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Miller v. Johnson: The Supreme Court "Remaps" Shaw v. Reno

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Miller v. Johnson: The Supreme Court "Remaps" *Shaw v. Reno*

I. INTRODUCTION

The right to vote in free elections and participate in the political process is the most basic right in a democratic society. After the Civil War, the United States Constitution was twice amended in hopes of insuring to former slaves the same rights that white male citizens already enjoyed—equal protection of the laws and the right to vote.[1] Many states however, especially in the Deep South, successfully ignored this constitutional imperative for upwards of a century through "race-neutral" devices such as poll taxes, grandfather clauses, and literacy tests.[2]

In the early 1960's, the United States Supreme Court began to employ the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution to protect the civil rights of minorities, including the right to vote. In 1965, Congress made use of its enforcement powers under the Fifteenth Amendment by enacting the Voting Rights Act (VRA).[3] The VRA served as a strong message from the federal government to the states regarding the inappropriateness of any continued racial discrimination in voting.

Recently, the Court's utilization of the Equal Protection Clause has shifted from emphasizing the protection of the voting rights of minorities to concern about the voting rights of all citizens. The North Carolina case of *Shaw v. Reno*[4] (*Shaw II*) began this trend in 1993. *Miller v. Johnson*[5] represents the Supreme Court's effort to clarify the principles enunciated in *Shaw II*. *Miller*,

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1. The Fourteenth Amendment, ratified in 1868, provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Fifteenth Amendment, Section 1, ratified in 1870, provides in pertinent part: "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude." The second section of the Fifteenth Amendment gives Congress the power to enforce the amendment through appropriate legislation.

2. Jason Maschman, *Walking a Thin Line in* Shaw v. Reno*: Do Majority-Minority Districts Have a Place in a Color-Blind Constitution?*, 38 St. Louis L.J. 1077, 1083 (1994).

3. Voting Rights Act of 1965, *as amended*, 42 U.S.C. § 1973 (1988).

4. 113 S. Ct. 2816 (1993). In Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. 1992) (*Shaw I*), the district court held the plaintiffs failed to state a claim and dismissed the action. The United States Supreme Court, on direct appeal, reversed, holding the plaintiffs had stated a racial gerrymander claim. The Court remanded the case directing the district court to apply strict scrutiny analysis if the claim remained uncontradicted. Shaw v. Reno, 113 S. Ct. 2816,2824, 2832 (1993) (*Shaw II*). On remand, the district court held the defendants had met the requirements of strict scrutiny. Shaw v. Hunt, 861 F. Supp. 408, 473, 475 (E.D.N.C. 1994) (*Shaw III*). The plaintiffs have again appealed to the Supreme Court. Shaw v. Hunt, 115 S. Ct. 2639 (1995) (*probable jurisdiction noted*) (*Shaw IV*). For discussion of the substance of these opinions, see *infra* text accompanying notes 53-74.

5. 115 S. Ct. 2475 (1995).

a controversial 5-4 opinion written by Justice Kennedy, held Georgia's most recent congressional redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment.[6]

While *Miller v. Johnson* represents the first Supreme Court decision analyzing the merits of a reverse racial gerrymandering claim, it does not appear it will be the final word on the subject. The Supreme Court has noted probable jurisdiction in the remand decision in *Shaw v. Reno*[7] and in *Vera v. Richards*[8] (*Vera I*), a district court decision concerning Texas's congressional district lines. The *Shaw III* district court majority held that while the State of North Carolina's concession that two districts were drawn to insure blacks had a voting majority in each established a "prima facie racial gerrymander," the plan's use of race passed strict scrutiny analysis as a sufficiently "narrowly tailored" effort to serve the state's "compelling interest."[9] In the Texas case, the district court held the three districts under attack were the product of unconstitutional gerrymanders as they were not narrowly tailored to further a compelling state interest.[10]

Even more important to Louisiana citizens is the very recent district court decision in *Hays v. Louisiana*[11] (*Hays IV*). The *Hays IV* district court on remand from the Supreme Court held in a *per curiam* decision that Louisiana's challenged district, District Four of Act 1, "was and is the product of racial gerrymandering and was not narrowly tailored to further a compelling state interest."[12]

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6. The split among the justices reveals the controversial and important nature of this subject matter. Joining Justice Kennedy in the majority were Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas. Justice O'Connor filed a separate concurring opinion. Justices Stevens, Souter, Ginsburg, and Breyer dissented. Justice Stevens wrote a separate dissent. See Part V for a discussion of these dissenting opinions.

7. Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994), *probable jurisdiction noted* 115 S. Ct. 2639 (1995).

8. Vera v. Richards, 861 F. Supp. 1304 (S. D. Tex. 1994) (hereinafter *Vera I*), *probable jurisdiction noted sub nom.* Bush v. Vera, 115 S. Ct. 2639 (1995) (hereinafter *Vera II*).

9. *Shaw III*, 861 F. Supp. at 473, 475.

10. *Vera I*, 861 F. Supp. at 1341, 1344.

11. Hays v. Louisiana, Nos. 92-1522, 95-1241 (Jan. 5, 1996). In Hays v. Louisiana, 839 F. Supp. 1188 (W.D. La. 1993) (hereinafter *Hays I*), plaintiff challenged the constitutionality of Act 42, the redistricting legislation prior to the current Act. The district court held the act unconstitutional. Pending appeal to the United States Supreme Court, Act 42 was repealed and Act 1 was enacted. Because of this, the Supreme Court vacated and remanded *Hays I*. On remand, the district court found Act 1 unconstitutional as well. Hays v. Louisiana, 862 F. Supp. 119 (W.D. La. 1994) (hereinafter *Hays II*). The Supreme Court, on appeal, held the plaintiffs lack of standing and remanded the case for dismissal. United States v. Hays, 115 S. Ct. 2431 (1995) (hereinafter *Hays III*). An amended petition was filed adding proper plaintiffs. The district court again held Act 1 unconstitutional. Hays v. Louisiana, Nos. 92-1522, 95-1241 (W.D. La. Jan. 5, 1995) (hereinafter *Hays IV*). For more discussion of the substance of these opinions, see *infra* part VI.

12. *Hays IV*, Nos. 92-1522, 95-1241 at 24.

II. *MILLER V. JOHNSON*

A. Facts

The 1990 United States Census indicated Georgia was entitled to an additional, eleventh congressional seat. Georgia's General Assembly was, therefore, called upon to redraw the State's congressional districts. A plan was submitted by Georgia to the United States Attorney General for preclearance, as required by Section 5 of the VRA on October 1, 1991.[13] It contained *two* majority-minority districts[14] (the 5th and the 11th) and another district (the 2nd) in which blacks represented approximately 35% of the voting-age population.

On January 21, 1992, the Department of Justice refused preclearance of the Georgia plan although it increased the number of majority-minority districts from one to two and there was no evidence of an intent on the part of the General Assembly to discriminate against minority voters.[15] The Department's objection was that the Georgia plan only provided for two majority-minority districts while not "recognizing" certain other minority populations by creating a *third* majority-minority district.[16] The Georgia General Assembly responded by submitting a new plan which assigned additional black populations to the Eleventh, Fifth, and Second Districts. The Justice Department again refused preclearance.

On its third try, Georgia "set out to create three majority-minority districts to gain preclearance."[17] The General Assembly used as its "benchmark" the American Civil Liberties Union's "max-black" plan which was one of the alternative schemes that the Justice Department had relied upon in refusing to preclear the second plan.[18] The third plan took the black population of Meriwether County from the Third District and connected it to the Second District by the "narrowest of land bridges."[19] The "Macon-Savannah Trade" which was a part of the "max black" plan was also incorporated into the new plan. Under this "Trade," the Eleventh District lost the dense black population of Macon to the Second District, thereby making the Second District the third

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13. Section 5 of the Voting Rights Act of 1965, *as amended*, 42 U.S.C. § 1973c (1988). The VRA requires certain jurisdictions to "preclear" any changes to voting procedures. Preclearance is given when the United States Attorney General or the District of Columbia District Court finds the changes do not have the *purpose* or the *effect* of denying or abridging the right to vote on account of race or color. See *infra* Part III.A.2 for further explanation of "preclearance."

14. "A majority-minority district is a single-member election district . . . drawn to have a majority (over 50%) of minority *voters*. It is designed to help insure that at least some minority representatives will be elected in a jurisdiction in which the minority voters would be overshadowed by the majority." Maschman, *supra* note 2, at 1077 n.1 (emphasis added).

15. Miller v. Johnson, 115 S. Ct. 2475, 2484 (1995).

16. *Id.* at 2483.

17. *Id.* at 2484 (citing Johnson v. Miller, 864 F. Supp. 1354, 1366 (S.D. Ga. 1994)).

18. *Miller*, 115 S. Ct. at 2484.

19. *Id.* (citing Johnson v. Miller, 864 F. Supp. 1354, 1367 (S.D. Ga. 1994)).

majority-minority district. The Eleventh District's black population loss was then offset by redrawing its boundaries to include the black populations of Savannah.

To make way for this "Savannah extension," two counties were split as was the City of Savannah itself. The plan as a whole split twenty-six counties, twenty-three more than under the existing congressional districts, but included three majority-minority districts as urged by the Justice Department.[20] On April 2, 1992, the Justice Department gave preclearance to Georgia's third redistricting plan. Elections were held under the new congressional districting plan in November 1992, and black candidates were elected to Congress from all three majority-minority districts.

B. Procedural History

In January 1994, the *Johnson* appellees, five white voters from the Eleventh District, filed suit against various state officials (the *Miller* appellants). The plaintiff-appellees alleged the "[Eleventh] District was a racial gerrymander and so a violation of the Equal Protection Clause as interpreted in *Shaw v. Reno*."[21] A majority of the three judge district court[22] held the Eleventh District was invalid under *Shaw II*. The court read *Shaw II* "to require strict scrutiny whenever race is the 'overriding, predominant force' in the redistricting process."[23] Applying strict scrutiny, the court rejected proportional representation as a compelling interest but it *assumed* that compliance with the VRA *could* be a compelling interest sufficient to justify voting district assignments motivated predominately by race. The court concluded, however, that strict scrutiny was still not satisfied as the VRA itself did not *require* three majority-minority districts in Georgia. Thus, the plan was not narrowly tailored to the assumed compelling interest of compliance with the VRA.[24]

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20. The *Miller* Court described the new Eleventh District as a "tale of disparity, not community," in terms of its "social, political and economic makeup." *Id.* (citing Johnson v. Miller, 864 F. Supp. 1354, 1376-77, 1389-90 (S.D. Ga. 1994). When the Eleventh District lost Macon's black population but picked up Savannah's, it connected "the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County, though 260 miles apart in distance and worlds away in culture." *Id.* Justice Kennedy stated "[t]he populations of the [Eleventh] are centered around four discrete, widely spaced urban centers that have nothing to do with each other and stretch the district hundreds of miles across rural counties and narrow swamp corridors." *Id.* at 2485 (quoting Johnson v. Miller, 864 F. Supp. 1354, 1389 (S.D. Ga. 1994).

21. *Id.*

22. *See* 28 U.S.C. § 2284(a) (1988) ("A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body").

23. *Miller*, 115 S. Ct. at 2485 (citing Johnson v. Miller, 864 F. Supp. 1354, 1392-93 (S. D. Ga. 1994)).

24. *Id.*

The *Miller* plaintiffs filed a notice of appeal to the United States Supreme Court[25] and requested a stay of the district court's judgment. The Supreme Court granted the stay[26] and noted probable jurisdiction.[27]

C. Issue and Holding

In *Miller*, the Court was confronted with the issue of whether the drawing of Georgia's Eleventh District violated the equal protection principles stated in *Shaw II* and, if so, whether the district could be sustained, nonetheless, as narrowly tailored to serve a compelling state interest. *Held*: As race was the predominating factor motivating the Georgia General Assembly's assignment of black voters to the Eleventh District, an equal protection claim was stated. Furthermore, as this racial classification could not withstand strict scrutiny analysis, it is a violation of the Equal Protection Clause.

Part III of this Note contains background information concerning the VRA itself, jurisprudence interpreting that statute, and equal protection apportionment jurisprudence prior to *Miller*. An in-depth analysis of the majority opinion emphasizing the subissues the Court was required to address in holding Georgia's redistricting scheme unconstitutional is contained in Part IV. Parts V and VI analyze the implications of *Miller* and the dilemma *Hays v. Louisiana* raises for the federal courts.

III. BACKGROUND

A. Voting Rights Act of 1965

The Voting Rights Act of 1965 was enacted to "rid the country of racial discrimination in voting."[28] The sections of primary importance to redistricting are Sections 2 and 5. Section 2 establishes a federal statutory voting dilution right of action. Section 5 prescribes the consequences for jurisdictions classified as "covered jurisdictions" under Section 4 of the VRA.

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25. *See* 28 U.S.C. § 1253 (1988) ("Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges").

26. Miller v. Johnson, 115 S. Ct. 36 (1994).

27. Miller v. Johnson, 115 S. Ct. 713 (1995).

28. James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose v. Results Approach from the Voting Rights Act*, 69 Va. L. Rev. 633, 678, 684 (1983) (quoting Beer v. United States, 425 U.S. 130, 140, 96 S. Ct. 1357, 1363 (1976)) (quoting South Carolina v. Katzenbach, 383 U.S. 301, 315, 86 S. Ct. 803, 812 (1966)).

1. VRA Section 2

Section 2 of the VRA of 1965 was enacted by Congress in an effort to make the Fifteenth Amendment's guarantee of the right to vote a reality.[29] Section 2 is the source of a "federal right of action to challenge vote dilution."[30] "Vote dilution"[31] claims make up the typical Section 2 violations.[32] In 1982, Congress substantially amended Section 2 to clarify statutorily that a violation could be shown by discriminatory "results" alone, *i.e.*, no proof of a discriminatory "purpose" was needed.[33] The amendment also added a new subsection to Section 2[34] delineating the legal standards to be used under the "results" test. A violation is established if members of protected groups show they have less opportunity than other members of the electorate to participate in the political

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29. Section 2 of the VRA, *as amended*, 42 U.S.C. § 1973 (a) and (b) (1988).

30. Miller v. Johnson, 115 S. Ct. 2475, 2501 (1995) (Ginsburg, J., dissenting). Section 5 was originally enacted as temporary legislation, but amended in 1982 to remain in effect for an additional 25 years; Section 2, however, is permanent legislation. Also, Section 5 is applicable only to covered jurisdictions under Section 4, whereas Section 2 establishes a standard of liability for both covered or uncovered jurisdictions. Unlike Section 5, Section 2 places the initial burden of proof on the plaintiff, not the State, to show the invalidity of an apportionment plan. 42 U.S.C § 1973 (1988). *See* Blumstein, *supra* note 28, at 704; Thornburgh v. Gingles, 478 U. S. 30, 47, 106 S. Ct. 2752, 2764 (1984); Growe v. Emison, 113 S. Ct. 1075, 1084 (1993).

31. "Vote dilution" refers to "the practice of limiting the ability of [minorities] to convert their voting strength into control of, or at least influence with, elected public officials. This can be done by "cracking" (dividing the minority population so that it constitutes an inconsequential minority in each district) or by "packing" (where excessive "majorities" of minorities are concentrated into a small number of districts thereby leaving the remainder of districts with white majorities). Maschman, *supra* note 2, at 1085 (quoting Richard L. Engstrom, *Racial Vote Dilution: The Concept and the Court, in* The Voting Rights Act: Consequences and Implications 14 (Lorn S. Foster ed., 1985)). *See also* Voinovich v. Quilter, 113 S. Ct. 1149, 1155 (1993). Vote dilution can be accomplished with single-member districts through gerrymandering ("cracking or packing") or with multi-member districts, whereby the minority's voting power is overwhelmed by the sheer numbers of the white majority. Maschman, *supra* note 2, at 1085, nn.64-65.

32. There are *two* kinds of vote dilution claims recognized in the voting rights jurisprudence. The type discussed here is the *statutory* Section 2 vote dilution claim. The second type is a *constitutional* claim under the Equal Protection Clause. However, since the Equal Protection claim requires that the plaintiff prove both discriminatory effect and purpose, the Section 2 claim is much more prevalent. The 1982 amendments to Section 2 require only discriminatory "results" under a "totality of circumstances" analysis.

33. 42 U.S.C. § 1973 (a) and (b) (1988). The 1982 Amendments adding this "results" test were very controversial. Before 1982, a violation under Section 2 could be established by direct or indirect evidence concerning the context, nature, and result of the practice at issue. Blumstein, *supra* note 28, at 689 n.278 (quoting H.R. Rep. No. 227, 97th Cong., 2d Sess. 29 (1982)). A plurality of the Court in Mobile v. Bolden, 446 U.S. 55, 100 S. Ct. 1490 (1980), declared that the establishment of a Section 2 or Fifteenth Amendment violation required proof of *intentional* discrimination. This decision triggered the 1982 Amendments with the express addition of the "results" language and the new subsection (b). See *infra* note 36 for the text of Section 2 both before and after the 1982 Amendments.

34. 42 U.S.C. § 1973 (b) (1988).

process and elect representatives of their choice.[35] This new subsection makes it clear that the "results" test requires an inquiry into the "totality of the circumstances" and that the VRA does not ensure the members of any class proportional representation.[36] In *Thornburgh v. Gingles*,[37] the Court noted that "the essence of a Section 2 claim [after the 1982 amendments] is that a certain electoral law, practice, or structure interacts with certain social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[38]

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35. Section 2 of the VRA, *as amended*, 42 U.S.C. § 1973 (b) (1988).

36. Before the 1982 amendments, Section 2 of the VRA read as follows: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1976) (amended 1982). *See also* Chisom v. Roemer, 501 U.S. 380, 391, 111 S. Ct. 2354, 2362 (1991). *Cf.* U.S. Const. art. XV, § 1. After the amendment, Section 2, 42 U.S.C. § 1973 (1988), reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which *results* in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . as provided in subsection (b) of this section.
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> (b) A violation of subsection (a) of this section is established if, *based on the totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.
>
> *The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.*

(emphasis added except for word "provided").

37. 478 U.S. 30, 106 S. Ct. 2752 (1986).

38. *Id.* at 47, 106 S. Ct. at 2764. *See also* Voinovich v. Quilter, 113 S. Ct. 1149, 1155 (1993). In *Gingles*, the Court noted that the "typical factors" the Senate Judiciary Committee had indicated as probative of a Section 2 violation were relevant. The Court, however, made it clear that there must be a conjunction of certain circumstances. Otherwise, the use of multi-member districts usually would not impede the ability of minority voters to elect representatives of their choice. Generally, a bloc voting majority must usually be able to defeat candidates supported by a *politically cohesive* minority. Thus as for specific elements (often called the "Gingles test"), the minority must be able to prove: (1) it is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) it is politically cohesive; (3) white majority votes sufficiently as a bloc to enable it in the absence of special circumstances to defeat the minority's preferred candidate. In Growe v. Emison, 113 S. Ct. 1075, 1084 (1993), the Court applied these "threshold elements" to a Section 2 dilution "packing" claim involving a single member district. The *Growe* Court emphasized the importance of these elements as the single-member district plans are usually presumed by the Court to be more protective of minority voting rights than the more problematic multi-member districts at issue in Thornburgh v. Gingles.

2. VRA Section 5

Section 5,[39] the "preclearance" provision, requires a covered jurisdiction[40] seeking to "enact or administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force of effect on November 1, 1964,"[41] to institute an action in the United States District Court for the District of Columbia for declaratory judgment or preclearance by the Attorney General of the United States. The district court or Attorney General must find the "qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[42] However, this finding will not serve to "bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure."[43]

Section 5 was a congressional response to a common practice of government entities in some jurisdictions of staying "one step ahead" of the federal courts by passing new discriminatory laws as soon as the old ones had been struck down.[44] This practice was possible because each new law would remain in effect until the Justice Department or a private plaintiff was able to show that the new law was also discriminatory. Under Section 5, however, Congress decided to "shift the advantage . . . to the victim" by "freezing election procedures in covered areas unless the changes [could] be shown to be nondiscriminatory."[45] Thus, the burden was shifted to the covered jurisdictions to show that proposed voting qualifications or prerequisites were nondiscriminatory before they could be enacted.[46]

In *Beer v. United States*,[47] the Court interpreted Section 5's "effect" language as based upon a "nonretrogression principle."[48] Specifically, the Court

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39. *As amended*, 42 U.S.C. § 1973c (1988).

40. A "covered jurisdiction" is one to which Section 4 of the VRA applies because of a history of systematic exclusion of minorities from the electoral process. More specifically, Section 4's triggering formula, adopted in 1965 and extended in 1970, 1975, and 1982, has two parts. First, to be covered, a jurisdiction has to have used a "test or device to screen voters as of the November 1, 1964, 1968, or 1972." Second, a jurisdiction must have low voter registration or turnout—fewer than 50% of age-eligible citizens registered as of November 1, 1964, 1968, or 1972 respectively, or fewer than 50% of such persons actually voting in the 1964, 1968 or 1972 presidential elections. Section 4 of VRA (1965), *as amended*, 42 U.S.C. § 1973b(b) (1988).

41. *Id.*

42. *Id.* The language of Section 5 that is most often at issue in apportionment legislation is "standard, practice, or procedure." *See* Allen v. State Board of Elections, 393 U.S. 544, 566, 89 S. Ct. 817, 832 (1969) (holding Section 5 applied to "any state enactment that altered the election law of a covered State even in a minor way").

43. Section 5 of the VRA, *as amended*, 42 U.S.C. § 1973c (1988).

44. Beer v. United States, 425 U.S. 130, 140, 96 S. Ct. 1357, 1363 (1976).

45. *Id.*

46. Blumstein, *supra* note 28, at 684 n.7.

47. 425 U.S. 130, 96 S. Ct. 1357 (1976).

48. Simply stated, "nonretrogression" means a change may not worsen the position of minorities in terms of voting strength. Significantly, the *Beer* Court's choice of a nonretrogression

stated "the purpose of Section 5 has always been to insure that no voting procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral *franchise*."[49] The language of Section 5, however, clearly indicates a violation may occur if legislation has a discriminatory "purpose or effect" on account of race or color.[50] Thus, even without retrogression, a covered jurisdiction will violate Section 5 (and not receive preclearance) if an impermissible racial purpose is behind the electoral change.

*B. Pre-*Miller *Equal Protection Jurisprudence*

1. United Jewish Organization of Williamsburgh v. Carey[51]

The State of New York's 1972 reapportionment plan for its state senate and assembly districts was rejected by the United States Attorney General under Section 5 of the VRA. In 1974, a revised plan was submitted which did not change the number of majority-minority legislative districts, but instead sought to increase the percentages of the nonwhite majorities in the existing majority-minority districts. To do this, a portion of the white population in Kings County was reassigned to different assembly and senate districts. As a result, a community of Hasidic Jews which had previously been in one district was split between two adjoining districts. The plaintiffs, Hasidic Jews, sued under the Fourteenth and Fifteenth Amendments, claiming the plan would "dilute the value of their franchise by 'halving its effectiveness.'"[52]

A plurality of the Court,[53] composed of Justices White, Stevens, Brennan, and Blackmun, found the Fourteenth and Fifteenth Amendment rights of the plaintiffs had not been violated. The plurality found the plaintiffs had not shown that the State had done anything other than what it was authorized to do by Section 5, *i.e.*, comply with the Attorney General's position and the nonretrogres-

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standard rejected Justice White's dissenting argument for a standard which would give minorities the chance to achieve proportional representation ("representation roughly proportionate to the Negro population"). *Beer*, 425 U.S. at 143-44, 96 S. Ct. at 1365 (White, J. dissenting).

49. *Id.* at 141 (emphasis added). In City of Rome v. United States, 446 U.S. 156, 185, 100 S. Ct. 1548, 1566 (1980), the Court substituted the word "process" for "franchise."

50. Section 5 of the VRA (1965), *as amended*, 42 U.S.C § 1973c (1988) (emphasis added). *See also* City of Richmond v. United States, 422 U.S. 358, 378, 95 S. Ct. 2296, 2307 (1975) ("An official action . . . taken for the purpose of discriminating against [minorities] on account of their race has no legitimacy at all under our Constitution or under the statute [VRA]. [Official actions] animated by such a purpose have no credentials whatsoever.").

51. 430 U.S. 144, 97 S. Ct. 996 (1977).

52. *United Jewish Organization of Williamsburgh*, 430 U.S. at 152-53, 97 S. Ct. at 1003 (hereinafter *UJO*).

53. The composition of the Court at the time of the *UJO* decision was: Chief Justice Burger and Justices Brennan, Stewart, White, Marshall, Blackmun, Rehnquist, Powell, Stevens. Justice Marshall did not take part in this decision, and Chief Justice Burger was the sole dissenter; however, there was no majority opinion for the Court.

sion principle. At a minimum, the plaintiffs would have to have shown an increase in nonwhite voting strength as a result of the 1974 plan in order to realistically claim that white voting strength had been diluted. A second plurality, composed of Justices White, Stevens, and Rehnquist, indicated that so long as the white population as a whole was given fair representation, the plan did not violate the constitution. These justices reasoned 70% of the districts in Kings County had white majorities while the county had only a 65% white population. Finally, two justices, Stewart and Powell, concurred in the result stating the plan did not violate the constitution because the plaintiffs had not shown the plan had either the purpose or effect of discriminating against them based on their race.

2. Shaw v. Reno

In *Shaw v. Reno*,[54] the Court gave the Equal Protection Clause a new twist with regard to the drawing of voting district lines.

Although the actual facts of *Shaw II* are quite detailed, a simple summary will suffice. As a result of the 1990 census, North Carolina gained an additional seat in the United States House of Representatives. Thus, reapportionment was required. North Carolina submitted its plan for preclearance to the United States Attorney General as provided in Section 5 of the VRA. The Attorney General refused to preclear the plan because it only had one minority-majority district. The Attorney General maintained additional black voting strength should be recognized. North Carolina submitted a revised plan containing a second majority-minority district. This district was "highly unusual"—it was approximately 160 miles long, for much of its length no wider than the interstate highway corridor, cut five of the ten counties into three different districts, and even divided towns.[55] The Attorney General, nevertheless, cleared this plan.[56]

Suit was filed by five white North Carolina residents against various state officials[57] and several federal officials including the Attorney General. A

54. 113 S. Ct. 2816 (1993) (hereinafter *Shaw II*). For more in-depth analyses of the *Shaw II* opinion, see Melissa E. Austin, Shaw v. Reno*: A Beginning for Color-Blind Reapportionment*, 2 Geo. Mason Independent L. Rev. 495 (1994), Elizabeth Bachman, *Shooting Down the Phoenix:* Shaw v. Reno *and the Controversy over Race-conscious Districting*, 22 Fordham Urb. L. J. 153 (1994), Maschman, *supra* note 2, Michael J. Moffatt, *The Death of the Voting Rights Act or An Exercise in Geometry?*—Shaw v. Reno *Provides More Questions Than Answers*, 22 Pepp. L. Rev. 727 (1995), Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts, and Voting Rights" Evaluating Election-District Appearances after* Shaw v. Reno, 92 Mich. L. Rev. 483 (1993), Tricia A. Martinez, *When Appearance Matters: Reapportionment under the Voting Rights Act and* Shaw v. Reno, 54 La. L. Rev. 1335 (1994).

55. *See Shaw II*, 113 S. Ct. at 2820-2821.

56. *Id.* at 2821.

57. State defendants included the Governor of North Carolina, the Secretary of State, the Speaker of the North Carolina House of Representatives, and members of the North Carolina State Board of Elections. *Shaw II*, 113 S. Ct. at 2821.

majority of the three judge district court held the plaintiffs' claim was barred by *United Jewish Organizations of Williamsburgh v. Carey*.[58] The district court held a claim could only be stated if the redistricting scheme was adopted "with the *purpose* and *effect* of discriminating against the white voters . . . on account of their race."[59] In *UJO*, the district court felt the purposes of favoring minority voters and complying with the VRA were not discriminatory in the constitutional sense and that majority-minority districts have an impermissibly discriminatory effect "*only when they unfairly dilute or cancel out white voting strength*."[60] Because the state's purpose was to comply with the VRA, and as proportional underrepresentation of white voters did not result from the plan, the district court concluded no claim was stated and dismissed the case.[61]

The Supreme Court reversed, holding the plaintiff-appellants had stated an "analytically distinct"[62] claim under the Equal Protection Clause. The Court carefully explained the nature of the claim, indicating it was crucial to the case's resolution.[63] The Court emphasized the plaintiffs had not alleged an Equal Protection vote dilution claim but instead had claimed that North Carolina had engaged in "unconstitutional racial gerrymandering."[64] While the Equal Protection Clause had provided minorities a vote dilution claim,[65] the Court recognized the equal protection principles[66] that govern "normal," *i.e.*, non-

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58. 430 U.S. 144, 97 S. Ct. 996 (1977).

59. *Shaw II*, 113 S. Ct. at 2822 (quoting Shaw v. Reno, 808 F. Supp. 461, 472 (E.D.N.C. 1992) (hereinafter *Shaw I*)) (emphasis added).

60. *Id.* (quoting *Shaw I*, 808 F. Supp. at 472-73) (emphasis added).

61. *Id.*

62. Miller v. Johnson, 115 S. Ct. 2475, 2485 (1995), *Shaw II*, 113 S. Ct. 2816, 2828 (1993). Justice O'Connor writing for the majority in *Shaw II*, maintained that the claim that is "recognized" in *Shaw II* really is not new. *See Shaw II*, 113 S. Ct. at 2825.

63. Specifically, the Court emphasized that because this equal protection claim concerned classifications based on race, special harms are threatened that are not present in vote dilution cases like *UJO*; therefore, a different analysis is warranted. *Shaw II*, 113 S. Ct. at 2828. *See also* Miller v. Johnson, 115 S. Ct. 2475, 2485 (1995) ("*Shaw* recognized a claim 'analytically distinct' from a vote dilution claim."). The essence of the *Shaw II* claim is that the plan in question could not rationally be understood as anything other than an effort to separate citizens into separate voting districts on the basis of race without sufficient justification. *Shaw II*, 113 S. Ct. at 2828.

64. *Shaw II*, 113 S. Ct. at 2824.

65. *See supra* note 32.

66. These "equal protection principles" applicable to "non-apportionment" state legislation are not the well established principles they may appear to be. Although in 1995 the Court recognized the "central mandate [of the Equal Protection Clause] is racial neutrality in [all] governmental decisionmaking," this has not always been so apparent to the Court. Miller v. Johnson, 115 S. Ct. 2475, 2482 (1995). Only recently, in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995), did the Court hold "all racial classifications, imposed by whatever *federal*, state or local actor, must be analyzed by a reviewing court under strict scrutiny." (emphasis added). "In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling state interests." *Id.* In Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564-65, 110 S. Ct. 2997, 3008-09 (1990), the Court held "benign" *federal* racial classifications need only to satisfy "intermediate scrutiny." (emphasis added). *Metro Broadcasting* was a departure in Equal Protection

apportionment state legislation, also "govern a State's drawing of congressional districts, though . . . application of these principles to electoral districting is a most delicate task."[67] Furthermore, the plaintiffs claimed this "deliberate segregation of voters into separate districts on the basis of race" for voting purposes "without regard to traditional districting principles and without sufficient compelling justification" violated their right to participate in a "color-blind" electoral process.[68]

Because this equal protection claim was different from an equal protection vote dilution claim, the Court stated the plaintiff did not have the burden of proving "purpose and effect of diluting a racial group's voting strength."[69] Justice O'Connor, writing for the majority, held *UJO* was not controlling.[70] Applying these basic principles in the voting rights context, the Court held "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race' . . . demands the same close scrutiny [the Court] gives other state laws that classify citizens by race."[71] Finally, the *Shaw II* Court emphasized it was not holding that "race-conscious redistricting . . . is . . . always unconstitutional."[72] Under *Shaw II*'s principles, an equal protection claim is stated only when a plaintiff shows that voters were segregated into

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jurisprudence that had been consistent since Bolling v. Sharpe, 347 U.S. 497, 500, 74 S. Ct. 693, 695 (1954), in which the Court stated "it would be unthinkable that the same Constitution would impose a lesser duty [than that on the states] on the federal government."

67. City of Richmond v. Croson, 488 U. S. 469, 493-494, 100 S. Ct. 706, 721-22 (1989), finally settled for *state* and *local* governments the equal protection principles *Adarand* clarified regarding *federal* racial classifications. That Court held "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," and that the single standard of review for racial classifications should be strict scrutiny. This statement by the Court in *Croson*, like that in *Adarand*, did not come about easily. In three cases beginning in 1978 until *Croson* in 1989, only a plurality of the Court would agree on these concepts. *See* Regents of University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 (1978); Fullilove v. Klutznick, 448 U.S. 448, 100 S. Ct. 2758 (1980); Wygant v. Jackson Board of Education, 476 U.S. 267, 106 S. Ct. 1842 (1986). The common obstacle in these three cases was the view held by a plurality of the Court that remedial legislation, *i.e.*, legislation that operates against a group that historically has *not* been subject to governmental discrimination, should only be subject to intermediate scrutiny. *See Bakke*, 438 U.S. at 359, 98 S. Ct. at 2783; *Fullilove*, 448 U.S. at 518-19, 100 S. Ct. at 2795-96; *Wygant*, 476 U.S. at 301-02, 106 S. Ct. at 1861. Miller v. Johnson, 115 S. Ct. 2475, 2483 (1995).

68. *Shaw II*, 113 S. Ct. at 2824.

69. *Id.* at 2828-29.

70. The Court held *UJO* was not binding precedent even though the plaintiffs in that case were white and re-apportionment occurred. While members of the dissent disagreed, the majority distinguished *UJO* on the bases that (1) the plaintiffs in *UJO* had alleged a vote dilution claim and (2) the *UJO* plaintiffs "did not allege that the plan on its face was so highly irregular that it rationally could be understood as an effort to segregate voters by race" as the *Shaw* plaintiffs did. *Shaw II*, 113 S. Ct. at 2829.

71. *Shaw II*, 113 S. Ct. at 2825 (quoting Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266, 97 S. Ct. 555, 563 (1977)).

72. *Id.* at 2824.

voting districts *solely* because of race.[73] Once a claim is established, the plan must be narrowly tailored to meet a compelling state interest to be constitutional.[74] The Court remanded the case to the district court to decide whether the claim of racial gerrymandering remained uncontradicted, and if so, whether it withstood strict scrutiny analysis.[75]

IV. *MILLER V. JOHNSON*: ANALYSIS OF THE COURT'S RATIONALE

A. Is "Bizarreness" a Threshold Determination?

The Court in *Miller* addressed several subissues in deciding whether Georgia's redistricting legislation violated the Equal Protection Clause. The first was presented by those defending the plan. Appellants did not contest the district court's finding that there was overwhelming evidence of an intent to racially gerrymander and, thus, that race was the "predominant, overriding factor" in the drawing of the Eleventh District.[76] The appellants argued, however, that this evidence was irrelevant in establishing a *Shaw II* claim *unless* the plaintiff could establish as a threshold matter that "the district's shape is so bizarre that it is unexplainable on grounds other than race."[77]

The Court rejected this contention, stating this was a misinterpretation of *Shaw II* and the equal protection principles applied therein. The Court explained "bizarreness" was not a *requirement* for a racial gerrymandering claim as recognized in *Shaw II*. Evidence other than bizarreness could be used to show race-based redistricting. The shape of a district is, nevertheless, relevant because it may be "persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines."[78]

B. Do "Normal" Equal Protection Standards Regarding Race Apply to Apportionment Legislation?

Alternatively, appellants argued the general prohibitions of the Equal Protection Clause as to race-based decision-making could not apply in the districting context "because redistricting by definition involves racial considerations."[79] This same argument had been raised and rejected in *Shaw II*.[80] The

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73. *Id.*
74. *Id.* at 2832.
75. *Id.*
76. Miller v. Johnson, 115 S. Ct. 2475, 2485 (1995) (quoting Johnson v. Miller, 864 F. Supp. 1354, 1374 (S.D. Ga. 1994)).
77. *Miller*, 115 S. Ct. at 2485.
78. *Id.* at 2486.
79. *Id.* at 2487.
80. *Shaw II*, 113 S. Ct. 2816, 2845-48 (1993) (Souter, J., dissenting).

Court again firmly rejected this idea as founded on the very stereotypical assumptions forbidden by the Equal Protection Clause itself. Justice Kennedy acknowledged redistricting usually involves "various interests compet[ing] for recognition, but [that] it d[id] not follow from this that individuals of the same race share a single political interest."[81] The Court explained the "same race, thus same interest" theory is based on the demeaning idea that minority racial groups have "minority views" separate and distinct from those of other citizens. This theory is "the precise use of race as a proxy the Constitution forbids."[82] The Court concluded a redistricting legislature may always be *aware* of racial demographics, but that it does not follow that race should be the predominate consideration.[83]

C. *How May a Plaintiff Establish a Racial Gerrymander?*

A *Shaw II* racial gerrymander equal protection claim requires a plaintiff prove district assignments were based upon race. In *Miller*, Justice Kennedy indicated, as a necessary prerequisite to suit, to have a discriminatory purpose, the actors must be motivated by race not just be aware of race.[84] Specifically, it must be shown that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[85] By using *direct* evidence of legislative purpose or *circumstantial* evidence consisting of a district's shape and demographics, a plaintiff must show that in redistricting the legislature "subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions, or communities defined by actual shared interests, to racial considerations."[86] The Court explained, however, that where these traditional race-neutral considerations are not *subordinated* to race, a state can defeat a racial gerrymandering claim.

Applying this test to the Georgia plan, the Court found the district court's finding that race was the predominant factor motivating the General Assembly was not clearly erroneous. In fact, the Court maintained this finding seemed unavoidable.[87] While the Court found the circumstantial evidence of race-based district-

81. *Miller*, 115 S. Ct. at 2487.

82. *Id.*

83. *Id.* at 2488.

84. This implies a decision was made at least "because of" not merely "in spite of" the consequences. *Id.* Also, as the Court noted, this evidentiary burden is especially difficult in that until a plaintiff makes a sufficient showing, a state legislature is entitled to a presumption of good-faith. *Id.*

85. *Id.*

86. *Id.* (quoting *Shaw II*, 113 S. Ct. 2820, 2827 (1993)).

87. "On this record, we fail to see how the District Court could have reached any conclusion other than that race was the predominant factor in drawing Georgia's Eleventh District; and in any event, we conclude the court's finding is not clearly erroneous." *Id.* at 2489.

ing quite compelling,[88] it did not decide whether this evidence alone was enough to establish a *Shaw II* claim. "Considerable direct evidence,"[89] however, made it clear that the overriding motivation of the General Assembly was to create a third majority-minority district by assigning black populations to the Eleventh District.

The *Miller* Court concluded the district court had been correct in rejecting the traditional race-neutral defenses raised by the State.[90] The Court stated the State's "mere recitation of purported 'communities of interest'" could not save the legislation.[91] Justice Kennedy emphasized that while a state *can* recognize communities with a particular racial makeup, the state action *must* be directed at an *actual*, common interest other than race.[92]

D. Could the Georgia Plan Withstand Strict Scrutiny Analysis?

In *Shaw II*, the Court held only that the plaintiffs had stated an equal protection claim and remanded the case, directing the district court to apply strict scrutiny standards to the redistricting legislation. Following *Shaw II*, the district court in *Miller* applied the strict scrutiny analysis to the Georgia plan and found the Eleventh District to be unconstitutional. Thus, it was appropriate for the Supreme Court in *Miller* to review the district court's decision on the merits of the case. For the Georgia legislation to be held constitutional, the State had to demonstrate that its legislation was narrowly tailored to further a compelling state interest. Ultimately, the Supreme Court concluded Georgia had failed to sustain this burden.

The Court first considered what compelling state interests might be furthered by Georgia's redistricting legislation. While the Court recognized that there is a "significant state interest in eradicating the effects of past racial discrimination,"[93]

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88. The district court found it "exceedingly obvious" from the shape of the Eleventh District together with relevant racial demographics that the drawing of narrow land bridges to incorporate within the district outlying appendages containing nearly 80% of the district's total black population was a deliberate attempt to bring black populations into the district. *Id.* (quoting Johnson v. Miller, 864 F. Supp. 1354, 1374-76 (S.D. Ga. 1994)). The *Miller* majority noted that while the Eleventh District's shape might not be "bizarre on its face," when considered in conjunction with its racial and population densities, the racial gerrymander seen by the district court became "much clearer." *Id.*

89. The direct evidence relied on by the Court included: (1) the Justice Department's objection letters and the three preclearance rounds in general, (2) the testimony of Linda Herschel, the operator of the reapportionment computer, (3) the State's own concessions evidenced in the findings of the district court and its brief to the Supreme Court. *Id.*

90. A statement by a Georgia state official indicating that creating a third majority-minority district would require violation of compactness and contiguity standards was strong evidence that racial objectives subordinated any of these race-neutral considerations. *Id.* at 2490.

91. *Id.*

92. "[W]here the State *assumes* from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates,'" it partakes in racial gerrymandering that is in conflict with equal protection mandates. *Id.*

93. *Id. See also* United States v. Paradise, 480 U.S. 149, 167, 107 S. Ct. 1053, 1064 (1987) ("The Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor.").

it concluded this was not Georgia's true intention. Instead, the Court found the true reason for the creation of the Eleventh District was to satisfy the Justice Department's preclearance demands under Section 5 of the VRA.

In determining whether compliance with preclearance demands was a valid, compelling interest, the Court stated that regardless of "[w]hether in some cases, compliance with the [substantive requirements of Section 5 of the] Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination, it cannot do so here."[94] The Court explained "compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district is not *reasonably necessary* under a *constitutional reading and application* of those laws."[95] Therefore, the Georgia plan was not required by the VRA under a correct reading of the substantive provisions of the statute.

The Court found the *Justice Department*, not the *VRA* itself, had, in effect, required the Georgia plan as a prerequisite for *preclearance* under its "black-maximization" policy. The *VRA* did not require the redrawing of the Eleventh District because there was no reasonable basis to believe that the earlier plans submitted by Georgia violated Section 5.[96] "Wherever a plan is ameliorative, [*i.e.*, where the number of majority-minority districts is increased] it cannot violate Section 5 unless the new apportionment itself so discriminates on the basis of race or color so as to violate the Constitution."[97] Both of Georgia's earlier plans had increased the number of majority-minority districts from one to two. Thus, they were ameliorative and not in violation of the nonretrogression principle.[98]

The second compelling interest possibility addressed by the Court involved compliance with the demands of the *Justice Department* under the "preclearance" authority given the Attorney General in Section 5 of the VRA. The Court rejected the contention that the preclearance demands of the Justice Department should be considered automatic compelling interests without any judicial review, stating "[w]e do not accept the contention that the State has a compelling interest in

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94. *Miller*, 115 S. Ct. at 2490-91.

95. *Id.* at 2491 (emphasis added). Thus, the Court did not reach a decision on the compelling interest issue. Instead, it struck down the racial classification on the basis of the narrowly tailored aspect of strict scrutiny not being satisfied.

96. *Id.* at 2492. Whether the substantive provisions of Section 2 may have required the Georgia plan was not an issue addressed by the Court.

97. *Id.* (quoting Beer v. United States, 42 U.S. 130, 141, 96 S. Ct. 1357, 1363 (1976).

98. The Government argued that Georgia in the first two plans had failed to prove a "nondiscriminatory purpose" for refusing to create a third majority-minority district. The Court, while recognizing Section 5 does include a "purpose" element, was unconvinced and stated it was clear from the evidence presented that the Justice Department's Section 5 objections were motivated by its policy of maximizing majority-minority districts wherever possible. Furthermore, the Court found Georgia had given an adequate nondiscriminatory explanation for its plan. Justice Kennedy explained that when a state chooses to follow other districting principles other than the creation of a maximum number of majority-minority districts, there is no automatic *inference* of discrimination on the basis of race or color.

complying with whatever preclearance mandates the Justice Department issues."[99] Justice Kennedy reasoned presumptive skepticism of all racial classifications[100] requires the judiciary to partake in an independent judicial strict scrutiny analysis. Furthermore, he maintained it would be inappropriate for a court engaging in such constitutional scrutiny to give the Justice Department's interpretation of the VRA any deference at all.

V. IMPLICATIONS OF *MILLER V. JOHNSON*

A. Criticisms of the Opinion: The Dissents

1. Justice Stevens' Dissent

In *Miller*, Justice Stevens strongly disagreed with the concept of a "racial gerrymander" claim (a "*Shaw II* claim") existing under the Equal Protection Clause. He argued a plaintiff who cannot prove the elements of a vote dilution claim has not suffered a "legally cognizable injury."[101] However, even *assuming* there is merit to the concept of an equal protection racial gerrymander claim, Justice Stevens did not believe the plaintiffs in *Miller* had suffered the injuries the majority attributed to them.

These injuries are "representational harms."[102] The *Shaw II* Court explained a representational harm arises "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group [because] elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole."[103] Justice Stevens stated this approach was inherently flawed. He argued it is irrelevant that this belief results from legislative action because these harms can only result if that belief becomes a reality, *i.e.*, if all or most of black voters support the same candidate and if the successful candidate ignores the interest of white constituents. Based on this conclusion, Justice Stevens maintained the plaintiffs' standing depends on the very premise that the majority rejects—that voters of the same race "'think alike, share the same political interests and will prefer the same candidates at the polls.'"[104]

Perhaps Justice Stevens misinterpreted Justice Kennedy's argument. The constitutional problem arises when there is an *assumption* made by the government based solely on race.[105] These impermissible assumptions are manifested when

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99. *Id.* at 2491.

100. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2110-11 (1995).

101. *Miller*, 115 S. Ct. at 2497.

102. *Hays III*, 115 S. Ct. 2431, 2485 (1995).

103. *Shaw II*, 113 S. Ct. 2816, 2827 (1993).

104. *Miller*, 115 S. Ct. at 2498 (Stevens, J., dissenting).

105. A careful reading of the majority opinion will show Justice Stevens quoted the majority out of context. *See Miller*, 115 S. Ct. at 2490. "But where the *State assumes* from a group of voters' race

the government assigns voters to districts because of their race. Justice Douglas succinctly stated in his dissent in *Wright v. Rockefeller*:[106] "Of course race, like religion, plays an important role in the choices which individual voters make . . . [b]ut government has no business designing electoral districts along racial or religious lines."[107]

In a final attack, Justice Stevens criticized the majority for analogizing voting district assignments based primarily on race to the injuries that black Americans suffered during the years of segregation. Justice Stevens emphasized traditional segregation was an attempt to bar blacks from joining whites in whatever activity was involved. The Georgia districting plan instead attempted to promote diversity and tolerance by increasing the likelihood that a larger number of black representatives would be able to participate in legislative debate. The majority emphasized that "forced diversity," however, usually cannot be legitimate; nor is the Nation's goal of having race "not matter" furthered by implying that black citizens require or would automatically be best served by a black representative.

2. Justice Ginsburg's Dissent

Justice Ginsburg attacked the majority's conclusion that although recognition of actual communities of interest can be a legitimate districting principle, the "political, social and economic interests within the Eleventh District's black population" were "fractured," not common.[108] Justice Ginsburg argued ethnicity itself can tie people together creating a common bond regardless of religious or economic differences. In reality, this may in some circumstances be true, but it is constitutionally inappropriate for a legislature to assume it is so. Again, Justice Douglas' admonition in *Wright*[109] against even well-intentioned racial gerrymandering is relevant.

B. The Impact of Miller v. Johnson

1. Threshold Requirements and Plaintiff's Burden of Proof

The *Miller* decision has clearly changed certain issues and concepts while leaving others the same or uncertain. Although the Court indicated its conclusion

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that they 'think alike, share the same political interests, and will prefer the same candidates at the polls,' it engages in racial stereotyping at odds with equal protection mandates." *Id.* This statement follows the Court's discussion indicating a state could legitimately recognize through district lines a community with a particular racial makeup as long as that action by the state was directed at "some common thread of relevant interests." It appears the point Justice Kennedy was making is that a state may recognize actual common interests of a group of people who coincidentally share the same race, but it is wrong for a state to *assume* that a group of people of the same race will share an interest *because* of their race.

106. 376 U.S. 52, 84 S. Ct. 603 (1964) (Douglas, J., dissenting).

107. *Id.* at 66, 84 S. Ct. at 611.

108. *Miller*, 115 S. Ct. at 2488.

109. *See supra* text accompanying note 105.

that "bizarreness" was not a threshold requirement was only "logical" from its opinion in *Shaw II*, this was not so clear to many.[110] In rejecting "bizarreness" as a threshold requirement, the *Miller* Court, nevertheless, maintained a district's shape may be "persuasive circumstantial evidence" of the legislature's intent.[111] The Court ultimately, however, based its holding on the direct evidence as to this intent, though it found the district court's finding as to the shape and demographics of the Eleventh District to be "quite compelling."[112] The Court specifically listed the *direct* evidence relied upon for its holding, but did not indicate what *circumstantial* evidence would be sufficient to state a claim. Unfortunately, the "standard" enunciated in *Shaw II* offers no practical assistance either.[113]

Although the Court did not expressly announce it was creating a new "test," it, in effect, did so by establishing the "race as a predominate factor" standard. This standard requires a plaintiff to show race was the predominant overriding factor in the legislature's redistricting plan, *i.e.*, that traditional race-neutral districting principles were subordinated to racial considerations.[114] The Court's language in *Shaw II* suggested an equal protection claim arises when race is the *only* factor considered in districting assignments.[115] In doing this, the *Miller* Court may have answered a question *Shaw II* left open. The Court in *Shaw II* stated "we express no view as to whether 'the intentional creation of majority-minority districts without more' always gives rise to an equal protection claim."[116] Under the *Miller* test, if this intention is the *predominate motivation* of a legislature, it seems that a claim would be stated.

Even with the *Miller* Court's effort to clarify a plaintiff's burden of proof, questions still remain. First, must these districting principles actually be "traditional in fact" in a state's history, or is it adequate that they are merely only race-neutral?[117] A second question is whether "incumbency protection" can be a

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110. *Miller*, 115 S. Ct. at 2486. A close reading of the opinion in *Shaw II* does indicate this conclusion is "logical." *See Shaw II*, 113 S. Ct. 2816 (1993) ("[I]t seems clear . . . proof *sometimes* will not be difficult at all. *In some exceptional cases*, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as an effort to 'segregate[e] . . . voters' on the basis of race." *Id.* at 2827.) (emphasis added). Commentators who did not see the "logic" of this conclusion include Pildes and Niemi, *supra* note 53, at 484, 495 (1993) and Maschman, *supra* note 2, at 1091 n.106 (discussing Justice Souter's dissent in *Shaw II*, 113 S. Ct. at 2848).

111. *Miller*, 115 S. Ct. at 2486.

112. *Id.* at 2489.

113. *See Shaw II*, 113 S. Ct. at 2832 (an "apportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race").

114. *Miller*, 115 S. Ct. at 2488.

115. *See Shaw II*, 113 S. Ct. at 2824 ("redistricting legislation . . . [that] rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles").

116. *Id.* at 2828.

117. The United States, as *amicus curiae* in oral arguments before the United States Supreme Court regarding *Shaw IV* argued these districting principles need only be race-neutral. There it was argued recent urban problems motivated the legislature to create an urban district even though urban

traditional districting principle. In the *Shaw IV* oral arguments before the United States Supreme Court, one Justice implied that if incumbent protection is shown to be in fact a traditional districting principle, it should be addressed in deciding if race was the predominate motivation of a legislature.[118] In the Texas case, *Vera v. Richards*, the issue was addressed by the district court and in oral arguments.[119] In oral arguments, the state and federal appellants contended that the district court erred by failing to recognize incumbent protection as a traditional districting principle. The appellants argued that if the district court had done this, no equal protection claim would be stated, thereby making strict scrutiny unnecessary.[120]

2. The Role of the Judiciary

In light of the new "race as a predominate factor" standard established by *Miller* and Justice Kennedy's emphatic rejection of the Justice Department's preclearance requirements as an automatic compelling interest,[121] it appears increased involvement by the judiciary in the apportionment process is inevitable.[122] The threat of increased judicial involvement, however, is lessened somewhat by the majority's affirmation of the presumption of good faith enjoyed

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districts clearly had not been a traditional districting factor. The Government's position is that tradition is only a good way to help prove that the districting principle was race neutral, but is not itself required. U.S. Oral. Arg. at * 29, Shaw v. Hunt, Nos. 94-923, 94-924, 1995 W.L. 729891 (December 5, 1995) (hereinafter *Shaw IV* Arguments).

118. *Id.* at *14.

119. *Vera I*, 861 F. Supp. 1304 (S.D. Tex. 1994), *Vera II*, 115 S. Ct. 2639 (1995).

120. The questions and answers in oral argument indicate confusion as to the district court's true classification of incumbent protection. One Justice suggested that the district court's statements may be ambiguous thus making remand proper for clarification. U.S. Oral. Arg. at *15, Bush v. Vera, Nos. 94-988, 94-806, 94-805, 1995 W.L. 729899 (December 5, 1995) (hereinafter *Vera II* Arguments). The district court stated "[i]ncumbent protection is a valid state interest only to the extent that it is not a pretext for unconstitutional racial gerrymandering." Vera v. Richards, 861 F. Supp. 1304, 1336 (S.D. Tex. 1994) (*Vera I*). Furthermore, "racial data were an omnipresent ingredient." *Id.* To the extent incumbent protection motivated the legislature, the district court concluded, it was not a "countervailing force against racial gerrymandering." In fact, "racial gerrymandering was an essential part of the incumbency protection." *Id.* at 1339. Presumably incumbent protection may be found to be a traditional districting principle, but as with any of the others, a problem arises when the traditional criteria itself depends on race. *See Vera II* Arguments at *18. *Miller* is quite emphatic that these districting principles must be race-neutral.

121. *Miller*, 115 S. Ct. 2475, 2491 (1995). As one of the purposes of this note is to "point out" the changes *Miller* has made in relation to past jurisprudence, it is interesting to compare the position of Justice Kennedy in *Miller* with that of Justice Brennan's concurrence in *UJO*. In *Miller*, Justice Kennedy is unwilling even to "accord deference to the Justice Department's interpretation of the [Voting Rights Act.]" *Id.* Justice Brennan, however, was willing to concur in *UJO* in large part because he was "prepared to accord considerable deference to the judgment of the Attorney General that a particular districting scheme complies with the remedial objectives furthered by the Voting Rights Act." *UJO*, 430 U.S. 144, 174, 97 S. Ct. 996, 1014 (1977) (Brennan, J. concurring).

122. Justice Ginsburg, dissenting, maintained this expanded judicial role is "unwarranted." *Miller*, 115 S. Ct. at 2507.

by a state legislature.[123] Also, Justice O'Connor, concurring, emphasized that the standard implemented by the majority does not "throw the vast majority of the Nation's 435 congressional districts into doubt, where presumably the States have drawn the boundaries in accordance with their customary districting principles . . . even though race may well have been considered in the redistricting process."[124]

Other parts of Justice O'Connor's concurrence suggest an additional limit on judicial involvement in apportionment. She explained "application of the Court's standard helps achieve *Shaw II*'s basic objective of making *extreme* instances of gerrymandering subject to meaningful judicial review."[125] "To invoke strict scrutiny, a plaintiff must show that the State has relied on race in *substantial disregard* of customary and traditional districting principles."[126] Justice O'Connor's views are particularly significant in light of the fact that she provided the "swing vote" with regard to the Georgia plan. In *Miller*, the Court found that the true goal of the General Assembly was to gain preclearance which necessitated compliance with a "max-black" districting plan.[127] Clearly, Georgia was an extreme case. A valid question arises as to how extreme a case must be to meet Justice O'Connor's threshold requirements. In other words, in a case where the true intent of the legislature is less clear, Justice O'Connor may not be satisfied that traditional districting principles have been "substantially disregarded" and, therefore, rely on her view that most districts are presumably legitimate and not instances of "extreme racial gerrymanders."

3. *The "Racial Gerrymander" Equal Protection Claim: Its Definition and Rationale*

The *Shaw II* Court, quoting from *Davis v. Bandemer*,[128] defined a racial gerrymander as "the deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes." Thus, Justice Stevens' argument that *Shaw II* misapplied the term "gerrymander" was again rejected in *Miller*. In his dissent, Justice Stevens insisted a gerrymander exists only when there is a "grotesque line-drawing by a *dominant* group to maintain or enhance its political power at a *minority's* expense."[129] Justice Stevens also maintained that while the Constitution does not mandate "proportional representation," it does allow a state to adopt a policy that promotes "fair representation of different groups."[130] *Miller* maintained the

123. *Id.* at 2488.
124. *Id.* at 2497 (O'Connor, J., concurring).
125. *Id.* (emphasis added).
126. *Id.* (emphasis added).
127. *Id.* at 2485.
128. 478 U.S. 109, 165, 106 S. Ct. 2797, 2826 (1986).
129. *Miller*, 115 S. Ct. at 2497 (Stevens, J., dissenting) (emphasis added).
130. *Id.* at 2499 (Stevens, J., dissenting). It is important to note that the case Justice Stevens quoted in support of this contention involved a plan by a state legislature that would give proportional legislation to the major *political parties*, thus being distinguishable. Gaffney v. Cummings, 412 U.S. 735, 93 S. Ct. 2321 (1973).

existence of the racial gerrymander equal protection claim first recognized in *Shaw II* as "analytically distinct" from the traditional equal protection vote dilution claim. The *Miller* majority rejected Justice Stevens' argument that there is no "injury" shown unless dilution is proven.

Often called the "*Shaw* claim," this claim is justified by the unique problems created when people who are widely separated—geographically, economically and politically—and who have nothing in common but their race are joined purposefully in an electoral district. In *Shaw II*, Justice O'Connor stated this "bears an uncomfortable resemblance to political apartheid."[131] The *Shaw II* Court also emphasized that the special dangers associated with racial gerrymandering exist even when it is undertaken for a remedial purpose. According to that Court, racial gerrymandering "may balkanize us into competing racial factions [and] threatens to carry us further away from the goal of a political system in which race no longer matters—a goal the Fourteenth and Fifteenth Amendment embody and to which the Nation continues to aspire."[132]

The *Miller* Court affirmed these contentions, adding additional justification for requiring strict scrutiny analysis of any race-based districting whether remedial or otherwise and without regard to which race might be impacted by the assignment. Quoting Justice O'Connor's dissent in *Metro Broadcasting, Inc. v FCC*,[133] Justice Kennedy stated the Equal Protection Clause orders governmental entities to treat "citizens" as "individuals" and not simply "components of a racial, religious, or national class."[134] "Race-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the [g]overnment by the Constitution."[135]

4. *Applicability of "Normal" Equal Protection Principles to Apportionment Legislation*

In both *Miller* and *Shaw II*, the Court was faced with the argument that "normal" equal protection principles do not apply with respect to apportionment legislation. Justice Ginsburg, dissenting, agreed. Specifically, she stated:

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131. *Shaw II*, 113 S. Ct. 2816, 2827 (1993).

132. *Miller*, 115 S. Ct. at 2486 (quoting *Shaw II*, 113 S. Ct. at 2832).

133. 497 U.S. 547, 110 S. Ct. 2997 (1990).

134. *Miller*, 115 S. Ct. at 2486 (quoting Metro Broadcasting v. FCC, 497 U.S. 547, 602, 110 S. Ct. 2997, 3028 (1990)). This focus on the *individual* is especially important considering that four Justices in *Shaw II* felt that *UJO* was the controlling precedent in these kinds of cases. In *UJO*, three justices—Justices White, Stevens, and Rehnquist—felt that "as long as whites *as a group* were provided with fair representation, . . . there was [no] cognizable discrimination against whites or an abridgment of their right to vote on the grounds of race." *UJO*, 430 U.S. 144, 166, 97 S. Ct. 996, 1010 (1977).

135. *Miller*, 115 S. Ct. at 2486 (quoting *Metro Broadcasting*, 497 U. S. at 547, 604, 110 S. Ct. at 2997, 3046 (O'Connor, J., dissenting)).

> Apportionment schemes, by their very nature, assemble people in groups. States do not assign voters to districts based on merit or achievement, standards [s]tates might use in hiring employees or engaging contractors. Rather, legislators classify voters in groups—by economic, geographical, political, or social characteristics and "then reconcile the competing claims of these groups."[136]

In *Shaw II*, Justice O'Connor acknowledged a reapportionment statute really does not classify individuals. However, she also emphasized that while an "awareness" of race, just like awareness of age, economic status, religion and political persuasion is permissible,[137] classifications disregarding traditional districting principles are not.[138] The test enunciated in *Miller* further clarifies this matter by requiring race be shown to be the predominating factor motivating the legislature in order to state an equal protection claim.

5. Are African-Americans Being Treated Unfairly?

Justice Ginsburg, joined by Justice Stevens, argued the *Miller* majority used the Equal Protection Clause "to shut out 'the very minority group whose history in the United States gave birth to the Equal Protection Clause.'"[139] Justice Ginsburg argued this while noting that Chinese-Americans and Russian-Americans are able to seek and secure group recognition in the delineation of voting districts. The *Miller* majority generally, and Justice O'Connor in her separate concurrence specifically though briefly and perhaps inadequately, addressed this contention. The majority maintained "[r]acial and *ethnic* distinctions of any sort are inherently suspect and thus call for the most exacting judicial scrutiny."[140] Justice O'Connor stated:

> The standard would be no different if a legislature had drawn the boundaries to favor some ethnic group; . . . efforts to create majority-minority districts [are not treated] less favorably than similar efforts on behalf of other groups. Indeed, the driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks.[141]

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136. *Miller*, 115 S. Ct. at 2505 (Ginsburg, J., dissenting).

137. *Shaw II*, 113 S. Ct. 2816, 2827 (1993) ("That sort of race consciousness does not lead inevitably to impermissible race discrimination.").

138. *Id.* at 2826.

139. *Miller*, 115 S. Ct. at 2505 (Ginsburg, J, dissenting) (quoting *Shaw II*, 113 S. Ct. at 2845 (Stevens, J. dissenting)).

140. *Miller*, 115 S. Ct. at 2482 (quoting Regents of University of California v. Bakke, 438 U.S. 265, 291, 98 S. Ct. 2733, 2748 (1978)) (emphasis added).

141. *Miller*, 115 S. Ct. at 2497 (O'Connor, J., concurring).

6. *Strict Scrutiny Analysis: Narrowly Tailored to Achieve a Compelling State Interest*

Miller clearly affirms that the eradication of the effects of past discrimination can be a compelling state interest. The Court, however, did not hold that compliance with Section 5 of the VRA was also a compelling interest.[142] Justice Kennedy implied that it could be as long as the statute was "reasonably necessary under a constitutional reading and application of [the] law."[143] The implication is strengthened by the fact that Justice O'Connor, in *Shaw II*, stated "[s]tates certainly have a very strong interest in complying with federal antidiscrimination statutes that are constitutionally valid as interpreted and as applied."[144] Both justices, however, clearly emphasized that the narrowly tailored aspect of the strict scrutiny analysis would be most decisive in these cases. As part of that requirement, the districting plans must be "necessary" under the VRA.[145]

Although the *Miller* Court rejected the argument that Section 5 of the VRA required Georgia's racial gerrymander plan, it did not address the effect of Section 2. In *Shaw II*, the state appellees specifically argued the districting plan at issue was required to avoid dilution under Section 2. Justice O'Connor, in *Shaw II*, declined to address this, indicating instead it should be addressed on remand as it had not been developed in the district court below. Justice O'Connor, however, did note that to establish a Section 2 violation a plaintiff must satisfy the three factors set forth in *Thornburgh v. Gingles*[146] which were, in *Growe v. Emison*,[147] made applicable to single-member districts.[148]

On remand, the *Shaw III* district court held that the avoidance of a Section 2 violation and compliance with Section 5 could be compelling interests as long as there is "a strong basis in evidence" for concluding that the districting plan is "necessary" to comply with the requirements of the VRA.[149] That district court found that the State, in fact, had carried this burden[150] and that the North Carolina plan was narrowly tailored for that purpose.[151] In the Texas case, *Vera I*, the district court doubted whether the State's fear of potential liability

142. *See Miller*, 115 S. Ct. at 2490-91 ("Whether or not in some cases compliance with the Voting Rights Act standing alone can provide a compelling interest . . . .").

143. *Id.*

144. *Shaw II*, 113 S. Ct. 2816, 2830 (1993).

145. *Miller*, 115 S. Ct. at 2491; *Shaw II*, 113 S. Ct. at 2831.

146. 478 U.S. 30, 106 S. Ct. 2752 (1986). *See supra* text accompanying note 37.

147. 113 S. Ct. 1075 (1993).

148. *Shaw II*, 113 S. Ct. at 2830. *See Gingles*, 478 U.S. at 50-51, 106 S. Ct. at 2766-67; *Growe*, 113 S. Ct. at 1084-85; Voinovich v. Quilter, 113 S. Ct. 1149, 1157 (1993).

149. *Shaw III*, 861 F. Supp. 408, 438, 439 (E.D.N.C. 1994). *See also* Dewitt v. Wilson, 856 F. Supp. 1409, 1415 (E.D. Cal. 1994), *appeal dismissed*, 115 S. Ct. 2367 (1995).

150. *Shaw III*, 861 F. Supp. at 473.

151. *Id.* at 475.

under Section 5 was really justified, but even if it was, the districts' lines were unconstitutional because they were not "narrowly tailored."[152]

The narrowly tailored aspect of strict scrutiny has proven to be a very controversial issue on remand in the district courts of Texas and North Carolina. The Supreme Court in *Shaw II* did not establish firm guidelines. Justice O'Connor simply stated that with regard to the VRA, a plan would not be narrowly tailored if it "went beyond what was reasonably necessary to avoid" a violation of the act.[153] The *Shaw III* majority concluded the controlling principles are those that are constitutionally mandated.[154]

The district court majorities in *Shaw III* and *Vera I* disagreed on what role traditional districting principles such as compactness, contiguity, and maintaining the integrity of political subdivisions are to play in deciding if a district is narrowly tailored. The *Shaw III* district court cited and relied upon Supreme Court cases holding traditional districting principles are not constitutionally required.[155] The *Vera I* majority and the dissent in *Shaw III* maintained that while there may be no constitutional requirements with regard to a district's shape, traditional districting principles are relevant in deciding if there are less restrictive means available.[156] The role the *Gingles* factors are to play under

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152. *Vera I*, 861 F. Supp. 1304, 1342 (S.D. Tex. 1994).

153. *Shaw II*, 113 S. Ct. 2816, 2831 (1993).

154. The district court indicated the "one person, one vote" standard must be satisfied, undue dilution of the voting strength of any identifiable group of voters could not occur, and the five factors set forth in United States v. Paradise, 480 U.S. 149, 171-185, 107 S. Ct. 1053, 1066-74 (1987), provided a suitable standard. These factors as summarized and interpreted by the North Carolina district court are as follows:

> (1) the efficacy of alternative remedies (The *Shaw III* majority indicated this factor considers whether the state could have accomplished its compelling purpose just as well by some alternative means that was either completely race-neutral or made less extensive use of racial classifications. The district court further indicated this inquiry only required asking if the plan creates more majority-minority districts than necessary to comply with the VRA and whether those districts have substantially larger concentrations of minority voters than necessary to give minorities a reasonable opportunity to elect representatives of their choice. *Shaw III*, 861 F. Supp. 408, 445-46 (E.D.N.C. 1994));
>
> (2) whether the program imposes a rigid racial "quota" or just a flexible racial "goal";
>
> (3) the planned duration of the program;
>
> (4) the relationship between the program's goal for minority representation in the pool of individuals ultimately selected to receive the benefit in question and the percentage of minorities in the relevant pool of eligible candidates (The majority in Shaw v. Hunt interpreted this factor in the redistricting context to be satisfied so long as the percentage of majority-minority districts created by the plan does not substantially exceed the percentage of minority voters in the jurisdiction as a whole. *Id.* at 448);
>
> (5) the impact of the program on the rights of innocent third parties. (*Id.* at 449).

155. *Id.*

156. *Id.* at 489-90 (Voorhees, C.J., dissenting). *Cf. Vera I*, 861 F. Supp. at 1343 ("[T]o be narrowly tailored, a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria."). This position may have merit considering even the *Paradise* factors approved by the *Shaw III* remand majority require inquiry as to the efficacy of alternative means that are either race-neutral or place less emphasis on race.

narrowly tailored requirements when a plan seeks to comply with Section 2 of the VRA (assuming Section 2 may serve as a compelling interest) also appears to pose another controversy that the Supreme Court will have to address.[157]

7. Is the Voting Rights Act Unconstitutional?

The tone of recent Supreme Court opinions raises questions concerning the constitutionality of the VRA. *Miller*, in fact, specifically questioned the constitutionality of Section 5 of the VRA.[158] Justice Kennedy acknowledged, however, that the Court in *South Carolina v. Katzenbach*[159] upheld Section 5 as a "necessary and constitutional" response, under Congress's *Fifteenth* Amendment power, to the extreme measures enacted by the states to discriminate against black voters.[160] However, he cautioned, "the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Voting Rights Act . . . into tension with the *Fourteenth* Amendment."[161] Congress's exercise of its Fifteenth Amendment power, even when otherwise proper, must still be "consistent with the letter and spirit of the Constitution."[162]

As Kennedy continued, it appears that Section 5 is not doomed. He noted the *Beer* Court specifically approved a nonretrogression standard for the "effect" language of Section 5, thus rejecting Justice White's view that Section 5 requires districts to be drawn in such a way as to give minorities a chance to achieve proportional representation.[163] Justice Kennedy indicated the "maximization policy" advocated by the Justice Department in *Miller* is far removed from this nonretrogression policy and, therefore, raises concerns about Section 5's constitutionality as interpreted by the Justice Department. He, however, did not go further with this. Instead, he concluded there was no indication that *Congress* intended such a "far-reaching application"[164] of Section 5. Thus he "reject[ed] the Justice Department's interpretation of the statute," avoiding the constitutional

157. In the *Shaw IV* Arguments, the appellant argued that the districts in question could not be justified by Section 2 of the VRA because the narrowly tailored aspect of strict scrutiny could not be satisfied. This was because the majority-minority districts were not located in the areas of the State which arguably could meet the preconditions of *Gingles*. *Shaw IV* Arguments, 1995 WL 729891 at *13, 20 (Dec. 5, 1995). The State appellees in response maintained that as long as the *Gingles* preconditions can be met somewhere in the state, the State has discretion in choosing exactly where the district would be drawn. *Id.* at *17. It is not certain what the entire Court's response to this position will be, but the words of one Justice may provide insight—"[s]o then the remedy has nothing to do with the initial violation. That is a very strange doctrine of law." *Id.*

158. Miller v. Johnson, 115 S. Ct. 2475, 2493 (1995).

159. 383 U.S. 301, 86 S. Ct. 803 (1966).

160. *Id.*

161. *Id.* (emphasis added).

162. *Id.* (quoting McCulloch v. Maryland, 4 Wheat. 316, 421 (1819)).

163. *Id.* (quoting Beer v. United States, 425 U.S. 130, 141, 143-44, 96 S. Ct. 1357, 1364, 1365 (1976)).

164. *Miller*, 115 S. Ct. at 2493.

issues raised by it.[165] Therefore, the Court will most likely continue to uphold the validity of Section 5 as long as there are no "maximization" requirements required by the *substantive* provisions of the VRA.[166] Justice Kennedy supported this by noting the VRA had been "of vital importance in eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions."[167]

Although the validity of Section 2 of the VRA was not expressly questioned in *Miller*, the opinion suggests that it may be in the future because the creation of majority-minority districts is often the solution to Section 2 violations. Thus, the constitutionality of Section 2 is brought into question since race normally would be the predominant motivation. In *Shaw II*, the appellants argued that if Section 2 did require the revised North Carolina districting plan, then Section 2 was unconstitutional.[168] Whether Section 2 is constitutional is uncertain. In *Shaw II*, Justice O'Connor responded only that these claims should be addressed on remand because they had only been raised at the Supreme Court level.[169]

It is possible to interpret Section 2 in such a manner as to maintain its constitutionality. Clearly, as the Fifteenth Amendment commands, states should not enact voting plans that "dilute" the voting power of citizens based on race or color. The requirements for proving a Section 2 violation as set forth in *Gingles* should prevent that section from causing equal protection problems under the *Shaw II* line of cases. Arguably, if these elements are proven, then the minority group *actually has a commonality of political interests*. If this political cohesiveness is shown, then the predominate districting factor would presumably not be "race for race's sake," but rather an *actual* common interest coincidentally shared by members of a racial group. Under these circumstances, no equal protection claim would be stated under *Miller*.

VI. *MILLER*'S IMPACT ON LOUISIANA VOTERS: *HAYS V. LOUISIANA*

In *Hays v. Louisiana* (*Hays IV*),[170] Louisiana's congressional districting plan was challenged as a "racial gerrymander" under the Fourteenth Amendment

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165. *Id.*

166. *Id.*

167. *Id.* at 2494.

168. *Shaw II*, 113 S. Ct. 2316, 2831 (1993).

169. On remand, the district court held Section 2 was constitutional. *Shaw III*, 861 F. Supp. 408, 437 (E.D.N.C. 1994). It appears the Texas district court held the same. *Vera I*, 861 F. Supp. 1304, 1342 (S.D. Tex. 1994). Justice Kennedy, however, in *Chisom v. Roemer* dissented separately in order to emphasize the majority's opinion in that case was only one of statutory construction and did not address the question of whether Section 2 as interpreted by *Gingles* was constitutional. His emphasis in rebutting any implication of a finding of constitutionality may indicate he and possibly others have their doubts. *See* Chisom v. Roemer, 501 U.S. 380, 418, 111 S. Ct. 2354, 2376 (1991) (Kennedy, J., dissenting).

170. Nos. 92-1522, 95-1241 (W.D. La. Jan. 5, 1996).

for the third time.[171] The *Hays IV* district court found Louisiana's redistricting legislation, Act 1, violates the Equal Protection Clause.[172] Act 1's District Four begins in North Louisiana's Caddo Parish and runs southeast along the Red River until it reaches Baton Rouge. This same three-member district court had reached this same conclusion in 1994.[173] The United States Supreme Court, however, on appeal, found the *Hays* plaintiffs lacked standing and remanded the case to the district court with instructions to dismiss the plaintiffs' complaint.[174]

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171. Although the districting plan currently at issue in Louisiana is Act 1, this story actually began with the *Hays* plaintiffs' attack on Act 42, the districting plan that preceded Act 1. As a result of the 1990 census, Louisiana lost one of its eight congressional seats, thus making reapportionment necessary. The Louisiana Legislature submitted Act 42 to the Attorney General for preclearance in May 1992. This plan contained two majority-minority districts whereas Louisiana had only had one under the former arrangement.

The majority-minority district in question in Act 42 was District Four. This district was "Z-shaped," extending along Louisiana's northern border with Arkansas and eastern border with Mississippi. *Hays I*, 839 F. Supp. 1188, 1199 (W.D. La. 1993), *Hays III*, 115 S. Ct. 2431, 2434 (1995). The *Hays* plaintiffs filed suit challenging Act 42, but while this case was pending in the district court, the United Supreme Court decided *Shaw II*. Focusing on the odd shape of District Four, the district court declared Act 42 unconstitutional. *Hays I*, 839 F. Supp. at 1188. The State of Louisiana and the United States as an intervenor appealed to the Supreme Court. While the appeal was pending, the Louisiana Legislature repealed Act 42 and enacted a new districting plan, Act 1 of the 1994 Extraordinary Session. The Supreme Court vacated *Hays I* and remanded the case to consider the constitutionality of the new plan. For further information on *Hays I*, see Martinez *supra* note 53.

172. *Hays IV*, Nos. 92-1522, 95-1241 (W.D. La. Jan. 5, 1995), slip op. at 1.

173. The district court in *Hays II* held that Act 1's District Four was "so extremely irregular on its fact that it rationally can be viewed only as an effort to segregate the races for purposes of voting." *Hays II*, 862 F. Supp. 119, 122 (W.D. La. 1994), *vacated and remanded with instructions to dismiss complaint*, 115 S. Ct. 2431 (1995) (quoting *Shaw II*, 113 S. Ct. 2816, 2828 (1993)).

174. *Hays III*, 115 S. Ct. 2431 (1995). The Supreme Court stated standing requires a plaintiff to have suffered a personal injury; generalized grievances are not enough. In this context, a plaintiff must prove that he or she has been subjected to a racial classification. With a racial gerrymandering claim, the Court rejected the idea that *any* citizen of Louisiana had standing. Instead, the Court indicated that when a plaintiff lives in a racially gerrymandered district, he or she has been denied equal treatment because of reliance on racial criteria. There is an inference that these voters suffer the special representational harms resulting from racial classifications in the voting context. Plaintiffs that do not live in such districts, however, cannot justifiably have the "benefit" of this inference, and thus must produce specific evidence that he has personally suffered these special harms. For these particular plaintiffs, the standing problem resulted because of the change from the Act 42 plan to the Act 1 plan. Under Act 42, all of Lincoln Parish in which the plaintiffs reside was in District Four. Under Act 1, however, only part of Lincoln Parish is in District Four with the remainder being in District Five. The plaintiffs in *Hays II* all resided in what is now the District Five part of Lincoln Parish. The Supreme Court explained the district court's holding was as to District Four (*Hays II*) and that no evidence on the record tended to show the Legislature was aware of the racial composition of District Five. The Court further emphasized that the fact District Five might be different but for the Legislature's race intentions regarding District Four is still not enough to create a cognizable injury. Following this decision, plaintiffs living within District Four were joined.

On remand, the plaintiffs filed an amended complaint which added residents of Act 1's District Four, thus fulfilling the standing requirement.[175]

The district court in *Hays IV* ultimately reached the same factual findings in 1995 as it had in 1994.[176] The court, however, did clarify these findings of fact and conclusions of law in light of the Supreme Court's decision in *Miller v. Johnson*. In fact, the district court indicated *Miller* was "commanding precedent, factually on all fours."[177] First, the *Hays IV* court indicated that its earlier finding that race was the "'fundamental factor' driving the design of Act 1" is synonymous with finding race was the "predominant factor" motivating the legislature as *Miller* demands.[178] Furthermore, the district court concluded the reason for this emphasis on race was the Legislature's justified belief that the Department of Justice would not preclear any plan for Louisiana which did not include a second majority-minority district.[179] The district court further maintained that this conclusion was supported by both circumstantial and direct evidence.[180]

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175. *Hays IV*, slip op. at 11.

176. The majority in *Hays II*, however, primarily relied on the shape of District Four in holding that an equal protection claim was stated. *Hays II*, 862 F. Supp. at 121-22.

177. *Hays IV*, slip op. at 14.

178. *Hays II*, 862 F. Supp. at 122, *Hays IV*, slip op. at 14.

179. *Hays IV*, slip op. at 16-17. The evidence before the district court on this matter is conflicting. The testimony of Representative Adley and Senator Greene indicates that they thought the Justice Department was requiring two minority-majority districts for preclearance. *See* Transcript of *Hays IV* at 21, No. 92-1522 (W.D. La. Jan 5, 1996) (hereinafter "Transcript") (on file with author) ("This letter [from Deval M. Patrick, Justice Department] was used to indicate that the Justice Department wanted two majority-minority districts") and at 53 ("55 percent or greater minority registered voter[s] will be acceptable"). The deposition of Glenn Koepp, the Act 1 cartographer, however indicated he did not share this opinion. *See* Deposition of Glenn Koepp (hereinafter Koepp Dep.) at 71, 120, 129 (on file with author). However, Mr. Koepp also emphasized that he could only speak for himself, not all the legislators. Koepp Dep. at 137. He later indicated that he believed the *Voting Rights Act* would require the creation of a second majority-minority district and that was the reason he recommended the creation of one. Koepp Dep. at 145-46.

180. *Hays IV*, slip op. at 14. The circumstantial evidence focused on the district lines in conjunction with racial and population densities. *Id.* at 15. The direct evidence consisted mainly of the statement of the cartographer who drew Act 1's lines as well as the testimony of legislators which indicated race was virtually the exclusive factor used in order to gain preclearance from the Justice Department. *Id.* at 16-17. Judge Shaw during the *Shaw IV* hearing asked questions concerning the appendages of Act 1. Judge Shaw concluded that the appendages in Act 1 supplied only sixty percent of the district's total black population in comparison to the eighty percent found with regard to Georgia's Eleventh District.

As for direct evidence, the testimony of Representative Adley proved relevant. He indicated that he as a legislator received districting plan materials which only contained information concerning race and population in the districts; there was no information provided, according to him, regarding home values, rental values, amount of vehicle ownership, per capita income, unemployment, the number of people below the poverty rate, or the number of high school or college graduates. In fact, he stated there was no information on any socioeconomic factors at all. Transcript, *supra* note 175, at 26-27. He also testified about the lobbying efforts focused on the House committees. These consisted of lobbyists wearing big buttons that said "two minority districts." Transcript, *supra* note

Once again, as in *Hays II*, the race-neutral defenses offered by the State were rejected by the district court. The State's testimony concerned three traditional districting principles which the *Hays IV* court described as "weak."[181] The first was the fact that District Four's lines coincided with those of Louisiana's former District Eight. The court, however, rejected this explanation, as it found the Act 1 cartographer conceded District Eight was itself a means of placing a large percentage of minority voters in one district.[182] Thus, the court indicated reliance on former District Eight would only reinforce that District Four's design was based on race.[183]

175, at 26. The deposition of Mr. Koepp, the cartographer, indicated that he drew the district lines under Act 1 to capture the black populations of Lafayette, Baton Rouge, Alexandria. and Shreveport. Koepp Dep., *supra* note 175, at 88- 90, 101. Also, Mr. Koepp revealed that the only windows open on his computer which created the map of Act 1 contained racial data; there was no information in front of him concerning compactness, contiguity, or socioeconomic data. Koepp Dep., *supra* note 175, at 78.

Also before the court was the testimony of Dr. Ronald E. Weber, an expert witness, discussing his conclusion that race was a predominate factor in Act 1. Transcript, *supra* note 175, at 85. On cross-examination, Dr. Weber's conclusions were arguably weakened by opposing counsel. The cross-examination indicated that Dr. Weber had not read the transcripts of the House and Senate redistricting committees, the transcripts of the floor debate in the Senate on Act 1, nor had he talked to the sponsors or drafters of the bill concerning the considerations that went into the creation of the districts in Act 1. Transcript, *supra* note 175, at 135. Dr. Weber indicated he had relied on the press reports, reading the journal voting record and his awareness of the letter from the Justice Department. Transcript, *supra* note 175, at 136-37.

181. *Hays IV*, slip op. at 18. While the district court did not discuss the possibility of incumbency protection as a traditional districting principle, there was evidence pertaining to this issue. *See* Koepp Dep., *supra* note 175, at 75 ("Once you started . . . with a base plan of the old Eighth . . . it became evident then that you can create a district . . . that did very little disruption to the incumbents"). Mr. Koepp also indicated that a Lafayette incumbent urged Mr. Koepp to allow him to keep as much of his old district as he could. Koepp Dep., *supra* note 175, at 108.

182. *Hays IV*, slip op. at 18. The evidence regarding the actual role of the "old Eighth" is rather confusing. Mr. Koepp, the cartographer, indicated that Senators Bagneris and Greene wanted him to build a district off the "old Eighth" because it had approximately "43 percent minority" in 1990. Koepp Dep., *supra* note 175, at 71. Mr. Koepp emphasized that his goal was to draw a plan which created a second majority-minority district but within the guidelines of the court. The second majority-minority district, however, was not an "absolute." Koepp Dep., *supra* note 175, at 71. In his testimony, Senator Greene stated that he remembered presentations by Mr. Koepp and Senator Brinkhaus in which they compared what eventually became Act 1 and the former District Eight. In fact, he said they belabored the point it was "an elongation" of District Eight. Transcript, *supra* note 175, at 50-51. Representative Adley, however, maintained that he did not remember any discussion during the floor debate with regard to Act 1's similarity to District Eight. Transcript, *supra* note 175, at 33.

183. *Hays IV*, slip op. at 18-19. In addition to the unanswered questions discussed in Part V.B.1., here arises another issue not addressed by *Miller* regarding traditional districting principles. In *Hays II*, the State also had contended District Four, the district under attack, was modeled after former District Eight. The district court in *Hays II*, however, ruled that not only was this mere pretext, District Eight's constitutionally had never been challenged and upheld, therefore, it could offer little legitimacy to District Four's lines. *Hays II*, 862 F. Supp. 119, 122 (1994). However, as Part V.B.2 indicates, statements in *Miller* by the majority and Justice O'Connor concurring may offer

The second and third explanations offered by the State were described as "patently post-hoc rationalizations."[184] The second was that District Four was designed to follow the Red River, and the third was that District Four actually is a "majority-poor rather than majority-black" district.[185] The *Hays IV* district court, however, found the evidence at trial established "that neither the Red River nor socio-economic factors were relied on by legislators at the time of the drawing of the district."[186]

Based on this evidence, the district court found an equal protection claim was established and applied strict scrutiny analysis to Act 1.[187] The district court concluded Louisiana had asserted no compelling interest,[188] and even if a compelling interest had been shown, the diffused population of Louisiana made it impossible to draw a plan containing two majority-minority districts that would be narrowly tailored[189] because of the undue burden placed on the rights of third parties.[190]

The district court analyzed three compelling interests put forth by the State: compliance with Section 5 of the VRA, compliance with Section 2 of the VRA, and remedying the effects of past discrimination.[191] With respect to Section 5, the court found that no evidence had been offered that a second majority-

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legitimacy to District Four. They indicate that a former district such as District Eight enjoys a presumption of legitimacy. Following this rationale, no past constitutional challenge and survival should be required in order for reliance on former district lines to be recognized as a traditional race-neutral districting principle. *See Hays II*, 862 F. Supp. at 150; Miller v. Johnson, 115 S. Ct. 2475, 2488, 2497 (1995) (O'Connor, J., concurring). In *Hays IV*, the district court again noted that District Eight was never challenged on constitutional grounds. *Hays IV*, slip op. at 19, n. 48.

184. *Hays IV*, slip op. at 18.

185. *Hays IV*, slip op. at 18. The second and third explanations are apparently arguing a "commonality of interest" other than race-controlled drawing of this district. *Miller* indicated proof of such would defeat the establishment of a racial gerrymander claim.

186. *Hays IV*, slip op. at 18. Representative Adley testified the legislators had no socioeconomic date provided to them. Transcript, *supra* note 175, at 27. Dr. Weber said he did not think legislators considered socioeconomic data because he heard Representative Adley say this and Glenn Koepp had corroborated this statement. Dr. Weber was willing to admit, however, that legislators would be knowledgeable about the general characteristics of their constituents. Transcript, *supra* note 175, at 139-40. Professor Charles M. Tolbert, another expert witness, testified that District Four had the lowest socioeconomic standing of all the Louisiana congressional districts. Transcript, *supra* note 175, at 197. Opposing counsel on cross-examination, however, emphasized that Professor Tolbert's study was not begun until August 1995 whereas the district was drawn in April of 1994. Transcript, *supra* note 175, at 212-13. Professor Tolbert also admitted his report does not speak to the issue of whether race was the predominant overriding factor in creating District Four. Transcript, *supra* note 175, at 219.

187. *Hays IV*, slip op. at 19. *Cf. Hays II*, 862 F. Supp. at 122.

188. *Hays IV*, slip op. at 19-23. *Cf. Hays II*, 862 F. Supp. at 123.

189. *Hays IV*, slip op. at 23. *Cf. Hays II*, 862 F. Supp. at 128-29.

190. *Hays IV*, slip op. at 23.

191. The district court in *Hays II* also analyzed and summarily rejected incumbent protection as a compelling interest. *Hays II*, 862 F. Supp. at 123. Otherwise, the conclusions in *Hays IV* as to the other three arguments analyzed in *Hays II* were very similar.

minority district was required to prevent a retrogression of minority voting strength. As to Section 2, the court rejected the avoidance of a Section 2 dilution violation as sufficient because the three *Gingles* factors required to establish such a violation were not met. The court concluded the evidence could not support a finding of "a numerous and compact minority."[192] Finally, rejecting the third purported compelling interest, the district court found a lack of concrete evidence of any lingering effects of past discrimination.[193]

The *Hays IV* district court chose to redraw Louisiana's congressional districts. The court plan provided for only one minority-majority district located in the New Orleans area where the *Gingles* preconditions are present.[194] Following this decision, the State of Louisiana must choose its course of action. Several options exist. These include: having the Legislature submit a new redistricting plan to the district court for approval as a substitute to the court plan, acquiescing to the court plan, or appealing the decision to the Supreme Court.

VII. CONCLUSION

A Supreme Court review of *Hays IV* like those that will occur in *Shaw IV* and *Vera II* could present very interesting possibilities. As for *Hays IV*, one possibility is that much of a review would be a factual review of the findings, *i.e.*, the legislative intent, the actual commonality of interest in District Four, the sufficiency of evidence of effects of past discrimination. A close examination of the record reveals this review would not necessarily be a simple task. However, the Court also could use *Hays IV* as a chance to further develop the *Miller* standards and answer some of the questions left open.

These open questions include whether avoidance of a Section 2 violation of the VRA is a compelling interest and whether reliance on old districts, such as the "old Eighth," can be another race-neutral districting principle even if their constitutionality was never challenged. The Court may also develop specific guidelines as to exactly what types of circumstantial evidence are needed to establish a "bizarre on its face" *Shaw II* claim. Also, with *Hays IV* as well as *Shaw IV*, the Court could decide to address the constitutionality of the VRA, an issue avoided by Justice Kennedy in *Miller*. Finally, the Court may clarify a key issue left unresolved in *Vera I*—the proper role, if any, incumbent protection should play in the process.

While these district court cases should provide the Supreme Court with further opportunities to clarify the controlling principles of law in this area, the future answers may prove surprising. *Shaw II* and *Miller* in a sense provided

192. *Hays IV*, slip op. at 21-22. *Cf. Hays II*, 862 F. Supp. at 124.

193. The district court emphasized the Supreme Court has decreed that there must be a "strong basis in evidence for [a] conclusion that remedial action was necessary." *Hays IV*, slip op. at 23.

194. *Hays IV*, slip op. at 26-27.

"easy cases" for the Court, yet fundamental conflict existed between the viewpoints of the majority and dissenting judges resulting in a 5-4 decision. The questions raised in the district court cases may challenge the Court to the extent that alliances among the justices may be altered.

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