section 5 preclearance

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266. 28 C.F.R. § 51.59 (1994).

267. *Shaw v. Reno*, 113 S. Ct. 2816, 2827 (1993).

268. *Id.* at 2832.

269. *See Johnson*, No. 194-008, slip op. (S.D. Ga. Sept. 12, 1994).

270. *See supra* notes 225-26 and accompanying text.

process. Because the Section 2 standards already incorporate traditional districting ideas,<sup>271</sup> DOJ should exercise some level of deference to these concerns and should not force states to elevate race to the sole districting criteria under the guise of Section 2 compliance.

The extent of DOJ's authority should be defined by a redistricting plan's vulnerability to a Section 2 claim. If Section 2 of the Act, as validly interpreted, demands a bizarrely shaped district, the state will have met its burden under the narrow tailoring strand in establishing the necessary "fit" between Voting Rights Act compliance and the state's choice for achieving this interest.<sup>272</sup> Under similar reasoning, if DOJ believes a plan is not violative of Section 2, the plan should be precleared regardless of the alternative plans available.

Looking beyond the compelling interest embodied in the Act, the Supreme Court noted in *Shaw v. Reno* that deliberately creating majority-minority districts would only be permissible if a state employs "sound districting principles" and the racial group's "residential patterns afford the opportunity of creating districts in which they will be a majority."<sup>273</sup> Therefore, sound districting principles such as compactness, contiguity, and respect for political subdivisions should not be subordinated to racial considerations unless a state justifiably believes its redistricting plan may violate Section 2 of the Act. Moreover, if a state employs these districting principles, the state would have compelling evidence that race has not become the overriding districting criteria.<sup>274</sup>

### CONCLUSION

Questions about the use of race in redistricting should only arise if some evidence exists which shows that a state's redistricting plan results in a disadvantage to a particular racial group (Section 2) or if the appearance of a district establishes

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271. The first *Thornburg* criteria is that the minority population be geographically compact. *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

272. See *Vera v. Richards*, No. H-94-0277, slip op. at 88 n.55 (S.D. Tex. Aug. 17, 1994).

273. *Shaw v. Reno*, 113 S. Ct. 2816, 2832 (1993) (quoting *United Jewish Org., Inc. v. Carey*, 430 U.S. 144, 167-68 (1977) (opinion of White, J.); see *Vera*, No. H-94-0277, slip op. at 88 n.55.

274. *Shaw*, 113 S. Ct. at 2827.

that the district could only be understood as an effort to classify voters based on race (*Shaw v. Reno*). If applied consistently and in a manner consistent with the Constitution, the Voting Rights Act should serve as the check on states that may attempt to disadvantage certain minority groups. By contrast, in the recent round of redistricting, the Act served as the vehicle by which DOJ forced states to violate the Equal Protection Clause of the United States Constitution.<sup>275</sup>

The constant reference to race in all redistricting legislation impresses upon the citizens, as well as our elected officials, that all African-Americans vote for African-Americans, and all whites vote for whites. DOJ speaks of a "community of interests" and the need for its preservation. What are communities of interest? Virtually every metropolitan community in the State of Georgia is now fractured by the lines of politics.<sup>276</sup> As the court warned in *Shaw v. Reno*, elected officials receive a clear message that they need only represent the majority. This byproduct of racial bloc voting affects white and African-American citizens alike.

Because of the history of pervasive racial discrimination in the area of voting rights, states have compelling justifications for eradicating the practices that lead to unequal opportunities. Moreover, states have compelling justifications for complying with the Voting Rights Act. The federal government, acting through one of its agencies, should not, however, be able to mandate specific voting changes. State legislatures must carefully craft legislation that furthers the compelling interests of the state without *impermissibly* using racial criteria. For jurisdictions subject to Section 5 preclearance, DOJ should defer to the state legislatures unless states fail to comport with the Act when it is interpreted and applied constitutionally.

*F. Faison Middleton, IV*<sup>277</sup>

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275. "DOJ stretched the VRA farther than intended by Congress or allowed by the Constitution, and had the [Georgia] General Assembly firmly in tow." Johnson v. Miller, No. 194-008, slip op. at 68 (S.D. Ga. Sept. 12, 1994).

276. See Appendix, Exhibits 1-4.

277. The author wishes to thank Linda Meggers, Director of Reapportionment Services for the State of Georgia, for all her help and support in drafting this Note. She was immensely helpful by providing access to research materials and up-to-date information on the redistricting litigation. The author also wishes to thank Penny Williams, Kevin Herrin, and Chris Hatcher for additional research assistance.

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**WHO DREW CONGRESSIONAL DISTRICT LINES?**

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**APPENDIX**



EXHIBIT 2

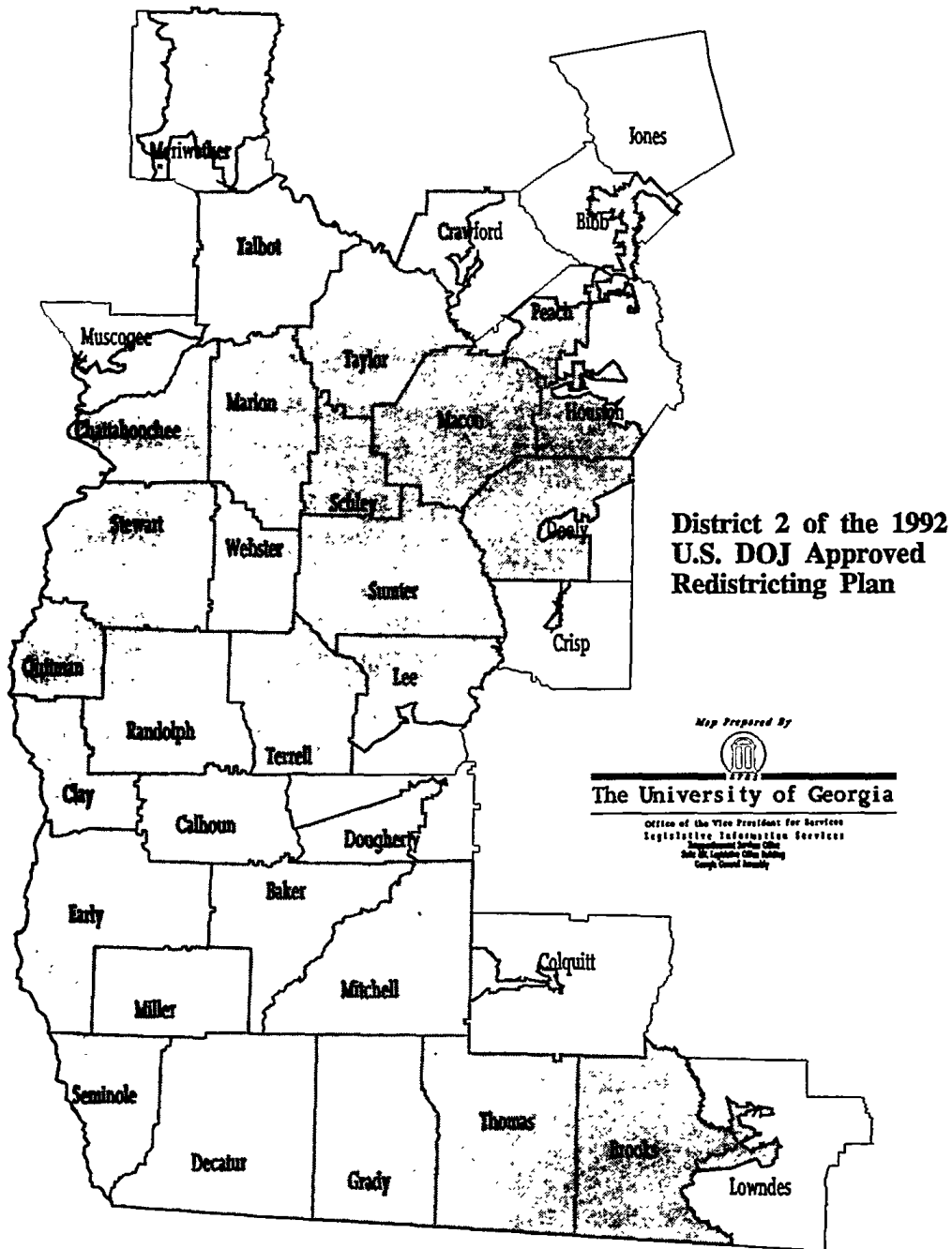




EXHIBIT 4

Black Max Plan

