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Could the Best of Tightrope Walkers Manage to Walk the Line between Race-Consciousness and Race-Predominance? An Analysis of Race-Based Districting in Light of Miller v. Johnson

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Could the Best of Tightrope Walkers Manage to Walk the Line Between Race-Consciousness and Race-Predominance? An Analysis of Race-Based Districting[1] in Light of *Miller v. Johnson*

I. INTRODUCTION

There was a time when state districting cases were half as difficult as they are now. That was so because the United States Supreme Court applied the protections granted under the Constitution's Equal Protection Clause only one way—in favor of minority interests. In the eyes of the Court, there was a method to this madness, for it was minorities, not the white majority, who were the objects of overt and covert discrimination in all forms and in every aspect of life. Thus, the Court stood on high moral ground in declaring that the rights of the powerless would not be trampled upon. Yet, while the Constitution is a moral document, it is also a color-blind one. In *Miller v. Johnson*,[2] the Court determined that certain forms of race-based districting, the carving of legislative boundaries to create majority-minority districts,[3] are invidious to the right to vote as an equal member of society and to equal protection under the laws.[4] In so doing, the Court nudged the focus of justice toward a more color-blind view.

This Note analyzes the Court's decision in *Miller* and its implications on redistricting, the rights of minorities, and federal government policy.

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1. This Note uses the term "districting" in reference to the manner by which voting districts are drawn. The terms "districting," "redistricting," "apportionment," and "reapportionment" are often used interchangeably. Charles Backstrom et al., *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINN. L. REV. 1121, 1121 n.1 (1978); Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 78 n.6 (1985).

2. 115 S. Ct. 2475 (1995).

3. Majority-minority voting districts are defined as "districts in which a majority of the population is a member of a specific minority group." Voinovich v. Quilter, 507 U.S. 146, 149 (1993).

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

Part II examines the development of the Court's strict scrutiny standard and its entanglement in state redistricting.[5] The facts of the *Miller* case are discussed in Part III,[6] followed by an analysis of the majority opinion, the concurring opinion, and the two dissenting opinions in Part IV.[7] In Part V, this Note considers the impact this decision will have on the judiciary, as well as its impact on American society.[8] Part VI concludes with a brief summation of the decision's importance.[9]

II. HISTORICAL BACKGROUND

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[10] Under conventional analysis, governmental decision making is presumptively valid.[11] As a result, when state action is challenged as a violation of the Equal Protection Clause, the standard of review is very deferential, requiring only that the state action be rationally related to achieving a legitimate state interest.[12] When a state discriminates according to a "suspect" classification,[13] however, the Court will strictly scrutinize its action and require that the state's interest be "'compelling'" and the means used to further this interest be "'narrowly tailored.'"[14] The Court has long deemed classifications based on race inherently suspect, thus requiring this type of strict scrutiny analysis.[15]

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5. *See infra* notes 10-130 and accompanying text.
6. *See infra* notes 131-42 and accompanying text.
7. *See infra* notes 143-220 and accompanying text.
8. *See infra* notes 221-313 and accompanying text.
9. *See infra* notes 314-18 and accompanying text.
10. U.S. CONST. amend. XIV, § 1.
11. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627-28 (1969).
12. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461-62 & n.6 (1981).
13. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that a law barring interracial marriage violated the Equal Protection Clause, in part because it was based on a suspect classification—race). Under this analysis, the targeted state action is considered "presumptively invalid and can be upheld only upon an extraordinary justification." Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979); *see also* Plyler v. Doe, 457 U.S. 202, 216-17 (1982) (noting that state action premised upon racial classification is "presumptively invidious").
14. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2109 (1995) (quoting Wygant v. Jackson Board of Educ., 476 U.S. 267, 274 (1986)).
15. Miller v. Johnson, 115 S. Ct. 2475, 2482 (1995); *see, e.g.*, *Loving*, 388 U.S. at 11-12 (noting that the Court has "consistently denied the constitutionality of measures which restrict the rights of citizens on account of race"); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (recognizing that a classification based on race must be viewed as "constitutionally suspect"); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (recognizing that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded

A. *The Development of Strict Scrutiny Analysis in Racial Classifications*

Much of the logic used in *Miller* had its roots in the landmark case of *Brown v. Board of Education*.[16] In *Brown*, black students denied entry into the segregated South's white schools petitioned the Court to desegregate the school system and allow black and white children to be taught together.[17] In a unanimous opinion, the Court held the segregation unconstitutional, reasoning that the "detrimental effect" of segregation harmed not simply the black community, but society as a whole.[18] Following *Brown*, the Court determined that racial classifications were "inherently unequal," and therefore subjected these classifications to strict scrutiny, creating a new cause of action.[19] Yet, for a period of time, the strict scrutiny standard was reserved solely for the historical victims of discrimination—minorities.[20]

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upon the doctrine of equality" and that "racial discriminations are in most circumstances irrelevant and therefore prohibited."). The only time the Court has upheld explicit racial discrimination under a strict scrutiny analysis was in upholding a law excluding American citizens of Japanese descent from certain West Coast areas. Korematsu v. United States, 323 U.S. 214, 223 (1944).

16. 347 U.S. 483 (1954).

17. *Id.* at 487-88.

18. *Id.* at 494-95.

19. GIRARDEAU A. SPANN, RACE AGAINST THE COURT 105-06 (1993). The Court never adequately explained the reasoning behind the rule. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 256 (1991). Nevertheless, the rule itself is very clear: the mere allegation that a person was classified by race constitutes a claim. *Id.* at 255-56.

20. *See, e.g.*, Hunter v. Erickson, 393 U.S. 385, 392-93 (1969) (holding invalid a municipal ordinance that prohibited a city council from taking measures to eliminate racial discrimination in housing absent a referendum); Hernandez v. Texas, 347 U.S. 475, 482 (1954) (invalidating state action that systematically prohibited Hispanics from participating on juries); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (declaring the systematic discrimination against Chinese laundry operators unconstitutional). In his treatise on constitutional law, Professor Laurence Tribe argued that "the device of strict scrutiny is most powerfully employed for the examination of political outcomes challenged as injurious to those groups in society which have occupied, as a consequence of widespread, insistent prejudice against them, the position of perennial losers in the political struggle." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1453-54 (2d ed. 1988). In *Strauder v. West Virginia*, the Court noted: "[The Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States." 100 U.S. 303, 306 (1879).

The first major case where the Court claimed that the Equal Protection Clause protected whites as well as blacks was *Regents of the University of California v. Bakke*.[21] In *Bakke*, the University of California at Davis Medical School rejected an applicant to its program purely because of a racial quota system that the University used in its admissions process.[22] In this affirmative action[23] case, the plurality noted that race-based classifications are subject to "stringent examination"[24] and the Court's "'most rigid scrutiny.'"[25] The plurality found that the medical school failed to show that its race-based admissions program was created to respond to identified discrimination.[26] As a result, the Court held that the school did not prove a compelling governmental interest to satisfy strict scrutiny review.[27]

Eight years later, the Court decided the first in a series of cases that would greatly expand upon the application of the Equal Protection Clause to non-minority groups. In *Wygant v. Jackson Board of Education*,[28] a school board responded to NAACP complaints by hiring minority teachers.[29] The school board and the Jackson Education Association approved the addition of a layoff provision to their collective bargaining agreement (CBA) that protected minorities from layoffs.[30] Thereafter, when the board needed to institute layoffs, "nonminority teachers were laid off, while minority teachers with less seniority were

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21. 438 U.S. 265 (1978) (plurality opinion).

22. *Id.* at 276-78.

23. Affirmative action programs are defined as "[e]mployment programs required by federal statutes and regulations designed to remedy discriminatory practices in hiring minority group members; i.e., positive steps designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination." BLACK'S LAW DICTIONARY 59 (6th ed. 1990).

24. *Bakke*, 438 U.S. at 290.

25. *Id.* at 291 (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).

26. *Id.* at 309. Justice Powell, writing for the plurality, noted: "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." *Id.* at 307.

27. *Id.* at 319. Justice Powell stated:

> The purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.

Id. at 310.

28. 476 U.S. 267 (1986) (plurality opinion).

29. *Id.* at 297-98 (Marshall, J., dissenting).

30. *Id.* at 270.

retained."[31] Although there was no majority opinion, five justices held that the school board's action was unconstitutional.[32] The plurality believed that strict scrutiny was appropriate because of the racial classification in the CBA, reasoning that the standard of review should not change solely because the classification at issue burdened a class of people who were not the traditional victims of discrimination.[33] Because the school board's actions were not narrowly tailored, the plurality concluded that the layoff plan violated the Equal Protection Clause.[34]

In *City of Richmond v. J.A. Croson Co.*,[35] the Court invalidated a race-conscious affirmative action program that reserved a percentage of city construction projects solely for minority-owned construction companies.[36] The Court held that a strict scrutiny analysis applies even to classifications designed to benefit minority groups.[37] Further, the Court suggested that its decision extended beyond affirmative action cases by holding that any race-based governmental action must undergo strict scrutiny.[38] Justice O'Connor, writing for the Court, asserted three reasons for requiring that affirmative action plans undergo strict scrutiny.[39] First, she stressed the difficulty in determining whether a racial classification is "'benign'" or "'remedial'" or whether it is actually "motivated by illegitimate notions of racial inferiority or simple racial politics."[40] Because of this difficulty, Justice O'Connor argued that strict

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31. *Id.* at 272.

32. *Id.* at 283-84; *id.* at 294 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 295 (White, J., concurring in the judgment).

33. *Id.* at 273-74.

34. *Id.* at 283-84. Justice Powell noted that the "Court never has held that societal discrimination alone is sufficient to justify a racial classification." *Id.* at 274.

35. 488 U.S. 469 (1989) (plurality opinion).

36. *Id.* at 511.

37. *Id.* at 493-94. The Court noted that "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 thus there is but one standard of review—strict scrutiny. *Id.* at 494 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279-80 (1986).

38. *Id.* at 493-94.

39. *Id.* at 493-95.

40. *Id.* at 493. In his concurring opinion in *Adarand Constructors, Inc. v. Pena*, Justice Thomas wrote:

> It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others. As to the races benefited, the classification could surely be called "benign." Accordingly, whether a law relying on racial taxonomy is "benign" or "malign,". . . either turns on whose ox is gored . . .

scrutiny is necessary to "'smoke out'" possible illegitimate uses of classifications.[41] Second, she argued that the "stigmatic" harm often caused by race-based classifications may actually hurt the group the classification intended to benefit because they foster the idea that the favored group is less competent and inferior than the unfavored group.[42] Finally, Justice O'Connor argued that strict scrutiny is necessary to achieve true race neutrality.[43]

Applying strict scrutiny to the contract reservations plan, the Court found the plan wanting.[44] The Court noted there was no evidence presented that anyone in the City of Richmond had ever discriminated against minorities in awarding construction projects.[45] As a result, the Court found no compelling interest for the City's action.[46] Further, the Court concluded that the means used were not narrowly tailored because Richmond failed not only to use any race-neutral methods aimed at opening up the construction market to minorities, but also to show that such an attempt would be futile.[47]

The Supreme Court later limited its holding in *Croson* to state action.[48] For congressional action, the Court used a lower standard of review—the "intermediate standard."[49] This distinction did not last long, with the Court's decision in *Adarand Constructors, Inc. v. Pena*[50] applying strict scrutiny across the board to state and congressional action alike.[51] In *Adarand*, a division of the United States Department

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or on distinctions found only in the eye of the beholder.

115 S. Ct. 2097, 2119 n.* (1995) (Thomas, J., concurring in part and concurring in the judgment) (internal citations omitted).

41. *Croson*, 488 U.S. at 493.

42. *Id.* at 493-94 (citing University of California Regents v. Bakke, 438 U.S. 265, 298 (1978)). Justice O'Connor applied the same reasoning in the reapportionment context. *See infra* notes 270-77 and accompanying text.

43. *Id.* at 495.

44. *Id.* at 511.

45. *Id.* at 498-506.

46. *Id.* at 506.

47. *Id.* at 507-08.

48. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564-65 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

49. *Id.* The Court in *Metro Broadcasting* held that

> benign race-conscious measures mandated by Congress—even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.

Id.

50. 115 S. Ct. 2097 (1995).

51. *Id.* at 2113.

of Transportation awarded a gravel and construction company with a contract for the construction of a highway.[52] The company sought to subcontract a portion of the job to a smaller company.[53] In conformity with federal law, the government placed a clause in the main contractor's agreement that provided additional monies if it subcontracted with a Disadvantaged Business Enterprise (DBE).[54] Federal regulations define a DBE as a small business, a majority of which is owned and managed by disadvantaged individuals—predominantly minorities.[55] While Adarand Constructors submitted the lowest bid, the company was denied the job because it did not qualify as a DBE.[56] Adarand filed suit, claiming that race-based subcontracting clauses violate the Equal Protection Clause of the Fifth Amendment.[57] The Court agreed, and moved the level of scrutiny for federal actions that discriminate on the basis of race from the intermediate standard of review to the strict scrutiny approach.[58]

B. The Reapportionment Cases

Most of the Supreme Court cases that concern race-based legislative districting have dealt with vote dilution claims, where legislators "gerrymandered"[59] districts in an effort to minimize the voting power of a particular group.[60] The Supreme Court has viewed vote dilution as an unconstitutional abridgment of the right to vote, holding that "[t]he

52. *Id.* at 2102.

53. *Id.*

54. *Id.* at 2103-04.

55. 49 C.F.R. § 23.62 (1995). There is a rebuttable presumption that "women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, [and] Asian-Indian Americans" are disadvantaged individuals. *Id.*

56. *Adarand*, 115 S. Ct. at 2102.

57. *Id.* at 2104. For purposes of determining the appropriate standard of review, an analysis under either the Fifth or Fourteenth Amendments is identical. *Id.* at 2112-13.

58. *Id.* at 2113.

59. Gerrymandering is defined as "the process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose, as, for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines." BLACK'S LAW DICTIONARY, *supra* note 23, at 687.

60. *See infra* note 96 (explaining the vote dilution standard).

right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."[61]

One of the earliest apportionment cases was *Gomillion v. Lightfoot*,[62] where the town of Tuskegee, Alabama, drafted a redistricting plan that excluded almost every black voter without excluding any white voters.[63] Interpreting Section 1 of the Fifteenth Amendment, the Court held the plan unconstitutional because it effectively denied blacks the right to be heard in the voting process.[64] While the Court used the Fifteenth Amendment as the basis for its decision, the concurring opinion reasoned that the redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment rather than the Fifteenth Amendment because of the plan's unlawful separation of individuals according to race.[65]

Following *Gomillion*, the Court decided the landmark case of *Baker v. Carr*.[66] It is argued that *Baker* "launched the modern era of voting rights jurisprudence."[67] In *Baker*, a state legislature had gone sixty years without reapportioning its districts.[68] As a result of population movements during that time, some districts had vastly greater numbers

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61. Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969).

62. 364 U.S. 339 (1960).

63. *Id.* at 341.

64. *Id.* at 342. The Court in *Shaw v. Reno* later stated that "*Gomillion* . . . supports [the] contention that district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption." 113 S. Ct. 2816, 2826 (1993).

65. *Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring). Justice Whittaker reasoned that because blacks in the area still retained the right to vote, though outside of the city boundaries, it could not be a Fifteenth Amendment violation. *Id.* (Whittaker, J., concurring). The Court has repeatedly reaffirmed Justice Whittaker's view. *See, e.g.*, Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) (citing *Gomillion* in support of the proposition that racial classifications are presumptively invalid); Whitcomb v. Chavis, 403 U.S. 124, 149 (1971) (citing *Gomillion* to support the contention that the Court has not hesitated to strike down infringements of Fourteenth Amendment rights).

66. 369 U.S. 186 (1962).

67. Alexander A. Yanos, Note, *Reconciling the Right to Vote with the Voting Rights Act*, 92 COLUM. L. REV. 1810, 1815 (1992); *see also* Burns v. Richardson, 384 U.S. 73, 88-89 (1966) (holding that properly apportioned multimember districts can violate the Equal Protection Clause if it can be shown "[they] operate to minimize or cancel out the voting strength of racial or political elements of the voting population"); Fortson v. Dorsey, 379 U.S. 433, 439 (1965) (upholding the constitutionality of multimember districts in general); Reynolds v. Simms, 377 U.S. 533, 560-61 (1964) (holding that legislators must not venture too far from the concept of one-man, one-vote in the way they apportion their districts); Gray v. Sanders, 372 U.S. 368, 379 (1963) (prohibiting states from diluting votes on the basis of race under the Fifteenth and Nineteenth Amendments).

68. *Baker*, 369 U.S. at 191.

of voters thus diluting the votes of those from larger districts.[69] The Court found that a legislature's reapportionment plan is a justiciable issue for the courts and invalidated the scheme.[70] On the heels of *Baker*, the Court decided *Wright v. Rockefeller*,[71] and extended the holding of *Gomillion* to congressional districting.[72] In *Wright*, a minority group alleged that one of New York's four congressional districts was apportioned to exclude nonwhites from the district.[73] While the Court ruled against the plaintiffs,[74] it was unanimous in its belief that the allegation the statute "segregate[d] eligible voters by race and place of origin" was a valid constitutional claim.[75] The only disagreement was whether the plaintiffs adequately proved their case.[76] Following *Baker* and *Wright*, the Court faced a number of cases involving multimember redistricting schemes. The Court held many of the schemes violated the Fourteenth Amendment when enacted with both a discriminatory intent and a vote diluting effect.[77] Nonetheless, by the 1970s, the Court had lessened its scrutiny of state reapportionment plans having a negative impact on minorities.[78]

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69. *Id.* at 193-94. In the course of those 60 years, the voting age population of Tennessee had increased four fold. *Id.* at 192.

70. *Id.* at 237.

71. 376 U.S. 52 (1964).

72. *Id.* at 58.

73. *Id.* at 53-54.

74. *Id.* at 56-58.

75. *Id.* at 56; *id.* at 58 (Harlan, J., concurring); *id.* at 59-62 (Douglas, J., dissenting).

76. *Id.* at 56-58; *id.* at 59 (Douglas, J., dissenting). The Court noted that two equally valid inferences arose from the plan, one that involved racial discrimination and another that did not. *Id.* at 56-57. The plaintiffs failed to prove that only one was valid. *Id.* Foreshadowing the Court's decision in *Miller*, Justice Douglas noted that segregating voters by race promotes polarized voting. *Id.* at 59 (Douglas, J., dissenting).

77. *See, e.g.*, Kirkpatrick v. Preisler, 394 U.S. 526, 531-32 (1969) (holding that states are required to "make a good-faith effort to achieve precise mathematical equality" in drawing Congressional districts); Swann v. Adams, 385 U.S. 440 (1967) (holding a state redistricting scheme invalid because it substantially deviated from population equality).

78. *See, e.g.*, Mahan v. Howell, 410 U.S. 315, 323 (1973) (holding that in the interest of "the normal functioning of state and local governments," states have more leeway in drawing state legislative districts than in drawing congressional districts); Gaffney v. Cummings, 412 U.S. 735, 745 (1973) (recognizing "that minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case" of unconstitutionality); Abate v. Mundt, 403 U.S. 182, 185 (1971) (holding that where a redistricting plan is "justified by legitimate state consid-

In 1976, the Court in *Beer v. United States*[79] directly addressed the criteria a state must satisfy under section 5 of the Voting Rights Act to successfully attack claims that its redistricting plan has the effect of denying or abridging the right to vote based on race.[80] In *Beer*, the City of New Orleans challenged the United States Justice Department, which rejected the city's reapportionment plan on the grounds that the plan failed to maximize black political representation.[81] While the Court noted that the purpose of the Voting Rights Act was to do away with racial discrimination in the voting process,[82] it recognized that 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."[83] The Court held that an increase in minority representation is not required under the Voting Rights Act, only the development of voting procedures fair to minorities.[84] The dissent argued that the Act requires minorities be given the opportunity to achieve representation in accordance with their numbers.[85] In the

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erations," population equality is not strictly required); Whitcomb v. Chavis, 403 U.S. 124 (1971) (recognizing that without evidence of intent to limit minority voting power, the Court cannot invalidate a plan based solely on impact). In order for a covered jurisdiction to make a change to its voting system, it would have to show under the Voting Rights Act that the proposal 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 U.S.C. § 1973c (1988).

79. 425 U.S. 130 (1976).

80. *Id.* at 141. Section 5 of the Voting Rights Act imposes "stringent new remedies for voting discrimination in . . . covered jurisdictions." James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 U. VA. L. REV. 633, 677 (1983). The term "covered jurisdiction" refers to any state which has a history of systematic exclusion of minorities from the electoral process. *Id.* at 680-88 (citing 42 U.S.C. § 1973c (1988)). In those jurisdictions, any alteration in a "standard practice, or procedure with respect to voting" must be pre-approved by the United States Attorney General or the District Court for the District of Columbia. *Id.* at 679 (citing 42 U.S.C. § 1973c (1988)). Its purpose was "to insure that old devices for disenfranchisement [would] not . . . be replaced by new ones." S. REP. NO. 417, 97th Cong., 2d Sess. 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 182.

81. *Beer*, 425 U.S. at 136-37. Notwithstanding the fact that there was a district with a significant black population, "[n]o Negro was elected to the New Orleans City Council during the decade from 1960 to 1970." *Id.* at 135.

82. *Id.* at 140.

83. *Id.* at 141. Nevertheless, the burden of proving that "the plan has neither the purpose, nor the effect, of 'abridging the right to vote on account of race or color'" rests with the state. Robert A. Blake, *A Step Toward a Colorblind Society:* Shaw v. Reno, 29 WAKE FOREST L. REV. 937, 951 (1994) (quoting 42 U.S.C. § 1973 (1988)).

84. *Beer*, 425 U.S. at 141. The Court reaffirmed this principle in City of Lockhart v. United States, 460 U.S. 125 (1983).

85. *Beer*, 425 U.S. at 143 (White & Marshall, JJ., dissenting).

Court's next Term, Justice White, who wrote for the dissent in *Beer*, wrote for the majority in the Court's next reapportionment case, *United Jewish Organizations of Williamsburgh, Inc. v. Carey*.[86]

In *United Jewish Organizations*, members of a Hasidic Jewish community in New York claimed that the state violated the Equal Protection Clause by splitting the community into two districts in an effort to create majority-minority districts in compliance with the Voting Rights Act.[87] The Court held that a state may affirmatively use race as a "specific remedy for past unconstitutional apportionments."[88] Thus, racial considerations could be used to increase minority representation, but could not be used to reduce the size of nonwhite voting blocks.[89] As long as white voters as a group were fairly represented, individual white voters could not claim a constitutional violation.[90] In a dissent that sounded like the *Miller* majority, Chief Justice Burger wrote:

> The result reached by the Court today in the name of the Voting Rights Act is ironic. The use of a mathematical formula tends to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshaling particular racial, ethnic, or religious groups in enclaves. It suggests to the voter that only a candidate of the same race, religion, or ethnic origin can properly represent that voter's interest, and that such [a] candidate can be elected only from a district with a sufficient minority concentration. The device employed by the State of New York and endorsed by the Court today, moves us one step farther away from . . . [an] American "melting pot."[91]

In *Thornburg v. Gingles*,[92] the Court had its first opportunity to interpret the recently amended section 2 of the Voting Rights Act.[93] As a re-

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86. 430 U.S. 144 (1977).

87. *Id.* at 155.

88. *Id.* at 161. Justice White, writing for the plurality, asserted that "neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment." *Id.*

89. *Id.*

90. *Id.* at 166-68. In *Regents of the University of California v. Bakke*, Justice Powell, writing for the majority, raised doubts concerning the expansive views supporting remedial racial classifications propounded by the Court in *United Jewish Organizations*, and thus limited the decision to gerrymandering cases. 438 U.S. 265, 305 (1978). This limitation expressed a reluctance among the Justices at that time to use racial considerations as a remedial measure. Bradley D. Whine, Note, *Can You Get to Kings County from Interstate 85? A Reevaluation of* United Jewish Organizations v. Carey *in Light of* Shaw v. Reno, 19 VT. L. REV. 843, 861 (1995).

91. *United Jewish Org.*, 430 U.S. at 186-87 (Burger, C.J., dissenting).

92. 478 U.S. 30 (1986).

93. Prior to 1982, § 2 was little more than a preamble to the Voting Rights Act. Abigail Thernstrom, *More Notes From a Political Thicket*, 44 EMORY L.J. 911, 925

sult of the 1980 census, North Carolina drafted a new districting scheme.[94] Members of the black community challenged the redistricting scheme on the grounds that it impaired their ability, through the use of multimember districts, to elect representatives of their choice.[95] In resolving this vote dilution claim, the Court interpreted section 2 as requiring that a totality of the circumstances test be used in determining whether the rights of a protected class to participate in the political system are violated.[96] Under the specific facts at issue in *Thornburg*, the Court held that the use of multimember districts did violate section 2.[97]

Less than two decades after *United Jewish Organizations*, the Court began moving away from that precedent with *Shaw v. Reno*.[98] The *Shaw* Court faced a fact pattern somewhat similar to that in *Miller*. After the 1990 census, North Carolina was allocated an additional congressional seat.[99] Under the Voting Rights Act, North Carolina was required to submit any new redistricting plan to the Justice Department for approval.[100] The North Carolina legislature drew up a plan that created one majority-minority district.[101] This plan was rejected by the Justice De-

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(1995). Section 2 was given greater meaning in 1982, prohibiting the application of any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right . . . to vote on account of race or color." 42 U.S.C. § 1973(a) (1988). As the statute dictates, a violation occurs when members of one racial group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973b(f)(2) (1988). Notwithstanding its later interpretation, the 1982 congressional debates on the amendment to § 2 assured Congress that the preclearance provision of § 5 would not be applicable to § 2, and, thus, that the Department of Justice could not use it to demand the creation of majority-minority districts. Themstrom, *supra*, at 925.

94. *Thornburg*, 478 U.S. at 34-35.

95. *Id.* at 35.

96. *Id.* at 48-50. To prove vote dilution, a plaintiff must first show that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50. Second, it must be shown that the group is "politically cohesive." *Id.* at 51. Finally, one plaintiff must prove that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* In *Growe v. Emison*, the Court applied the principles of *Thornburg* to single member districts, noting that "[i]t would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single member district." 113 S. Ct. 1075, 1084 (1993).

97. *Thornburg*, 478 U.S. at 80. The Court noted that the state's black population was "sufficiently large and contiguous to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multimember districts." *Id.* at 38.

98. 113 S. Ct. 2816 (1993).

99. *Id.* at 2819.

100. *Id.* at 2820.

101. *Id.* at 2819.

partment on the grounds that a second majority-minority district could have been created.[102] As a result, North Carolina redrafted its plan in accordance with the Department's wishes, and created two majority-minority districts.[103] A group of residents sued, arguing that the new plan classified citizens according to race and thus was unconstitutional.[104] In granting certiorari, the Court limited the appeal to the following question:

> Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own.[105]

Justice O'Connor, writing for the majority, was careful to note that this was not a vote dilution claim,[106] but instead one that dealt with "the deliberate segregation of voters into separate districts on the basis of race."[107] By her analysis, the two are "analytically distinct," for whereas vote dilution claims implicate the relative voting power of a group to which the plaintiff belongs, the issue in *Shaw* was one of governmentally imposed racial classifications in the context of voting.[108] The dissent criticized this distinction, noting that the Court in *United Jewish Organizations* was aware of the Fourteenth Amendment claim that eventually prevailed in *Shaw*, but that the argument "did not carry the day for peti-

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102. *Id.* at 2819-20.

103. *Id.* at 2820.

104. *Id.*

105. Shaw v. Barr, 506 U.S. 1019, 1019 (1992).

106. In a vote dilution claim, the question is "whether a particular group has been unconstitutionally denied its chance to effectively influence the political process." Davis v. Bandemer, 478 U.S. 109, 132-33 (1986). Thus, plaintiffs would have to "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.* at 127. Unconstitutional discriminatory effect "occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132.

107. *Shaw*, 113 S. Ct. at 2824. Under the kind of conventional race discrimination approach advocated by Justice O'Connor, plaintiffs would be required only to establish an intentional race-based classification or disadvantage to trigger a strict scrutiny analysis. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) (noting that racial classifications trigger strict scrutiny).

108. *Shaw*, 113 S. Ct. at 2829. This distinction is critical for if *Shaw* were deemed a vote dilution claim, then the policy of stare decisis would dictate an alternate outcome. *See* James F. Blumstein, *Racial Gerrymandering and Vote Dilution:* Shaw v. Reno *in Doctrinal Context*, 26 RUTGERS L.J. 517, 540-48 (1995).

tioners."[109] Regardless, the Court asserted that "[l]aws that explicitly distinguish between individuals on racial grounds fall within the core of" the Equal Protection Clause.[110] Accordingly, the Court noted that when government action is blatantly race-based, strict scrutiny applies.[111] Thus, the government would have to show a compelling state interest and prove that the law is narrowly tailored to meet that state interest.[112] In effect, the Constitution must be color-blind.[113] The Court, finding the "bizarre" shape of the district clear proof that racial considerations prevailed over normal districting considerations, applied strict scrutiny and declared the action an unconstitutional infringement of the Equal Protection Clause.[114] The Court noted that its judgment "express[ed] no view as to whether 'the intentional creation of majority-minority districts, without more,' always gives rise to an equal protection claim," and held only that based on the facts before them, the plaintiffs had a cause of action.[115] Thus, while it was clear after *Shaw* that bizarre districts trigger strict scrutiny, the Court provided little guidance

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109. *Shaw*, 113 S. Ct. at 2839 (White, J., dissenting).

110. *Id.* at 2824. It has been argued that "[m]ethodologically, one can view both *Shaw* and *Bakke* as rejecting a categorical, rule oriented form of legal decision for a more contextualized, standard-based approach." Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 504 (1993).

111. *Shaw*, 113 S. Ct. at 2825. Strict scrutiny was applied in *Shaw* not because of an infringement of the fundamental right to vote, but because race is a suspect classification, and it was alleged the district was drawn on the basis of race. Blumstein, *supra* note 102, at 527. Professor John Ely has argued against that general idea, contending that "regardless of whether it is wise or unwise, it is not 'suspect' in a constitutional sense for a majority, any majority, to discriminate against itself." John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 (1974).

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

113. *Id.* at 2824. *Shaw v. Reno* was not the first Supreme Court case to refer to a "color-blind Constitution." *See id.* In *Plessy v. Ferguson*, Justice Harlan wrote in a dissent: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens . . . . The law regards man as man, and takes no account of his surroundings or of his color . . . ." 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

114. *Shaw*, 113 S. Ct. at 2828.

115. *Id.* This left some commentators to wonder whether *Shaw* would have any judicial impact. *See* Stanley A. Haplin, Jr., *Waves and Backwashes in Voting Rights Law: Recognition Without Implementation of a New Principle Opposing Gerrymandering*, 22 S.U. L. REV. 255, 261 (1995) (asserting that *Shaw* may be remembered only as "a moral statement in support of color-blind districting"). Another commentator noted: "Justice O'Connor's opinion is remarkable for its studied avoidance of legal propositions! It is, in every sense, a deeply funny opinion: in saying nothing whatever, it speaks volumes about the Court's squeamishness on [q]uotas." Matthew Horan, Shaw v. Reno: *Will It Turn Out Like Koresh v. Reno?*, ARK. LAW., Spring 1994, at 31.

for the lower courts in determining the level at which racial considerations become suspect.[116]

In *Johnson v. DeGrandy*,[117] a minority group challenged the configuration of Florida's legislative districts as malapportioned.[118] As a result of these complaints, the state legislature enacted a new redistricting scheme.[119] The plaintiffs amended their complaint, alleging a violation of section 2 of the Voting Rights Act.[120] The legislative plan at issue intentionally created more than nine predominantly Hispanic House districts.[121] Nevertheless, the plaintiffs argued that eleven such districts could have been created without adverse impact to other groups.[122] The Court held, as it had in *Beer*, that such "maximization" of the minority vote was not required under the Voting Rights Act.[123] It reasoned that no violation existed because "minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting age population."[124] Yet, the Court did not disturb those intentionally created race-based districts already in existence, causing some to argue that "[t]he clear implication of this [opinion] is that race driven majority-minority districts are not per se invalid after *Shaw*."[125]

In *United States v. Hays*,[126] decided the same day as *Miller*, white residents in a majority-minority district filed suit, claiming that "Louisiana's congressional redistricting plan [was] a racial gerrymander that violates the Fourteenth Amendment's Equal Protection Clause."[127]

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116. Blake, *supra* note 83, at 956. To some extent, *Miller* seemed designed to fill this gap left open in *Shaw*.

117. 114 S. Ct. 2647 (1994).

118. *Id.* at 2651-52.

119. *Id.* at 2652.

120. *Id.*

121. *Id.*

122. *Id.* at 2653.

123. *Id.* at 2659.

124. *Id.* at 2651.

125. Halpin, *supra* note 115, at 263. *Shaw* was not cited in the majority's opinion; however, Justice Kennedy, in a separate concurrence, noted that the issue of whether majority-minority districts were per se invalid was not before the Court. *DeGrandy*, 114 S. Ct. at 2667 (Kennedy, J., concurring). Foreshadowing his majority opinion in *Miller*, Justice Kennedy argued that *Shaw* causes government officials and courts to "recognize that explicit race-based districting embarks us on a most dangerous course." *Id.* (Kennedy, J., concurring).

126. 115 S. Ct. 2431 (1995).

127. *Id.* at 2432. Twelve of the fifteen parishes within the district were split, as

In the course of litigation, the Louisiana legislature redrafted its districting scheme, and in doing so, dissolved the district in which the plaintiffs lived.[128] Under the new plan, the plaintiffs' homes were removed from the majority-minority district.[129] The Court ruled that because plaintiffs did not live in the district they claimed was racially gerrymandered and failed to prove that they had been the subject of a racial classification, they lacked standing on which to sue.[130]

III. FACTS OF THE CASE

For nearly three decades, the Justice Department has, pursuant to its interpretation of the 1965 Voting Rights Act, required Georgia to obtain prior administrative or judicial approval of any change to its legislative districting.[131] Because of the 1990 census results, Georgia was entitled to an eleventh congressional seat.[132] Georgia had only one district with a majority-black population, thus in the interest of fairness, Georgia's General Assembly redrew the State's congressional districts so as to create another majority-black district for the new seat.[133] Even with these changes, the General Assembly's plan was rejected by the Department of Justice because the Department claimed that Georgia failed to explain why it did not create a third majority-black district.[134] As a result, Georgia created a new plan, which increased the black population in a third district and thus allowed a strong minority influence.[135] Again, the Justice Department rejected the plan, relying on the ACLU's "max-black" plan as proof that a third majority-minority district could have

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well as four of the State's seven largest cities. Hays v. Louisiana, 862 F. Supp. 119, 121 (W.D. La. 1994), *vacated*, 115 S. Ct. 2431 (1995). The district court noted that the contours of the district could "only be explained credibly as the product of race-conscious decisionmaking." *Id.* at 122.

128. *Hays*, 115 S. Ct. at 2434.

129. *Id.*

130. *Id.* at 2432. Injury from discriminatory governmental actions "accords a basis for standing only to 'those persons who are personally denied equal treatment by the challenged discriminatory conduct.'" *Id.* at 2435 (quoting Allen v. Wright, 468 U.S. 737, 755 (1984)). Nonetheless, the Court also noted that "[a]ny citizen able to demonstrate that he or she, personally, has been injured by that kind of racial classification has standing to challenge the classification in federal court." *Id.* at 2436.

131. Miller v. Johnson, 115 S. Ct. 2475, 2483 (1995). Judicial approval must be by the United States District Court for the District of Columbia. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 2483-84. The Justice Department argued that because the black population was 27% of Georgia's general population, the two majority-minority districts created by the Georgia legislature, which allocated only an 18% share of the districts to majority-minority populations, were inadequate. *Id.* at 2483.

135. *Id.* at 2484.

been created.[136] The Georgia General Assembly finally relented and designed a third majority-black district, the Eleventh District, by clumping together black neighborhoods from Atlanta, Savannah, and outlying areas, creating a district that spanned 200 miles and in some areas was only as wide as the highway.[137] Elections were held in accordance with the newly approved districting plan and black candidates won in all three majority-black districts.[138]

Five white voters from the gerrymandered Eleventh District filed an action against various state officials, claiming that the state action violated the Equal Protection Clause of the Fourteenth Amendment.[139] A district court panel agreed and held the districting invalid.[140] The court determined that racial considerations were the "overriding and predominant force" in creating the districts and applied strict scrutiny.[141] The United States Supreme Court granted certiorari.[142]

IV. ANALYSIS OF OPINION

A. *Justice Kennedy's Majority Opinion*

Justice Kennedy delivered the opinion of the Court, approaching it with an eye toward defining *Shaw v. Reno*,[143] decided two terms prior.[144] The *Shaw* Court held that "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race'. . .

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136. *Id.*
137. *Id.*
138. *Id.* at 2485.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. 113 S. Ct. 2816 (1993).
144. Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas joined in Justice Kennedy's majority opinion. *Id.* at 2482. Justice O'Connor also wrote a concurring opinion. *Id.* at 2497.

Because the shape of the district at issue in *Miller* was less dramatic than the North Carolina district at issue in *Shaw*, the *Miller* Court could not simply apply *Shaw*; it had to either expand the decision or retreat from it. Charles Fried, *Foreward: Revolutions?*, 109 HARV. L. REV. 13, 64 (1995). Harvard Law Professor and Massachusetts Supreme Court Justice Charles Fried noted three options available to the Court in *Miller*: (1) to limit *Shaw* to the particular facts of the case; (2) to reverse itself, overturn *Shaw*, and "admit that the whole enterprise" was "misconceived"; or (3) apply the principles underlying *Shaw* to the new case. *Id.* The *Miller* Court chose the last option. *Id.*

demands the same close scrutiny that we give other state laws that classify citizens by race."[145] Justice Kennedy's opinion, while recognizing that a state's redistricting plan could be voided if it failed to pass *Shaw*'s bizarreness test, stood for the proposition that it could also be voided where race "predominated" in the state's decision making.[146]

Justice Kennedy relied on *Shaw* to distinguish this claim from the vote dilution cases. He drew a distinction between cases where a state acts "'to minimize or cancel out the voting potential of racial or ethnic minorities'"[147] and cases where a state is "separating voters into districts."[148] Reminiscent of the Court's discussion in *Shaw*, Justice Kennedy noted that the Equal Protection Clause has been interpreted to ensure racial neutrality in governmental decision making.[149] He noted that "'[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.'"[150] Justice Kenne-

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145. *Miller*, 115 S. Ct. at 2483 (quoting *Shaw*, 113 S. Ct. at 2825 (quoting Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977))) (internal quotation marks omitted).

146. *Id.* at 2487.

147. *Id.* at 2485-86 (quoting Mobile v. Bolden, 446 U.S. 55, 66 (1980)). Because majority-minority districts are never 100% minority, proponents of race-based districting argue that such districts are "among the least segregated . . . in the nation." Brief for the Congressional Black Caucus as Amicus Curiae at 19-20, Hays v. Louisiana, 115 S. Ct. 2475 (1995) (Nos. 94-558, 94-627). This argument is deceptive. White voters are included in majority-minority districts not out of some sense of integration, but simply as "filler people" to prevent minority votes from being wasted. T. Alexander Aleinkoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 630-31 (1993). Whites that find themselves in majority-minority districts "should not be expected to compete in any genuine sense for electoral representation in [those districts,] lest they undo the preference given to the specified minority group." *Id.* at 631. Voting rights scholar Abigail Thernstrom noted: "Whites who think of running in a majority-black constituency are informed in no uncertain terms that the color of their skin disqualifies them; they are treading where they do not belong." Thernstrom, *supra* note 93, at 918.

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

149. *Id.* at 2482. The *Shaw* Court noted that the central purpose of the Equal Protection Clause is "to prevent the states from purposefully discriminating between individuals on the basis of race." *Shaw*, 113 S. Ct. at 2824 (citing Washington v. Davis, 426 U.S. 229, 239 (1976)). Yet, others argue that race consciousness is a prerequisite to true equality. Justice Blackmun noted almost two decades earlier: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat persons equally, we must treat them differently." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part). The Court has recognized "that in order to remedy the effects of prior discrimination, it may be necessary to take race into account." Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) (plurality opinion).

150. *Miller*, 115 S. Ct. at 2482 (quoting *Bakke*, 438 U.S. at 291); *see also* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an ex-

dy declared that the doctrine of racial neutrality must be applied equally, without respect to whether a burden is placed on the minority or whether the majority accepts a burden upon itself.[151] Government cannot favor groups because the Constitution recognizes only individuals.[152] As a result, laws classifying citizens on the basis of race cannot be upheld unless they pass the Court's strict scrutiny test—narrowly tailored to achieve a compelling state interest.[153] Justice Kennedy observed that

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traordinary justification.").

151. *Miller*, 115 S. Ct. at 2482; *see also* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2110 (1995) ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited."); Powers v. Ohio, 111 S. Ct. 1364, 1370 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (plurality opinion) (holding that strict scrutiny applies regardless of "the race of those burdened or benefited by a particular classification"); *Bakke*, 438 U.S. at 289-90 ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."). *But cf.* Strauder v. West Virginia, 100 U.S. 303, 307 (1879) (arguing that post-Civil War Amendments were intended to bar discrimination against blacks).

152. *Miller*, 115 S. Ct. at 2486. As early as 1967, the Court invalidated a law against interracial marriage not because of its effect on a particular group, but because of its effect on individuals of either race who sought to intermarry. Loving v. Virginia, 388 U.S. 1, 2 (1967). Justice O'Connor, in her *Metro Broadcasting, Inc. v. FCC* dissent, argued: "At the heart of the Constitution's guarantee of equal protection lies the simple command that the government must treat citizens 'as individuals, not as simply components of a racial, religious, sexual or national class.'" 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (quoting Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1083 (1983)), *overruled by Adarand*, 115 S. Ct. at 2113. Justice Ginsburg later disagreed, noting that the process of redistricting inherently treats voters as groups, not as individuals. *Miller*, 115 S. Ct. at 2506 (Ginsburg, J., dissenting). Rather than assigning voters based on "merit or achievement," as an employer would, voters are classified into groups, whether by economic, geographical, political, or social classification, and the interests of each group are balanced against the other. *Id.* (Ginsburg, J., dissenting) (citing Davis v. Bandemer, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring)); *see also* Marcia Coyle, *The Court's New View: Colorblind Rulings Put Heavy Burden on Racial Classifications*, NAT'L L.J., July 10, 1995, at A1 ("[C]ivil rights law is based on group protections . . . . 'Brown v. Board of Education was filed not simply to get Linda Brown into public school but to desegregate public schools.'" (quoting voting rights scholar and litigator Frank R. Parker of the District of Colombia Law School)).

153. *Miller*, 115 S. Ct. at 2486; *see also Adarand*, 115 S. Ct. at 2114; *Shaw*, 113 S. Ct. at 2825; *Croson*, 488 U.S. at 494; *Wygant*, 476 U.S. at 274, 280 n.6. Critics argue that if it is the race-based classification itself which causes the injury, then the Court's opinion in *United States v. Hays*, 115 S. Ct. 2431 (1995), decided the same day as *Miller*, in which the Court found plaintiffs lacked standing, seems wrongly

such a rule has been applied where the state attempts to racially discriminate in access to its public parks, buses, golf courses, beaches, and schools.[154]

The premise of *Shaw* was that "'laws that explicitly distinguish between individuals on racial grounds fall within the core of [the Equal Protection Clause's] prohibition.'"[155] Justice Kennedy argued that this prohibition extends beyond clear-cut racial discrimination, and applies to state action neutral on its face but "'unexplainable on grounds other than race.'"[156] He maintained that *Shaw* was not intended to suggest that "a district must be bizarre on its face before there is a constitutional violation."[157] He reasoned that because *Shaw* recognized that where a district is not so bizarre, proof of an Equal Protection Clause violation will be more difficult, one can logically conclude that other evidence besides a district's bizarreness may be taken into account.[158] Justice Kennedy argued, "Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but 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."[159]

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decided. *The Supreme Court 1994 Term—Leading Cases: Constitutional Law*, 109 HARV. L. REV. 160, 167 (1995) [hereinafter *Leading Cases*]. They argue that an individual would be subject to the same racial classification whether he was excluded from, or included in, a district because of his race. *Id.*

154. *Miller*, 115 S. Ct. at 2486 (citing New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (per curiam) (public parks); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. Atlanta, 350 U.S. 879 (1955) (golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches); Brown v. Board of Educ., 347 U.S. 483 (1954) (schools)). In his dissent, Justice Stevens distinguished these cases from the facts in *Miller*, noting that the Court's prior cases sought to remedy the exclusion of blacks from white-only public facilities. *Id.* at 2498 (Stevens, J., dissenting). Furthermore, race was not a qualification for living in the Eleventh District of Georgia. *Id.* (Stevens, J., dissenting). Justice Stevens noted: "What respondents contest is the inclusion of too many black voters in the District as drawn. In my view, if respondents allege no vote dilution that inclusion can cause them no conceivable injury." *Id.* (Stevens, J., dissenting).

155. *Miller*, 115 S. Ct. at 2483 (quoting *Shaw*, 113 S. Ct. at 2824) (brackets in original).

156. *Id.* at 2483 (quoting *Shaw*, 113 S. Ct. at 2825) (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 262, 266 (1977) (internal quotation marks omitted).

157. *Id.* at 2486.

158. *Id.* at 2487 (citing *Shaw*, 113 S. Ct. at 2826).

159. *Id.* at 2486. Prior to *Miller*, the lower courts were split on whether to recognize evidence other than bizarreness in establishing an Equal Protection Clause violation. *See* Shaw v. Hunt, 861 F. Supp. 408, 431 (E.D.N.C. 1994) (noting that the bizarre shape of a district is constitutionally significant "only as circumstantial evidence that the disproportionate concentration of members of a particular race in certain districts

In determining the proof necessary to sustain an equal protection challenge, Justice Kennedy distinguished simple awareness of racial demographics from the predominance of race in the redistricting process.[160] He noted that states will almost always take race into account in drawing their districts, but that does not necessarily mean that race has predominated in the process.[161] He maintained that it is the plaintiff's burden to show, through either bizarreness in a district's shape or direct evidence of a legislature's intent, that the legislature was predominantly motivated by race in drawing its districts.[162] A plaintiff makes this showing by proving that traditional districting principles, such as "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests," were less important to the legislature

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was something the line-drawers deliberately set about to accomplish"); Hays v. Louisiana, 839 F. Supp. 1188, 1195 (W.D. La. 1993), *vacated*, 114 S. Ct. 2731 (1994) (holding that gerrymandering may also be proved by "direct evidence that a legislature enacted a districting plan with the specific intent of segregating citizens into voting districts based on their race"); *but see* DeWitt v. Wilson, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994) (noting that a redistricting plan is invalid under *Shaw* only if it is "so dramatically irregular that [it] can only be explained as [an] attempt[] to segregate by [race]").

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

161. *Id.* at 2488. A good explanation of racial predominance can be found in Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979). The *Feeney* Court wrote that "discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects. . . . " *Id.* at 279 (citations omitted). Justice Kennedy recognized that this may be a difficult distinction to make, and thus believed courts should be very careful in adjudicating claimed violations of the Equal Protection Clause through race-based districting. *Miller*, 115 S. Ct. at 2488.

162. *Miller*, 115 S. Ct. at 2488. The Court earlier wrote in *Mt. Healthy City School District Board of Education v. Doyle* that the Equal Protection Clause is violated when race is a "substantial" or "motivating" factor in the state's decision making. 429 U.S. 274, 287 (1977). For Justice Ginsburg, legislative intent alone would not be sufficient proof—in her *Miller* dissent, she noted that in *United Jewish Org. of Williamsburgh, Inc. v. Carey*, "[f]ive justices specifically agreed that the intentional creation of majority-minority districts does not give rise to an equal protection claim, absent proof that the districting diluted the majority's voting strength." *Miller*, 115 S. Ct. at 2506 n.11 (Ginsburg, J., dissenting) (citing *United Jewish Organizations of Williamsburgh v. Carey*, 430 U.S. 144, 165 (1977)).

in drawing its districts than were racial considerations.[163] Absent that showing, a state's good faith will be presumed.[164]

After examining Georgia's redistricting plan, Justice Kennedy could offer no "predominant factor" other than race for the shape of the voting district.[165] He noted that no community of actual shared interests could have existed in the Eleventh District, which he claimed told a "tale of disparity, not community"[166] because of its "fractured political, social, and economic interests."[167] He reasoned that the predominance of race in the district's design was apparent when the shape of the district was viewed together with its "racial and population densities."[168] The Court declined to decide whether the combination of shape and population density alone was sufficient to prove the predominance of racial motivation in the state's districting process, because the district court was provided with direct evidence of racial predominance.[169] This direct evidence was provided by the Justice Department's refusal to approve Georgia's redistricting plan unless more majority-minority districts were created, as well as Georgia's acquiescence to that demand.[170] Justice

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163. *Miller*, 115 S. Ct. at 2488. In *Shaw v. Reno*, the Court noted that where race-neutral districting considerations are the basis for the legislature's districting plans, a state can "defeat a claim that a district has been gerrymandered on racial lines." 113 S. Ct. 2816, 2827 (1993).

164. *Miller*, 115 S. Ct. at 2488. This presumption is born out of the discomfort the Court feels toward involving itself in state redistricting, which it considers essentially a state function. *See* Voinovich v. Quilter, 113 S. Ct. 1149, 1156-57 (1993) (noting that reapportionment is the domain of the states, and not the federal courts); Growe v. Emison, 113 S. Ct. 1075, 1081 (1993) ("[T]he Constitution leaves with the States primary responsibility for apportionment."); Chapman v. Meier, 420 U.S. 1, 27 (1975) ("[R]eapportionment is primarily the duty and responsibility of the State. . . . "); White v. Weiser, 412 U.S. 783, 795-796 (1973) ("Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task.").

165. *Miller*, 115 S. Ct. at 2489 (citing Johnson v. Miller, 864 F. Supp. 1354, 1374-78 (S.D. Ga. 1994), *aff'd*, 115 S. Ct. 2475 (1995)).

166. *Id.* at 2484 (citing Johnson v. Miller, 864 F. Supp. 1354, 1376-77, 1389-90 (S.D. Ga. 1994), *aff'd*, 115 S. Ct. 2475 (1995)).

167. *Id.* at 2488. The district court noted that "[t]he populations of the Eleventh [District] are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties and narrow swamp corridors." *Johnson*, 864 F. Supp. at 1389. The Almanac of American Politics refers to the Eleventh District as a "monstrosity." MICHAEL BARONE & GRANT UJIFUSA, ALMANAC OF AMERICAN POLITICS 356 (1994).

168. *Miller*, 115 S. Ct. at 2489.

169. *Id.* (citing Johnson v. Miller, 864 F. Supp. 1364, 1378, 1389-90 (S.D. Ga. 1994), *aff'd*, 115 S. Ct. 2475 (1995)).

170. *Id.* (citing Johnson v. Miller, 864 F. Supp. 1364, 1366, (S.D. Ga. 1994), *aff'd*, 115 S. Ct. 2475 (1995)). The Attorney General of Georgia strongly objected to the Department of Justice's demand that three majority-minority districts be created because the only way to comply would "violate all reasonable standards of compactness and

Kennedy noted that the United States Attorney General "would accept nothing less than abject surrender to its maximization agenda."[171]

Once Justice Kennedy established race as the predominant factor in drawing the district, he applied the strict scrutiny standard of review to the redistricting plan.[172] To prevail under this standard, the state must show that its plan is "narrowly tailored to achieve a compelling interest."[173] While the Court found a strong state interest in eliminating the effects of past discrimination,[174] it recognized that Georgia's true objective was to satisfy the demands of the Department of Justice.[175] The Court reasoned that complying with the demands of the Justice Department, independent of any interest in remedying past discrimination, could not provide the compelling interest necessary to survive strict scrutiny.[176] Justice Kennedy noted further: "When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied."[177] He reasoned that blind defer-

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contiguity." *Id.* at 2489-90.

171. *Id.* at 2489 (quoting Johnson v. Miller, 864 F. Supp. 1364, 1360-67, (S.D. Ga. 1994), *aff'd*, 115 S. Ct. 2475 (1995)). Justice Department officials told Georgia legislators at a Washington meeting "to subordinate their economic and political concerns to the quest for racial percentages." Johnson v. Miller, 864 F. Supp. 1364, 1364 n.8 (S.D. Ga. 1994), *aff'd*, 115 S. Ct. 2475 (1995).

172. *Miller*, 115 S. Ct. at 2490.

173. *Id.* (citing Shaw v. Reno, 113 S. Ct. 2816, 2829-32 (1993)); *see also* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2114 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (plurality opinion); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 & n.6 (1986) (plurality opinion).

174. *Miller*, 115 S. Ct. at 2490.

175. *Id.* (citing *Johnson*, 864 F. Supp. at 1378). Justice Ginsburg disputed that assertion in her dissent. She argued that while the Justice Department dictated a plan to Georgia's General Assembly, that was not the final plan enacted. *Id.* at 2504 (Ginsburg, J., dissenting) (citing *Johnson*, 864 F. Supp. at 1396-97 n.5 (Edmondson, J., dissenting)). Further, Georgia had options other than to change its redistricting plan. *Id.* (Ginsburg, J., dissenting). The state could have filed a civil action in the United States District Court for the District of Columbia, seeking relief from the Justice Department's demands. *Id.* (Ginsburg, J., dissenting).

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

177. *Id.* at 2491; *see also* Shaw v. Reno 113 S. Ct. 2816, 2832 (1993) (noting that only three justices on the Court have ever contended that "[s]tates have a significant interest in minimizing the consequences of racial bloc voting apart from the requirements of the Voting Rights Act"); *Croson*, 488 U.S. at 501 ("The history of racial classifications in this country suggests that blind deference to legislative or executive pronouncement of necessity has no place in equal protection analysis.").

ence to the Justice Department's objection would result in a "surrender[] to the Executive Branch [of] our role in enforcing the constitutional limits on race-based official action."[178] Justice Kennedy further deduced that Georgia's districting plan was not required by the Voting Rights Act.[179] He cited the district court's finding that the Justice Department had operated under a "black-maximization" policy,[180] and stated: "Wherever a plan is 'ameliorative,' a term . . . used to describe plans increasing the number of majority-minority districts, it 'cannot violate [section five of the Voting Rights Act] unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.'"[181] Thus, the Act's "non-regression" principle simply dictates that so long as a state's redistricting does not put minorities in a worse posi-

178. *Miller*, 115 S. Ct. at 2491. The *Shaw* Court wrote that "the Voting Rights Act and our case law make clear that a reapportionment plan that satisfies section five [of the Voting Rights Act] may still be enjoined as unconstitutional." *Shaw*, 113. S. Ct. at 2831; *see, e.g.*, United States v. Nixon, 418 U.S. 683, 704 (1974) (reasoning that the Executive Branch can have no judicial power); Baker v. Carr, 369 U.S. 186, 211 (1962) (noting that the Supreme Court is the "ultimate interpreter of the Constitution"); Cooper v. Aaron, 358 U.S. 1, 18 (1958) (stating that "the federal judiciary is supreme in the exposition of the law of the Constitution"); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (proclaiming "[i]t is emphatically the province and duty of the judicial department to say what the law is."). Nor did Justice Kennedy believe it proper to accord the Justice Department's interpretation of the Voting Rights Act any deference. *Miller*, 115 S. Ct. at 2491.

179. *Miller*, 115 S. Ct. at 2491. Justice Kennedy noted that if the Act were interpreted to compel race-based districting, it would likely be unconstitutional and jeopardize the statute as a whole. *Id.* at 2492.

180. *Id.* at 2491, 2492-93 (citing Johnson v. Miller, 864 F. Supp. 1354, 1366, 1380 (S.D. Ga. 1994), *aff'd*, 115 S. Ct. 2475 (1995)). The district court noted that it had "been placed in the unenviable position of depriving black citizens of a privilege the Justice Department never had the right to grant: maximization of the black vote, whatever the cost." Johnson v. Miller, 864 F. Supp. 1354, 1369 (S.D. Ga. 1994), *aff'd*, 115 S. Ct. 2475 (1995)).

181. *Miller*, 115 S. Ct. at 2492 (quoting Beer v. United States, 425 U.S. 130, 141 (1976)). During the 1982 congressional debate on amending the Voting Rights Act, the proponents of section 5 assured Congress that the Act would not be used to require proportional representation for minorities. Katherine I. Butler, *Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights?*, 26 RUTGERS L.J. 595, 604 (1995). The Assistant Attorney General for Civil Rights in the Carter Administration stated: "[A]ssume . . . that no fairly-drawn redistricting plan will result in minority control of [one] district, because of dispersed minority residential patterns, for example. The Department's response is not to demand that the jurisdiction adopt a . . . gerrymandered districting plan to ensure . . . proportional minority representation." *Id.* at 604 n.20 (citing *1 Voting Rights Act: Hearings on S.52, S.1761, S.1975, S.1992, and H.R. 3112, Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Cong., 2d Sess. 1380, 1388 (1982) (statement of former Assistant Attorney General for Civil Rights Drew S. Days, III)).

tion than before redistricting, the plan is valid.[182] As a result, Georgia's original plan, which created an additional majority-minority district, was valid under the Act.[183]

B. Justice O'Connor's Concurring Opinion

Justice O'Connor wrote a separate concurrence to stress that the Court's decision should not throw into doubt a large number of congressional districts.[184] She noted that most states have drawn boundaries in accordance with customary districting principles, even though race may have been considered.[185] Instead, she characterized the majority opinion as setting the standard for subjecting "extreme instances of gerrymandering" to judicial scrutiny.[186]

C. Justice Stevens' Dissenting Opinion

Justice Stevens' views on the case substantially mirrored those of Justice Ginsburg.[187] He viewed *Shaw* as improperly decided for two reasons. First, it held that a majority's efforts to disenfranchise a minority for its own gain and a majority's effort to suffer a burden to enfranchise

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182. *Miller*, 115 S. Ct. at 2492, 2493.

183. *Id.* at 2492.

184. *Id.* at 2497 (O'Connor, J., concurring). Despite Justice O'Connor's words, civil rights groups argue that the decision has created a presumption that all majority-minority districts are unlawful. Richard Willing, *High Court Rejects Race-Based Districts; Decision Could Reverse Trend of More Blacks Elected to the U.S. House*, DETROIT NEWS, June 30, 1995, at A6.

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

186. *Id.* (O'Connor, J., concurring). Justice O'Connor noted: "To invoke strict scrutiny, a plaintiff must show that the state relied on race in substantial disregard of customary and traditional practices." *Id.* (O'Connor, J., concurring). Some scholars have interpreted Justice O'Connor's concurrence, which supplied the essential fifth vote, as a significant retreat from Justice Kennedy's majority opinion. *See* Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 876 n.36 (1995) (reasoning that O'Connor's concurrence makes the state of the law "unclear" insofar as she would require a "substantial disregard of customary and traditional practices"). Another commentator noted: "Both *Adarand* and *Miller* present the crux at which constitutional and practical judgment have arrived with respect to reverse discrimination, and Justice O'Connor quite evidently is right at that crux." Fried, *supra* note 144, at 67. Yet this same commentator also noted: "If Justice O'Connor has seemed to some to be skittish about this, it is only in the application . . . . [S]he has been fervent in her embrace of the universalistic principle." *Id.* at 68.

187. *Miller*, 115 S. Ct. at 2497 (Stevens, J., dissenting); *see also infra* notes 198-220 (discussing Justice Ginsburg's dissenting opinion).

a minority were moral equivalents.[188] Second, the Court failed to identify which class of voters would have standing to sue and never "coherently articulated what injury this cause of action is designed to redress."[189]

Justice Stevens promoted his own standard for determining when a districting plan violates the Equal Protection Clause. Under his standard, a violation would exist when a districting plan serves "'no purpose other than to favor one segment—whether racial, ethnic, religious, economic, or political—that may occupy a position of strength at a particular point

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188. *Id.* at 2497-98 (Stevens, J., dissenting) (citing Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097, 2120 (1995) (Stevens, J., dissenting)). In his dissent in *Adarand*, Justice Stevens wrote: "There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination." 115 S. Ct. 2097, 2120 (1995) (Stevens, J., dissenting). Justice Stevens' argument is at complete odds with the views of Justice Thomas, who wrote in his *Adarand* concurrence:

> I believe that there is a 'moral and constitutional equivalence' between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.

Id. at 2119 (Thomas, J., concurring in part and concurring in the judgment) (citations omitted).

189. *Miller*, 115 S. Ct. at 2497 (Stevens, J., dissenting). Yet, in *Joint Anti-Fascist Refugee Committee v. McGrath*, the Court articulated that "standing may be based on an interest created by the Constitution." 341 U.S. 123, 152 (1951). In a similar vein, the Court in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)* wrote:

> Nor . . . could the fact that many persons shared the same injury be sufficient reason to disqualify from seeking review . . . any person who had in fact suffered injury . . . . To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.

412 U.S. 669, 686, 688 (1973).

Furthermore, in *Brown v. Board of Education*, the Court answered similar criticisms with the question: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does." 347 U.S. 483, 493 (1954). The Court deemed segregation inherently unequal, reasoning that it is the racial classification itself that causes the injury. *Id.* at 494-95; *see also supra* notes 17-18 and accompanying text. One scholar has noted that the legal theory represented by Justice Stevens' dissent "would return us to the separate but equal doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954)." Butler, *supra* note 181, at 600. Butler noted that "[b]y logical extension of the . . . reasoning that injury depends on deprivation of representation, a state could hold separate elections for blacks and whites so long as the seats to be elected by blacks did not exceed their percentage of the electorate." *Id.*

in time, or to disadvantage a politically weak segment of the community.'"[190] By his analysis, a redistricting plan that benefits a political minority does not violate the Equal Protection Clause[191] because the Constitution does not bar a state from promoting the "fair representation of different groups."[192]

In regard to the injury recognized by *Shaw*, Justice Stevens queried: "If the . . . injury does not flow from an increased probability that white candidates will lose, then how can the increased probability that black candidates will win cause white voters, such as respondents, cognizable harm?"[193] Yet, even given *Shaw*'s authority, Justice Stevens saw no injury to the plaintiffs in this case.[194] He characterized the majority opinion as allowing relief under the theory of "representational harms."[195] By his understanding of the *Shaw* representational harms argument,

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190. *Miller*, 115 S. Ct. at 2499 (Stevens, J., dissenting) (quoting Karcher v. Daggett, 462 U.S. 725, 748 (1983) (Stevens, J., concurring)).

191. *Id.* (Stevens, J., dissenting). Justice Stevens seemingly contradicted his own dissent in *Fullilove v. Klutznick* where he stated: "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." 448 U.S. 448, 537 (1980) (Stevens, J., dissenting). Justice Stevens also noted in the earlier case that "any official action that treats a person differently on account of race or ethnic origin is inherently suspect." *Id.* at 523 (Stevens, J., dissenting).

192. *Miller*, 115 S. Ct. at 2499 (Stevens, J., dissenting) (citing Gaffney v. Cummings, 412 U.S. 735, 754 (1973)). The Court in *Gaffney v. Cummings* wrote:

> [N]either we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.

412 U.S. 735, 754 (1973).

In response to the *Gaffney* argument, the Court in *Shaw* explained: "[T]he very reason that the Equal Protection Clause demands strict scrutiny of all racial classifications is because without it, a court cannot determine whether or not the discrimination truly is benign." Shaw v. Reno, 113 S. Ct. 2816, 2830 (1993).

193. *Miller*, 115 S. Ct. at 2497 (Stevens, J., dissenting). Justice White unsuccessfully argued the same position in *Shaw*. *See Shaw*, 113 S. Ct. at 2834 (White, J., dissenting).

194. *Miller*, 115 S. Ct. at 2499 (Stevens, J., dissenting).

195. *Id.* at 2497 (Stevens, J., dissenting) (citing United States v. Hays, 115 S. Ct. 2431, 2436 (1995)). The *Shaw* Court declared that representational harms occur when, in a district drawn to "effectuate the perceived common interests of one racial group," elected representatives believe that their duty of representation is owed not to their constituency as a whole, but only to the minority group that makes up the majority of their district. *Shaw*, 113 S. Ct. at 2827.

Justice Stevens argued that a member of a district does not have standing unless most or all of the prevalent minority group vote for the same candidate and the winning candidate ignores his white constituents.[196] Believing that the plaintiffs in *Miller* failed that test, Justice Stevens would have dismissed the action.[197]

D. Justice Ginsburg's Dissenting Opinion

Justice Ginsburg felt the Court should hesitate to become involved in state reapportionment matters and instead should leave them mainly to the state legislatures.[198] At the same time, she recognized the necessity of judicial involvement to secure the voting rights of racial minorities.[199] Justice Ginsburg noted that the tenets of the Constitution were not always followed and that racial discrimination in voting was rampant following passage of the Fifteenth Amendment.[200] Joined in her dissent by Justices Stevens, Breyer, and Souter, Justice Ginsburg argued against the majority's inclusion of whites as co-equals in Equal Protection Clause jurisprudence.[201] She maintained that a distinction between majority and minority interests must be made to protect minority voters.[202] Justice Ginsburg noted not only America's long history of denying voting rights to blacks, but also what she believed was an ongoing struggle by blacks to gain fair representation.[203] She argued that a majority, by contrast, is free from such obstacles, and as a result, can exert its influence upon state legislators.[204]

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196. *Miller*, 115 S. Ct. at 2497 (Stevens, J., dissenting). In a case decided the same day as *Miller*, however, the Court noted in dicta that "[w]here a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." United States v. Hays, 115 S. Ct. 2431, 2436 (1995).

197. *Miller*, 115 S. Ct. at 2499 (Stevens, J., dissenting).

198. *Id.* (Ginsburg, J., dissenting); *see also supra* note 164.

199. *Miller*, 115 S. Ct. at 2499 (Ginsburg, J., dissenting). The Fifteenth Amendment requires as much, declaring that one's right to vote "shall not be denied . . . by any state on account of race." U.S. CONST. amend. XV.

200. *Miller*, 115 S. Ct. at 2501 (Ginsburg, J., dissenting). Eventually the Court intervened and forced jurisdictions to abide by these constitutional requirements. *See, e.g.*, Schell v. Davis, 336 U.S. 933 (1949) (per curiam) (prohibiting the discriminatory application of voting tests); Smith v. Allwright, 321 U.S. 649 (1944) (invalidating white primaries); Lane v. Wilson, 307 U.S. 268 (1939) (invalidating procedural barriers to voting); Guinn v. United States, 238 U.S. 347 (1915) (prohibiting grandfather clauses).

201. *Miller*, 115 S. Ct. at 2506 (Ginsburg, J., dissenting).

202. *Id.* (Ginsburg, J., dissenting).

203. *Id.* (Ginsburg, J., dissenting).

204. *Id.* (Ginsburg, J., dissenting).

In Justice Ginsburg's view, the Court's opinion expanded the scope of judicial intervention in redistricting cases.[205] Under her interpretation of *Shaw*, judicial intervention in a state's redistricting plan on the basis of an Equal Protection Clause violation is limited to cases where a district's shape is "extremely irregular."[206] She viewed the Court's decision as a move away from the Court's self-imposed limitation to intervene only where traditional districting practices are completely "set aside."[207] She refused to link the use of race-based decisions with a strict scrutiny analysis, noting that in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*,[208] where "the state 'deliberately used race in a purposeful manner' to create majority-minority districts, . . . seven of eight Justices participating voted to uphold the State's plan without subjecting it to strict scrutiny."[209]

Even under the Court's predominance analysis, Justice Ginsburg argued that race "did not crowd out all other factors" in the delineation of

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205. *Id.* at 2499-2500 (Ginsburg, J., dissenting).

206. *Id.* at 2499 (Ginsburg, J., dissenting) (citing Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993)). Justice Ginsburg's contention seems to run afoul from the spirit of *Shaw*. While the Court in *Shaw* pointed to the bizarre shape of the district in support of its holding, it also observed that laws which "explicitly distinguish between individuals on racial grounds" are not in line with the "central purpose" of the Equal Protection Clause. Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993). The Court noted that "[n]o inquiry into legislative purpose is necessary when a racial classification appears on the face of the statute." *Id.* In the absence of a facial classification, the Court has required a plaintiff to show the existence of intentional discrimination to trigger strict scrutiny. Washington v. Davis, 426 U.S. 229, 239 (1976). The *Shaw* Court used the bizarre shape of the district as evidence of the intentional use of race and thus demanded strict scrutiny. *Shaw*, 113 S. Ct. at 2827.

207. *Miller*, 115 S. Ct. at 2500 (Ginsburg, J., dissenting).

208. 430 U.S. 144 (1977).

209. *Miller*, 115 S. Ct. at 2505 n.11 (Ginsburg, J., dissenting) (quoting *United Jewish Org.*, 430 U.S. at 165). Justice Ginsburg's reasoning may be contrary to *Gomillion v. Lightfoot*, where boundary lines were redrawn to remove black voters from a city. 364 U.S. 339, 345-345 (1960). While blacks were deprived of a right to vote, this was also true of everyone living outside the city boundaries. *Id.* at 341. Thus, the claim was not based on a right of blacks to vote in city elections, but instead on the constitutional protection against inclusion and exclusion from a municipality on the basis of a racial classification. *Id.* at 346. As a result of the apparent inconsistency between the two cases, the majority in *Miller* held that "[t]o the extent any of the opinions in [*United Jewish Organizations*] can be interpreted as suggesting that a state's assignment of voters on the basis of race would be subject to anything but our strictest scrutiny, those views ought not to be deemed controlling." *Miller*, 115 S. Ct. at 2487-88.

the Georgia district.[210] She pointed to the redistricting drafters' accommodation of a particular state senator by placing his son in the district and of a state representative by keeping his black neighborhood intact outside of the Eleventh District.[211] She found the boundaries of the district distinguishable from the configuration at issue in *Shaw*, where the lines used to define the extremely irregular shape of the North Carolina district[212] were drawn with race alone in mind.[213] In her view, the Georgia district reflected the use of traditional districting principles with respect to size, shape, and political subdivisions.[214] Justice Ginsburg noted that Georgia's Eleventh District was absent from a "statistically calculated list of the twenty-eight most bizarre districts in the United States."[215] She also noted that the district's land area was about average, not out of proportion with other districts in the state,[216] and was generally respectful of political boundaries, ranking about average among Georgia's districts in divided counties.[217]

Justice Ginsburg alternatively argued that race alone is enough to create a community of interests by which districting should be proper.[218] She noted that legislators have districted according to "ethnicity" for a long time.[219] She reasoned that denying blacks their own districts, while

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210. *Miller*, 115 S. Ct. at 2502 (Ginsburg, J., dissenting).

211. *Id.* at 2503-04 (Ginsburg, J., dissenting).

212. *Id.* at 2502 (quoting Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993)). Justice Ginsburg noted that the district at issue in *Shaw* spanned 160 miles and was, "'for much of its length, no wider than the I-85 corridor.'" *Id.* at 2502 (Ginsburg, J., dissenting) (quoting *Shaw*, 113 S. Ct. at 2820-21). One of the district's legislators said, "'[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district.'" *Id.* (Ginsburg, J., dissenting) (quoting *Shaw*, 113 S. Ct. at 2820-21) (internal quotation marks omitted) (quoting WASH. POST, Apr. 20, 1993, at A4).

213. *Id.* at 2502-03 (Ginsburg, J., dissenting). Yet, as noted earlier, Justice Kennedy viewed such a distinction as less important in *Miller* because irrespective of the shape of Georgia's Eleventh District, there was direct evidence that racial considerations predominated. *Id.* at 2489; *see also* Johnson v. Miller, 864 F. Supp. 1354, 1372, 1378 (S.D. Ga. 1994), *aff'd*, 115 S. Ct. 2475 (1995).

214. *Miller*, 115 S. Ct. at 2502-03 (Ginsburg, J., dissenting).

215. *Id.* at 2504 (Ginsburg, J., dissenting) (citing Pildes & Niemi, *supra* note 110, at 565.

216. *Id.* (Ginsburg, J., dissenting) (citing *Johnson*, 864 F. Supp. at 1396 n.4 (Edmondson, J., dissenting)).

217. *Id.* (Ginsburg, J., dissenting). Yet, as noted earlier, Justice Kennedy judged the district not just according to its geometric shape, but as a whole, together with its racial and population densities. *Id.* at 2489.

218. *Id.* at 2504 (Ginsburg, J., dissenting).

219. *Id.* (Ginsburg, J., dissenting) (citing NATHAN GLAZER & DANIEL P. MOYNIHAN, BEYOND THE MELTING POT 19-20 (1963) ("[M]any elements—history, family and feeling, interest, formal organizational life—operate to keep much of New York life channeled within the bounds of [an] ethnic group."); E. LITT, BEYOND PLURALISM: ETHNIC POLITICS

allowing gerrymandered districts for other ethnic groups, "would shut out 'the very minority group whose history in the United States gave birth to the Equal Protection Clause.'"[220]

V. IMPACT

A. *Judicial Impact*

Together with *Adarand* and *Shaw*, *Miller v. Johnson* crystallizes the Courts' developing Equal Protection Clause jurisprudence. The current Supreme Court seems determined to remove many of the vestiges of racial classifications from government decision making.[221] Some observers feel that the end result may be the total prohibition on the use of racial classifications by the government.[222]

Justice Ginsburg warned in her dissent that *Miller*'s legacy will be increased litigation.[223] By her analysis, determining when districting plans are predominantly motivated by race, and therefore impermissible,

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IN AMERICA 2 (1970) ("[E]thnic forces play a surprisingly persistent role in our politics"); H. Bailey & E. Katz, *Preface* to ETHNIC GROUP POLITICS at ix (H. Bailey & E. Katz eds., 1969) ("[E]thnic identifications do exist and . . . one cannot really understand the American political process without giving special attention to racial, religious and national minorities.")). Further, Justice Ginsburg argued that America has a long history of drawing district lines in accordance with ethnic groupings. *Miller*, 115 S. Ct. at 2505 (Ginsburg, J., dissenting) (citing STEVEN P. ERIE, RAINBOW'S END: IRISH-AMERICANS AND THE DILEMMAS OF URBAN MACHINE POLITICS, 1840-1985 91 (1988) (noting that Jersey City's "Horseshoe district" lumped "most of the city's Irish together") and *Coveted Landmarks Add a Twist to Redistricting Task*, L.A. TIMES, Sept. 10, 1991, at A1, A24 (noting how one Irish Catholic state assemblyman "wanted his district drawn following [Catholic] parish lines so all the parishes where he went to baptisms, weddings and funerals would be in his district.")). On the other hand, opponents of race-based districting argue that these examples are by no means as extreme as Georgia's gathering of blacks from distant areas to create the Eleventh District. Fried, *supra* note 144, at 65. Further, their "commonality" encompassed more than simply their ethnicity. *Id.* at 65 n.350.

220. *Miller*, 115 S. Ct. at 2506 (Ginsburg, J., dissenting) (quoting Shaw v. Reno, 113 S. Ct. 2816, 2845 (1993) (Stevens, J., dissenting)).

221. Coyle, *supra* note 152, at A1.

222. In her article, Coyle noted that "[t]he Court has moved substantially toward adoption of a color-blind Constitution under which the government can never have a 'compelling interest' justifying race-based classifications." *Id.* This conclusion is probably unwarranted because the Court has continuously stressed that race-conscious state decision making is not completely barred. *See* Shaw v. Reno, 113 S. Ct. 2816, 2824, 2826 (1993); *Miller*, 115 S. Ct. at 2488; *id.* at 2497 (O'Connor, J., concurring).

223. *Miller*, 115 S. Ct. at 2507 (Ginsburg, J., dissenting).

will not be easy.[224] She noted that "[g]enuine attention to traditional districting practices and avoidance of bizarre configurations seemed, under *Shaw*, to provide a safe harbor."[225] After *Miller*, Justice Ginsburg suggested that states will know if their race-based districts are safe only through litigation.[226] She characterized the majority's new standard as an "invitation to litigat[ion]" anytime that plaintiffs "plausibly allege that other factors carried less weight than race."[227] This may create a "catch-22" for drafters of legislative districts, for "[i]f the state draws a majority-black district, it can get sued by whites under uncertain standards, and if it doesn't draw them, it can be sued by minorities for failing to comply with the Voting Rights Act."[228] In the end, Justice Ginsburg predicted that a large number of federal judges will find themselves "drawn into the fray."[229]

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224. *Id.* at 2506-07 (Ginsburg, J., dissenting). Justice Ginsburg is not alone in her opinion. It has been noted that while the Court in *Miller* freed lower courts from interpreting *Shaw's* vague bizarreness standard, "*Miller* established a standard that is at least as difficult to comprehend." *Leading Cases*, *supra* note 153, at 165. Further, the new standard may become difficult to prove as legislators begin to realize how to make the predominance of race in their districting process seem like something else—perhaps "geographic vicinity" or "party affiliation." *Id.*

225. *Miller*, 115 S. Ct. at 2507 (Ginsburg, J., dissenting). Justice O'Connor gave the perception of a "safe harbor" when she wrote in *Shaw* that "traditional districting principles such as compactness, contiguity, and respect for political subdivisions . . . are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw*, 113 S. Ct. at 2827.

226. *Miller*, 115 S. Ct. at 2507 (Ginsburg, J., dissenting).

227. *Id.* at 2505 (Ginsburg, J., dissenting). Some fear that this new litigation will be "skewed" by legislators whose primary allegiance is to their party. *Leading Cases*, *supra* note 153, at 165.

228. Richard C. Reuben, *A 'Simple Command' Creates Confusion: Validity of Thousands of Redistricting Plans in Doubt After High Court Ruling*, A.B.A. J., Sept. 1995, at 19.

229. *Miller*, 115 S. Ct. at 2507 (Ginsburg, J., dissenting); *see also* Reuben, *supra* note 228, at 18 (arguing that we will see "a new era of trench litigation and debate not seen in at least a generation"). Justice O'Connor, in her concurrence in *Miller*, argued the contrary, noting that the decision "does not throw into doubt the vast majority of the nation's 435 congressional districts," presuming that in the majority of cases, the states have used "customary districting principles." *Miller*, 115 S. Ct. at 2497 (O'Connor, J., concurring). In *Dillard v. City of Greensboro*, the first redistricting case after *Miller* to make its way to the Federal Court of Appeals, black plaintiffs challenged the multimember districting scheme used in Alabama to elect its county commissioners and city councils, alleging that it violated section 2 of the Voting Rights Act. 74 F.2d 230, 231 (11th Cir. 1996). The City of Greensboro conceded that their districting violated the Voting Rights Act, and submitted a new plan to the Justice Department. *Id.* The Attorney General denied preclearance under section 5, however, arguing that not enough majority-minority districts were created. *Id.* at 232. A magistrate judge, appointed by the district court, approved a plan submitted by the black plaintiffs that created three majority-minority districts. *Id.* The Eleventh Circuit held that *Miller* was controlling and remanded the case for a determination of

Civil rights groups, politicians, and others looked to *Miller* for the answers left unresolved after *Shaw*—primarily, the kind of role race can play in the redistricting process.[230] The Court's answer in *Miller* was not particularly clear.[231] In determining the role that race will play in drafting future districts, two issues must be addressed. First, the Court gave little guidance to lower courts on how to determine whether race was an impermissible predominant consideration in designing a district. *Miller* tells us that race is a predominant consideration when traditional districting principles are forsaken,[232] but the Court provides little help in determining at what point these principles become forsaken. Second, the Court did not address whether race-based districting can be a remedy for past discrimination. Section 5 of the Voting Rights Act gives the Justice Department the authority to deny the preclearance of any retrogressive voting procedure.[233] In *Shaw*, the Court wrote that "[a] reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression."[234] Nevertheless, the *Shaw* Court also noted that there is "a significant state interest in eradicating the effects of past racial discrimination."[235] The *Miller* Court reiterated that statement, but stated that because the State failed to argue that the district was created to remedy past discrimination, it was not an issue.[236] In *City of Richmond v. J.A. Croson Co.*,[237] the Court noted that an affirmative action plan would fulfill a compelling state interest where there was a "'strong basis in evidence for [the] conclusion that remedial action was necessary.'"[238] In *Miller*, the Court used the same standard in analyzing race-based districting claims, noting its insistence on "a strong basis in evidence of the harm being remedied."[239] Yet, the Court did not elaborate

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whether race was the predominant consideration in drawing the district. *Id.* at 231-33.

230. *See* Coyle, *supra* note 152, at A1.

231. One scholar noted: "[T]he Court's attempted bright-line ruling is clear as mud." Richard C. Reuben, *Heading Back to the Thicket: Voting District Cases Pose Politically and Racially Charged Questions*, A.B.A. J., Jan. 1996, at 40.

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

233. Beer v. United States, 425 U.S. 130, 140-41 (1976).

234. Shaw v. Reno, 113 S. Ct. 2816, 2831 (1993).

235. *Id.*

236. *Miller*, 115 S. Ct. at 2490.

237. 488 U.S. 469 (1989) (plurality opinion).

238. *Id.* at 500 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion)).

239. *Miller*, 115 S. Ct. at 2491. The Court's insinuation that remedial race-based districting may be constitutional seems to be self-contradictory. If classifications based

on the application of such a standard. Further, the scope of the decision is not clear. According to the director of the American Civil Liberties Union Voting Rights Project, "[t]he [*Miller*] opinion affects everything from congressional to school board and water districts."[240] As a result of the decision, Georgia is not only dealing with its stricken congressional district, but is also looking into correcting its state legislative districts.[241]

Even when it is established that race was a predominant consideration in drafting a district and strict scrutiny is deemed applicable, it is uncertain how the Court will apply the standard. Prior to *Adarand* and *Miller*, strict scrutiny was viewed as "strict in theory, fatal in fact."[242] Yet, the current Court has signaled that strict scrutiny may not be as harsh as in the past.[243] An often repeated idea that permeates *Croson*, *Adarand*, *Shaw*, and *Miller* is that strict scrutiny will be used only to determine the "good" from the "bad."[244] Professors Richard Pildes and Richard Niemi argue that the Court's use of a strict scrutiny analysis represents a "legal middle ground" between complete colorblindness and "the preferential use of race to enhance the political or economic position of previously

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predominantly on race are invidious to our system of government, then both remedial and nonremedial racial classifications would be unconstitutional. *See Miller*, 115 S. Ct. at 2482.

240. Reuben, *supra* note 228, at 18.

241. *Id.*

242. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring). In his *Adarand* dissent, Justice Stevens noted that strict scrutiny "has usually been understood to spell the death of any governmental action to which a court may apply it." Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2121 n.1 (1995) (Stevens, J., dissenting).

243. *Adarand*, 115 S. Ct. at 2117. In *Adarand*, the Court wrote that it "wish[ed] to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Id.* (quoting *Fullilove*, 448 U.S. at 519). The Court noted *United States v. Paradise* where it found that a state's action constituted "pervasive, systematic, and obstinate discriminatory conduct" and endorsed a race-based remedy accordingly. *Id.* at 2118 (citing United States v. Paradise, 480 U.S. 149, 167 (1987) (plurality opinion)).

244. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (noting that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by insuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."); *Adarand*, 115 S. Ct. at 2113 (noting that "[t]he point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking."). Yet, states may find it almost impossible to satisfy the narrowly tailored prong because a court will almost always be able to come up with an alternative purpose that applies more traditional districting principles. Tricia A. Martinez, *When Appearance Matters: Reapportionment Under the Voting Rights Act and* Shaw v. Reno, 54 LA. L. REV. 1335, 1364 (1994).

disadvantaged minorities."[245] Yet, even the conservative members of the Court are not in complete agreement on what strict scrutiny means. Justice Scalia noted in his concurring opinion in *Adarand* that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."[246]

B. Societal Impact

The perceived impact of *Miller* depends on what side of the raced-based districting argument the observer falls. Proponents of race-based districting argue quite strongly that the Court's actions will hinder further achievement and success in the black community.[247] They view the Court's actions as "declaring the nation 'colorblind' regardless of the reality."[248] Their reality is a racially polarized electorate where whites vote only for whites, and blacks only for blacks.[249] One study on racial

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245. Pildes & Niemi, *supra* note 110, at 504.

246. *Adarand*, 115 S. Ct. at 2118 (Scalia, J., concurring in part and concurring in the judgment).

247. Coyle, *supra* note 152, at A1.

248. *Id.* Harvard Professor Morton Horwitz noted that the Court's demand for a color-blind Constitution "wishe[s] away existing racial realities with the same cruel formalism that was characteristic of the Court's post-Civil War decisions." Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 106 (1993).

Other proponents of race-based districting argue that "[t]he Voting Rights Act implicitly acknowledges that . . . race-consciousness exists in practice and that it should be harnessed in a progressive, or at least non-retrogressive, manner." *Leading Cases*, *supra* note 153, at 166-67. Those that favor a color-blind Constitution respond that "the system is truly purged of racial bias only when the law treats all groups, including whites, without distinction." Alexandra Natapoff, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059, 1062 n.18 (1995) (citing Richard A. Epstein, *Tuskegee Modern, or Group Rights Under the Constitution*, 80 KY. L. REV. 869, 881-85 (1992)).

249. Dayna Cunningham, *Insuring Access: Redistricting and Representation*, NAT'L B. A. MAG., Dec. 8, 1994, at 13. Cunningham noted that "race continues to be the single most decisive determinant of political behavior in American life." *Id.* One scholar noted:

> What the Supreme Court is reluctant to acknowledge is that the Voting Rights Act is still needed. There are still attempts to disenfranchise and dilute the minority vote. Racially polarized voting is a reality. Black candidates, as a rule, are still unable to be elected in majority white districts. The judicial and political discourse is ignoring that reality.

Nancy K. Barron, *The Voting Rights Act: Over the Hill at Age 30?*, 22-FALL HUM. RTS.

voting patterns in the South concluded that "a jurisdiction nearly always must have more than a [fifty percent] black population for black candidates to be elected."[250] Twenty-five years ago, one percent of districts where whites held a majority elected a black representative.[251] Even today, in districts where the black population hovers around twenty-five percent, it is estimated that only around one percent of elected positions would be filled by blacks were majority-minority districts eliminated.[252] In a study of South Carolina election races where whites and blacks ran against each other, whites voted for other whites ninety percent of the time, while blacks voted for other blacks eighty-five percent of the time.[253]

From the point of view of some individuals, majority-minority districts have proven extraordinarily successful in neutralizing the minorities' natural disadvantage in the voting process.[254] Certainly a dramatic surge in black office holding has taken place over the past thirty years, from two black officeholders in 1965, when the Voting Rights Act was passed, to 160 black officeholders in 1990.[255] It was during this time span that majority-minority districts proliferated.[256] After the 1990 Census, which

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10, 30 (1995).

250. Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV 1359, 1368 (1995) (reviewing THE POLITICS OF RACE QUIET REVOLUTION IN THE SOUTH (Chandler Davidson & Bernard Grofman eds., 1994)).

251. *Id.*

252. *Id.* at 1373. In the wake of *Miller*, civil rights activists argue that the decision "could reduce the 38 [sic] congressional seats now held by African-Americans to merely a handful." Jan Crawford Greenburg, *Race-Based Districts Banned: Vote Power of Blacks Jeopardized*, CHI. TRIB., June 30, 1995, at 1. Such projections may be somewhat dubious. First, those projections are based on past voting habits and do not take into account that racial attitudes are rapidly changing. Thernstrom, *supra* note 93, at 933. Thernstrom has noted that the record of black electoral success decades ago "tells us little about the prospects for such success today." *Id.* Second, those projections do not take into account that unfortunately blacks do not enter electoral races in the same numbers as whites do. *Id.* at 933. Simply stated, "black candidates cannot win races they do not enter." *Id.* Third, no candidate of any race can win an election if their political views are contrary to those of a majority of their electorate. *Id.* at 934. California Congressman Ronald V. Dellums has been repeatedly reelected as a black in a majority-white district because his left-leaning views are in-synch with his Berkeley electorate. *Id.* On the other end of the spectrum, Oklahoma Congressman J.C. Watts won his election as a black in a majority-white district because his conservative views matched those of Oklahoma voters. *Id.* Congressman Watts' election symbolizes the fact that conservative candidates in the South, whether black or white, do better than those who are "militantly liberal." *Id.*

253. James W. Loewen, *Racial Bloc Voting and Political Mobilization in South Carolina*, 19 REV. BLACK POL. ECON. 23, 24 (1990).

254. Pildes, *supra* note 250, at 1370.

255. *Id.* at 1367.

256. *Id.* at 1370.

caused state legislatures to adopt new districting schemes, this country saw "the largest increases in minority representation since the Voting Rights Act was passed."[257] The number of majority-minority districts doubled, going from twenty-six to fifty-two.[258] Further, there was a twenty-three percent increase in the number of majority-black state legislative districts.[259] Today, blacks sit on city councils in numbers roughly proportional to their population.[260] It can be argued that the increase in black representation in Congress has resulted in a greater say in issues of particular interest to the black community.[261]

Members of the black community have criticized the Court for attempting to eliminate racial preferences, arguing its true effect is to eliminate preferences for blacks, leaving the "natural" preferences for whites in our society intact.[262] Twenty years ago, four justices of the Supreme

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257. Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of* Shaw v. Reno, 3 D.C. L. REV. 1, 2 (1995).

258. *Id.* at 59 (citing U.S. BUREAU OF THE CENSUS, *Number of Congressional Districts with Black or Hispanic Majorities Double, Census Bureau Says*, U.S. DEPARTMENT OF COMMERCE NEWS, Mar. 24, 1993).

259. *Id.*

260. Pildes, *supra* note 250, at 1367.

261. For example, in the first half of the Clinton Administration, the Congressional Black Caucus achieved major concessions in President Clinton's budget and those conservative and moderate Democrats that sought to cap entitlements were partly defeated by caucus opposition. Kenneth J. Cooper, *For Enlarged Congressional Black Caucus, a New Kind of Impact*, WASH. POST, Sept. 19, 1993, at A4. Further, the Caucus successfully defeated the Clinton Administration's nominee for Assistant Attorney General for Civil Rights because of his lukewarm support for majority-minority districts. Neil A. Lewis, *Clinton's Choice For Rights Chief Is Withdrawing*, N.Y. TIMES, Dec. 18, 1993, at A1. On the other hand, it is also argued that these districts "marginalize the black elected officials upon whom the voters count to represent their interests effectively." Thernstrom, *supra* note 93, at 935. Lani Guinier, a former United States Attorney General nominee noted: "[B]lacks elected from single-member districts have little control over policy choices made by their white counterparts. Thus, although it ensures more representatives, district-based black electoral success may not necessarily result in more responsive government." Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1080 (1991). Minorities may find their interests better represented by dispersing their votes over more "influence districts" because more elected officials would then owe their success to minority votes. Thernstrom, *supra* note 93, at 935. One commentator remarked: "In a representative democracy, the power of an interest group lies not in how many of its number are elected to office, but in how many elected officials it has the power to influence." Jeffrey G. Hamilton, *Deeper into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court*, 43 EMORY L.J. 1519, 1550 (1994).

262. *Leading Cases*, *supra* note 153, at 168. Proponents of race-based districting

Court wrote that "we cannot . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."[263] From that point of view, the *Miller* case has a huge impact because it symbolizes for many that the Court is no longer responsive to the needs of minorities.[264] Further, it may mean that there will be fewer blacks in Congress because the favorable district boundaries that place them in office could be changed.[265] Consequently, Congress will be less representative of black interests as a whole. Aforementioned University of Michigan Law Professor Richard Pildes supports this theory.[266] He concludes that a strong link exists between the race of the representative and the benefits provided to minorities.[267] Among these benefits, Professor Pildes includes "improvements in municipal services in minority communities, increased use of minority contractors, more appointments of minorities to commissions and boards, the creation of police review boards, and general shifts in program priorities."[268]

For others, the impact of *Miller* is very different. In *Shaw v. Reno*,[269] the Court vocalized the problems inherent in race-based districting. Justice O'Connor associated "apartheid" with the "perception [behind race-based districting] that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."[270] Additionally, Justice O'Connor viewed

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interpret the Court's decision in *Miller* to mean "that districts that are 'set aside' for black representatives are unconstitutionally segregated by race, while districts that are drawn to protect white incumbents are simply following traditional districting principles." *Id.*

263. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 327 (1978) (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part).

264. Coyle, *supra* note 152, at A1.

265. *Id.*

266. Pildes, *supra* note 250, at 1377.

267. *Id.*

268. *Id; see also* RUFUS P. BROWNING ET AL., PROTEST IS NOT ENOUGH: THE STRUGGLE OF BLACKS AND HISPANICS FOR EQUALITY IN URBAN POLITICS 141, 168 (1984) (noting that "minority council members were important in linking minorities to city hall, in providing role models, and in sensitizing white colleagues to minority concerns."); JAMES W. BUTTON, BLACKS AND SOCIAL CHANGE: IMPACT OF THE CIVIL RIGHTS MOVEMENT IN SOUTHERN COMMUNITIES 226, 227 (1989) (explaining that "black representation on the inside . . . gave [black citizens] easy, constant, and relatively quick access to the decision making arena and to white leaders, both public and private.").

269. 113 S. Ct. 2816 (1993).

270. *Id.* at 2816. On the other hand, many proponents of race-based districting maintain that blacks are, for the most part, a unified people. J. Morgan Kousser, Shaw v. Reno *and the Real World of Redistricting and Representation*, 47 RUTGERS L. J. 625, 648 (1995). They note that "[t]he vast majority of African-Americans are

such race-based standards as dangerous to our system of government.[271] She cited cases noting that "'[i]f our society is to continue to progress . . . it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.'"[272] Justice O'Connor believed that this injury continues because race-based districting "reinforce[s] the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin."[273] Furthermore, Justice O'Connor wrote that such policies "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility."[274] She stated that "'[w]hen racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated . . . .'"[275] She also noted that "[r]acial gerrymandering . . . may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters."[276] The majority in *Shaw* believed that race-based districts reinforce "racial stereotypes and threaten[] to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole."[277]

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driven toward unity because they are still discriminated against, and racial bloc voting is already a stark reality." *Id.*

271. *Shaw*, 113 S. Ct. at 2828.

272. *Id.* at 2827 (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630-31 (1991)).

273. *Id.* at 2832.

274. *Id.* at 2824 (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

275. *Id.* at 2827 (quoting Wright v. Rockefeller, 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting)). One commentator noted: "'Fostering election of officials who need not appeal to members of other races seems an odd way to pursue Martin Luther King, Jr.'s dream of a land where his children will not be judged by the color of their skin, but by the content of their character.'" Hamilton, *supra* note 261, at 1552 (quoting Stuart Taylor, *Electing by Race*, AM. LAW., June 1991, at 54).

276. *Shaw*, 113 S. Ct. at 2832. Justice O'Connor previously noted in *Metro Broadcasting, Inc. v. FCC* that 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 Government by history and the Constitution." 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). To those on the other side however, race does matter. Kousser, *supra* note 270, at 662-65. They argue that black voters, especially in the South, are consistently more liberal than whites. *Id.*

277. *Shaw*, 113 S. Ct. at 2828. Conversely, promoters of majority-minority districts

Conservatives have long argued that discrimination breeds discrimination.[278] In *Holder v. Hall*,[279] Justice Thomas argued that race-based districts portend "disastrous implications," creating "political homelands" that will inevitably "deepen racial divisions" because they are based on the assumption that blacks "all think alike on important matters of public policy."[280] It is true that a growing number of black officials appeal to voters across racial lines.[281] For instance, in the 1994 Congress, eleven members of the Congressional Black Caucus represented districts where black voters were a minority.[282]

Voting rights scholar Abigail Thernstrom examined mayoral races across the country and noted that in cities where the population exceed-

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argue that elected officials will truly "pay special attention" to those who they feel got them into office. Kousser, *supra* note 270, at 649. They note that white congressmen are just as susceptible as black congressmen to favoring one side. *Id.*

278. *See* Natapoff, *supra* note 248, at 1062 n.18. Even nonconservatives realize a problem. Lani Guinier has argued that majority-minority districts contribute to the isolation of minorities and those they elect, and may even contribute to their political marginalization. Guinier, *supra* note 261, at 1079-80, 1101-34; *see also* Lani Guinier, *Voting Rights and Democratic Theory: Where Do We Go From Here, in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 283, 286-287 (Bernard Grofman & Chandler Davidson eds., 1992). Journalist and commentator Juan Williams has expressed similar views, suggesting that the demands of black legislators for more seats in Congress has itself caused a backlash against liberalism and "pushed black America out of the mainstream of the national political dialogue." Juan Williams, *Blacked Out in the Newt Congress: The Black Caucus Regroups as Jesse Mulls a Third Party Bid*, WASH. POST, Nov. 20, 1994, at C1.

279. 114 S. Ct. 2581 (1994).

280. *Id.* at 2597-99, 2618 (1994) (Thomas, J., concurring in the judgment). Justice Kennedy argued in his *Metro Broadcasting, Inc. v. FCC* dissent that the idea that individuals who share the same race will also share the same political interests is "based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens." *Metro Broadcasting*, 497 U.S. at 636 (Kennedy, J., dissenting).

281. Thernstrom, *supra* note 93, at 932. Thernstrom noted: "Whites not only say they will vote for black candidates; they do so, often casting their ballots for an African-American running against a white opponent." *Id.*

282. *Odious Imprint of Apartheid*, WALL ST. J., Aug. 31, 1994, at A12 (editorial). These figures are seriously contested. University of Michigan Professor Richard Pildes noted:

> Of the thirty-eight black members of the House in the 103rd Congress, only two were clearly elected from majority-white congressional districts; two more were elected from districts of complex composition. Of the remaining thirty-four black congresspersons, thirty represented districts whose total population was majority-black and whose voting age population was either majority-black or majority-minority (black plus hispanic). The four remaining districts electing blacks to the 103rd Congress were similarly ones in which black and hispanic minority voters together constituted a substantial majority.

Pildes, *supra* note 250, at 1374-75.

ed 50,000 people, "[s]ixty-seven percent of the black mayors elected . . . over the last thirty years have not had the benefit of a majority-black constituency."[283] Blacks have also won gubernatorial[284] and senatorial[285] races where the vast majority of the voting population was white.[286]

Dissenting in *Plessy v. Ferguson*,[287] Justice Harlan argued that "[t]he destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."[288] For those who share those ideals, this decision implies that state-sponsored discrimination is on its last leg. Once gone, private discrimination will have no model in the form of a state equivalent, and thus will slowly perish. The *Miller* Court heavily criticized the Justice Department for its execution of the Voting Rights Act.[289] For those critical of the Justice Department's policies in this regard, *Miller* is a major "'wake-up call'" to the Department.[290] It reaffirms the holding of *Beer v.*

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283. Thernstrom, *supra* note 93, at 932. In Maine, where the black population totals less than half of one percent, blacks are mayors of two important cities. *Id.* at 933. In New York City, Rudolph Guiliani lost nearly a third of the white vote to his black opponent in the 1989 mayoral race. *Id.* Over a third of whites voted for Sharon Sayles Belton, a black candidate and the subsequent victor in the 1993 Minneapolis mayoral race. *Id.* In the same election cycle, nearly a third of whites voted for black candidate Freeman Bosely, Jr., in the St. Louis mayoral race, even though three whites ran against him. *Id.*

284. L. Douglas Wilder, elected governor of Virginia in 1989, received between 40 and 43% of the white vote, only two to five percentage points less than his white predecessor. *Id.*

285. Carol Mosley-Braun was elected to the United States Senate from Illinois in 1992, despite the fact that Illinois has a black population of less than 12%. *Id.*

286. *Id.* On the other hand, Lani Guinier has argued that conservative blacks who appeal to a majority-white electorate are not "authentically" black. LANI GUINIER, THE TYRANNY OF THE MAJORITY 55-58 (1994). In her view, representation by conservative blacks is no representation at all. *Id.* Guinier's basic premise is that black officeholders who are not "community-based," "culturally-rooted," and "politically, psychologically, and culturally black" are meaningless tokens. Guinier, *supra* note 261, at 1103.

287. 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

288. *Id.* at 560 (Harlan, J., dissenting).

289. Miller v. Johnson, 115 S. Ct. 2475, 2491 (1995). The district court also criticized the Justice Department, and accused the Justice Department of deploying informants. Miller v. Johnson, 864 F. Supp. 1354, 1367 (S.D. Ga. 1994), *aff'd*, 115 S. Ct. 2475 (1995). It further called "the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General . . . an embarrassment." *Id.* at 1368.

290. Reuben, *supra* note 228, at 19 (quoting Professor James Blumstein, Vanderbilt

United States that section 5 of the Voting Rights Act simply requires states to prevent minority voting rights from getting any worse.[291]

In either case, *Miller* will have an impact on the two-party system. The Republican Party has been making serious gains in the South in recent years.[292] Many white Democrats and liberal scholars blame this erosion, at least in part, on the policy of race-based districting.[293] One commentator noted:

> [R]eapportionment not only siphoned solid Democratic votes from white districts, but also helped Republicans attract higher-caliber candidates and raise more money by giving them a better shot at winning those districts. In addition, when black voters were removed from marginally Republican districts, the Democrat's chances of winning such seats became that much slimmer.[294]

While it is true that race-based districts virtually assure that the representative from that district will be a Democrat (because minorities vote overwhelmingly Democratic), it may have the inevitable counter-effect of removing vital Democratic votes from neighboring districts, making them more Republican.[295] It is no accident that a Republican President appointed the Attorney General who denied Georgia's redistricting plan and required that a third majority-minority district be created in Georgia.[296] The Bush Administration's Assistant Attorney General for Civil Rights

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University School of Law). The Court's decision in *Miller* may have "loosened the reins with which the Justice Department has held state legislatures." *Leading Cases*, *supra* note 153, at 166. As a result, "state legislatures will find it easier to draw districts that are more to their liking." *Id.* Proponents of a strong Justice Department role in redistricting argue that "state legislatures left to their own devices will generally protect incumbents, who are, by and large, white." *Id.*

291. Reuben, *supra* note 228, at 19 (citing Beer v. United States, 425 U.S. 130 (1976)). The Justice Department's actions in the Georgia case were nothing new. Thernstrom, *supra* note 93, at 930. It has been a "freewheeling" policy of the Justice Department to determine what is "racially fair." *Id.* A 1981 Justice Department memorandum on Alabama's Barbour County council districts noted the ease with which the Department determined fairness: "Since blacks constitute 40.5 percent of the voting age population, they would be entitled to 2.8 districts [that is, two viable districts plus a third influence district]." *Id.* at 930-31. Vanderbilt University School of Law Professor James Blumstein noted that "[t]he Justice Department's position has completely ignored *Beer*, and the Court in this case was really saying it meant what it said back in 1976." Reuben, *supra* note 228, at 19.

292. Paul West, *Southern Democrats Turn into a Vanishing Breed*, BALTIMORE SUN, June 25, 1995, at A1.

293. Selwyn Carter, *African-American Voting Rights: An Historical Struggle*, 44 EMORY L.J. 859, 859 (1995); Timothy G. O' Rourk, Shaw v. Reno*: The Shape of Things to Come*, 26 RUTGERS L.J. 723, 725-26 (1995).

294. Steven A. Holmes, *Did Racial Redistricting Undermine Democrats?*, N.Y. TIMES, Nov. 13, 1994, at 32.

295. *Id.*

296. Abigail Thernstrom, Shaw v. Reno*: Notes From a Political Thicket*, 1994 PUB. INTEREST L. REV. 35, 39 (1994).

vocally advocated that minorities were entitled to their "fair share of political power," which he defined as a "proportional number of legislative seats."[297] Throughout the 1980s, the Republican Party, and in particular General Counsel Benjamin Ginsburg, aggressively used the Voting Rights Act and majority-minority districting to promote partisan goals.[298] The party has even intervened in districting cases on the side of minority plaintiffs.[299] After the 1994 elections, General Counsel Ginsburg was quoted as saying: "Look at the results . . . . We'd be nuts to want to see these [majority-minority] districts abolished."[300]

Nevertheless, this conventional wisdom, accepted by the Republican Party and most scholars, has not gone uncontested. Those who argue that the benefit to conservative representation in Congress is far more negligible than suggested note that the proliferation of majority-minority districts after the 1990 census led to the defeat of only a few white Democrats in the 1992 election.[301] Some contend that this was due in large

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297. *Id.*

298. Pildes, *supra* note 250, at 1380 n.89. One observer noted:

> An alliance of convenience . . . has developed between civil rights lawyers—who for 25 years have battled with astonishing success for full voting rights for blacks and other minorities—and Republicans, whose enthusiasm for minority office-holding surfaced more recently, in tandem with their awareness of how it can help their side.

Stuart Taylor, Jr., *Electing by Race*, AM. LAW., June 1991, at 50.

299. For example, in Armour v. Ohio, 775 F. Supp. 1044 (N.D. Ohio 1991), the Republican Party supported the black plaintiffs who demanded their own majority-minority district. Pildes, *supra* note 250, at 1380 n.89. Republicans have also given technical map-drawing help to black groups seeking the creation of majority-minority districts. *See* Peter Bragdon, *Democrats' Ties to Minorities May Be Tested by New Lines*, CONG. Q. WKLY. REP. 1739, 1741 (1990).

300. Holmes, *supra* note 294, at 32. *See generally* Kimball Brace et al., *Does Redistricting Aimed to Help Blacks Necessarily Help Republicans?*, 49 J. POL. 169, 182 n.15 (1987) (detailing alliances between the Republican Party and minority groups in redistricting fights).

301. Frank Parker, *Voting Rights Enforcement in the Bush Administration: The Four Year Record*, *in* REPORT ON THE CITIZENS COMMISSION ON CIVIL RIGHTS, NEW OPPORTUNITIES: CIVIL RIGHTS AT A CROSSROADS 118 (Susan M. Liss & William L. Taylor eds., 1992). According to a study by Allan J. Lichtman, Professor of History at American University, "'Democrats actually fared a bit better in the nine states with new black districts [Alabama, Florida, Georgia, Louisiana, Maryland, North Carolina, Texas and Virginia] [sic] than in the 41 states with no such districts." Carter, *supra* note 293, at 862 (quoting Allan J. Lichtman, *Redistricting, in Black and White: Quotas Aren't the Issue*, N.Y. TIMES, Dec. 7, 1994, at A2). It was also noted that Democrats had their greatest losses in the senatorial and gubernatorial races, where redistricting is irrelevant. *Id.* The Lichtman study suggested that had the Democrats not lost a

part to the creativity of the legislative drafters who "made a concerted effort both to create majority-minority districts and to preserve white incumbents (sometimes of both parties) by clever maneuvering of district lines that retained just enough of the core of the incumbents' political bases to enable them to get reelected."[302] For instance, almost three quarters of black voters who were moved into majority-minority districts, were moved from Republican dominated districts, where the black vote was not having much of an effect.[303] In its analysis of the 1994 election results, the NAACP Legal Defense and Educational Fund noted that forty-seven of the fifty-four seats which the Democrats lost "were either in states without majority-minority districts, in white districts surrounded by other white districts, or in districts in which the percentage of minority voters in post-1990 redistricting either increased or remained constant."[304] The NAACP argues that the existence of majority-minority districts may have even prevented additional Democratic losses.[305] A Democratic task force examining the effect of majority-minority districts in 1994 somewhat supported the NAACP position, placing the figure at five to nine Democrat seats lost due to redistricting.[306] In the end, these analyses may be somewhat dubious because they examined only the 1994 elections. Professor Pildes noted that "[t]o determine the relative contributions of ideology, race of the candidate, and other factors to voter preferences, one election cannot be studied in isolation."[307]

If one accepts the conventional wisdom that majority-minority districts help Republicans, then clearly one of the big winners after *Miller* is the Democratic Party. If the Democratic Party is truly more sensitive to minority interests than the Republican Party, the result may be that while minorities will lose some representation by members of their own race,

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single congressional seat in the nine states with new majority-minority districts, "the Republicans would still have gained control of the House." *Id.* (citing Lichtman, *supra* at A2).

302. Parker, *supra* note 257, at 55.

303. Pildes, *supra* note 250, at 1385; *see also* HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 203 (4th ed. 1994) (noting that most of the blacks moved from white districts to black districts were taken from Republican districts).

304. O'Rourk, *supra* note 293, at 725-26 n.11 (quoting Steven A. Holmes, *Civil Rights Group Disputes Election Analyses on Black Districts*, N.Y. TIMES, Dec. 1, 1994, at A1).

305. *Id.*

306. Thomas B. Edsall, *Racial Redistricting Had Minor Role Nov. 8, Analysts Say*, WASH. POST, Dec. 27, 1994, at A4.

307. Pildes, *supra* note 250, at 1379 n.85. In spite of this Pildes argues that because black Democrats tend to be more liberal than white Democrats, the practice of race-based districting may have the effect of increasing the net-liberalism in Congress. *Id.* at 1385-87.

their ideological representation, by those who share their same philosophy, will increase.[308]

Further, while the Court has taken a hardline view towards racial gerrymandering, it has been very lenient towards political gerrymandering. Since the Court's decision in *Davis v. Bandemer*,[309] which established the justiciability of political gerrymandering, no state has lost a case involving the purposeful drawing of legislative districts for predominantly political purposes.[310] At the same time, the Republican Party has taken over a majority of state governorships and its share of state legislature seats is on the upswing.[311] Because the vast majority of minorities in this country are Democrats,[312] the political power of minorities may be hit with a double blow, for their political party may become the subject of unfavorable partisan gerrymandering, and at the same time they may lose their racially gerrymandered districts.[313]

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308. While the number of black representatives remained the same in the wake of the 1994 elections, their power and influence suffered a dramatic decline. Prior to the 1994 elections, all but one member of the Congressional Black Caucus was a Democrat, and many Caucus members held committee and subcommittee chairmanships. O'Rourk, *supra* note 293, at 727-28. After the election, no member of the Black Caucus held a chairmanship. *Id.*; *see also* Williams, *supra* note 278, at C1, C4. Further, one of the first actions of the 1994 Republican Congress was to cut off federal funding to the Congressional Black and Hispanic caucuses. Carter, *supra* note 293, at 859.

309. 478 U.S. 109 (1986).

310. Anthony Q. Fletcher, *White Lines, Black Districts*—Shaw v. Reno *and the Dilution of the Anti-Dilution Principle*, 29 HARV. C.R.-C.L. L. REV. 231, 250 (1994); *see also* Badham v. Eu, 488 U.S. 1024 (1989) (upholding a California districting plan designed to maximize Democratic advantage); Gaffney v. Cummings, 412 U.S. 735 (1973) (upholding a redistricting plan designed to split the districts evenly among the two parties).

311. *Clinton Pledged to Work With the Republican Leaders of the Next Congress*, WALL ST. J., Nov. 10, 1994, at A1.

312. In 1990, 7.5% of registered voters were black, the vast majority of which were Democrats. Anne Groer, *The Politics of Race; In Campaign Parlance, Equality and Equity Can Become 'Wedge' Issues Used to Divide Voters*, ORLANDO SENTINEL TRIB., Dec. 8, 1991, at G1. In the presidential elections of 1992, the Democratic ticket received 82% of the black vote and 62% of the Hispanic vote. *Portrait of the Electorate*, N.Y. TIMES, Nov. 5, 1992, at B9.

313. This is a real concern for many minority activists. Their position is simple: "Unless the Court is prepared to propose an objective formula for apportionment or otherwise fundamentally alter the electoral system in a manner that addresses the problems of political gerrymandering, it should not attempt to attack gerrymandering with sporadic shots at state legislatures in the limited instances in which racial considerations appear to 'predominate.'" *Leading Cases*, *supra* note 153, at 170. This has also been a concern of Justice White. In his dissent in *Shaw*, he noted that when the

VI. CONCLUSION

In the end, it is important to note that the Court in *Miller* has not said that racial considerations may not be taken into account.[314] Justice Ginsburg noted that "[t]o offend the Equal Protection Clause, all agree, the legislature had to do more than consider race."[315] The majority held only that race may not be the predominant factor in planning districts.[316] That is also the current position of the Justice Department, which is not planning on halting its scrutiny of legislative districting.[317] Nonetheless, the Court in *Miller* has established one thing for certain: the Equal Protection Clause of the Constitution applies to all people—white and black alike. Whether it is an idea whose time has come, or an idealistic notion with no grounding in reality, the Court, through its recent opinions in the affirmative action and voting fields, continues to press for a color-blind Constitution. In *Adarand*, Justice Scalia summarized best the Court's view on how the state should view its citizenry: "In the eyes of government, we are just one race here. It is American."[318]

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race of a voter corresponds to his party affiliation, racial and political gerrymanders become indistinguishable. Shaw v. Reno, 113 S. Ct. 2816, 2835, 2840-41 (1993) (White, J., dissenting). The *Shaw* Court dismissed this contention, arguing that the Fourteenth Amendment demands a stricter scrutiny when classifications are based on race. *Id.* at 2828.

314. Miller v. Johnson, 115 S. Ct. 2475, 2500 (1995) (Ginsburg, J., dissenting).

315. *Id.* (Ginsburg, J., dissenting).

316. *Id.* at 2488.

317. Reuben, *supra* note 228, at 19.

318. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2119 (1995) (Scalia, J., concurring in part and concurring in the judgment).