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Miller v. Johnson: The Supreme Court Eases the Burden of Proving Racial Gerrymandering

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Miller v. Johnson: The Supreme Court Eases The Burden of Proving Racial Gerrymandering

I. INTRODUCTION

The Fourteenth and Fifteenth Amendments to the United States Constitution guarantee all Americans in the United States equal protection under the laws and the right to vote.\(^1\) Despite the passage of these amendments, historically, African Americans suffered from widespread discrimination in the voting process.\(^2\) Only after the passage of the Voting Rights Act in 1965\(^3\) did African Americans begin to see a substantial increase in their representation in Congress.\(^4\) This change occurred, in part, because several states racially gerrymandered\(^5\) their voting districts in an effort to remedy past discrimination.\(^6\)

Recent decisions by the United States Supreme Court, however, have changed the way states may draw their voting districts.\(^7\) The Supreme Court’s hostility toward racially gerrymandered redistricting plans began with its decision in Shaw v. Reno ("Shaw I").\(^8\) In Shaw

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1. U.S. CONST. amend. XIV, §1; U.S. CONST. amend. XV, §1. See infra notes 34-35 for the relevant text of the Fourteenth and Fifteenth Amendments.

2. See infra notes 62-82 and accompanying text.


4. David Morgan, Conservatives Target Seats in Congress, REUTERS, October 21, 1994, available in LEXIS, News Library, Reuter North American News File (noting that since the Voting Rights Act was enacted, the number of elected black officials nationwide increased from 300 to almost 8,000).


6. David Broder, Racial Gerrymandering for Congress: Good or Bad?, TIMES-PICAYUNE, March 28, 1994, at B7 (noting that a racially gerrymandered district in Louisiana sent the State’s first black member in 115 years to Congress, and two districts in North Carolina elected black congresspersons in that State for the first time since the Reconstruction).

7. See infra notes 122-33, 212-58 and accompanying text.

8. 113 S. Ct. 2816 (1993) [hereinafter Shaw I].
I, the Court held that the state created a majority-minority district, which was so irregular on its face that it could rationally be viewed only as an effort to segregate races for voting purposes, and that the state could not offer a sufficiently compelling justification for the plan.9

After the Shaw I decision, citizens in at least seven states challenged their legislatures’ congressional redistricting plans.10 In all of these states, the citizens alleged that the plans constituted unconstitutional racial gerrymandering11 under Shaw I.12 All of the federal courts that heard and decided the racial gerrymandering challenges relied upon Shaw I, but their interpretations of that case led to widely divergent results.13 Their inconsistent interpretations led the Supreme Court to decide to clarify its previous holding.14

9. Id. at 2827; see infra part II.C.2.


11. The term gerrymander, named after Massachusetts Governor Elbridge Gerry, became popular in 1812 after then-governor Gerry approved a bizarre redistricting map of Essex County, Massachusetts. T. Alexander Aleinikoff & Samuel Issacharoff, Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno, 92 MICH. L. REV. 588, 588 n.1 (1993). The term refers to distorted districting patterns drawn by legislators. Id. Initially, legislators gerrymandered voting districts for political rather than racial reasons. For instance, Patrick Henry attempted to gerrymander a congressional district in Virginia to prevent the election of James Madison in 1790, because Henry believed Madison would vote against passage of the Bill of Rights. Id. at 588 n.2. Even today, political parties that hold a majority in state legislatures continue to gerrymander voting districts to give their party an advantage. The Supreme Court upheld such tactics as constitutional in Davis v. Bandemer, 478 U.S. 109, 136 (1986) (upholding state plan that disproportionately favored Republicans, but holding that such plans may violate the Equal Protection Clause if they discriminated against voters from other political parties or diluted such votes). See supra note 5 for a definition of racial gerrymandering.

12. See infra part II.C.

13. See infra part II.D.

14. Miller v. Johnson, 115 S. Ct. 713 (1995); see also Nancy E. Roman, Racially Drawn Districts’ Legality Left to Supreme Court; Recent Rulings Reject Approach, WASH. TIMES, September 14, 1994, at A4 (noting a recent series of conflicting decisions by federal panels which have prompted the Court to act).

All cases “challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body” must be decided by a three-judge panel at the district court level. 28 U.S.C. § 2284 (1988). A party may appeal these decisions directly to the Supreme Court. 28 U.S.C. § 1253 (1988).
The Supreme Court’s most recent decision regarding redistricting, *Miller v. Johnson*, addressed these inconsistencies. The *Miller* case arose after three federal courts struck down portions of congressional redistricting plans that created districts in which black citizens constituted a majority (hereinafter referred to as majority-minority districts). These federal courts held that the legislatures impermissibly created the districts to encourage the election of a minority representative to Congress.

In *Miller*, the Supreme Court held that parties could prove unconstitutional racial gerrymandering without a threshold showing that the congressional districts in question were bizarrely shaped. The Court determined that the bizarre shape of a district “may be persuasive circumstantial evidence” of racial gerrymandering. The Court noted that other evidence of race-based districting on the part of a state, regardless of the shape of the district, could be used to prove a constitutional violation. Thus, the *Miller* decision represents a shift in the Supreme Court’s approach to analyzing redistricting by states, and greatly affects minority voting rights.

This Note explores historical interpretations of the Fourteenth Amendment’s Equal Protection Clause, as well as the Voting Rights Act, and discusses how the courts used them to protect the rights of both minorities and non-minorities. This Note first explains how the Equal Protection Clause was interpreted to protect voting rights, and how Congress, in an effort to provide further protection, enacted the Voting Rights Act. Next, this Note examines the conflict created by state application of both the Voting Rights Act and the Equal Protection Clause. This Note then reviews the Supreme Court’s decision in *Shaw v. Reno*, and how this decision led to conflicting interpretations among lower federal courts.

16. See infra notes 212-91 and accompanying text.
19. Miller, 115 S. Ct. at 2487.
20. Id. at 2486.
21. Id.
22. See infra notes 351-55 and accompanying text.
23. See infra parts II.A-B.
24. See infra parts II.A-B.
25. See infra part II.C.
26. See infra parts II.C-D.
Within this context, this Note then discusses how the Supreme Court's decision in *Miller* changed the way in which states may draw their voting districts.27 This Note discusses the facts of *Miller*, and the majority, concurring, and dissenting opinions.28 This Note then analyzes the issues resolved by the *Miller* decision, and how this decision also raised new issues for states to consider when mapping voting districts.29 This Note further analyzes the legal correctness of the *Miller* decision in relation to the Equal Protection Clause and the Voting Rights Act.30 Next, this Note suggests that the Fourteenth Amendment's Equal Protection Clause allows states to create districts that encourage minority representation in government, and argues that courts should grant states extreme deference and allow states to enact legislation that attempts to remedy past injustices.31 Finally, this Note concludes that while the *Miller* decision could cause a rollback in minority voting rights, the current split among the Justices suggests that the issue of the constitutionality of the racial gerrymandering has yet to be resolved.32

II. BACKGROUND

A. *The Fourteenth Amendment's Equal Protection Clause Prohibits Racially Discriminatory Voting Practices*

The right to vote is a fundamental civil and political right in the United States.33 More than 100 years ago, the Fifteenth Amendment extended voting rights to racial minorities.34 This Amendment, considered in conjunction with the Equal Protection Clause of the Fourteenth Amendment,35 does not merely guarantee the right to vote;

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27. See infra part III.
28. See infra parts III.A-B.
29. See infra part IV.A.
30. See infra part IV.B.
31. See infra part V.
32. See infra parts V-VI.
33. Reynolds v. Sims, 377 U.S. 533, 561, 568-9 (1964) (striking down a state legislative redistricting plan as violating the Equal Protection Clause; holding that voting for representative government is a fundamental right). See infra note 68.
34. The Fifteenth Amendment states in pertinent part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.
35. The Fourteenth Amendment states in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
it also protects the right of a citizen to have his or her vote count.\textsuperscript{36} Thus, the Fourteenth Amendment requires that a citizen not only must be allowed to vote, but also must possess voting power that is approximately equal to that of other citizens.\textsuperscript{37}

The Supreme Court has held that the central purpose of the Equal Protection Clause is to "prevent the States from purposefully discriminating between individuals on the basis of race."\textsuperscript{38} Therefore, state and local governments are required to treat individuals equally.\textsuperscript{39} While governments may still classify groups of people in some circumstances,\textsuperscript{40} they may not use impermissible criteria in their classifications or arbitrarily create such classifications to burden a specific group of individuals.\textsuperscript{41} If states disregard these rules, the classification constitutes discrimination and violates the Equal Protection Clause.\textsuperscript{42}

1. The Standard of Review in Equal Protection Cases

The Supreme Court has held that state legislatures retain significant discretion in deciding what actions are necessary for their citizens, and will presume the constitutionality of such actions.\textsuperscript{43} In equal protection cases, however, the Court has abandoned this deferential standard when a plaintiff proves that the state legislature possessed a racially

\begin{itemize}
\item \textsuperscript{36} Colegrove v. Green, 328 U.S. 549, 569 (1946) (Black, J., dissenting). \textit{See infra} part II.A.2.
\item \textsuperscript{37} \textit{See Reynolds}, 377 U.S. at 560-61 ("[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people . . . .").
\item \textsuperscript{38} \textit{Shaw I}, 113 S. Ct. at 2824 (citing Washington v. Davis, 426 U.S. 229, 239 (1976)).
\item \textsuperscript{39} RONALD D. ROTUNDA ET. AL., \textit{TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE} § 18.1 (2d ed. 1992).
\item \textsuperscript{40} \textit{Id.} at § 18.2. \textit{See, e.g.}, United States v. Paradise, 480 U.S. 149, 170-71 (1987) (ordering state police force to enforce promotion quotas set by court as a result of judicial finding of past racial discrimination); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-42 (1985) (offering special treatment for mentally retarded residents of city); Rostker v. Goldberg, 453 U.S. 57, 81 (1981) (requiring only men and not women to register for the United States military draft); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 476 (1981) (criminally sanctioning men, but not women, for committing statutory rape).
\item \textsuperscript{41} ROTUNDA, \textit{supra} note 39, § 18.2. \textit{See, e.g.}, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). The \textit{Wygant} Court overturned an affirmative action scheme because of insufficient evidence of past racial discrimination, and because the scheme burdened non-minorities. \textit{Id.} at 274-76, 280-84. The majority explained, however, that if sufficient evidence had been introduced, the affirmative action plan might have been upheld. \textit{Id.} at 280-81. \textit{See infra} notes 57-61 and accompanying text.
\item \textsuperscript{42} \textit{Wygant}, 476 U.S. at 283-84.
\item \textsuperscript{43} \textit{See City of Richmond v. J. A. Croson Co.}, 488 U.S. 469, 500 (1989).
\end{itemize}
Discriminatory intent or purpose.44 When a plaintiff shows such intent, the Court applies “strict scrutiny,” requiring the defendant to show that the legislature “narrowly tailor[ed]” the law to satisfy a “compelling governmental interest.”45

Discriminatory intent can be proven in either of two ways.46 First, a law may clearly, or on its face, discriminate on the basis of race.47 Second, a law may appear race-neutral on its face, but in its application a clear pattern emerges that is “unexplainable on grounds other than race . . . .”48 In the latter situation, the Court has recognized the discriminatory effect of the legislative action as important circumstantial evidence of discriminatory intent.49 Under either type of

44. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977). In Arlington Heights, the plaintiff, a nonprofit real estate developer, alleged that the city violated minorities’ equal protection rights by refusing to rezone a tract of land from a single-family to a multiple-family classification. Id. at 252. The Court held that the plaintiff failed to prove that racially discriminatory intent or purpose was a motivating factor in the zoning decision. Id. at 270.

45. See generally Croson, 488 U.S. at 484-85 (discussing the standards the Court will apply and also citing language in both lower court decisions in this case including J.A. Croson Co. v. City of Richmond, 779 F.2d 181, 190 (4th Cir. 1985) and also J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1357 (4th Cir. 1987)). This strict scrutiny test is difficult for the government to overcome; in fact, in past cases, once the plaintiff proved racially discriminatory intent, the state rarely succeeded in showing that the use of a racial classification was narrowly tailored to satisfy a compelling governmental interest. Alfinikoff and Issacharoff, supra note 11, at 592. But see Korematsu v. United States, 323 U.S. 214, 219 (1944), where the Court upheld the use of internment camps for persons of Japanese ancestry.

See generally Fullilove v. Klutznick, 448 U.S. 448, 490-92 (1980) (upholding the constitutionality of federal minority set-aside program, and noting that Congress had a compelling interest in attempting to end the long history of discrimination); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284, 320 (1978) (plurality opinion) (allowing a white plaintiff to challenge university set-aside program); Justice Powell, who wrote the opinion for the court in Bakke explained that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.” 438 U.S. at 291. See supra note 58 and accompanying text. The Court reiterated this point in Fullilove, where it stated that “[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.” 448 U.S. at 491.

46. See infra notes 47-48 and accompanying text.

47. See, e.g., Croson, 488 U.S. at 477-78 (setting aside city contracts for minority businesses); Wygant, 476 U.S. at 274-76 (showing preferential treatment to minority teachers in hiring practices); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (segregating public school children on the basis of race); Strauder v. West Virginia, 100 U.S. 303, 305 (1879) (banning minorities from serving on juries).

48. Arlington Heights, 429 U.S. at 266 (holding that the plaintiff failed to show discriminatory intent on the part of the defendants, and that a showing that the effect of the law might be discriminatory was not enough to prove discriminatory intent). The Court noted that circumstantial and direct evidence may be used to determine whether the legislature possessed a discriminatory purpose. Id. See supra note 44.

49. For example, in Yick Wo v. Hopkins, 118 U.S. 356 (1886), the Court held a
analysis, however, the plaintiff need prove only that the discriminatory purpose is one motivating factor in the decision to enact the legislation in order to trigger strict scrutiny. 50

In the first cases interpreting the Equal Protection Clause, the Supreme Court limited the application of the Clause to state actions that deprived black citizens of their political rights. 51 The Court gradually extended the scope of the Clause, holding it applicable to school segregation, 52 employment, 53 housing, 54 education, 55 and voting. 56

In Regents of the University of California v. Bakke, 57 the Court further extended the scope of the Clause, holding that any racial or ethnic classification would be subject to a strict scrutiny standard, even if the racial group being classified comprises a majority of the population. 58

facially race-neutral city ordinance to be unconstitutional under the Equal Protection Clause because the plaintiffs showed that the city prosecuted only Chinese immigrants under the ordinance. Id. at 374. Similarly, in Gomillion v. Lightfoot, 364 U.S. 339 (1960), a concurring Justice found that a legislative plan redrawing a city's boundaries violated the Equal Protection Clause because it excluded almost every minority from the new city limits and altered the city's shape from a square to a twenty-eight sided figure. Id. at 349 (Whittaker, J., concurring).


51. See, e.g., In re Slaughter-House Cases, 83 U.S. 36 (1873), where the Court limited the scope of the Equal Protection Clause, holding it to be "so clearly a provision for [the negro] race . . . that a strong case would be necessary for the application to any other." Id. at 81. See also Plessy v. Ferguson, 163 U.S. 537, 544 (1896), (noting that the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality . . . ."), overruled by Brown, 347 U.S. at 483; Strauder, 100 U.S. at 306 (stating that the Fourteenth Amendment's purpose is to secure the negro race with "all the civil rights that the superior race enjoy.").

53. Croson, 488 U.S. at 500.
54. Arlington Heights, 429 U.S. at 265.
55. Bakke, 438 U.S. at 320 (plurality opinion).
57. 438 U.S. at 265 (plurality opinion).
58. See id at 290-91. The plaintiff in Bakke challenged the constitutionality of a public university's admissions program. Id. at 277-78 (plurality opinion). The admissions committee set aside a certain number of positions for minority students. Id. at 275 (plurality opinion). The plaintiff, who was denied admission to the school, alleged that he had higher scores than some of the minority students who had been admitted. Id. at 277 (plurality opinion).

Justice Powell, who wrote the opinion of the Court, based his holding on Fourteenth Amendment principles. Id. at 320 (plurality opinion). Justice Stevens, joined by three members of the court, wrote a concurring opinion. Id. at 408 (Stevens, J., concurring). He concurred in the judgment, but based his decision on statutory grounds, finding that the preferential admissions program violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. Id. at 420-21 (Stevens, J., concurring).
The Court’s decision in *Bakke* made it possible for a white citizen to bring successfully a suit under the Equal Protection Clause alleging reverse discrimination. Additionally, although *Bakke* opened the door for race-based legislation that attempts to remedy the effects of past discrimination to survive under the strict scrutiny analysis, nonetheless a state may not justify its actions on the basis of general, societal discrimination. Instead, a state must introduce evidence of specific, prior discriminatory acts on the part of the state.

2. The Fourteenth Amendment’s Equal Protection Clause Protects Voting Rights

The need for the protections of the Fourteenth Amendment became clear in the aftermath of the Civil War, when states attempted to deny voting rights to minorities through various devices such as poll taxes, literacy tests, and racial gerrymandering of voting districts. Some states created at-large election schemes that eliminated the potential voting strength of minorities. Other states gerrymandered districts

While a majority of the Court did not decide *Bakke* on constitutional grounds, subsequent decisions by the Court rely heavily on Justice Powell’s opinion in *Bakke* as supporting the doctrine that race-based actions will be subject to strict scrutiny. See, e.g., *Croson*, 488 U.S. at 490; U.S. v. Paradise, 480 U.S. 149, 167 (1987); *Wyant*, 476 U.S. at 273.

59. *Id.* at 289 (stating that “[t]he guarantees of the Fourteenth Amendment extend to all persons”) (plurality opinion).


61. *Croson*, 488 U.S. at 493. For example, in *Paradise*, 480 U.S. at 149, a federal court found that the State of Alabama repeatedly and blatantly discriminated against minorities when hiring and promoting state troopers. *Id.* at 154. The court ordered the State to use preferential hiring procedures in order to increase the number of minorities that served as state troopers. *Id.* The Supreme Court upheld this order, noting that such action was necessary as a remedial measure in light of clear instances of repeated discrimination. *Id.* at 176.

62. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 310-13 (1966) (discussing the history of repeated discrimination against black citizens and the use of voting procedures designed specifically to prevent minorities from exercising their right to vote).

63. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 616 (1982) (striking down the use of an at-large electoral system and upholding the lower court’s order that the state adopt
so that minorities were either excluded from important voting districts\textsuperscript{65} or scattered among various districts, ensuring they could never constitute a majority of votes in any district.\textsuperscript{66}

The Supreme Court attempted to remedy these discriminatory actions by creating principles to govern the mapping of voting districts.\textsuperscript{67} The first principle required equal representation, so that every voting district in a state contained the same number of citizens, and citizens had an equal opportunity to participate effectively in the voting process.\textsuperscript{68} In addition, redistricting plans that classified citizens on the
basis of race were subject to strict scrutiny, identical to previous Fourteenth Amendment equal protection claims involving racial discrimination.\(^{69}\)

States continued, however, to use various devices that prevented black citizens from voting.\(^{70}\) While the Court struck down the use of many of these devices,\(^{71}\) states created new discriminatory practices almost as soon as they were forbidden to use the old ones.\(^{72}\) Congress attempted to remedy this problem through the passage of the Civil Rights Act.\(^{73}\) State and local governments, however, continued to use discriminatory voting procedures, and many minority citizens continued to be denied their right to vote.\(^{74}\)

**B. The Voting Rights Act**

1. **Background: State Abuses Lead to Federal Crackdown**

In an effort to resolve this ongoing problem of discrimination, Congress enacted the Voting Rights Act in 1965 to assist in enforcing the Fourteenth and Fifteenth Amendments to the Constitution.\(^{75}\) More specifically, Congress intended to end discriminatory acts on the part of state and local governments that diminished the voting rights of representation in the political arena is a fundamental right).


73. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §1971 (1988 & Supp. V 1993)). Later amendments to the Civil Rights Act granted the Attorney General additional power in these suits in order to end discriminatory voting practices. Id. § 1971(a)-(c). The amendments allowed the Attorney General to join states as defendants in the suits and gain access to voting records. Id. Additionally, the amendments authorized federal courts to register voters in areas of systematic discrimination and expedited the hearing of voting cases before three-judge courts. Id. See also *Katzenbach*, 383 U.S. at 313 (noting Congress' numerous attempts to cope with the problem of voting discrimination via case-by-case litigation).

74. *Katzenbach*, 383 U.S. at 313. In *Katzenbach*, the Court detailed the problems the federal government faced in suing individual states over specific voting practices when the real problem concerned widespread, rampant discrimination among many states. Id. at 314-15.

75. H.R. Rep. No. 439, 89th Cong., 1st Sess. 6 (1965), reprinted in 1965 U.S.C.C.A.N. 2437. This House Report also suggested that the Voting Rights Act was intended to assist in enforcing Article I, § 4 of the Constitution. Id.
minorities. The Act proved to be one of the most comprehensive and successful federal laws in the history of the United States. Yet voting rights litigation continued to crowd the dockets of federal courts, and as old issues died with the discriminatory practices that created them, new issues continued to emerge.

Prior to enactment of the Voting Rights Act, the federal government experienced serious problems when it attempted to halt discriminatory practices used by the states. Repeated delays in the judicial process and the acts of state and local officials, who defied or evaded court orders, or simply enacted new discriminatory laws to replace the forbidden legislation, prevented any increase in minority voting power. Congress soon realized that using a case-by-case litigation approach would not solve the problem of voting discrimination.

Congress aggressively addressed state abuses by enacting the Voting Rights Act (the "Act"), which contained broad and sweeping provisions intended to govern almost every area of the voting process, and to force states to end all discriminatory voting practices. The

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76. See Katzenbach, 383 U.S. at 308.
77. See Bernard Grofman, Would Vince Lombardi Have Been Right if He Had Said: "When it Comes to Redistricting, Race isn't Everything, it's the Only Thing?", 14 CARDOZO L. REV. 1237, 1238 (1993).
78. See supra notes 62-66, 70-72, and accompanying text (discussing voting practices that were declared illegal).

Gone are the poll taxes, the literacy tests, and the other overt barriers to voter registration. Gone as well under the impact of one-person, one-vote is the artificial numerical inflation of the voting strength of one community at the expense of another. Yet, despite these changes, voting rights claims continue to mount . . . . [C]hanges in the substantive law . . . [are] clearing the way for greater judicial supervision of the electoral process.

Id.
80. See supra notes 62-74 and accompanying text.
83. Katzenbach, 383 U.S. at 315-16. Despite the Act's strict requirements on state and local governments and broad grant of federal review of local voting regulations, its constitutionality has been upheld by the Court as a valid exercise by Congress of its powers granted by § 2 of the Fifteenth Amendment. See generally Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (upholding broad use of federal power under § 5); Katzenbach, 383 U.S. at 316 (upholding constitutionality of §§ 4(a)-(d), 5, 6(b), 7, 9, 13(a), and part of § 14). In Katzenbach, the Court noted that the remedies prescribed in the Voting Rights Act, while stringent, were appropriate means to enforce the Fifteenth Amendment's prohibition against discriminatory voting practices. Id. at 324. The Court held that the extensive federal control over state and local voting practices,
Act prohibited the use of literacy tests, poll taxes, and other discriminatory devices. In addition, the Act offered various remedies and defined the states to which the Act applied. The Act also forbade certain governmental units from implementing new voting regulations without first obtaining approval from federal authorities.

2. Federal Control Over Changes in State Voting Procedures Under Sections 2 and 5 of the Voting Rights Act

Modern challenges to state voting procedures occur under sections 2 and 5 of the Voting Rights Act, as well as under the Fourteenth Amendment. Section 2 authorizes claims by private citizens against a state for unlawful vote dilution. Congress extended coverage of the Act in 1982, adding an important provision to section 2. The new authorized by the Act, did not unconstitutionally impinge upon the states' own powers to regulate the election process. Id. at 326.

85. Id. The initial version of § 2 provided that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Id.
87. Id.
88. 42 U.S.C. § 1973c (1988); see also 28 C.F.R. § 51 (explaining the procedures for the administration of § 5 of the Voting Rights Act of 1965, as amended). Section 4(b) grants the Attorney General the authority to designate an area as a covered jurisdiction under the Voting Rights Act if a list of factors are met. 42 U.S.C. § 1973c. See infra note 193 and accompanying text for further explanation of this provision.
89. Grofman, supra note 77, at 1239.
90. See supra note 63 for examples of vote dilution. Such suits are usually brought by minorities, who allege that their racial group has been scattered among other districts, so that they do not constitute a majority in any district. See, e.g., Thornburg v. Gingles, 478 U.S. 30 (1986) (establishing standard of review for voter dilution claims); United Jewish Org. v. Carey, 430 U.S. 144 (1977) (dividing a community of Hasidic Jews into two voting districts); Solomon v. Liberty County, 899 F.2d 1012 (11th Cir. 1990), cert. denied, 111 S. Ct. 670 (1991) (challenging the dilution of minority vote by scattering minorities among various majority-white districts); Garza v. County of Los Angeles, 756 F. Supp. 1298 (C.D. Cal.), (finding intentional discrimination and dilution of the Hispanic vote) aff'd, 918 F.2d 763 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991); Jeffers v. Clinton, 730 F. Supp. 196 (E.D. Ark. 1989), (holding that legislative redistricting plan diluted the minority vote; ordering the creation of black majority districts), aff'd, 111 S. Ct. 662 (1991). 

the committee concludes that it is essential to continue for an additional 5 years all the foregoing provisions of the act in full force and effect in order to safeguard the gains in Negro voter registration thus far achieved, and to prevent future infringements of voting rights based on race or color.
language provided that federal courts could find a violation of the Equal Protection Clause if state redistricting plans reduced or diluted a citizen’s voting strength. The amendment eliminated the requirement of discriminatory intent, providing that any voting procedure that has a discriminatory effect violates section 2 of the Act. Under section 5, states can bring suit against the federal government. Section 5 requires states to obtain preclearance from the Attorney General and to prove that their plans do not abridge the minority vote or dilute minority voting power in violation of section 2. In order to help states obtain preclearance, the Attorney General’s office encourages states to “maximize” minority voting power through the creation of majority-minority districts.

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93. Grofman, supra note 77, at 1245. This standard marks a departure from the purposeful intent standard used by the Supreme Court in most Equal Protection cases. As a result, “the nature of districting litigation has shifted. Until quite recently, almost all challenges under the Voting Rights Act were to at-large elections. Now, a very high proportion of challenges are directed against the way that lines are drawn within a single-member district plan.”

The amendment effectively overruled the Supreme Court's decision in Mobile v. Bolden, 446 U.S. 55 (1980), where the Court held that § 2 required the plaintiffs to prove discriminatory purpose, and that proof of discriminatory effect alone was insufficient to establish a § 2 claim. Grofman, supra note 77, at 1245. See supra note 63.

94. Section 5 requires that covered jurisdictions submit redistricting plans to the Attorney General for preclearance before they can enforce the plans. 42 U.S.C. § 1973c. If the Attorney General denies preclearance, states may attempt to obtain a declaratory judgment granting preclearance from the federal district court for the District of Columbia, or they may petition that court before requesting preclearance from the Attorney General. See generally Rome v. United States, 446 U.S. 156, 168 (1980) (refusing to allow political unit [city of Rome] of a covered jurisdiction [entire State of Georgia] to bring independently a declaratory judgment action); Beer v. United States, 425 U.S. 130, 138 (1976) (upholding redistricting plan as valid under § 5 of the Voting Rights Act, and articulating standard of review for § 5 claims); Georgia v. United States, 411 U.S. 526, 541 (1973) (enjoining State that failed to obtain preclearance from conducting elections under new redistricting plan).

95. See supra notes 92-93 and accompanying text. Section 5 requirements apply to “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . .” 42 U.S.C. § 1973c, as amended.

In a series of cases, the Supreme Court interpreted and further clarified the Act. In *Allen v. State Board of Elections*, for example, the Court held that the Voting Rights Act covered "any state enactment which altered the election law of a covered State in even a minor way." The Court also concluded that private parties had standing to sue when their state or local government failed to comply with section 5 by enacting and enforcing a new voting law without first obtaining federal approval. This holding gave citizens an important vehicle through which they could personally ensure the protection of their voting rights. The ruling also provided an added check on local governments, which were now under the scrutiny of both the federal government and their own citizens.

In addition, in *Beer v. United States*, the Supreme Court defined the standard a redistricting plan must satisfy to survive a section 5 review. The Court interpreted the purpose of section 5 as ensuring that no changes in voting laws be made "that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." The Court found that a reapportionment plan that enhanced the minority vote would satisfy section 5 unless it unconstitutionally discriminated on the basis of race.

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98. *Id.* at 566. In *Allen*, the States of Mississippi and Virginia passed new laws and regulations that affected the voting process, but did not attempt to obtain prior approval under § 5 of the Voting Rights Act. *Id.* at 544. The plaintiffs brought four separate suits (three in Mississippi and one in Virginia). *Id.* at 547. The Mississippi suits were consolidated on appeal. *Id.* The general issue was whether jurisdictions covered by § 5 must obtain federal approval of any changes to the voting process. *Id.* at 549-52. More specifically, the *Allen* Court held that a local law creating an at-large voting system for county officeholders was subject to § 5, whereby the county government must obtain approval for the new plan before enforcing it. *Id.* at 569. The Court noted that such a change could seriously weaken minority voting power:

Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.

*Id.* The Court concluded that the county must prove to federal authorities that the proposed change had neither the purpose nor the effect of discriminating against minority voters. *Id.* at 570.
99. *Id.* at 567.
100. 425 U.S. 130 (1976).
101. *Id.* at 138-41. In *Beer*, the city of New Orleans requested a declaratory judgment under § 5 of the Voting Rights Act that a plan reapportioning the city's councilmanic districts did not violate the Act. *Id.* at 133. The Court held that the plan satisfied the requirements of the Act, since it actually increased the possibility that more minority officials would be elected. *Id.* at 142.
102. *Id.* at 141.
The Beer Court also required, however, that jurisdictions make an affirmative showing that their plans did not intentionally dilute minority voting strength. As a result of the Court’s interpretation of the Act, section 5 fulfilled Congress’ objective of forcing states to discontinue discriminatory voting practices.

C. Redistricting Under the Voting Rights Act and the Potential Conflict With the Equal Protection Clause

1. Initial Deference to the Voting Rights Act

Initially, the Supreme Court deferred to the states when analyzing the creation of majority-minority voting districts. In deciding whether to approve reapportionment plans, the Attorney General interpreted the Beer nondilution requirement as imposing on states an affirmative duty to maximize minority voting strength and to create majority-minority districts. The Supreme Court implicitly approved such actions in United Jewish Organizations v. Carey (“UJO”). While the opinion in UJO was “highly fractured,” a majority of the Court upheld the intentional creation or preservation of majority-minority dis-

103. Id.
104. Grofman, supra note 77, at 1239 n.9.
105. See supra note 94. In Georgia v. United States, 411 U.S. 526 (1973), the Court held that the opinion in Allen “all but conclusively established” that § 5 applied to state redistricting plans. Id. at 532. The Georgia Court cited congressional approval of the Allen decision, indicating that the decision accurately interpreted congressional intent. Id. at 533. Additionally, the Court noted that since Allen was decided, many states, assuming that redistricting plans were included in § 5 as requiring approval, had submitted their plans to the Attorney General. Id.
106. See supra note 94 and accompanying text (explaining that states may obtain preclearance of their redistricting plan from the Attorney General rather than a federal court).
108. 430 U.S. 144 (1977). In UJO, a New York redistricting plan required federal approval because § 5 of the Voting Rights Act covered three counties in New York. Id. at 148. State officials submitted the plan to the Attorney General, who objected to it because the plan appeared to dilute the vote of minorities, specifically blacks and Puerto Ricans. Id. at 149-50. The officials responded to this objection by redrawing the district lines, whereby the percentage of minority voters in districts where minorities already constituted a majority increased substantially. Id. at 151. The Attorney General did not object to the new plan. A group of Hasidic Jews, however, sued, alleging that their vote had been diluted by the new plan. Id. at 152.
districts, holding that such actions did not violate the Equal Protection Clause.\textsuperscript{110}

In \textit{UJO}, the Court held that the legislature did not possess the requisite discriminatory purpose because the legislature did not intend to deprive its citizens of the right to vote, or to minimize their voting strength, on the basis of race.\textsuperscript{111} The \textit{UJO} Court also relied on \textit{Beer} in finding the legislative plan constitutional.\textsuperscript{112} The Court interpreted \textit{Beer} to allow approval of a reapportionment plan that deliberately increased the percentage of minority voters in a certain district in order to comply with section 5.\textsuperscript{113}

In addition, the \textit{UJO} Court considered the issue of whether it would uphold the plan if evidence of a racially discriminatory purpose or effect existed.\textsuperscript{114} In doing so, the Court implicitly concluded that even if the redistricting plan contained discriminatory legislative purposes or political effects, it could still withstand judicial scrutiny.\textsuperscript{115} The Court, however, required the state to encourage fair representation of all racial groups when creating the plan.\textsuperscript{116} The \textit{UJO} Court therefore created a highly deferential standard by which plaintiffs would have difficulty proving that a state redistricting plan, approved by the Attorney General as consistent with the requirements of the Voting Rights Act, violated the Fourteenth Amendment.\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{110} \textit{UJO}, 430 U.S. at 165 (finding that the plan, by deliberately drawing nonwhite districts, did not minimize or unfairly cancel out white voting strength, because under the contested redistricting plan, whites continued to be fairly represented relative to their share of the population).
\item \textsuperscript{111} \textit{Id.} "There is no doubt that . . . the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment . . . ." \textit{Id.}
\item \textsuperscript{112} \textit{UJO}, 430 U.S. at 160.
\item \textsuperscript{113} \textit{Id.} "Implicit in \textit{Beer} and \textit{City of Richmond}, then, is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5." \textit{Id.} at 161.
\item \textsuperscript{114} \textit{See id.} at 167 (comparing the present case to one where a state changes its voting scheme "for the purpose of increasing minority representation").
\item \textsuperscript{115} \textit{Id.} The Court noted that "we think it would be . . . permissible" for a state to attempt to increase minority voting power, even if it resulted in the "intentional reduction of white voting power." \textit{Id.} at 168.
\item \textsuperscript{116} \textit{Id.} at 167. The "plan can be viewed as seeking to alleviate the consequences of racial voting at the polls and to achieve a fair allocation of political power between white and nonwhite voters . . . ." \textit{Id.}
\item \textsuperscript{117} \textit{Id.} Such a standard remains consistent with the position of Congress, which in each amendment of the Voting Rights Act has made clear its goal of strengthening minority voting rights, and with the position of the Attorney General, who has repeatedly encouraged the creation of voting districts that increase minority voting
\end{itemize}
2. Shaw v. Reno: The Return of Strict Scrutiny

While some commentators consider the Voting Rights Act to be one of the most important and successful pieces of legislation in the twentieth century, criticism of the Act has increased dramatically. Critics of the Voting Rights Act cite the liberal allowance of "race-conscious remedies" in voting rights litigation, which they allege violate the notion that the Constitution is colorblind.

The Supreme Court appeared to agree with these critics in Shaw I when it departed from the liberal standard created in UJO, and returned to a narrower interpretation of the Voting Rights Act. In a five to four decision, the Shaw I Court stated that a legislative redistricting plan containing a district "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for
purposes of voting” might violate the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{124}

In \textit{Shaw I}, the plaintiffs alleged neither voter dilution nor deprivation of the right to vote.\textsuperscript{125} Rather, the plaintiffs alleged that the reapportionment plan at issue violated the Fourteenth Amendment because race-conscious districting “violated their constitutional right to participate in a ‘color-blind’ electoral process.”\textsuperscript{126} The district court dismissed the plaintiffs’ claim that North Carolina unconstitutionally gerrymandered the voting districts.\textsuperscript{127}

The Supreme Court reversed the district court’s decision and held that the plaintiffs stated a valid cause of action under the Equal Protection Clause.\textsuperscript{128} The Court stated that the bizarrely shaped districts lacked traditional districting principles and therefore raised an inference of unconstitutional racial discrimination.\textsuperscript{129} The Court compared the district to “the most egregious racial gerrymanders of the past”\textsuperscript{130} and classified the district as resulting in “political apartheid.”\textsuperscript{131} Additionally, the Court emphasized that the use of such districts to separate voters on the basis of race involved a different, “special” type of injury, which eliminated the need for the plaintiffs to establish vote

\begin{footnotes}
\textsuperscript{124} Shaw I, 113 S. Ct. at 2824. The \textit{Shaw I} case arose when the North Carolina legislature created new congressional voting districts to reflect population increases indicated in the 1990 census. \textit{Id.} at 2819-20. Because half the State’s counties are covered by § 5 of the Voting Rights Act, the State submitted its first plan, which contained only one majority-minority district, to the Attorney General for approval. \textit{Id.} at 2820. The Attorney General objected to the plan, noting that the addition of another majority-minority district would prevent dilution of the minority vote, and that the drawing of such a district was feasible. \textit{Id.} In its second plan, which the Attorney General approved, the legislature added a second majority-minority district, the design of which generated much controversy. \textit{Id.} at 2821; Grofman, supra note 77, at 1257.

\textsuperscript{125} Shaw I, 113 S. Ct. at 2824. The Court upheld the dismissal of all of the claims against the federal defendants, but did address the plaintiffs’ claim against the State. \textit{Id.} at 2823. The \textit{Shaw I} court concluded that the plaintiffs stated a valid claim under the Equal Protection Clause. \textit{Id.} \textit{See infra} notes 128-33 and accompanying text.

\textsuperscript{126} Shaw I, 113 S. Ct at 2824.

\textsuperscript{127} \textit{Id.} at 2822.

\textsuperscript{128} \textit{Id.} at 2824.

\textsuperscript{129} \textit{Id.} at 2826-27. Such principles include “compactness, contiguity, and respect for political subdivisions.” \textit{Id.} at 2821. “We emphasize that these criteria are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.” \textit{Id.}

\textsuperscript{130} \textit{Id.} at 2824.

\textsuperscript{131} \textit{Id.} at 2827. Moreover, the Court dismissed arguments that because the plan did not dilute nonminority voting strength, the plaintiffs did not have standing to challenge the plan. \textit{Id.} at 2828. The Court noted that any racial classification can violate the Constitution, regardless of the racial group benefited by the classifications. \textit{Id.} at 2829.
\end{footnotes}
dilution or deprivation. Thus, the Court created a new cause of action under the Equal Protection Clause, recognizing geographical oddities in legislative redistricting plans as sufficient evidence of intentional discrimination to prove an equal protection violation.

D. Lower Courts' Application of Shaw v. Reno

The Shaw I Court granted the plaintiffs the opportunity to prove an equal protection violation based on racial gerrymandering. Because the Court did not decide whether the redistricting plan was constitutional, however, two substantive areas were left open for interpretation by lower courts. The first was whether state legislators could use any racial criteria in redistricting plans. The second was whether the Voting Rights Act provided a legitimate justification for racially gerrymandered redistricting plans.

1. Race as a Factor in Redistricting Plans—Evidence Required to Invoke Strict Scrutiny

Federal courts faced with Shaw I redistricting cases disagreed

132. Id. at 2828. See infra note 169 and accompanying text. The Court found that the creation of racially gerrymandered voting districts could violate the Equal Protection Clause because racial gerrymandering caused "special harms," such as the continued racial polarization and balkanization of American society. Id. at 2828.

133. Race-Based Districting and Minority Voting Rights, 107 HARV. L. REV. 194, 195 (1993). While the Court relied on the Equal Protection Clause, "its reasoning relied on appeals to the negative symbolism of race-consciousness rather than on a demonstration of unequal treatment .... In this way, the Shaw Court used the historical connection between race-consciousness and racially discriminatory treatment to cast doubt on the district." Id.

134. See supra notes 122-33 and accompanying text.

135. See e.g., Aleinikoff & Issacharoff, supra note 11, at 602-03. The authors asserted:

[T]he Court declined the opportunity to announce a clear and decisive norm for districting cases or to reconsider UJO, choosing instead to focus on the peculiar shape of the challenged North Carolina district and to arrive at a decision whose broader implications for the review of state districting decisions is unclear.

Id.


137. Shaw I, 113 S. Ct. at 2831-32. While the Court recognized that a state's desire to eradicate the effects of past discrimination could constitute a significant state interest, the Court warned that the state must have a "strong basis in evidence for concluding that remedial action is necessary." Id. (citations omitted). Additionally, the Court noted that attempted compliance with the Voting Rights Act would not always satisfy the compelling interest standard. Id.

138. In these cases, the plaintiffs challenged congressional redistricting plans, alleging that the plans contained racially gerrymandered districts in violation of the Equal Protection Clause. See infra notes 143-84 and accompanying text. The Supreme
significantly on when a legislature’s use of race as a redistricting factor triggered strict scrutiny. Three distinct interpretations of this issue emerged from the cases following Shaw I. The courts applied strict scrutiny when: (1) race was a recognizable factor in the legislature’s decision to create a majority-minority district;\(^{139}\) (2) race was the sole factor;\(^{140}\) or (3) race was a predominant or motivating factor.\(^{141}\)

Courts adopted polar extremes in interpreting the degree of racial motivation that would invoke strict scrutiny under Shaw I. Two courts applied strict scrutiny once the plaintiffs offered evidence showing that race played any role in the legislature’s redistricting decisions.\(^{142}\)

In the first case, Hays v. Louisiana ("Hays I"),\(^{143}\) the federal district court moved beyond the Supreme Court’s reasoning in Shaw I by holding that plaintiffs could prove racial gerrymandering without showing that legislators created bizarrely shaped districts.\(^{144}\) The court explained that the plaintiffs could trigger strict scrutiny through direct evidence that a state legislature used racial criteria when it enacted the

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141. Johnson, 864 F. Supp. at 1372 (holding a majority-minority district in legislative redistricting plan to be unconstitutional); Vera v. Richards, 861 F. Supp. 1304, 1346 (S.D. Tex. 1994) (holding several districts in redistricting plan to be unconstitutionally racially gerrymandered). See infra notes 154-61 and accompanying text.
142. Hays II, 862 F. Supp. at 122; Shaw II, 861 F. Supp. at 429; Hays I, 839 F. Supp. at 1188. Courts interpreting Shaw I to require that race need only be a tangible factor to invoke stricter scrutiny relied on Fourteenth Amendment decisions predating Shaw I. See supra part II.A.1 for a discussion of the standard of review enunciated in previous equal protection cases.
143. 839 F. Supp. 1188 (W.D. La. 1993), vacated, 114 S. Ct. 2731 (1994), aff’d sub nom. St. Cyr v. Hays, 115 S. Ct. 687, vacated sub nom. United States v. Hays, 115 S. Ct. 2431 (1995). In Hays I, the Louisiana legislature enacted a redistricting plan to accommodate population shifts in the state, as evidenced in the 1990 census. Id. at 1190. The plan created two majority-minority districts. Id. at 1191. A group of citizens sued, alleging impermissible racial gerrymandering. Id. at 1190-91. The State argued that since other considerations, such as incumbency protection and partisan interests, also played a factor in the redistricting process, the plan could not be considered racial gerrymandering. Id. at 1201. The Hays I court rejected this argument. Id. at 1201-02.
144. Id. at 1195. After the Hays I court struck down the redistricting plan, the state created a new plan, which a Louisiana district court, applying Hays I, summarily rejected. Hays II, 862 F. Supp. at 122. The Supreme Court, on appeal of the Hays II decision, ordered that the plaintiffs’ claim be dismissed due to lack of standing. United States v. Hays, 115 S. Ct. 2431 (1995) [hereinafter Hays III].
redistricting plan. The *Hays I* court used inferential evidence derived from the bizarrely shaped districts, as well as direct evidence of legislative intent, to support its finding that the Louisiana legislature engaged in racial gerrymandering, and that the redistricting plan must therefore be strictly scrutinized.

In the second case, *Shaw v. Hunt* ("*Shaw II"), a North Carolina federal district court similarly held that because race played a role in creating congressional districts, the North Carolina legislature engaged in racial gerrymandering. The *Shaw II* court reasoned that evidence of use of racial criteria could be proven "by any means," such as bizarre shape, expert testimony, or state concession.

In contrast to the *Hays I* and *Shaw II* courts, a federal court in California ruled the opposite, concluding that *Shaw I* applied only to a narrow class of cases. In *DeWitt v. Wilson*, the district court interpreted *Shaw I* to require a stricter standard of scrutiny only when districts were so oddly shaped that the legislature clearly considered only

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145. *Hays I*, 839 F. Supp. at 1195. The court noted that if someone “involved in the design and passage of a redistricting plan asserts or concedes that design of the plan was driven by race, then racial gerrymandering may be found without resorting to the inferential approach approved by the Court in Shaw [I].” *Id.*

146. *Id.* at 1199, 1204-05. The court emphasized, however, that evidence that some of the districts appeared distorted was merely superfluous to its holding. *Id.* at 1204. (“We need not even consider the indirect or inferential proof approbated in Shaw [I] to reach the same point—a finding of racial gerrymandering.”) The court became the first in the country to strike down a congressional redistricting plan for creating racial majority-minority districts in violation of the Equal Protection Clause.

147. 861 F. Supp. 408 (E.D.N.C. 1994), *prob. juris. noted*, Shaw v. Hunt, 115 S. Ct. 12639 (1995). This case emerged after the Supreme Court reversed and remanded *Shaw I*, 113 S. Ct. 2816. All of the parties remained the same except that the federal defendants were dismissed from the case, although on remand the United States submitted amicus curiae briefs in support of the state defendants. *See supra* Section II.C.2.


149. *Id.* at 431. The court stated:

“This ‘race-a-motivating-factor’ triggering test is necessarily met by proof that the plan’s lines were deliberately drawn so as to create one or more districts in which a particular racial group is a majority, even if factors other than race are shown to have played a significant role in the precise location and shape of those districts.

*Id.* The *Shaw II* court departed from the *Hays I* reasoning in its emphasis on the importance of the irregular shape of the congressional districts as part of the initial stage of analysis. *Id.* The *Shaw II* court noted that "ugly" districts are important as "circumstantial evidence that the disproportionate concentration of members of a particular race in certain districts was something the line-drawers deliberately set about to accomplish." *Id.* While the court in *Shaw II* considered other direct evidence relating to the legislative intent, it did not specifically rely on those factors in reaching its conclusion that the legislative plan was racially gerrymandered. *Id.*

the race of state voters when drawing them. The DeWitt court emphasized that proof showing the state created a race-based districting plan would not always establish a racial gerrymandering claim.

Later decisions rejected the extreme positions advocated by other federal courts and instead adopted a more moderate evidentiary standard for proving racial gerrymandering. In Johnson v. Miller, for example, a federal court in Georgia analyzed the two opposing positions taken by other courts before deciding that neither position espoused the correct interpretation of Shaw I. The Johnson court instead determined that in order to state a claim of racial gerrymandering, a plaintiff must show that “race was the substantial or motivating consideration” in creating the redistricting plan. This

151. Id. at 1412. “Shaw [I] held when districts are drawn in such an extremely irregular fashion as to be unexplainable, other than being based solely on race, a claim under the Equal Protection Clause for racial gerrymandering can be stated.” Id. The DeWitt court based its decision on the unique facts of Shaw I—namely, that the congressional districts at issue had extremely distorted boundaries. Id.

152. Id. at 1413. “Thus, in redistricting, consciousness of race does not give rise to a claim of racial gerrymandering . . . .” Id. Cf. Bridgeport Coalition for Fair Representation v. City of Bridgeport, 26 F.3d 271, 278 (2d Cir. 1994) (applying Shaw I to a city council redistricting plan, and holding that it did not trigger strict scrutiny because race was not the city’s sole motivation when designing the plan). See infra note 319.


155. See supra notes 143-152 and accompanying text.

156. Johnson, 864 F. Supp. at 1371-72. The Johnson court first examined the low evidentiary standard required by Hays I and Shaw II. Id. at 1371 (citing Hays I and Shaw II as adopting a lower standard of proof in racial gerrymandering cases). See supra notes 144-49 and accompanying text. The court concluded that these decisions not only departed from Shaw I and traditional Fourteenth Amendment principles, but also would lead to an unnecessary increase in litigation, placing state legislatures in an untenable position. Johnson, 864 F. Supp. at 1371-73. See also id. at 1373 n.22 (citing the recent Supreme Court case Holder v. Hall, 114 S. Ct. 2581, 2598 (1994), where the Court noted the recent, disturbing trend of extensive judicial activism in racial gerrymandering claims). Additionally, the Johnson Court noted that past Supreme Court cases held that the legislature may always “intentionally consider race in redistricting—and even alter the occasional line in keeping with that consideration—without incurring constitutional review.” Johnson, 864 F. Supp. at 1373.

The Johnson court also rejected DeWitt’s higher evidentiary standard, which granted state legislatures too much deference in enacting race-based legislation. Johnson, 864 F. Supp. at 1372. The court noted that the Equal Protection Clause “does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes.” Id. (citing Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977) (citations omitted)).

evidentiary standard, the court emphasized, requires proof that race played the greatest role in deciding where to draw the district lines.\textsuperscript{158}

In \textit{Vera v. Richards},\textsuperscript{159} a federal court in Texas similarly found that the plaintiffs must prove that race was a primary factor in creating a redistricting plan in order to invite more stringent judicial inquiry into the plan.\textsuperscript{160} The \textit{Vera} court held that the Texas state legislature engaged in racial gerrymandering because its redistricting plan could not be explained "on grounds other than race."\textsuperscript{161}

\section*{2. The Role of the Voting Rights Act in Providing a Justification for Using Race as a Factor}

Once plaintiffs had successfully proven that a state legislature racially gerrymandered its congressional redistricting plan, \textit{Shaw I} instructed courts to move to the second prong of analysis and review the plan with a heightened level of scrutiny.\textsuperscript{162} This strict scrutiny standard requires that a state offer sufficient justifications to show that it narrowly tailored its redistricting plan to satisfy a compelling government interest.\textsuperscript{163}

In \textit{Shaw I}, however, the Supreme Court offered little guidance to courts when determining what justifications could satisfy this stricter

\begin{itemize}
\item \textsuperscript{158} \textit{Id.} Under such a standard, the plaintiff must prove that the legislature (a) was consciously influenced by race, and (b) while other redistricting considerations may also have consciously influenced the district shape, race was the overriding, predominant force determining the lines of the district. If race, however deliberately used, was one factor among many of equal or greater significance to the drafters, the plan is not a racial gerrymander/racial classification subject to strict scrutiny. \textit{Id.}
\item \textsuperscript{159} 861 F. Supp. 1304 (S.D. Tex. 1994).
\item \textsuperscript{160} \textit{Id.} at 1342. In creating the plan, the legislature considered several important factors: the requirements of the Voting Rights Act; the strong interests of incumbent members of Congress in retaining support in their present districts; and the interests of political parties in increasing their power base. \textit{Id.} at 1314, 1316-17.
\item \textsuperscript{161} \textit{Id.} at 1332 (quoting \textit{Shaw I}, 113 S. Ct. at 2825). The Texas court found that three congressional districts were racially gerrymandered and noted the "highly irregular" shape of those districts. \textit{Id.} at 1345. The court found that the other districts were not racially gerrymandered, and noted that "[w]hen compared with the other districts," they were "not highly irregularly shaped." \textit{Id.} at 1344.

In deciding whether the disputed districts resulted from racial gerrymandering, the \textit{Vera} court, as in \textit{Johnson}, examined other racial gerrymandering cases before rejecting their analyses and adopting a new one. \textit{Id.} at 1331-32.
\item \textsuperscript{162} \textit{Shaw I}, 113 S. Ct. at 2832. For a discussion of the two-step analysis that courts must apply when examining state actions under the Equal Protection Clause, see supra notes 43-50 and accompanying text.
\item \textsuperscript{163} \textit{Shaw I}, 113 S. Ct. at 2832. The plaintiff, however, still retains the ultimate burden of proving that the legislative plan is not narrowly tailored. \textit{Id.}
\end{itemize}
Rather, the Court enunciated two broadly based standards for lower courts to consider. First, the Court noted that attempted compliance with the Voting Rights Act does not necessarily constitute a compelling government interest. Second, the Court stated that a racially gerrymandered district will be narrowly tailored only if the state has a "strong basis in evidence for concluding that remedial action is necessary." The federal courts that applied Shaw I in racial gerrymandering cases disagreed in their interpretations of these standards.

The federal district court in Shaw II determined that compliance with the Voting Rights Act constituted a sufficiently compelling governmental interest, and held that the State of North Carolina was therefore justified in racially gerrymandering its voting districts. The court noted the difficulty in determining what constitutes a compelling governmental interest in a redistricting case, as courts had, historically, treated voting rights cases differently from other equal protection cases. The Shaw II court relied on these precedents, however, as support for its proposition that both the need to comply with the Voting Rights Act and the need to remedy past discrimination con-

164. Id. at 2831. The Court offered, however, some examples of justifications that could satisfy this requirement. Id. at 2830. For instance, the Court mentioned that if a state enacted the redistricting plan to prevent a retrogression of minority voting power, under Beer v. United States, 425 U.S. 130 (1976), it might meet the stricter standard. Shaw I, 113 S. Ct. at 2830. An additional possible justification by a state would be the desire to avoid dilution of minority voting strength, which the Court defined in Thornburg v. Gingles, 478 U.S. 30 (1986). Shaw I, 113 S. Ct. at 2831. The Court noted, however, that in either situation, the redistricting plan might still be unconstitutional if the plaintiffs proved that the state did more than Beer or Thornburg required. Id. at 2830-31.


166. Id. "'[R]ace-based districting, as a response to racially polarized voting, is constitutionally permissible only when the State 'employ[s] sound districting principles,' and only when the affected racial group's 'residential patterns afford the opportunity of creating districts in which they will be in the majority.'" Id. (citations omitted).


168. Id. The court cited several important differences between the use of racial preferences in educational admissions (Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)); employment (Wygant, 476 U.S. at 267); and government contracts (Croson, 488 U.S. at 469), from the consideration of race in legislative redistricting plans. Id. at 423. The Supreme Court recently granted certiorari on this issue. Shaw III, 115 S. Ct. 2639. See infra notes 368, 373-76 and accompanying text.

169. The court found such an interest existed in select cases where a state discriminated against minorities and excluded them from the political process, yet minority citizens had no recourse under the Voting Rights Act. Shaw II, 861 F. Supp. at 437. Such a situation could occur if minorities were too widely dispersed to constitute a "geographically compact" majority-minority district, see Thornburg v. Gingles, 478 U.S. 30, 49 (1986), and therefore could not claim voter dilution under § 2 of the Act. Shaw II, 861 F. Supp. at 444. Additionally, if the area at issue was not a jurisdiction
stated sufficiently compelling governmental interests. The court determined that such interests were even more compelling in voting rights cases than in other areas governed by equal protection law.

Other federal courts agreed that compliance with the Voting Rights Act might constitute a compelling governmental interest. Their decisions, however, focused on the fact that the states failed to tailor narrowly their redistricting plan to comply with such an interest.

In *Hays v. Louisiana* ("Hays I"), a federal district court disagreed with *Shaw II* and held that the State of Louisiana failed to meet the second prong of the equal protection claim. The court noted that under *Shaw I*, a racially gerrymandered redistricting plan is covered by § 5 of the Act, minority voters would otherwise have no recourse against such discriminatory actions. *Id.*

170. *Shaw II*, 861 F. Supp. at 443 (citations omitted). The court mentioned the importance of encouraging states to voluntarily comply with federal discrimination laws as a compelling interest. *Id.* at 437 (citing *Wygant*, 476 U.S. at 274-77).

171. *Id.* at 438. "[T]he Supreme Court has recognized consistently that the Voting Rights Act is the single most important piece of federal anti-discrimination legislation ever passed by Congress . . . ." *Id.* The *Shaw II* court noted that a state must have a "strong basis in evidence" for concluding that the creation of the majority-minority districts is necessary. *Id.* at 437 (citations omitted). Additionally, the court explained that the state must identify past discriminatory acts with some particularity before it may engage in race-based redistricting. *Id.* at 444 (citing *Croson*, 488 U.S. at 504). The state does not, however, need to make an explicit finding of discrimination on the record, as long as it can demonstrate that it has some evidentiary basis for its actions. *Wygant*, 476 U.S. at 289-91 (O'Connor, J., concurring). The court held, however, that North Carolina had a strong basis for concluding that it must engage in race-based redistricting in order to comply with the Voting Rights Act because it had information sufficient to support a *prima facie* showing that its failure to do so would violate the Act. *Shaw II*, 861 F. Supp. at 474.

Furthermore, the court found that the State's desire to "eradicate the effects of past or present racial discrimination in its political processes" posed an additional compelling state interest. *Id.* at 443. Evidence showed that legislators honestly believed that justice required adding another majority-minority district in light of the state's extensive history of discrimination in voting. *Id.* at 463.


In *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994), the court also acknowledged that a state might have a compelling interest in enacting remedial legislation that met the requirements of the Act. *Id.* at 1333.

173. See, e.g., *Johnson*, 864 F. Supp. at 1393; *Vera*, 861 F. Supp. at 1345. *See infra* notes 207-11 and accompanying text for a discussion of why these courts believed that the redistricting plans were not narrowly tailored.


175. *Id.* at 1209.

narrowly tailored only if it is "reasonably necessary" to achieve the compelling governmental interest.\textsuperscript{177} According to the \textit{Hays I} court, a plan creating additional majority-minority districts would be reasonably necessary only if a state needed to add a second majority-minority district to prevent a reduction of minority voting strength.\textsuperscript{178}

In another case, \textit{Johnson v. Miller},\textsuperscript{179} the court held that while compliance with the Voting Rights Act might be compelling, the state's redistricting plan was not "reasonably necessary" to achieve compliance, because it exceeded the requirements of the Act.\textsuperscript{180}

In \textit{Vera v. Richards},\textsuperscript{181} a third district court explicitly disagreed with the contention in \textit{Shaw II},\textsuperscript{182} which proposed that a racially gerrymandered district lacking traditional notions of districting could still be found constitutional.\textsuperscript{183} On the contrary, the \textit{Vera} court used evidence of oddly-shaped boundaries to support its holding that the legislature did not narrowly tailor the districts to achieve a compelling interest.\textsuperscript{184}

\textsuperscript{177} \textit{Hays I}, 839 F. Supp. at 1206 (quoting \textit{Shaw I}, 113 S. Ct. at 2831 (citations omitted)). The \textit{Hays I} court interpreted this requirement as preventing states from burdening the "rights and interests of its citizens more than is reasonably necessary to further the compelling governmental interest advanced by the state." \textit{Id.} at 1206-07.

\textsuperscript{178} \textit{Id.} at 1207. The court concluded that such facts did not exist in the present case. \textit{Id.} The court assumed for purposes of its analysis that compliance with the Voting Rights Act constitutes a compelling state interest. \textit{Id.} The \textit{Hays I} court held that since the State clearly did not need to take such action, the redistricting was unconstitutional. \textit{Id.}


\textsuperscript{180} \textit{Id.} at 1393. The \textit{Johnson} court found only two situations where race-based redistricting could be narrowly tailored to satisfy either § 5 or § 2 of the Voting Rights Act. First, if the Attorney General denied § 5 preclearance of a redistricting plan because it led to a retrogression in minority voting power. \textit{Johnson}, 864 F. Supp. at 1384 (citing \textit{Beer} v. United States, 425 U.S. 130, 141 (1976)) (holding that plaintiffs stated a claim for abridgement of the right to vote because a new enactment led to a retrogression of plaintiffs' voting power). \textit{See also} 28 C.F.R. § 51.54(a) (citing \textit{Beer}, and making retrogression the standard for finding discriminatory effect under § 5). \textit{See supra} notes 100-05 for a discussion of \textit{Beer} and the retrogression standard.

Second, race-based redistricting could be narrowly tailored if minority plaintiffs suing under § 2 could show the existence of a geographically compact area of minority voters that legislators ignored when creating such a plan. \textit{Johnson}, 864 F. Supp. at 1387.

\textsuperscript{181} 861 F. Supp. 1304 (S.D. Tex. 1994).

\textsuperscript{182} 861 F. Supp. 408 (E.D.N.C. 1994).

\textsuperscript{183} \textit{Id.} at 476. \textit{See supra} note 180.

\textsuperscript{184} \textit{Vera}, 861 F. Supp. at 1304. In \textit{Vera}, the court struck down District 30 because it had "no integrity in terms of traditional, neutral redistricting criteria." \textit{Id.} at 1339. The court also struck down Districts 18 and 29 "[b]ecause [they] are formed in utter disregard for traditional redistricting criteria and because their shapes are ultimately unexplainable on grounds other than racial quotas." \textit{Id.} at 1341. Lastly, the court upheld District 28, noting that the district is not "so out of line with traditional districting criteria as to raise a serious question about racial gerrymandering." \textit{Id.} at 1344.
III. DISCUSSION

A. Miller v. Johnson: The United States Supreme Court Expands its Holding in Shaw v. Reno

In the aftermath of Shaw I, courts split widely when interpreting the plaintiffs’ burden of proof in cases alleging that race-conscious redistricting plans violated the Equal Protection Clause. In particular, the courts disagreed on the degree of race consciousness that would trigger strict scrutiny. Additionally, when applying strict scrutiny, courts differed on what would constitute a compelling governmental interest, and how a state could narrowly tailor a redistricting plan to achieve that interest.

In Miller v. Johnson, the Supreme Court attempted to answer these questions and resolve the conflict created by Shaw I. In a five to four decision, the Miller Court held that if the plaintiff could establish, through either direct or circumstantial evidence, that race was the predominant factor in the state’s creation of a redistricting plan, then the plan would be subject to strict scrutiny. Additionally, the Court held that a redistricting plan created to comply with the Voting Rights Act could withstand strict scrutiny, but only where the racially gerrymandered districts were reasonably necessary to satisfy the requirements of the Act.

1. The Facts and the Lower Court’s Opinion

The Miller case arose because the State of Georgia added a majority-minority voting district in an effort to comply with the Voting Rights Act. Between 1980 and 1990, the State contained ten congressional districts; a majority of the voters were black in one of these districts. The 1990 census revealed that the State’s population had increased, entitling the State to an additional eleventh congressional seat, and

185. See supra notes 138-61 and accompanying text.
186. See supra notes 162-84 and accompanying text.
188. Id. at 2488, 2490. See infra notes 233-38 and accompanying text.
189. Id. at 2491.
190. Id. at 2483. In Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982), aff’d, 459 U.S. 1166 (1983), the United States District Court for the District of Columbia held that the first plan submitted by the Georgia legislature violated § 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1988). Id. at 517. The court held that the plan, which fragmented the black community in one area of the state, “implemented a scheme designed to minimize black voting strength to the extent possible.” Id. at 518. Georgia’s legislature subsequently submitted a plan that repaired the fragmentation, which the district court approved. Id. at 520.
requiring the State legislature to devise a redistricting plan to accommodate the new district. Since the United States Attorney General had previously designated Georgia a covered jurisdiction under section 4(b) of the Voting Rights Act, the State legislature had to obtain federal preclearance before enacting a new redistricting plan.

The first two plans submitted by Georgia's General Assembly contained two majority-minority districts. The Justice Department, however, denied preclearance of both plans, noting that the plans did not fully recognize the State's black population, and suggesting that the legislature create a third majority-minority district. The legislature subsequently created a new plan containing another majority-minority district, known as the Eleventh District, which the Justice Department approved.

After the 1992 elections were held under the new plan, five white voters from the Eleventh District sued various State officials alleging that the State legislature racially gerrymandered the legislative redistricting plan in violation of the Equal Protection Clause. In those elections, black candidates from all three majority-minority districts were elected to Congress. As proof of racial gerrymandering, the plaintiffs cited the shape of the Eleventh District, which they alleged was bizarre. Additionally, the plaintiffs submitted statements made

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191. Miller, 115 S. Ct. at 2483. The census also revealed that 27% of the state's population was black. Id.

192. 42 U.S.C. § 1973b(b) (1988). See also 30 Fed. Reg. 9897 (1965); 28 C.F.R. § 51 (1993). Section 4(b) grants the Attorney General the authority to designate an area as a covered jurisdiction under the Voting Rights Act if a list of factors are met. See supra note 88 and accompanying text for an explanation of this provision.


194. Miller, 115 S. Ct. at 2483-84. The Justice Department relied on several alternative plans, each of which contained three majority-minority districts, in making its decision to deny preclearance. Id. at 2484.

195. Id.

196. Id. at 2485. The United States also "intervened in support of the defendant" in the case. Id.

197. Id. at 2485. See Shaw I, 113 S. Ct. 2816 (holding that plaintiffs could state an equal protection claim for racial gerrymandering). See supra note 50.


199. Id. at 1378. The plaintiffs noted that the district stretched 260 miles, from metropolitan Atlanta in the northern portion of the State, to rural towns in central Georgia, to Savannah in the south. Id. at 1376. The district split the city of Savannah,
by members of the Justice Department, who had encouraged the State to submit a redistricting plan that contained a third majority-minority district.\footnote{199}

A three-judge federal panel declared the Georgia redistricting plan an unconstitutional racial gerrymander.\footnote{200} The court interpreted the Supreme Court's decision in \textit{Shaw I}\footnote{201} as holding that in order to state a claim of racial gerrymandering, a plaintiff must show that "race was the substantial or motivating consideration" in creating the redistricting plan.\footnote{202} This evidentiary standard, the court emphasized, requires proof that race played the greatest role in deciding where to draw the district lines.\footnote{203}

Furthermore, the district court determined that proof of racial gerrymander could be found not only by the bizarre shape of the congressional district, but also by other evidence of legislative intent to create districts on the basis of race.\footnote{204} The court concluded that the Georgia plan was racially gerrymandered.\footnote{205}

After determining that the legislature engaged in racial gerrymandering, the lower court then turned to the strict scrutiny prong of its analysis, examining whether the gerrymandering was narrowly tailored to satisfy a compelling governmental interest.\footnote{206} Even though it found compliance with the Voting Rights Act a potentially compelling interest,\footnote{207} the court determined that the state did not narrowly

\footnote{199} See \textit{infra} note 210 and accompanying text.
\footnote{200} \textit{Id.} at 1377. See \textit{infra} note 210 and accompanying text.
\footnote{201} \textit{Johnson,} 864 F. Supp. at 1393.
\footnote{202} 113 S. Ct. 2816 (1993).
\footnote{203} \textit{Johnson,} 864 F. Supp. at 1372. See \textit{supra} notes 154-58 and accompanying text.
\footnote{204} \textit{Johnson,} 864 F. Supp. at 1372. Under such a standard, the plaintiff must prove that the legislature (a) was consciously influenced by race, and (b) while other redistricting considerations may also have consciously influenced the district shape, race was the overriding, predominant force determining the lines of the district. If race, however deliberately used, was one factor among many of equal or greater significance to the drafters, the plan is not a racial gerrymander/racial classification subject to strict scrutiny. \textit{Id.} See \textit{infra} notes 154-58 and accompanying text.
\footnote{205} \textit{Johnson,} 864 F. Supp. at 1374 (quoting \textit{Shaw II}, 861 F. Supp. at 431. for the assertion that proof can be made "by any means, including state concession, bizarre shape, or some combination of the various factors typically used to prove the 'intent' element of an Equal Protection claim . . . .").
\footnote{206} \textit{Id.} at 1378. The court noted the bizarre shape of the Eleventh District. \textit{Id.} at 1367. The court also cited statements by various state officials, who acknowledged that they purposefully created the Eleventh District to contain a significant majority-black population. \textit{Id.} at 1361-68, 1378.
\footnote{207} \textit{Id.} at 1383. See \textit{infra} notes 179-80 and accompanying text.
\footnote{208} \textit{Johnson,} 864 F. Supp. at 1381. In fact, the court stated that "in scenarios
tailor the plan to achieve this goal because the plan exceeded the retrogression requirements of the Voting Rights Act. The court found that the Attorney General should have precleared Georgia’s initial redistricting plan, rather than force the State to add a third majority-minority district. Because the State could not rebut the plaintiff’s evidence that the plan was not narrowly tailored, the court held, the plan must be struck down as unconstitutional.

2. The Majority Opinion

In Miller v. Johnson, the Supreme Court clarified and expanded its holding in Shaw v. Reno ("Shaw I"). The Miller Court affirmed the opinion of the lower court, holding that the Georgia legislature racially gerrymandered its redistricting plan in violation of the Equal Protection Clause of the Fourteenth Amendment.

The majority began its analysis by defining how a plaintiff can prove racial gerrymandering, thus subjecting a redistricting plan to strict scrutiny by the court. The defendants in Miller argued that Shaw I required the plaintiff to demonstrate that the shape of the Eleventh District was so bizarre that it could not be explained on grounds other than race, and that the plaintiff failed to do so.

Involving jurisdictions subject to § 5, a compelling interest is initially assumed, since the plans in question could not have been enacted without VRA 'compliance' as interpreted by the Justice Department." 

209. Id. at 1384. See supra notes 153-58, 179-80 and accompanying text for a complete discussion of the court's rationale.

210. Johnson, 864 F. Supp. at 1384. The Johnson court severely criticized the actions of the Department of Justice ("DOJ") throughout its opinion, finding that the DOJ exceeded its authority in forcing the state to add another district to satisfy § 5 preclearance requirements. Id. at 1367-68. The court conceded that it had no power to review the actions of the DOJ (under the Voting Rights Act, only the District Court for the District of Columbia has jurisdiction over cases against the DOJ pursuant to 42 U.S.C. 19731(b) (1988)). Id. at 1383 n.32. The court implied, however, that by striking down districts approved by the DOJ, it would be sending a message that the DOJ's interpretation of the Voting Rights Act was unconstitutional. Id. at 1383.

211. Id. at 1393 (prohibiting congressional elections in the racially gerrymandered district until the court revised the redistricting plan).


214. Miller, 115 S. Ct. at 2494.

215. Justice Kennedy wrote the majority opinion, in which Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Thomas joined. Id. at 2482.

216. Id. at 2485-87.

217. See Brief for Appellants at *24, Miller, 115 S. Ct. 2475 (1995) (No. 94-631), 1995 WL 89323 (arguing that "the highly irregular, bizarre character of a district is an essential element of a Shaw I claim. Without it, not even a prima facie equal protection claim can be made out."). The State defendants also asserted that a "bizarre," 'extremely irregular' configuration is not a mere item of circumstantial evidence. It is a critical
Further, the defendants asserted that evidence of legislative intent alone could not state a Shaw I claim of racial gerrymandering. 218 The Miller Court rejected these arguments. The Court stated that Shaw I requires that when a state legislative plan evidences the use of “race as a basis for separating voters into districts,” that plan will be subject to strict scrutiny under the Equal Protection Clause.219 The Court noted that just as a state cannot, “absent extraordinary justification, segregate citizens on the basis of race” in other areas of society, a state also cannot segregate citizens on the basis of race when drawing voting districts.220

Specifically, the Miller Court noted that in order to prove racial gerrymandering of a voting district, thereby subjecting it to strict scrutiny, the plaintiff did not have to prove that the district was “bizarre on its face.”221 The Court explained that a bizarrely shaped district provided powerful circumstantial evidence of race-based districting, but other evidence could also prove a potential constitutional violation.222

In formulating this rule, the majority applied principles articulated in previous equal protection cases.223 Those cases applied strict scrutiny

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218. See Brief for the United States at *17, Miller, 115 S. Ct. 2475 (1995) (Nos. 94-929, 94-361, 94-797), 1995 WL 89331 [hereinafter Brief for the United States]. The federal defendant (“Defendant”) contested the lower court’s holding on this issue for several reasons. For example, Defendant argued that state legislatures necessarily considered race when drawing district lines in order to ensure compliance with the Voting Rights Act. Id. at *21. With regard to certain districts, this consideration may at times be “overriding” or “predominant.” Id. Application of the lower court’s holding, Defendant argued, would result in a redistricting plan being subject to strict scrutiny every time a state attempted to comply with federal law. Id.

Moreover, the Defendant asserted that the lower court’s holding would prove unworkable. Id. In general, the Defendant noted, it is “difficult or impossible for any court to determine the ‘sole’ or ‘dominant’ motivation” of a diverse group of legislators when they enact a new law. Id. (quoting Palmer v. Thompson, 403 U.S. 217, 225 (1971)). This determination becomes even more difficult in cases involving redistricting plans, where legislators attempt to achieve a variety of purposes and goals. Id. at *21-*22.

219. Miller, 115 S. Ct. at 2485-86.

220. Id. at 2486. The Court analogized a Shaw I claim to previous equal protection cases, where the Supreme Court held that the segregation of citizens on the basis of race in public parks, buses, beaches, golf courses, and schools was unconstitutional. Id. (citations omitted).

221. Id. The Court explained that it did not intend in Shaw I to suggest that the mere appearance of a district, along with evidence of the district’s demographics, could “give rise to an equal protection claim,” or that the bizarre shape of a district was a threshold requirement for an equal protection claim. Id.

222. Id.

223. Id. at 2487 (noting that the principles enunciated in Shaw I have repeatedly
in two circumstances: first, if the government action was expressly race-based, or "unexplainable on grounds other than race;" and second, if the action appeared to be race-neutral on its face, but other evidence proved that the action was motivated by racist intent. In Miller, the Court analogized evidence of a bizarrely shaped district to those cases involving express racial classifications. The Court stated if a legislative plan is "so highly irregular," then an intent to use race-based factors can be inferred. In cases where a legislative redistricting plan is not irregular on its face, and therefore appears race-neutral, the Court explained, the plaintiff may still prove racial motivations by other means.

Before determining whether the plaintiff in Miller offered sufficient proof of racial gerrymandering, the Court emphasized its hesitancy in reviewing redistricting legislation, which, in a federalist system, remains an exclusive state function. The Court acknowledged that a state must examine a variety of factors when drawing district lines, and that a state will necessarily consider racial and other demographics during the redistricting process. The Court explained, however, that while a state may "be aware of racial considerations," a state cannot be "motivated by them.

Despite these reservations, the Miller Court concluded that in order to trigger strict scrutiny of a legislative redistricting plan, the plaintiff must show that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or

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225. Miller, 115 S. Ct. at 2487 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that a laundry permit ordinance, as enforced, discriminated against Chinese residents)); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (concluding that redrawing of municipal boundaries was designed to exclude black citizens from the city). See supra notes 48-50 and accompanying text.
226. Miller, 115 S. Ct. at 2487.
227. Id. (quoting Shaw I, 113 S. Ct. at 2826).
228. Id. (citing Shaw I, 113 S. Ct. at 2826).
229. Id. The Court acknowledged, however, that in such case, proof of race-based redistricting will be more difficult. Id. (citing Shaw I, 113 S. Ct. at 2826).
230. Id. at 2488. "It is well settled that 'reapportionment is primarily the duty and responsibility of the State.'" Id. (citations omitted).
231. Id.
232. Id.
without a particular district." The majority stated that the plaintiff could meet this burden through circumstantial evidence of the bizarre shape of a district, along with demographics showing the separation of citizens by race, or through direct evidence of the legislature’s purpose.

Turning to the facts of the case, the Miller Court affirmed the lower court’s holding that the plaintiffs met their burden of proving racial gerrymandering, and that the Court must therefore examine the legislative redistricting plan with strict scrutiny. The Court noted the existence of circumstantial evidence of the odd shape of the district, and accompanying demographics showing the racial composition of the district. Additionally, the Court cited extensive direct evidence of the Justice Department’s insistence that the legislature create a third majority-black district. The Court concluded that this evidence supported the district court’s holding that race was the overriding factor in the creation of the Eleventh District.

The majority then turned to an examination of whether the redistricting plan was narrowly tailored to achieve a compelling governmental interest. The defendants argued that the State of Georgia considered race when drawing the congressional districts only to comply with sections 2 and 5 of the Voting Rights Act. The defendants asserted that not only did attempting to comply with the Act constitute a compelling state interest, but also that the creation of three majority-minority districts was narrowly tailored to achieve compliance.

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233. Id.
234. Id. The Court explained that in order to make such a showing, the “plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.” Id.
235. Id.
236. Id. at 2489. The Court noted that in comparison with other districts in this country, the shape of the Eleventh District alone “may not seem bizarre on its face.” The Court stated, however, that the district’s shape, when considered along with the racial and population densities of the district, provided “compelling” evidence. Id. See supra notes 221-22 and accompanying text.
237. Miller, 115 S. Ct. at 2489.
238. Id.
240. Brief for the United States, supra note 218, at *28. The defendants stated that in order to rely on the Voting Rights Act as a justification, the State must show that there existed a “‘strong basis in evidence’ for the State’s actions.” Id. Further, the defendants argued that the State could satisfy this requirement if a sound basis existed for believing that failure to draw the third majority-minority district would lead to “a prima facie case against it” under the Voting Rights Act. Id. at *28-*29 (citations omitted).
The Miller Court rejected the defendants' arguments. The Court acknowledged that the State legislature created the third majority-minority district solely to comply with the Justice Department's pre-clearance requirements under section 5 of the Voting Rights Act. The Court explained, however, that regardless of whether compliance with the Act alone might constitute a compelling interest, the State must show that the creation of the Eleventh District was "reasonably necessary" to satisfy the Act.

In the present case, the Court held that the State could not prove that a reasonable basis existed to believe that its two previously proposed redistricting plans violated the Act. The Court determined that the Justice Department misinterpreted the requirements of section 5 when it required the State to draw a third majority-minority district. The Court noted that these plans increased the number of majority-black districts in the State from one to two. Therefore, the Court explained, these earlier plans prevented retrogression and, as such, fully complied with section 5. The Court concluded that because the State's creation of the Eleventh District exceeded the requirements of the Voting Rights Act, the State could not prove that it narrowly tailored its actions to comply with the Act.

The Miller Court also rejected the defendants' argument that they acted reasonably in relying on the Justice Department's interpretation.

defendants alleged that since the Attorney General refused to preclear the redistricting plan under § 5 unless the State added a third majority-minority district, the State had a strong basis for believing that the plan violated § 5. Id. at *31. Additionally, given the history of discrimination and racially polarized voting in the State, the State also had a sound basis for believing that the plan violated § 2. Id. at *36-*38.

241. Miller, 115 S. Ct. at 2490. The Court stated that a compelling state interest existed when a state attempted to "eradicat[e] the effects of past racial discrimination." Id. (citing Shaw I, 113 S. Ct. 2816, 2831 (1993)). In this case, however, the defendants did not argue "that it created the Eleventh District to remedy past discriminator[y] acts." Id. at 2490.

242. Id. at 2490-91. The Court did not discuss whether compliance with the Voting Rights Act provided a compelling interest "independent of any interest in remedying past discrimination." Id.

243. Id. at 2491. "As we suggested in Shaw [I], compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." Id. (citing Shaw I, 113 S. Ct. at 2830-31).

244. Id. at 2492.

245. Id.

246. Id.

247. Id.; see Beer v. United States, 425 U.S. 130, 141 (1976) (holding that a redistricting plan did not violate § 5 unless it led to a retrogression in the voting power of racial minorities). See supra notes 100-05 and accompanying text.

248. Miller, 115 S. Ct. at 2493.
of the Voting Rights Act. While courts normally defer to the Justice Department’s interpretation of federal laws, the Miller Court stated that it could not accord any such deference in cases where the interpretation results in a potential constitutional violation. The Court determined that the Justice Department exceeded the authority granted to it under section 5. The Georgia legislature’s reliance on this authority therefore could not satisfy the strict scrutiny analysis, and the Court struck down the redistricting plan.

3. Justice O’Connor’s Concurring Opinion

Justice O’Connor cast the deciding vote in joining the Court’s opinion, and wrote a concurring opinion clarifying her interpretation of the new standard adopted by the majority. Justice O’Connor stated her belief that the standard of proof necessary to invoke strict scrutiny should be “a demanding one” to be applied only to “extreme instances of gerrymandering.” Specifically, Justice O’Connor interpreted the majority opinion to require that the plaintiff prove the State relied on racial considerations “in substantial disregard of customary and traditional districting practices.”

Importantly, Justice O’Connor emphasized that such a standard should apply to any claim of racial gerrymandering, regardless of the race of the parties bringing the action. She explained that the standard articulated by the majority should not “treat efforts to create

249. See Brief for the United States, supra note 218, at *29-*30 (arguing that a state should be allowed to assume that the Attorney General’s objection, unless “clearly unsupportable,” to the redistricting plan was correct, given her important role in the statutory scheme of the Voting Rights Act).

250. Miller, 115 S. Ct. at 2491 (citing Presley v. Etowah County Comm’n, 502 U.S. 491, 508-09 (1992)).

251. Id. (citation omitted). The Court noted that such deference was especially unwarranted in cases involving racial classifications, stating that “we would be surrendering to the Executive Branch our role in enforcing the constitutional limits on race-based official action.” Id. Further, the Court cited a series of cases holding that in this country’s system of separation of powers, the federal judiciary alone retains the role of interpreting the Constitution. Id.

252. Id. at 2493.

253. Id. at 2492.

254. Id. at 2497 (O’Connor, J., concurring). Justice O’Connor also wrote the majority opinion in Shaw v. Reno, 113 S. Ct. 2816 (1993).

255. Miller, 115 S. Ct. at 2497 (O’Connor, J., concurring).

256. Id. (O’Connor, J., concurring). According to Justice O’Connor, the high threshold at which strict scrutiny begins means that the constitutionality of most of the existing congressional districts should not be in doubt, even if race played a role in the redistricting process. Id. (O’Connor, J., concurring).

257. Id. (O’Connor, J., concurring).
majority-minority districts less favorably than similar efforts on behalf of other groups.  

B. The Dissenting Opinions

1. Justice Stevens's Opinion

Justice Stevens joined the dissenting opinion of Justice Ginsburg, and separately dissented to clarify his principal disagreement with the majority's holding. Justice Stevens argued that the plaintiffs in *Miller* lacked standing to bring a claim for racial gerrymandering because they did not suffer a legally cognizable injury. 

Stevens reiterated his disagreement with the majority holding in *Shaw I*, but concluded that even if *Shaw I* was correctly decided, the plaintiffs in *Miller* did not suffer the injury attributed to them by the majority. He interpreted the majority opinion to hold that the plaintiffs' placement in the Eleventh District resulted in "representational harms." He argued that the finding of such a harm to the plaintiffs actually offered support for the societal misconception that the majority professed to loathe: members of a specific race will vote for a candidate of their own race.

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258. *Id.* (O'Connor, J., concurring).
259. *Id.* at 2497 (Stevens, J., dissenting).
260. *Id.* (Stevens, J., dissenting).
261. *Id.* (Stevens, J., dissenting). Justice Stevens wrote a dissenting opinion in *Shaw I*, 113 S. Ct. at 2843 (Stevens, J., dissenting). In that opinion, he stated that a legislative plan violated the Equal Protection Clause only when the plan evidences a purpose "to enhance the power of the group in control of the districting process at the expense of any minority group." *Id.* at 2844 (Stevens, J., dissenting). Additionally, Justice Stevens expressed the belief that it should be constitutionally permissible to draw district lines that benefit racial minorities "whose history in the United States gave birth to the Equal Protection Clause." *Id.* at 2844-45 (Stevens, J., dissenting).
263. *Id.* (Stevens, J., dissenting) (quoting *Hays III*, 115 S. Ct. at 2436). In *Hays III*, a group of voters sued the State of Louisiana for racially gerrymandering its redistricting plan in violation of the Equal Protection Clause. *Id.* at 2434. A three-judge federal panel declared the plan unconstitutional. See *supra* notes 143-46 and accompanying text. On appeal, the Supreme Court reversed, holding that the plaintiffs lacked standing to challenge the redistricting plan. *Hays III*, 115 S. Ct. at 2437. The Court found that the plaintiffs, none of whom lived in an allegedly racially gerrymandered district, could not prove that they had been injured by the redistricting plan. *Id.* The Court therefore vacated the lower court's judgment and remanded with instructions to dismiss the complaint. *Id.*
264. *Miller*, 115 S. Ct. at 2498 (Stevens, J., dissenting) (quoting *Shaw I*, 113 S. Ct. at 2827 (defining the harm suffered as "reinforc[ing] the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls."). Justice Stevens reached this conclusion by finding that the plaintiffs could be harmed only "if all or most of the black voters [in their district]
Additionally, Justice Stevens noted that even if the plaintiffs were harmed by the racially gerrymandered districts, a statutory claim already existed to redress that harm. He explained that if these districts prevented white voters such as the plaintiffs from electing a candidate of their own race, then the plaintiffs could assert a violation under section 2 of the Voting Rights Act.\[265\]

Finally, Justice Stevens indicated his disagreement with the Court’s comparison of the present case to previous cases involving desegregation of minorities or redistricting plans designed to reduce minority voting power.\[266\] He found such analogies disturbing, and expressed his belief that in cases such as *Miller*, where legislation benefits a “politically weak group,” no equal protection violation exists.\[267\]

2. Justice Ginsburg’s Opinion

Justice Ginsburg criticized the majority for needlessly expanding the Court’s previous holding in *Shaw I*.\[268\] She noted that voting districts would now be subject to strict scrutiny not only when legislatures abandoned traditional districting principles to create bizarrely shaped districts, but also when those principles were “‘subordinated to’—given less weight than—race.”\[269\] Justice Ginsburg found that the majority’s holding also expanded the judiciary’s role in the redistricting process, a highly politicized function normally controlled by the states.\[270\]

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265. *Id.* at 2498 (Stevens, J., dissenting) (citing Thornburg v. Gingles, 478 U.S. 30, 56-58 (1986) (interpreting § 2 to provide a remedy for voter dilution when the plaintiffs allege and prove that racially gerrymandered district lines prevented them from electing a candidate of their own race)). See supra notes 90-93 and accompanying text.

266. *Miller*, 115 S. Ct. at 2498 (Stevens, J., dissenting). Justice Stevens found *Miller* distinguishable because in those cases, segregation, as well as racially gerrymandered voting districts, “frustrated the public interest in diversity and tolerance by barring African Americans from joining whites in the activities at issue.” *Id.* (Stevens, J., dissenting). Creating majority-minority districts, on the other hand, “serves the [public] interest in diversity and tolerance by increasing the likelihood that a meaningful number of black representatives will add their voices to legislative debates.” *Id.* (Stevens, J., dissenting).

267. *Id.* at 2499 (Stevens, J., dissenting).

268. *Id.* at 2499-500 (Ginsburg, J., dissenting). Justices Stevens and Breyer joined the entire opinion, while Justice Souter joined all but a portion of the opinion. *Id.* at 2499 (Ginsburg, J., dissenting).

269. *Id.* at 2499-500 (Ginsburg, J., dissenting) (quoting the majority opinion, *id.* at 2488).

270. *Id.* at 2499 (Ginsburg, J., dissenting).
Justice Ginsburg began her dissent by noting several issues on which the Court unanimously agreed: first, that the principles of federalism and separation of powers justify granting deference to a state legislature’s creation of a redistricting plan; second, that the country’s history of discrimination against black citizens requires statutory and constitutional protection of minority voting rights; third, that states may consider the racial or ethnic makeup of communities when drawing district lines; and fourth, that states may group people according to their common interests. Therefore, Justice Ginsburg reasoned, in order to violate the Equal Protection Clause, the Georgia legislature “had to do more than [just] consider race.” Justice Ginsburg determined that the issue dividing the Court was defining “how much more” the State had to do.

Justice Ginsburg emphasized the extreme deference with which courts have traditionally treated redistricting plans. She explained that extensive, blatant discrimination against black citizens in Georgia and elsewhere in this country caused the courts to move away from this deferential standard in cases where the plaintiffs alleged and proved racial discrimination in the voting booth. She noted that the

271. Id. at 2500 (Ginsburg, J., dissenting) (quoting Reynolds v. Sims, 377 U.S. 533, 586 (1964), for the notion that “legislative reapportionment is primarily a matter for legislative consideration and determination”).

272. Id. (Ginsburg, J., dissenting). Justice Ginsburg noted that the Voting Rights Act and the Equal Protection Clause were designed to remedy past discriminatory acts and prevent future racist acts from occurring. Id. (Ginsburg, J., dissenting) (citations omitted).

273. Id. (Ginsburg, J., dissenting).

274. Id. (Ginsburg, J., dissenting). States may consider race, even if they are not required to do so, in order to recognize that members of a community share common interests and beliefs. Id. (Ginsburg, J., dissenting) (citing Shaw I, 113 S. Ct. at 2826). Indeed, Justice Ginsburg argued that states could consider the race and ethnicity of voters even when those voters do not necessarily share political, social, and economic interests. Id. at 2504-05 (Ginsburg, J., dissenting). She noted that “ethnicity itself can tie people together.” Id. (Ginsburg, J., dissenting) (citing the many districts in this country that are “identified by their ethnic character”).

275. Id. at 2500 (Ginsburg, J., dissenting).

276. Id. (Ginsburg, J., dissenting).

277. Id. (Ginsburg, J., dissenting) (citing Chapman v. Meier, 420 U.S. 1, 27 (1975) (stating “what has been said on many occasions” is that legislative redistricting should be primarily the duty “of the state through its legislature” rather than the courts)). Additionally, Justice Ginsburg noted that the Constitution assigned the responsibility of redistricting to the states. Id. (Ginsburg, J., dissenting); See U.S. Const. art. I, § 2.

278. Miller, 115 S. Ct. at 2500-01 (Ginsburg, J., dissenting). Justice Ginsburg detailed the history of discriminatory acts conducted against black citizens in Georgia after the Fifteenth Amendment granted them the right to vote. Id. at 2501 (Ginsburg, J., dissenting). For instance, at Georgia’s constitutional convention in 1877, the convention leader stated that the purpose of the convention was to ensure that blacks
judiciary assumed an even greater role under the Voting Rights Act, which Congress enacted in response to these discriminatory practices by states.279

Justice Ginsburg also outlined the factual differences in Miller and Shaw I, and how both cases reached the identical outcome. In Shaw I, the Court noted that judicial intervention in redistricting plans should occur only in extreme circumstances.280 That intervention was justified in Shaw I because the State legislature drew the contested district in such a bizarre manner that the legislature clearly considered only race, while excluding all other traditional districting practices.281 In contrast, Justice Ginsburg noted that the shape of the Eleventh District in Miller did not evidence a legislative intent to consider race in the absence of all other districting principles.282 Unlike the Shaw I district, the Eleventh District was not bizarrely shaped.283 Therefore, Justice Ginsburg concluded that the shape of the Eleventh District should not justify judicial intervention.284

Last, Justice Ginsburg criticized the majority for encouraging the filing of equal protection claims against states “whenever plaintiffs plausibly allege that other factors carried less weight than race.”285 She noted the general rule in Equal Protection cases, as the majority pointed out: states must treat people as individuals and cannot classify individuals on the basis of their commonality with certain groups.286
In contrast, Justice Ginsburg noted the exception to this rule in redistricting cases, where states as a practical matter can, and must, divide people into groups.\textsuperscript{287} Justice Ginsburg acknowledged the need for close judicial scrutiny of previous redistricting cases, where states repeatedly discriminated against minorities who possessed little political power needed to end the discrimination.\textsuperscript{288} Contrarily, she argued that the majority racial group does not require the protection of the courts, and that extensive judicial interference in cases involving white citizens was therefore unwarranted.\textsuperscript{289} Justice Ginsburg stated that by offering such protections, the majority needlessly expanded the judiciary's role in the redistricting process.\textsuperscript{290} In addition, she noted that the limits placed on states' consideration of race prevented states from complying with "[s]tatutory mandates and political realities [which] require states to consider race."\textsuperscript{291}

\section*{IV. ANALYSIS}

The Court in \textit{Miller} expanded its previous decision in \textit{Shaw I} by
allowing white citizens\textsuperscript{292} to challenge legislative redistricting plans not only when legislatures create bizarre-shaped majority-minority districts, but also when race is a predominant motive in creating such districts.\textsuperscript{293} The Court noted that such “segregated” districts,\textsuperscript{294} unlike other equal protection violations, cause harm to the plaintiffs because they reinforce racial stereotypes and “may balkanize us into competing racial factions.”\textsuperscript{295} In so holding, the \textit{Miller} Court departed from thirty years of decisions that encouraged a broad reading of the Voting Rights Act and supported the Act’s purpose of increasing minority voting power.\textsuperscript{296}

\textbf{A. The Status of Key Issues After Miller}

\textbf{1. Issues Resolved by Miller}

In \textit{Miller v. Johnson}, the Court articulated the necessary elements of an equal protection claim for racial gerrymandering.\textsuperscript{297} While the Court previously held in \textit{Shaw I} that a redistricting plan will be subject to strict scrutiny if it is “bizarre on its face,”\textsuperscript{298} the Court in \textit{Miller} stated that other factors besides bizarreness could also trigger strict scrutiny.\textsuperscript{299}

\begin{notes}
\textsuperscript{292} The plaintiffs in both \textit{Shaw II} and \textit{Miller} were white. \textit{Miller}, 115 S. Ct. at 2485; \textit{Shaw II}, 861 F. Supp. at 416.
\textsuperscript{293} \textit{Miller}, 115 S. Ct. at 2486.
\textsuperscript{294} \textit{Id.} It is interesting to note, in light of the use of the term “segregation,” that in most majority-minority districts African Americans make up less than 65% of the total population, and non-minorities constitute the rest of the population. \textit{See, e.g., Hays I}, 839 F. Supp. at 1207-08 (indicating that is it unnecessary for the legislature to include so many minorities in one district where they constitute 63% of population). These may actually be the most integrated districts in the country. \textit{See generally} Aleinikoff \& Issacharoff, supra note 11, at 611-12 which explains:

Labeling the North Carolina districting as ‘political apartheid’ is a disturbing exaggeration that hinders the Court’s analysis in several ways . . . . Thus, while some of the districts were undoubtedly drawn in order to guarantee that African Americans would constitute a majority, it is difficult to justify the hyperbolic labels the Court applied.

\textit{Id.}; Gayle Pollard Terry, \textit{Deval Patrick, The Justice Department’s Leading Civil Rights Advocate}, L.A. TIMES, Oct. 16, 1994, at M3 (quoting Patrick as asserting that racially gerrymandered districts “are responsible for the most integrated Congress in history”).

\textsuperscript{295} \textit{Miller}, 115 S. Ct. at 2486 (quoting \textit{Shaw I}, 113 S. Ct. at 2832).
\textsuperscript{296} For a discussion of these decisions, see \textit{supra} notes 106-33 and accompanying text.
\textsuperscript{297} \textit{See supra} notes 215-53 and accompanying text for a discussion of these elements.
\textsuperscript{298} \textit{Miller}, 115 S. Ct at 2486 (citing \textit{Shaw I}, 113 S. Ct. at 2816). \textit{See supra} note 124 and accompanying text.
\textsuperscript{299} \textit{Miller}, 115 S. Ct. at 2486. \textit{See supra} notes 221-22 and accompanying text.
\end{notes}
In order to establish a *Miller* claim, the Court stated, a plaintiff must prove that race played a predominant role in the redistricting process. A plaintiff can meet this burden in either of two ways: first, by direct evidence that the legislature created a district for the purpose of ensuring that the majority of its residents belonged to a specific race; or second, by circumstantial evidence showing that since a majority-minority district is so bizarrely shaped, the legislature must have intended to ensure that a majority of its residents were minorities.

Once the plaintiff proves racial gerrymandering, the redistricting plan will be subject to strict scrutiny by the court. In applying the equal protection analysis, the *Miller* Court stated that the plan could survive strict scrutiny only if it was “narrowly tailored to achieve a compelling [governmental] interest.” The Court found that one compelling interest would be to eradicate the effects of past discrimination. The Court suggested that compliance with the Voting Rights Act, in combination with the interest in remedying past discrimination, might also prove a compelling justification.

If the state suggests a legitimate compelling interest, a court must then determine if the plan is narrowly tailored to achieve that interest. In order to satisfy this prong, the state must offer specific

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300. *Miller*, 115 S. Ct. at 2488. While legislatures may still consider race, as well other factors, when drawing district lines, the Court will closely examine any plan where race predominated among those factors. *Id.*

301. *Id.* For instance, in *Miller*, the plaintiffs introduced at trial testimony of State officials who said they created the Eleventh District to comply with Justice Department requirements that they create a third majority-minority district. *Id.* at 2489. The plaintiffs also introduced letters from the Justice Department insisting upon a third majority-minority district. *Id.* The *Miller* court held that this evidence justified the lower court’s finding that the plaintiffs proved racial gerrymandering, thus subjecting the plan to strict scrutiny. *Id.* See supra notes 235-38 and accompanying text.

302. *Miller*, 115 S. Ct. at 2488. The shape must be considered in relation to the racial and population configurations within the district. *Id.* at 2489. If portions of the district extend in odd directions, just barely including black neighborhoods, then the Court can infer that the legislature included these neighborhoods in an effort to create a majority-black district. See *id.* at 2484 (explaining the shape and demographics of the Eleventh District), 2489 (stating that evidence of the District’s shape, “considered in conjunction with its racial and population densities ... is quite compelling,” but noting that direct evidence already established racial gerrymandering).

303. *Id.* at 2490.

304. *Id.* (citations omitted).

305. *Id.*

306. *Id.* at 2490-91. The Court declined to address whether the Voting Rights Act, standing alone, would provide a compelling interest. *Id.* at 2491; see infra notes 344-48 and accompanying text.

evidence of past racial discrimination, and must provide enough evidence to establish a strong basis that the plan is reasonably necessary to remedy that discrimination.\textsuperscript{308}

2. Issues Not Resolved by \textit{Miller}

While the Court expanded and clarified the elements of an equal protection claim for racial gerrymandering, the \textit{Miller} decision failed to address important issues that lower courts will have to decide when examining future racial gerrymandering cases. For instance, the \textit{Miller} Court did not provide any conclusive guidelines for determining how to prove racial gerrymandering in such cases.\textsuperscript{309} The \textit{Miller} Court held that a plaintiff can make out a \textit{prima facie} case of an equal protection violation by showing that race was the "predominant factor" when the legislature enacted a redistricting plan.\textsuperscript{310} In \textit{Miller}, the plaintiffs could easily prove this element in light of extensive evidence that the State of Georgia created the Eleventh District solely to satisfy the Justice Department's requirement of three majority-black districts.\textsuperscript{311} Race therefore clearly predominated over other factors when creating the district.\textsuperscript{312} In most cases, however, the legislature considers several factors, many of them political, when drawing the lines which will make it more difficult for courts to determine in future cases whether race predominates.\textsuperscript{313}

In addition, the Court avoided clarifying the relationship between the Voting Rights Act and the Equal Protection Clause. Congress created the Act to eradicate continued discrimination against minority groups in the voting process, and to ensure that minorities were not

\textsuperscript{308} Id. at 2491.

\textsuperscript{309} Redistricting: Into the Thicket, SACRAMENTO BEE, July 1, 1995, at B6. "[T]he decision's deeper problem is the confusion and turmoil [it] may generate. Determining what a shrewd political leader uses as a 'predominant' factor may not be as easy as making judicial pronouncements." Id.

\textsuperscript{310} See also Linda Greenhouse, The Supreme Court: Congressional Districts, Justices, in 5-4 Vote, Reject Districts Drawn With Race the 'Predominant Factor'; New Voting Rules, N. Y. TIMES, June 30, 1995, at A1 (finding that "[a]mong the most pressing questions is how the lower courts are to decide when race has been the 'predominant' factor as opposed to one factor among others in the ethnic, geographic and partisan stew of electoral politics.").

\textsuperscript{311} Miller, 115 S. Ct. at 2487-88. See supra note 233 and accompanying text.

\textsuperscript{312} Miller, 115 S. Ct. at 2484. The Justice Department refused to preclear the plan until the State created a third majority-minority district. Id. The State then redrew the lines of the Eleventh District so that more than 50% of eligible voters would be black. Id. See supra notes 190-95 and accompanying text.

\textsuperscript{313} See infra notes 367-76 and accompanying text.
denied their constitutional right to vote. Since the Voting Rights Act became enforceable, minority citizens have seen dramatic increases in their voting power, but in light of continued acts of discrimination, the need to enforce the Act continues. States create majority-minority districts to satisfy sections 2 and 5 of the Act, which require that the legislature consider minority voters when drawing district lines. When minorities predominate a district, however, considerations of minorities when mapping voting districts are now considered prima facie unconstitutional. It remains unclear how states can comply with these laws and avoid violating the Equal Protection Clause, as race will almost always predominate because of states' good faith efforts to comply with federal laws.

The Miller Court sidestepped this issue by determining that since the State's actions were unnecessary to satisfy the Act, the State could not rely on the Act as a defense to an equal protection claim. In addition, the Court implied that the Act, "standing alone," might not be a sufficiently compelling justification for racial gerrymandering. The Court acknowledged, however, that conflicting interpretations of the Act could bring it "into tension with the Fourteenth Amend-

314. See, e.g., South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966) ("The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting."). See supra part II.B. 315. See Grofman, supra note 77, at 1247. 316. See Prepared Testimony of Deval L. Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice, Before the Committee on the Judiciary, Subcommittee on the Constitution, U.S. House of Representatives, Federal News Service, July 20, 1995 (citing examples of blatant racial discrimination in housing, employment, and voting, as well as racist criminal acts committed against black and Hispanic citizens, that the Department of Justice is prosecuting). 317. See supra notes 89-105 for a discussion of these requirements. 318. Miller, 115 S. Ct. at 2487. See supra note 220 and accompanying text. 319. A federal appellate court was faced with this issue in Bridgeport Coalition for Fair Representation v. City of Bridgeport, 26 F.3d 271 (2d Cir. 1994). The court held that Shaw I applied only when the redistricting plan on its face offered convincing evidence that its creators used race as the sole motivation in designing the plan. Id. at 278. In Bridgeport, minority rights advocates sought both a preliminary and permanent injunction against city council elections under a redistricting plan because it diluted minority voting strength in violation of the Voting Rights Act. Id. at 27-73. On appeal, the city argued that an alternative plan recommended by the plaintiffs violated the principles enunciated in Shaw I. Id. at 278. The court in Bridgeport, attempting to reconcile the different standards involved in voter dilution and Shaw I claims, emphasized that a governmental unit must consider racial factors when creating voting districts in order to increase minority voting strength. Id. Therefore, the court explained, the plan will not violate the Equal Protection Clause unless the racial makeup of the districts serves as the sole criteria. Id.

320. Miller, 115 S. Ct. at 2492. 321. Id. at 2491.
Such a pronouncement threatens the future of the Voting Rights Act. 323

Finally, the Miller Court did not address whether a plaintiff can prove racial gerrymandering of a congressional district when the district is not bizarrely shaped. In both Miller and Shaw I, the Court concluded that the districts had been drawn in a bizarre manner. 324 In Miller, the Court found that the bizarre shape of the district and its demographics, along with other evidence of legislative intent, established a prima facie case of racial discrimination. 325 The Court did not state, however, whether a court could find racial gerrymandering when the majority-minority district is not bizarrely shaped.

B. Legal Correctness of Miller

The Miller decision reflects the current trend of the Court, which continues to move away from applying a deferential standard when examining remedial, race-based legislation. 326 In recent decisions, for example, the Court has consistently expressed the opinion that any race-based policy would be strictly scrutinized, regardless of which governmental unit created it. 327

By extending the strict scrutiny standard to congressional redistricting plans whenever those plans contain racially gerrymandered districts, both the Miller and Shaw I decisions ignore several important factors. First, most congressional districts in this country can be

322. Id. at 2493.
323. Aleinikoff & Issacharoff, supra note 11, at 639 (noting that if federal decisions interpreting Shaw I “condemn remedial race-conscious districting as constitutionally impermissible essentialism,” they weaken “core principles of voting rights law developed through almost three decades of litigation”).
324. See Miller, 115 S. Ct. at 2489; Shaw I, 113 S. Ct. at 2820-21. But see Miller, 115 S. Ct. at 2502-04 (Ginsburg, J., dissenting) (noting that most of the districts in Georgia are unusually shaped, and that the disputed district in Miller is not on the list of the 28 most bizarre districts in the country).
325. Miller, 115 S. Ct. at 2489 (finding that “by comparison with other districts the geometric shape of the Eleventh District may not seem bizarre on its face, . . . [but] in conjunction with its racial and population densities, the story of racial gerrymandering seen by the District Court becomes much clearer.”).
326. See, e.g., Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995) (overruling Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990)) (concluding that race-based actions by Congress must be strictly scrutinized under the Fifth Amendment, just as similar actions by state and local governments are strictly scrutinized under the Fourteenth Amendment); Shaw I, 113 S. Ct. at 2824 (holding that redistricting plans that classified citizens on the basis of race would be subject to strict scrutiny); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (explaining that the appropriate standard of review of any race-based policy should be strict scrutiny).
327. Adarand, 115 S. Ct. at 2113-17.
Second, legislators have legally gerrymandered districts for many years and for many different reasons. Such gerrymandering existed even before the first congressional elections in our country.

After Shaw I, however, citizens may now sue states under the Equal Protection Clause for going too far in considering minority voting power. When enacting redistricting legislation, states must consider a wide variety of competing factors, including protection of incumbents, preservation of partisan interests, cohesion of communities, and acknowledgment of minority voting power. The Voting Rights Act requires states to consider this last factor when redistricting. The Shaw I decision, however, places states in a precarious situation: states must acknowledge and encourage minority voting strength to satisfy the Voting Rights Act, but in doing so, they run the risk of violating the Equal Protection Clause.

In comparing redistricting plans to other equal protection issues, Miller also ignores other important points. Historically, courts treated voting rights issues much differently from other equal protection issues. Not only are voting rights fundamental, they are also

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328. Terry, supra note 294, at M3. "[T]he notion that these districts are bizarre shapes makes no sense when you take a look at congressional districts across the country and realize that there is no such thing as a regular or normal shape." Id.

329. Id. "Gerrymandering is traditional. Gerrymandering is done for a whole variety of things—some of which the [C]ourt has said is explicitly appropriate." Id. See also Aleinikoff & Issacharoff, supra note 11, at 607 ("Redistricting is an area in which classifications of all kinds—most notably partisan, socioeconomic, racial, and ethnic—are the lifeblood of the process.").

330. See supra note 11 and accompanying text.

331. Shaw I, 113 S. Ct. at 2832.

332. The Supreme Court has upheld each of these factors as a valid element to consider in redistricting. See, e.g., Davis v. Bandemer, 478 U.S. 109, 138-39 (1986) (White, J., with three Justices concurring) (explaining that the intentional drawing of district boundaries for partisan ends and for no other reason does not, in and of itself, violate the Equal Protection Clause); Karcher v. Daggett, 462 U.S. 725, 740 (1983) (holding that avoiding contests between incumbents and preserving the cores of prior districts are valid legislative policies in redistricting plans).


334. Grofman, supra note 77, at 1244-47. Grofman found at least five important differences between voting rights and other Fourteenth Amendment rights: voting has a special status as a fundamental right; most voting rights are also protected by the comprehensive Voting Rights Act; "the nature of voting rights remedies is [said] to be more straightforward than in other areas of racial discrimination"; in voting rights cases, the nature of the remedy is usually directed solely to those who have already been injured, and is capable of "immediate implementation;" and finally, the nature of the remedy for voter dilution in particular "does not require injury to innocent parties." Id. at 1244-46.
invaluable in a truly democratic political system. Additionally, the Miller Court failed to recognize that unlike in other equal protection contexts, the maximization of minority voting strength in redistricting cases does not unfairly diminish the voting power of non-minorities. In other equal protection contexts, the use of preferential treatment for minorities caused non-minorities to be disadvantaged. Congress intended the Voting Rights Act, however, not to give one racial group an advantage over another, but instead to ensure that all citizens have an equal say in government through the voting process. As a result, redistricting legislation that reflects considerations of race does not give one group more voting power than it deserves; rather, it attempts to equalize voting power among all groups.

The Miller decision also allows for increased judicial intervention in legislative redistricting plans. Such interference poses serious dangers because unelected officials will decide essentially political issues. In previous cases, the Supreme Court recognized the importance of granting deference to state legislatures in the area of redistricting.

335. Id. at 1244. See generally Aleinikof & Issacharoff, supra note 11, at 600 (comparing the problem of identifying voting rights under both the Voting Rights Act and the Fourteenth Amendment).

336. See, e.g., City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989). In Croson, the intentional use of minority contractors prevented other contractors from competing for projects. Id.

337. See, e.g., South Carolina v. Katzenbach, 383 U.S. 301, 308-37 (1966) (affirming the constitutionality of the Voting Rights Act after discussing the history of repeated discrimination against African Americans, and the use of voting procedures designed specifically to prevent minorities from exercising their right to vote; discussing in detail the legislative history of the Act); Reynolds v. Sims, 377 U.S. 533, 561, 568-69 (1964) (striking down a state legislative redistricting plan for violating the Equal Protection Clause; holding that states are required to permit all citizens to have equal voting power by placing them in equivalently populated districts).

338. While proportional representation by racial group is not required by the Voting Rights Act, the Supreme Court in Thornburg v. Gingles, 478 U.S. 30 (1986), stated that lack of proportionality could constitute evidence of a violation of the Voting Rights Act. Id. at 42. See also Miller, 115 S. Ct. at 2497 (Stevens, J., dissenting) (arguing that plaintiffs lack standing to bring a racial gerrymandering claim because they suffered no legally cognizable injury, and that if they did, they could bring a Gingles claim for voter dilution). See supra notes 259-67 and accompanying text.


340. See, e.g., Voinovich v. Quiltner, 113 S. Ct. 1149, 1156 (1993) ("Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place."); Gowe v. Emison, 113 S. Ct. 1075, 1080-81 (1993). See also Johnson, 864 F. Supp. at 1394 (Edmondson, J., dissenting) (explaining that redistricting is "fundamentally the domain of the states" since "state
Prior to passage of the Voting Rights Act, there was a need for judicial intervention in voting rights cases. Legislative inaction on important societal issues forced the courts to become involved in order to protect extremely important constitutional rights. Additionally, acts by the legislatures themselves violated the Constitution, and the judiciary offered some protection to citizens by reviewing these acts to determine if a violation existed. Indeed, in the voting rights arena, early decisions by the Court led to the reduction of legislative actions that invidiously discriminated against minorities.

Since the passage of the Voting Rights Act, however, the federal government has ensured that state legislatures recognize minority voting rights. Elected representatives in state legislatures can create redistricting plans only after extensive research and public debate before they may submit those plans to the Department of Justice for approval. In addition, section 5 of the Act grants the Department of Justice broad powers to review the redistricting plans of states that historically used discriminatory voting mechanisms to deprive minorities of their voting rights. The Supreme Court has previously upheld the grant of such broad powers as constitutional. Thus, the Voting Rights Act, and its accompanying federal regulations, contain numerous safeguards that protect against violation of the Fourteenth Amendment's Equal Protection Clause.


344. See supra notes 75-88 and accompanying text.

345. See Johnson, 864 F. Supp. at 1354; Shaw II, 861 F. Supp. at 408; Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994); Hays I, 839 F. Supp. at 1188. In each of these cases, the court noted the months spent researching and debating the issue, with input from many citizens of the state.


Finally, federal courts have struck down majority-minority districts based on their bizarre shape, but approved other districts with equally strange shapes in which whites were the majority. These decisions suggest that the Equal Protection Clause has been applied inconsistently by the Courts, resulting in unfair treatment of majority-minority districts.

V. IMPACT

The Supreme Court’s decision in Miller could have a dramatic impact on congressional districts nationwide. The Miller decision may well result in the unseating of many current minority members of Congress. Since many states created majority-minority districts for the purpose of increasing minority representation, all of those districts could potentially be held to violate the Equal Protection Clause unless the state can offer a compelling reason for its actions. The Miller

349. See generally Johnson, 864 F. Supp. at 1395-97 (Edmondson, J., dissenting) (stating that the majority-minority district which the court struck down is no less bizarrely shaped, nor no less contiguous, than some other districts in the State). See also William Raspberry, A Court Decision That Could Send Black Politicians Packing, CHI. TRIB., November 1, 1994, § 1, at 23. Raspberry compared two equally bizarre Texas districts, one of which is 47% black and the other of which is 80% white. Id. The black district was declared unconstitutional, but the white district was not found unconstitutional. Vera, 861 F. Supp. at 1334, 1344-45. Raspberry quoted an NAACP attorney, who is involved in the Texas redistricting litigation, as noting that “bizarreness becomes a constitutional issue only when it applies to districts with a substantial black population, while white districts that are at least as funny-looking are allowed to stand.” Raspberry, supra.

350. See supra notes 212-53 and accompanying text.

352. Jan Crawford Greenburg, Race-based Districts Banned: Vote Power of Blacks Jeopardized, DALLAS MORNING NEWS, September 11, 1994, at 6J (“[D]istricts designed to remedy centuries of racial exclusion are being required to meet much higher standards.”).

353. David G. Savage, Minority-Based Gerrymandering Facing Backlash, L.A. TIMES, October 8, 1994, at A1 (noting that in 1992, thirty-nine African Americans were elected to the House of Representatives, a “historic high water mark,” and that recent federal redistricting decisions could prevent many of these men and women from being reelected).

354. See Miller, 115 S. Ct. at 2498 (stating that to satisfy strict scrutiny standard a state must provide evidence of compelling reason for districting legislation); see also Greenburg, supra note 352, § 1, at 13 (noting that while the Court held only a compelling state interest can justify a district drawn primarily on the basis of race, what such a compelling reason may be was left uncertain). See supra text accompanying notes 222-43. But see Miller, 115 S. Ct. at 2497 (O’Connor, J., concurring) (stating “the Court’s standard does not throw into doubt the vast majority of the Nation’s 435 Congressional Districts . . . .”).
decision thus sets the stage for a flurry of lawsuits by citizens around the country who wish to challenge the constitutionality of the districts.355

The split among the Justices in Miller, however, reveals that the issue of racial gerrymandering has yet to be conclusively decided. The majority opinion expressed the view that any time race plays a predominant role in the redistricting process, the resulting redistricting plan will be considered prima facie unconstitutional.356 Four dissenting Justices disagreed, arguing that courts should apply a more deferential standard when examining redistricting plans.357

Justice O'Connor cast the deciding fifth vote that created the majority in Miller. She expressed reluctance in following the majority's broad holding, stating in her concurring opinion that redistricting plans should be strictly scrutinized only in "extreme instances."358 Additionally, Justice O'Connor found that the standard of proof enunciated by the majority would be a "demanding one" for plaintiffs to meet.359

Moreover, Justice O'Connor's fact-specific opinions in Shaw I360 and Miller361 repeatedly emphasized her reluctance to interfere in state political processes, as well as her belief that such interference was justified in both cases. In Shaw I, Justice O'Connor based her decision regarding the unconstitutionality of the North Carolina district on its extraordinarily odd shape, and suggested that the legislature simply went too far in trying to create a majority-minority district.362 In Miller, she similarly found that the Justice Department went too far in forcing the State of Georgia to comply with its demands for a third majority-minority district.363 Thus, Justice O'Connor's opinion in Miller suggests that in future cases with less "extreme" facts, she might find the majority-minority districts at issue to satisfy the requirements of the Equal Protection Clause. As a result, Justice O'Connor could form a new majority with the dissenters in Miller.364

355. See Greenburg, supra note 352, § 1, at 13 (quoting professor of law Daniel Polsby (stating that many cases will surface before racial classifications completely disappear)).
357. Miller, 115 S. Ct. at 2500 (Ginsburg, J., dissenting).
358. Id. at 2497 (O'Connor, J., concurring).
359. Id. (O'Connor, J., concurring).
360. See supra part II.C.2.
361. See supra part III.A.3.
363. Miller, 115 S. Ct. at 2497 (O'Connor, J., concurring).
364. See Linda Greenhouse, On Voting Rights, Court Faces a Tangled Web, N.Y.
The Court gave itself the opportunity to limit Miller to only "extreme" cases when, on the same day it decided Miller, the Court also decided Dewitt v. Wilson.\textsuperscript{365} In an unsigned decision, the Court upheld the California legislative redistricting plan, even though the State considered race when creating the plan.\textsuperscript{366}

Significantly, the Court has also decided to hear two other redistricting cases, Bush v. Vera\textsuperscript{367} and Shaw v. Hunt.\textsuperscript{368} Those cases will force the Court to address several issues it avoided in the Miller case. The Bush case in Texas, for instance, can be distinguished from Miller in two respects. First, the majority-minority districts are "relatively compact" and are not bizarrely shaped; in fact, they encompass defined minority communities.\textsuperscript{369} In addition, the State of Texas plans to argue that race did not play as important a role in the legislative redistricting process as incumbency protection.\textsuperscript{370}

In Bush, the Court will therefore have to clarify its decision in Miller in two respects: first, whether majority-minority districts must be geographically compact in order to withstand judicial scrutiny; and second, whether protecting incumbents is an additional permissible factor for states to consider when creating these districts.\textsuperscript{371} The Court has never addressed either issue; its decision in that case could therefore provoke dramatic changes in the redistricting process.\textsuperscript{372}

\textsuperscript{366} Id. The Court did not explain its order, stating only that "[w]ith respect to questions 1 through 4 presented by the statement as to jurisdiction, the judgment is affirmed. With respect to questions 5 and 6, the appeal is dismissed." Id. See supra notes 150-52 for a discussion of the district court's opinion in this case. See Linda Greenhouse, Minority Electoral Gains in Peril, N.Y. TIMES, June 30, 1995, at A1 (stating that the Supreme Court's affirmance in DeWitt suggests that "race may continue to play a role in redistricting.").
\textsuperscript{368} 115 S. Ct. 2639 (1995). For a discussion of the prior history of this case see supra notes 122-33 and accompanying text which discuss Shaw I, 113 S. Ct. at 2816, and also see supra notes 147-49 and accompanying text which discuss Shaw II, 861 F. Supp. at 408.
\textsuperscript{369} Greenhouse, supra note 364, at A1.
\textsuperscript{370} Jane Ely, Gerrymandering to Protect Incumbents, HOUSTON CHRONICLE, July 9, 1995, at B2 (discussing the fear of incumbents that the Court will invalidate incumbency protection as a factor when enacting redistricting plans).
\textsuperscript{371} Id.
\textsuperscript{372} Id. Ely notes that states have always presumed that they could consider incumbency protection when drawing the boundaries of voting districts, but that the Court has never before directly addressed the issue. Id. See supra part IV.A.2 for a
The *Hunt* case will also provide additional issues for the Court to address. In previous decisions, the Court avoided deciding whether a state’s attempted compliance with the Voting Rights Act could be a sufficiently compelling justification for considering race in the redistricting process, or even whether the Act, as applied, was constitutional. In *Miller*, however, the Court acknowledged that a state’s consideration of race in an effort to comply with the Voting Rights Act could create a potential conflict between the Act and the Equal Protection Clause. In *Hunt*, the Court will have to consider the relationship between the two, as the lower court upheld a redistricting plan because the State properly attempted to comply with the Act.

VI. CONCLUSION

In *Miller*, the Court clarified a few questions created by the *Shaw I* decision, but neglected to answer other, more disturbing questions. The Court resolved that a plaintiff can prove racial gerrymandering by evidence other than, or in addition to, the existence of a bizarrely-shaped district. The Court did not address, however, how much evidence is needed to prove racial gerrymandering, or whether racial gerrymandering can ever survive strict scrutiny. By agreeing to decide the constitutionality of other redistricting plans in the next term, the Court has given itself the opportunity to settle the most difficult, and divisive, issues in voting rights jurisprudence.

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discussion of the current confusion regarding the importance of bizarre shapes in the Court’s analysis of the constitutionality of redistricting plans.

373. *See supra* notes 135-61 and accompanying text.
375. *See Greenhouse, supra* note 364, at A8 (stating that the Court will be required to confront “another issue it avoided in the Georgia case: the relationship between the Voting Rights Act and the Constitution”).
376. *See supra* notes 167-71 and accompanying text for a discussion of the lower court’s holding.