Toward a More Colorblind Society: Congressional Redistricting after Shaw v. Hunt and Bush v. Vera

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Many question whether the civil rights movement has gone too far and behave as if the history of discrimination is the history of discrimination against white men.... Indeed, race relations is the only major social ill today we are considering curing by denial, as if declaring ourselves colorblind in law will make us colorblind in fact. And the pattern—routinely from the Congress and often from the courts—seems to be a pious acknowledgment of the existence of discrimination followed by outraged condemnation of any effort to do anything about it.

-Deval L. Patrick

For thirty years the states, the Department of Justice, the federal courts, and the Supreme Court have struggled to balance the Voting Rights Act and the Equal Protection Clause. While the Supreme Court and the Justice Department seek the same goal—a colorblind society—the means that each believes necessary to achieve this end are vastly different. Between these two camps are the states, where the legislators struggle to balance the requirements that each side imposes on the other. What began as an effort to improve representative democracy is now a battle zone where victory is uncertain and the rules for future engagements remain unclear. Shaw v. Hunt (Shaw II) and Bush v. Vera, the two most recent Supreme Court opinions in this area, continue the fight but may not have finished the war.

1. Deval L. Patrick, Remarks Before the National Conference of State Legislatures Annual Meeting Reapportionment Task Force Program (July 29, 1996), (text available from the Department of Justice, Civil Rights Division) [hereinafter Remarks of Deval Patrick]. At the time of his speech before the National Conference of State Legislatures, Deval Patrick was the Assistant Attorney General for the Department of Justice's Civil Rights Division, which oversees the congressional redistricting process. He resigned from this position on November 14, 1996. U.S. Civil Rights Aide Resigning, CHI. TRIB., Nov. 15, 1996, at N8.
Questions of race and voting rights highlight the differences in the views of the Supreme Court and the Justice Department, and place issues of equal protection, statutory affirmative duty, and federalism squarely against one another. This struggle began after the Court’s decision in Baker v. Carr\(^6\) established the authority of federal courts to review state legislative decisions involving apportionment. Since that decision, the Supreme Court has encountered numerous voting rights claims brought by racial minorities under the Fourteenth Amendment and the Voting Rights Act. In addition, a relatively new development is racial gerrymandering claims brought against states that have enacted redistricting plans benefiting minority groups.\(^7\) Suddenly, parties and attorneys that had previously brought these claims now find themselves defending against them. The prospect of the American Civil Liberties Union and the Congressional Black Caucus intervening in such actions to defend state voting districts would have been inconceivable in 1965, but in fact occurred in Shaw II.\(^8\)

This Comment traces the evolution of redistricting jurisprudence, analyzes the current position of the Court, and identifies possible future trends. In particular, the Comment considers the potential effect of these trends on North Carolina as it redraws its congressional districts for the third time this decade. The Comment begins with an introduction to the factors motivating the creation of the Voting Rights Act, the Act’s subsequent amendment, and its relevant provisions.\(^9\) Then, the Comment presents an overview of the Supreme Court’s interpretation of the Voting Rights Act in the context of congressional districting.\(^10\) The Comment addresses in detail the most recent Supreme Court proclamations in this area, Shaw II and Vera.\(^11\) In its analysis, the Comment considers how the position taken in these recent opinions increases the conflict between federal courts and states’ rights.\(^12\) The Comment also considers the opinions’ effect on a state’s ability to defend against

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8. See Brief Amicus Curiae of the American Civil Liberties Union and the Lawyers’ Committee for Civil Rights Under Law in Support of Appellees at 1-2, Shaw II (No. 94-923) 1995 WL 702821; Brief of the Congressional Black Caucus as Amicus Curiae in Support of Appellees at 1-2, Shaw II (No. 94-923) 1995 WL 702802.
9. See infra notes 16-58 and accompanying text.
10. See infra notes 59-114 and accompanying text.
11. See infra notes 115-92 and accompanying text.
12. See infra notes 193-213 and accompanying text.
claims brought under the Equal Protection Clause by showing that
the Voting Rights Act required the state’s redistricting plan. Next,
the Comment reviews Justice O’Connor’s concurrence to her own
plurality opinion in Vera, and analyzes the concurrence as a
proposed set of guidelines for determining what qualifies as a
constitutional plan. Finally, the Comment discusses future trends in
congressional districting. The Comment contains two Appendices
applying congressional redistricting principles in North Carolina.
Appendix A presents a congressional plan that the author created in
an attempt to comply with the competing guidelines. Appendix B
analyzes the North Carolina General Assembly’s plan created after
Shaw II, and compares the two plans.

The heart of Shaw II and Vera is the conflict among members of
the Court over legislative redistricting and the Court’s increasing
control over a traditional state function. This area of law includes
both separation-of-powers and federalism issues. The United States
Constitution clearly grants state legislatures the primary
responsibility for establishing guidelines for congressional elections.
This clear delineation has been breached by the Supreme Court in
cases where state processes have conflicted with other constitutional
provisions, but the basic responsibility for drawing districts has
always remained with the states. Indeed, the traditional
redistricting principles recognized by the Court are modeled after the
typical factors and considerations used by the states in the districting
process. The Supreme Court has held that traditional factors, such

13. See infra notes 214-70 and accompanying text.
14. See infra notes 271-303 and accompanying text.
15. See infra notes 304-69 and accompanying text.
16. See U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be
composed of Members chosen every second Year by the People of the several States, and
the Electors in each State shall have the Qualifications requisite for Electors of the most
numerous Branch of the State Legislature.”); id. § 4, cl. 1 (“The Times, Places and Manner
of holding Elections for Senators and Representatives, shall be prescribed in each State by
the Legislature thereof...”).
17. The vote dilution cases are the most famous departure from traditional principles
of federalism, and the entrance of the Court into this area was questioned by some of the
that a representative form of government requires votes to have equal value and
establishing the principle of one person, one vote); Baker v. Carr, 369 U.S. 186, 208-10
(1962) (holding that vote dilution claims are justiciable). In its rulings, however, the Court
has never acted to remove the redistricting process from state legislatures; rather, it has
issued various standards under which legislative action may be presumed to violate the
Fourteenth Amendment. See Vera, 116 S. Ct. at 1999 (Souter, J., dissenting) (recognizing
the historical deference to state legislatures).
as compactness, preserving communities of interest, incumbency protection, and adherence to political boundaries, do not conflict with the Fourteenth Amendment. These redistricting principles recognize the idea that voting is not simply a meaningful exercise to the individual. Rather, for voting to have any true power, an individual's vote must have the possibility of being combined with the votes of similarly minded citizens to ensure a real opportunity to elect that voter's candidate of choice.

Shaw II and Vera are the most recent attempts to address the tension between the Voting Rights Act of 1965 (as amended in 1982) and the Fourteenth and Fifteenth Amendments to the United States Constitution. Prior to enactment of the Voting Rights Act, many states did not submit willingly to the principles of equality embodied in these amendments, and used facially neutral but discriminatory voting criteria, such as poll taxes, literacy tests, white primaries, and "grandfather" clauses, to bar minorities from voting.

19. See id. at 199 (Souter, J., dissenting) ("[W]e have seen [traditional districting principles] as entirely consistent with the Fourteenth and Fifteenth Amendments' demands."); White v. Weiser, 412 U.S. 783, 797 (1973) (finding that the legislative policy of preserving incumbents' constituencies was not unconstitutional); Reynolds v. Sims, 377 U.S. 533, 578 (1964) (noting that states may maintain political subdivisions and provide for compact and contiguous districts).

20. See Vera, 116 S. Ct. at 199 n.3 (Souter, J., dissenting). Justice Souter was very concerned that the injury being remedied had not been articulated clearly. See id. at 2001-03 (Souter, J., dissenting). Thus, the generalized determination of whether a group has been treated properly in the legislative process, instead of an individualized claim of vote dilution, seems an anathema to Fourteenth Amendment claims, which rely on the premise that an action places burdens on some but not all. See id. at 2001-02 (Souter, J., dissenting). For a more extensive discussion of Justice Souter's concerns, see infra notes 198-200, 205-17 and accompanying text.


22. The Fourteenth Amendment provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

23. The Fifteenth Amendment provides: "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." Id. amend. XV, § 1.

24. See Chandler Davidson, The Voting Rights Act: A Brief History, in CONTOVERSIES IN MINORITY VOTING 11-13 (Bernard Grofman & Chandler Davidson eds., 1992). The poll tax was used extensively in the South and was particularly oppressive in Alabama, Mississippi, and Virginia, where its assessment was cumulative. See id. at 13. Literacy tests, however, provided the most effective barrier to black voting because even if administered fairly, blacks were hindered due to the inadequate education provided under Jim Crow systems. When administered unfairly, the tests benefited illiterate white voters. See id.
In addition, racial gerrymandering arose as a means of diluting minority votes. Whenever courts struck down these discriminatory techniques, states replaced them with new discriminatory rules and methods, which then had to be challenged in court. Because of the time necessary to adjudicate a claim, discriminatory rules continued to exist while the courts played catch-up. These methods of limiting the minority vote were so effective that by the 1960s the registration rate of eligible black voters was as much as fifty percent lower than that of white voters. Encouraged by President Lyndon Johnson, Congress reacted to this dire situation by enacting the Voting Rights Act. The statute voided all current discriminatory rules, required areas with a history of voting discrimination to have any future rules approved before they could be implemented, and established the requirement of equal protection for voting rights.

The primary substantive provisions of the Voting Rights Act are found in Sections Two and Five. Section Two (§ 2), as passed in 1965, read: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."
The Supreme Court's 1973 decision in *White v. Regester*\(^3\) extended § 2's application to cases of discriminatory results, as well as discriminatory intent.\(^3\) However, the Court effectively overruled *White* seven years later in *City of Mobile v. Bolden*.\(^5\) While *Bolden* did not directly overrule *White*,\(^3\) by articulating the issue in *White* to be "whether the multi-member districts [were] being used invidiously to . . . minimize the voting strength of racial groups,"\(^3\) it held that purposeful vote dilution was required for a vote dilution claim.\(^3\) *Bolden* immediately weakened the effectiveness of § 2 litigation.\(^3\)

By finding that § 2 went no further than the Fifteenth Amendment, the Supreme Court required proof that an election method was created for the purpose of discrimination.\(^4\) In response, Congress added a "results" standard to the statute in 1982, thus establishing that "proof of discriminatory results, rather than intent, was sufficient to substantiate a claim of dilution."\(^4\) Congress, however, was deeply divided over this amendment, particularly over whether such a change would require racial quotas.\(^2\) Ultimately, Congress mitigated the change with the following phrase: "Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."\(^4\)

Section Five (§ 5) of the Voting Rights Act provides for


\(^{34}\) See id. at 767, 769-70 (holding that the impact of an electoral system may constitute invidious discrimination).

\(^{35}\) 446 U.S. 55, 66-67 (1980) (holding that the intent to discriminate must be shown in order to establish a claim of vote dilution).

\(^{36}\) See id. at 68-69.

\(^{37}\) Id. at 69 (citations omitted).

\(^{38}\) See id.


\(^{40}\) See *Bolden*, 446 U.S. at 60-61. This change made it almost impossible for plaintiffs to succeed. See Hodgkiss, *supra* note 39, at 3.

\(^{41}\) Davidson, *supra* note 24, at 39. The body of § 2 now states: No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . . 42 U.S.C. § 1973(a) (1994) (emphasis added).

\(^{42}\) See Davidson, *supra* note 24, at 39-40.

\(^{43}\) 42 U.S.C. § 1973(b). Commonly known as the "Dole Compromise," this was an agreement formulated primarily by Senators Edward Kennedy, a Democrat from Massachusetts, and Robert Dole, a Republican from Kansas. See Davidson, *supra* note 24, at 40 & n.104.
preclearance of any changes in voting plans or practices. Preclearance is a procedural safeguard against the violations identified in the Voting Rights Act. Section 5 requires that any state or political subdivision determined to have previously engaged in racial vote dilution practices must submit any proposed changes in voting qualifications, standards, or practices to the United States District Court for the District of Columbia, seeking a declaratory judgment "that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Alternatively, the state may present the proposed change to the Attorney General, allowing the Attorney General to make this same evaluation. The Attorney General then has sixty days to enter an objection to the proposed plan. Consistently, states have sought preclearance from the Attorney General's office. As a result, the Attorney General's office has developed expertise in this area. Section 5 preclearance applies to areas that used prejudicial voting tests or had registered less than fifty percent of voting-age residents on November 1, 1964. Subsequent Court decisions also have used § 5 to prevent retrogression in minority representation.

The Supreme Court recently addressed the interrelation of § 2

45. Id.
46. See id.
47. See id.
48. All of the recent Supreme Court cases were submitted to the Attorney General’s office rather than to the United States District Court for the District of Columbia. See Vera, 116 S. Ct. 1941; Shaw II, 116 S. Ct. 1894; Miller v. Johnson, 115 S. Ct. 2475 (1995). The fact that states such as North Carolina and Georgia redrafted their plans rather than challenge the Attorney General's denial of preclearance indicates states' preference for working with the Attorney General's office on this issue. See Shaw II, 116 S. Ct. at 1899 (indicating that redrawing of districts followed objection letter from Assistant Attorney General for Civil Rights); Miller, 115 S. Ct. at 2483-84 (same).
49. See 42 U.S.C. § 1973b(b). This provision also provided for review in 1968 and 1970. See id. Any additional states or political subdivisions found at that time to satisfy these criteria were also subject to review. See id. A determination that an area requires preclearance is not reviewable by any court. See id.
50. See, e.g., Beer v. United States, 425 U.S. 130, 141 (1976) (determining that the purpose of § 5 of the Voting Rights Act is to ensure that a change in voting procedure does not lead to a retrogression in the effective participation of racial minorities in the electoral process). Retrogression means a decline in minority representation determined by comparing what currently exists to what is likely to exist under a modified plan. See Bernard Grofman et al., Minority Representation and the Quest for Voting Equality 26 (1992). The Court's interpretation of retrogression, nonretrogression, and § 5 of the Voting Rights Act is discussed more fully infra notes 109-14, 219-41 and accompanying text.
and § 5 requirements in *Reno v. Bossier Parish School Board*.\(^{51}\) Noting that each section addressed different concerns, the Court rejected the position that a violation of § 2 is reason to deny § 5 preclearance.\(^{52}\) Observing that § 5 was a reaction to the history of local circumvention of legislative and judicial rulings in certain areas, the Court recognized that § 5's requirements are specific to certain jurisdictions.\(^{53}\) Section 5 works to protect against retrogression by comparing proposed voting changes to the existing plan, whereas § 2 applies to all jurisdictions and is designed to end voting practices that weaken minority voting strength.\(^{54}\) Determination of a § 2 claim requires comparing a challenged plan to an ideal, undiluted voting plan.\(^{55}\) This standard is higher than the § 5 standard, and a majority of the Court declined to apply it, finding such a position would contradict twenty years of judicial interpretation of § 5.\(^{56}\) According to the Court, § 5 is designed only to prevent retrogression, not to implement the § 2 ideal plan.\(^{57}\) All of the Justices, with the exception of Justices Stevens and Souter, supported this portion of the opinion.\(^{58}\)

*Thornburg v. Gingles*,\(^{59}\) a case originating in North Carolina, provided the first post-1982 review of § 2 of the Voting Rights Act.\(^{60}\)

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51. 117 S. Ct. 1491 (1997). *Bossier Parish School Board* involved the school board’s application for approval of changes to its members’ voting districts. After the 1990 Census, the Board redrew its members’ districts “to equalize the population distribution.” *Id.* at 1495. The Board initially rejected a plan containing no majority-minority districts that the Attorney General had precleared. *See id.* at 1496. The parties stipulated that the plan was not “retrogressive” because no majority black districts existed under the status quo. *See id.* The Board then considered an NAACP plan containing two majority black districts, but rejected it, and adopted the first plan instead. *See id.* However, the Attorney General decided not to approve the first plan after all, based on the existence of the NAACP plan and the fact that the first plan violated § 2. *See id.* The Board sought district court preclearance, and the Supreme Court ruled that the plan should be precleared under § 5 since it was not retrogressive, even though it may violate § 2. *See id.*

52. *See id.* at 1497. The Court determined that the standards for § 2 and § 5 are different. Section 5 requires that any change in voting laws be precleared to prevent retrogression. *See id.* This standard is lower than § 2's standard. *See id.* Even if a change violates § 2, it should be precleared under § 5 as long as it is not retrogressive. *See id.*

53. *See id.*

54. *See id.* at 1497-98.

55. *See id.* at 1498.

56. *See id.*

57. *See id.*

58. *See id.* at 1503 (Thomas, J., concurring); *id.* at 1505 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 1507 (Stevens, J., dissenting) (joined by Justice Souter).


60. *See id.* at 34. Many of the major amendments to § 2 occurred in 1982. *See supra*
In *Gingles*, the plaintiffs contended that the multi-member districts used for North Carolina's legislative elections impaired the opportunity of black voters to participate in the political process.\(^6\) In its analysis of this claim, the lower court considered the Senate Judiciary Committee Majority Report on § 2 of the bill containing the Voting Rights Act amendment.\(^6\) This report established that the amendment was intended to counteract the Supreme Court's ruling in *Bolden*.\(^6\) The report also identified numerous "typical factors" that courts should consider when applying a "results test" to § 2 claims. These factors include: the "extent of any history of official discrimination"; the degree of "racially polarized" voting present; the use of large multi-member electoral districts, "majority vote requirements," or anti-"single-shot" provisions;\(^6\) denial of access to candidate slating; the burden of discrimination already placed on the minority population due to "education, employment and health"; racial overtones of political campaigns; and the past success of minority candidates.\(^6\) The district court used these provisions as a checklist in applying a "totality of the circumstances" test. The Supreme Court affirmed that this approach was a correct interpretation of Congress's intent in amending the statute, but noted that the factors are balanced by the circumstances in which a

notes 32-43 and accompanying text. Most importantly, Congress adopted a "results" standard so that proof of discriminatory results is sufficient to bring a § 2 claim. See Davidson, *supra* note 24, at 39.

61. See *id.* at 35. As the name implies, multi-member districts are districts in which the voting population elects multiple representatives instead of being subdivided into smaller districts electing individual representatives. For example, voters in a multi-member district will elect five representatives instead of five districts each electing a single representative. When a minority group could be a majority in a single district, but a multi-member district is used instead, the minority group's ability to control the election of one representative may be lessened. See *id.* at 49.


64. "Single-shot" voting occurs when a voter may vote for several candidates on a ballot but chooses to vote for only one. See Davidson, *supra* note 24, at 25 n.63. Under single-shot voting, the minority population could have some success by voting, as a group, only for the minority-choice candidate. See *id.* This strategy concentrates the minority vote and diffuses the white vote among the remaining candidates, thereby ensuring that the minority choice candidate would be elected to one of the positions. See *id.* To counter this success, some districts enacted full-slate and numbered-place legislation, which either barred or limited the effectiveness of this "single-shot" approach to the ballot. See *id.* at 23.

§ 2 violation may be proven. 66

The Court found that many factors may be relevant to the inability of minority voters to elect representatives of their choice, but a certain intersection of factors must be present for actionable submergence of minority voting power. 67 Therefore, the Court established three necessary preconditions before minority voters will be deemed impaired by multi-member districts:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate. 68

Unless these preconditions are satisfied, the mere use of multi-member districts cannot be considered to prevent the electoral success that the minority group might be able to achieve under a different districting scheme. 69

In the first appearance of Shaw before the Supreme Court, Shaw v. Reno (Shaw I), 70 the Court recognized a new claim under the Equal Protection Clause. The Court's opinion, authored by Justice O'Connor, noted that despite the ideal of a "color-blind" Constitution, the Supreme Court had never held that "race-conscious state decisionmaking is impermissible in all circumstances." 71 However, a violation of the Equal Protection Clause may be found when a redistricting plan is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification." 72 The

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66. See Gingles, 478 U.S. at 46.
67. See id.
68. Id. at 50-51 (emphasis added).
69. The Supreme Court extended these preconditions to single-member districts in Growe v. Emison, 507 U.S. 25, 40-41 (1993). Though multi-member voting districts historically were used to dilute minority voting strength, if the Gingles preconditions were not applied to single-member districts, the threshold for establishing injury would be higher with a multi-member than with a single-member district. See id. at 40. This result seemed counterintuitive to the Court's purpose of eliminating vote dilution; therefore, the Gingles preconditions are now applicable to all voting districts. See id. at 40-42.
70. 509 U.S. 630 (1993) (Shaw I).
71. Id. at 642.
72. Id.
Court acknowledged that determining whether race influenced redistricting is somewhat more difficult than with other legislative actions because the state would always be aware of race.\textsuperscript{73} However, the Court found that such race consciousness does not inevitably lead to racial discrimination.\textsuperscript{74} States emphasizing traditional districting principles, such as compactness, contiguity, and respect for political subdivisions, could use these objective factors as a defense to claims of racial gerrymandering.\textsuperscript{75} In short, when dealing with reapportionment, "appearances do matter."\textsuperscript{76} Thus, the majority of the Court rejected the idea that members of a racial minority may be grouped together regardless of factors such as age, economic status, and location, asserting that grouping in such a manner was as dangerous as racial stereotyping.\textsuperscript{77} However, the decision did not eliminate racial redistricting. Racial redistricting was allowable as long as the state had a compelling interest for it and the district was narrowly tailored.\textsuperscript{78} Narrow tailoring required that a state do no more than absolutely necessary to provide for equal representation of minority interests.\textsuperscript{79}

\textsuperscript{73.} See id. at 646.  
\textsuperscript{74.} See id. (citing Wright v. Rockefeller, 376 U.S. 52 (1964), in which the Court found that reapportionment plans concentrating a community of minority individuals may reflect legitimate purposes).  
\textsuperscript{75.} See id. at 647.  
\textsuperscript{76.} Id.  
\textsuperscript{77.} See id. at 647-48.  
\textsuperscript{78.} See id. at 658. These requirements form strict scrutiny under equal protection review. See Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995) (dispelling the idea that strict scrutiny is necessarily fatal by noting that in 1987 a unanimous Court upheld a narrowly tailored race-based remedy in United States v. Paradise, 480 U.S. 149 (1987)). This is the most stringent type of equal protection analysis, and, although not insurmountable, challenged statutes and applications rarely survive it. See id.; accord Fulilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment) (defining strict scrutiny as "scrutiny that is strict in theory, but fatal in fact"). Developed in the area of racial discrimination, it generally is applied to express racial classifications or actions having a discriminatory effect. See Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (holding that a neutral law making interracial marriage illegal was unconstitutional because it lacked a compelling reason); Korematsu v. United States, 323 U.S. 214, 218 (1944) (finding that the incarceration of citizens of Japanese ancestry was justified by a compelling reason); Strauder v. West Virginia, 100 U.S. 303, 308-10 (1879) (creating strict scrutiny review for an equal protection violation in jury service). In his famous footnote, Justice Stone instilled the idea that legislation impinging upon some constitutional rights may be subject to a higher standard of judicial scrutiny. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Basically, under Justice Stone's theory, when the group discriminated against is so politically weak that it is unable to influence the legislature to protect its rights and thus relies on the courts for relief, the group should be given greater protection. See id.  
\textsuperscript{79.} See Shaw I, 509 U.S. at 643-44 (providing a history of the application of narrow
Following Shaw I, state and local jurisdictions faced with the task of drawing districts found themselves in a bind. While Shaw I permitted them to take only limited action to improve effective minority voting strength, the Voting Rights Act required more aggressive measures. Although the Justice Department has interpreted the Voting Rights Act as requiring a maximization of majority-minority districts wherever possible, if the application of this principle results in too many irregularly shaped or non-compact districts, the jurisdiction could be faced with a racial gerrymandering suit based on the Fourteenth Amendment. Alternatively, a jurisdiction could refuse to maximize majority-minority districts and be denied § 5 preclearance by the Department of Justice, which could lead to a § 2 vote dilution suit.

The Court directly reviewed the Justice Department's maximization principle in Johnson v. DeGrandy. This § 2 action arose from a Florida redistricting plan for state representatives that failed to maximize majority-minority districts, even though minorities were able to form voting coalitions and elect minority candidates in proportion to their percentage of the population. The Court recognized that the district court defined vote dilution under § 2 as any failure to maximize minority representation. However,
the Court objected to this reading as contrary to the legislative intent merely to provide a means to increase minority representation, not to increase it to the point that it was over representative of the minority population. According to the Court, "[f]ailure to maximize cannot be the measure of § 2."\footnote{86} The \textit{DeGrandy} Court also found each of the three \textit{Gingles} factors to be present, but held that a mechanical application of these factors was not sufficient to sustain a claim.\footnote{87} While the \textit{Gingles} factors are necessary preconditions, their mere existence is not

\footnote{86. \textit{Id.} at 1017. It is particularly significant that Justice Souter delivered the opinion of the Court, and was joined by Chief Justice Rehnquist, and Justices Blackmun, Stevens, O'Connor, and Ginsburg. Justice Kennedy filed an opinion concurring in part, stating: "I agree with the Court that the District Court's maximization theory was an erroneous application of § 2." \textit{Id.} at 1026 (Kennedy, J., concurring in part and concurring in the judgment). Thus, even the Justices who would uphold the \textit{Shaw} district do not read § 2 to require maximization. \textit{Cf. Shaw II}, 116 S. Ct. at 1922 (Stevens, J., dissenting) ("[A] state legislature's primary jurisdiction for legislative apportionment and redistricting must include the right..., free of judicial rejection, to implement state policies that may fail to remedy to the fullest extent possible the voting rights violations originally found."). Therefore, while some Justices may recognize and favor majority-minority districts, a basic policy of creating them wherever possible is not advocated by the Court. Though some critics of majority-minority districts have claimed that their creation will result in an abandonment of traditional districts, the Court's position indicates that such a prediction is unrealistic. \textit{See} Lani Guinier, \textit{Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes, in AFFIRMATIVE ACTION AND REPRESENTATION—SHAW V. RENO AND THE FUTURE OF VOTING RIGHTS} 223 passim (Anthony A. Peacock ed., 1997) [hereinafter AFFIRMATIVE ACTION] (arguing that proportional representation is necessary for political fairness); Lynett Henderson, \textit{Lost in the Woods: The Supreme Court, Race, and the Quest for Justice in Congressional Reapportionment}, 73 DENV. U. L. REV. 201, 232-35 (1995) (finding a different electoral system necessary to resolve the political impasse and suggesting possible alternatives); Conference, \textit{The Supreme Court, Racial Politics, and the Right to Vote: Shaw v. Reno and the Future of the Voting Rights Act}, 44 AM. U. L. REV. 1, 59 (1994) [hereinafter Conference] (raising the argument that majority-minority districts lead to representatives from surrounding districts who are less responsive to minority concerns).

In application, maximization has extremely partisan effects. Minority voters are "the most reliable of Democratic voters." Conference, \textit{supra}, at 56. When minorities are grouped together in a district, the district becomes a Democratic stronghold; however, the surrounding districts are weakened for Democratic candidates by the removal of these voters. The surrounding districts then tend to vote Republican. \textit{See id.} In 1991-92, when the cases in this line of precedent were in the process of receiving preclearance, President George Bush, a Republican, was in office. Under his presidency, the Attorney General's office seems to have pursued this maximization policy. \textit{See id.} at 15, 56. Historically, grouping minorities into districts with "super-majority-minorities" has been considered a form of racial gerrymandering known as "packing." \textit{See} Jeffrey G. Hamilton, \textit{Deeper into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court}, 43 EMORY L.J. 1519, 1525 n.51 (1994). While these districts do not contain "super-majorities," they have been analogized to this form of gerrymandering. \textit{See id.} at 1557.

\footnote{87. \textit{See DeGrandy}, 512 U.S. at 1006-07.}
determinative of a § 2 violation—a court must also consider the “totality of the circumstances.” Originally, the Supreme Court developed the Gingles test as a structural guideline to examine these circumstances. In DeGrandy, the Court reiterated its position that a general review also must be undertaken and that proportionality is one of the relevant factors. However, the Court noted that proportionality is not dispositive. In a section particularly illustrative of the Court’s goal of colorblindness, the opinion reminded lower courts that while majority-minority districts are necessary remedial devices in some circumstances, they are premised on “‘politics of second best.’” According to the Court, the goal of the Voting Rights Act—to “hasten the waning of racism in American politics”—would be better served if minority-choice candidates were elected without maximization districts, but rather through the efforts of minority voters “to pull, haul, and trade to find common political ground.”

At the end of its 1995 Term, the Supreme Court handed down Miller v. Johnson, clarifying its position in Shaw I. Miller grew out of the difficulties that Georgia encountered in obtaining § 5 preclearance of its redistricting plan. The Supreme Court sharply criticized the predominant role that race played in drawing the final plan. The interaction between the Justice Department and the Georgia legislature illustrated the type of interaction between states and the Justice Department that the Court found particularly reprehensible. After a special legislative session in October of 1991,

88. See id. at 1011-13.
89. Id. at 1009-10.
90. See id. at 1010-11.
91. See id. at 1013-14.
92. See id. at 1014, 1020-21. The Court declined to establish proportionality as a safe harbor for states because of the perverse incentive to create majority-minority districts where they were unnecessary for equal access and opportunity to participate in the political process. See id. at 1019-20.
93. Id. at 1020 (quoting GROFMAN ET AL., supra note 50, at 136). The premise is that by applying a race-conscious calculus, the ultimate goal of equality is still not being reached fully. However, the authors argue that this is a “necessary evil in a color-conscious world” and thus still preferable to the alternative of no minority representation from largely white districts. See GROFMAN ET AL., supra note 50, at 136.
94. DeGrandy, 512 U.S. at 1020.
96. See generally Miller, 115 S. Ct. at 2485-86 (emphasizing the district court’s sharp criticism of the Justice Department’s partisan influence and finding the grouping of voters with only race as a common ground to be an “offensive and demeaning assumption” of minorities’ political interests).
Georgia sought Justice Department preclearance of a plan increasing the number of majority-black districts in the state from one to two.\textsuperscript{97} The Attorney General refused preclearance, noting in the objection letter that Georgia had created only two, instead of three, majority-black districts, and that certain African-American populations were not placed in such a district.\textsuperscript{98}

The legislature then redrew the districts, assigning the black population in central Georgia to a majority-black district and increasing the percentage of minority voters in three districts.\textsuperscript{99} Once again, the Justice Department denied preclearance. Relying on an alternative plan drafted by the American Civil Liberties Union ("ACLU"), which contained three majority-black districts, the Attorney General's letter stated that the legislature "failed to explain adequately" its failure to create the third majority-minority district.\textsuperscript{100}

After being chastised by the Justice Department twice, the legislature created a redistricting plan that closely resembled the ACLU's plan, nicknamed "max-black."\textsuperscript{101} Although this plan received preclearance,\textsuperscript{102} it created a district connecting black neighborhoods of Atlanta with poor, predominantly black areas of coastal Chatham County, "260 miles apart in distance and worlds apart in culture."\textsuperscript{103}

Georgia residents challenged the plan, and the Court recognized their Equal Protection claim under the terms of \textit{Shaw I}:

\begin{quote}
[T]he essence of the equal protection claim recognized in \textit{Shaw} is that the State has used race as a basis for separating voters into districts. Just as the State may not... segregate citizens on the basis of race in its public parks... so did we recognize in \textit{Shaw} that it may not separate its citizens into different voting districts on the basis of race.\textsuperscript{104}
\end{quote}

In addition to applying \textit{Shaw I} to the Equal Protection claim in \textit{Miller}, the Court clarified several aspects of the \textit{Shaw I} opinion. First, the Court stated that although bizarre shape is often indicative

\begin{center}
\textsuperscript{97} See id. at 2483. \\
\textsuperscript{98} See id. at 2483-84. \\
\textsuperscript{99} See id. at 2484. \\
\textsuperscript{100} Id. (citations omitted). \\
\textsuperscript{101} See id. \\
\textsuperscript{102} See id. \\
\textsuperscript{103} Id. The district has been described in various colorful ways, including "Sherman's march to the sea." Theo Lippman, Jr., Editorial, \textit{BALTIMORE SUN}, July 10, 1995, at A6. While the borders of this district are not as tortured as those in the questioned North Carolina or Texas districts, the broad sweep of the district and its mix of urban/rural and various socioeconomic classes of minorities drew the attention resulting in this suit. \\
\textsuperscript{104} \textit{Miller}, 115 S. Ct. at 2485-86 (citations omitted).
\end{center}
of racially gerrymandered districts, a showing of bizarre shape is not a threshold requirement for the claim.\textsuperscript{105} Second, the plaintiff must prove that race was the predominant factor in the legislature's decision by showing that traditional, race-neutral districting principles were subordinated to race.\textsuperscript{106} Third, if a state does show a compelling interest for racial redistricting, a "strong basis in evidence of the harm being remedied" is necessary to satisfy strict scrutiny,\textsuperscript{107} the "most rigorous and exacting standard of constitutional review."\textsuperscript{108}

The \textit{Miller} Court again rejected the Attorney General's maximization requirement for preclearance under the Voting Rights Act.\textsuperscript{109} In previous decisions, the Court interpreted § 5 as ensuring that changes in voting procedure do not lead to a \textit{retrogression} in the position of racial minorities in their effective involvement in the electoral process.\textsuperscript{110} District plans \textit{increasing} the number of majority-minority districts are termed "'ameliorative.'"\textsuperscript{111} Since, by this definition, the originally proposed Georgia plan was ameliorative, the Court found that it was not objectionable on the grounds that it was not ameliorative enough.\textsuperscript{112} Thus, a plan showing any improvement in minority voting opportunity will not violate § 5 unless the plan is so racially discriminatory as to violate the Constitution.\textsuperscript{113} Therefore, the Attorney General's refusal to preclear these plans, and the Georgia legislature's fear of a § 5 claim, were both unfounded.\textsuperscript{114}

Against this backdrop of Voting Rights Act jurisprudence, the Supreme Court considered two recent Voting Rights Act claims in \textit{Shaw v. Hunt (Shaw II)}\textsuperscript{115} and \textit{Bush v. Vera.}\textsuperscript{116} \textit{Shaw II} arose in North Carolina. Following the 1990 census, North Carolina's congressional delegation was increased from eleven to twelve

\begin{itemize}
  \item \textsuperscript{105} See id. at 2488.
  \item \textsuperscript{106} See id. Principles generally recognized as race-neutral include compactness, contiguity, respect for political subdivisions, and communities of shared interests. See \textit{Vera}, 116 S. Ct. at 1952-54; \textit{Miller}, 115 S. Ct. at 2488.
  \item \textsuperscript{107} \textit{Miller}, 115 S. Ct. at 2491.
  \item \textsuperscript{108} Id. at 2490.
  \item \textsuperscript{109} See id. at 2491-93.
  \item \textsuperscript{110} See id. at 2493 (discussing \textit{Beer v. United States}, 425 U.S. 130, 141 (1976)).
  \item \textsuperscript{111} Id. at 2492 (quoting \textit{Beer}, 425 U.S. at 141).
  \item \textsuperscript{112} See id.
  \item \textsuperscript{113} See id.
  \item \textsuperscript{114} See id.
  \item \textsuperscript{115} 116 S. Ct. 1894 (1996).
  \item \textsuperscript{116} 116 S. Ct. 1941 (1996).
\end{itemize}
CONGRESSIONAL REDISTRICTING

members. Originally, members of the North Carolina General Assembly were excited by the prospect of an additional North Carolina representative in Congress. However, the problems and expenses that the change caused presumably eroded much of this delight. The legislature initially adopted a redistricting plan that included one minority district in the northeast section of the state. The plan was submitted to the Attorney General of the United States for preclearance pursuant to § 5 of the 1965 Voting Rights Act. The Justice Department, through the Assistant Attorney General, denied preclearance, noting that the state "failed to give effect to black and Native American voting strength in the south-central to southeastern part of the state." In response, the legislature adopted a second redistricting plan that included two majority-minority districts: the First and the Twelfth. The Attorney General precleared the plan, even though the new districts were bizarrely shaped, and even thought District 12 was centered in the Piedmont or north-central area of the state rather than the south-central area that the Attorney General had identified as problematic.

The descriptions of these two majority-minority districts have often been repeated, and their boundaries drew considerable attention from the Court:

District 1[] is somewhat hook shaped. Centered in the

117. See Shaw II, 116 S. Ct. at 1899.
120. See supra notes 44-50 and accompanying text (discussing the Attorney General's role in the preclearance process under § 5 of the Voting Rights Act).
121. Shaw II, 116 S. Ct. at 1899 (citations omitted) (quoting Letter from Assistant Attorney General for Civil Rights). Forty of North Carolina's one hundred counties require judicial preclearance for any changes in voting districts pursuant to § 5 of the Voting Rights Act. See Shaw v. Reno, 509 U.S. 630, 634 (1993) (Shaw I). Because all congressional districts must be as equal in population as practicable, see infra note 362, any changes in one boundary line require modifications in the boundary lines of other districts, effectively requiring the entire state plan to be precleared.
122. See Shaw II, 116 S. Ct. at 1899.
123. See id. The allegation is that the Justice Department was willing to accept any plan with two majority-minority districts, regardless of where they were located, due to the Justice Department's maximization policy. Interview with Tom Farr of Maupin, Taylor, Ellis & Adams, P.A., in Raleigh, N.C. (Sept. 27, 1996); see also Miller v. Johnson, 115 S. Ct. 2475, 2484, 2492 (1995) (noting that the Attorney General refused to preclear several Georgia plans with two majority-minority districts because the legislature failed to explain why three districts were not created); supra note 86 (explaining and examining the political effect of maximization).
northeast portion of the State, it moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southern-most part of the State near the South Carolina border....

... District 12] is even more unusually shaped. It is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas "until it gobbles in enough enclaves of black neighborhoods."124

Five North Carolinians initiated the Shaw suit against several state officials in the United States District Court for the Eastern District of North Carolina.125 A three-judge panel of the district court dismissed the complaint.126 The plaintiffs appealed directly to the Supreme Court,127 as provided for in the Voting Rights Act.128 The Supreme Court reversed the lower court's dismissal, and instructed the district court to determine on remand if there was evidence of racial gerrymandering in the drawing of the congressional districts,129 and if so, whether it met the Fourteenth Amendment’s mandate that "state legislation that expressly distinguishes among citizens because of their race ... be narrowly tailored to further a compelling governmental interest."130 The district court determined that race was a predominant consideration

124. Shaw I, 509 U.S. at 635-36 (quoting Shaw v. Barr, 808 F. Supp. 461, 476 (E.D.N.C. 1992) (Voorhees, C.J., concurring in part and dissenting in part), rev'd sub nom. Shaw v. Reno, 509 U.S. 630 (1993) (Shaw I)). Commentary on the districts' shapes may be even more indicative of the districts' impression on observers. District 1 has been described as looking like a "'bug splattered on a windshield.'" Shaw I, 509 U.S. at 635 (quoting Editorial, Political Pornography-II, WALL ST. J., Feb. 4, 1992, at A14 (describing District 1 in the original plan that was denied preclearance, although District 1 remained substantially the same in the approved plan)). In reference to District 12, one state legislator was quoted as saying, "'[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district.'" Joan Biskupic, NC Case to Pose Test of Racial Redistricting; White Voters Challenge Black-Majority Map, WASH. POST, Apr. 20, 1993, at A4 (quoting unnamed North Carolina state legislator), quoted in Shaw I, 509 U.S. at 636.

125. See Shaw v. Barr, 808 F. Supp. 461, 463-64 (E.D.N.C. 1992), rev'd sub nom. Shaw v. Reno, 509 U.S. 630 (1993) (Shaw I). Originally, the action was also against the Attorney General of the United States and the Assistant Attorney General for the Civil Rights Division, but the District Court granted these defendants' motion to dismiss in Shaw v. Barr, id. at 467, and the decision was not appealed.

126. See id. at 473.

127. See Shaw I, 509 U.S. at 639.


129. See Shaw I, 509 U.S. at 658.

130. Id. at 643 (emphasis added).
in the state’s redistricting plan, but that District 12 was constitutional because it was “narrowly tailored to further the State’s compelling interests in complying with §§ 2 and 5 of the Voting Rights Act.”

Once again the plaintiffs appealed to the Supreme Court.

In this second appeal, known as “Shaw II,” the Court applied a two-step process to determine whether District 12 was constitutional. In an opinion authored by Chief Justice Rehnquist, the Court noted that while strict scrutiny is the standard of review for racial equal protection claims, “[a]pplying traditional ... principles in the voting-rights context is ‘a most delicate task.’” Unlike other areas where the use and consideration of race in legislative action is constitutionally suspect, state legislatures invariably are aware of race when drawing districts, if only because it is one of the pieces of information included in census material. Thus, in the voting rights context, mere awareness of race is not the problem. The “constitutional wrong occurs when race becomes the ‘dominant and controlling’ consideration.” The Court focused on statements made by state officials that their objective was to create two majority-minority districts in order to receive preclearance from the Attorney General. Based on these statements, the Court upheld the district court’s finding that race was a predominant consideration in the drawing of districts.

While the Equal Protection Clause of the Fourteenth Amendment generally prohibits racial classifications, such classifications may be acceptable when the state is pursuing a compelling state interest. In defense of District 12, North Carolina offered three compelling interests: “to eradicate the effects of past and present discrimination; to comply with § 5 of the Voting Rights Act; and to comply with § 2 of that Act.” The Court found the state’s interest in eradicating past discrimination unacceptable, but

132. *See id.*
133. The Court applied the standard two-part test for strict scrutiny it has developed in cases involving racial discrimination: (1) Is there a compelling state interest? (2) Is the legislation narrowly tailored to meet that compelling interest? *See id.* at 1902.
134. *Id.* at 1900 (quoting *Miller v. Johnson*, 115 S. Ct. 2475, 2483 (1995)).
135. *See id.*
136. *Id.* (quoting *Miller*, 115 S. Ct. at 2486).
137. *See id.* at 1901.
138. *See id.*
139. *See U.S. CONST. ammd. XIV, § 1.*
141. *Id.*
limited its holding to the instant case, noting that this general interest could be a legitimate defense in the future. For eradication of past and present discrimination to be a compelling state interest, the discrimination must be in a specific area, not generalized to the state, and there must be a "strong basis in evidence" for the remedial action taken. The Court held that North Carolina failed to show that at the time the districts were drawn, evidence of discriminatory practices existed. Thus, such practices could not have been the prevailing concern of the General Assembly.

The Court next considered whether compliance with the Voting Rights Act could be a compelling state interest, but avoided reaching a specific decision on that point. Rather, the Court held that the Justice Department and the North Carolina General Assembly misinterpreted §5 of the Voting Rights Act as requiring a maximization of majority-minority districts, rather than non-retrogression. The Court stated that its holding in Miller v. Johnson, the Georgia voting rights case, precluded this reading of §5. Thus, the Court rejected North Carolina's argument that the drawing of the second majority-minority district was required by the Justice Department's interpretation of §5.

Finally, assuming for the sake of argument that compliance with §2 of the Voting Rights Act could be a compelling state interest,
the Court found that the creation of the second majority-minority district did not survive strict scrutiny because that district was not narrowly tailored to remedy past racial discrimination. The Court specifically rejected North Carolina's argument that a state may create a remedial district anywhere in the state once a § 2 violation has been established. The Court recognized that prior decisions had not specified how closely correlated the ends and means must be for an action to be narrowly tailored. The Court therefore determined that the legislative action should "substantially address, if not achieve, the avowed purpose." Since the remedy was not applied to those suffering the injury—those in the south-central area of North Carolina—the Court determined that it did not satisfy the requirement. Applying this analysis, the Supreme Court held that District 12 was unconstitutional. The majority emphasized that the Equal Protection Clause applies to individual citizens, not to a minority group as a class. Thus, the remedy in a vote dilution claim must apply to the individual claimants suffering the injury, such as the minority voters in south-central North Carolina.

152. See Shaw II, 116 S. Ct. at 1905.
153. See id. at 1906.
154. Id. at 1905.
155. See id. at 1906. The Court's concern with applying a specific remedy to a specific injury was particularly evident in the oral argument before the Court. See Transcript of Oral Argument, Shaw v. Hunt (No. 94-923, 94-924), available in 1995 WL 729891, at *44-*76. The Justices were concerned that North Carolina had interpreted Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986) (establishing three preconditions to a cognizable violation of the Voting Rights Act), to mean that once a violation had been established the state legislature could create a remedial district anywhere it chose based on principles of federalism. The Supreme Court was very clear in its statements while questioning the state's attorney that an overlap is needed between any majority-minority district created and the area used to satisfy the Gingles criteria. See Transcript of Oral Argument, Shaw v. Hunt (No. 94-923, 94-924), available in 1995 WL 729891, at *44-*76.
156. This decision applied to only District 12 because the plaintiffs lacked standing to bring a claim with regard to District 1. See Shaw II, 116 S. Ct. at 1900. In United States v. Hays, 115 S. Ct. 2431 (1995), the Supreme Court held that only parties residing in the challenged district, or those that can demonstrate they personally have been subject to racial classification, have standing to bring a racial gerrymandering claim. See id. at 2436-37. Two of the original five plaintiffs in Shaw survived this test, but only with respect to District 12. See Shaw II, 116 S. Ct. at 1900.
158. Vote dilution is a method of reducing the effect of an individual's vote without actually denying the individual the right to vote. For example, members of a racial minority may be able to make up the majority of a single-representative district, but if a multi-representative district is created by including areas lacking racial minorities, the election results may differ—racial minorities may become submerged in the multi-representative district and be less able to elect the candidate of their choice. See Grofman et al., supra note 50, at 23-26. In 1969, the Supreme Court decided that § 5
Concurrent with *Shaw II*, the Supreme Court considered and issued an opinion in the Texas redistricting case *Bush v. Vera*. The Court, in an opinion authored by Justice O'Connor, affirmed a unanimous district court ruling declaring Texas's redistricting plan unconstitutional as a racial gerrymander. Three districts were challenged in this appeal: District 30, a new majority-African-American district in Dallas County; District 29, a new majority-Hispanic district in Harris County; and District 18, a reconfigured majority-African-American district interlocking with District 29.

The legislature's failure to observe traditional districting criteria, such as compacteness, its commitment to creating majority-minority districts, and its manipulation of district lines based on unprecedentedly detailed racial data strongly supported the application of strict scrutiny. In contrast, the legislature also was found to have been influenced by non-race factors, particularly incumbency protection. Thus, the Court recognized that this was a "mixed motive" case. Yet, after a careful review of each of the questioned districts, the Court determined that strict scrutiny was the applicable standard of review for each district.


160. See *id.* at 1951.
161. See *id.* at 1954-59. Districts 18 and 29 are described as interlocking because they fit together "like a jigsaw puzzle ... in which it might be impossible to get the pieces apart." *Id.* at 1958 (citations omitted). Essentially, the border between these districts is drawn such that all the Hispanic voters in the area are in District 29 and all the African-American voters are in District 18. *See id.* at 1958-59.
162. The district court rejected the appellants' claim that the Texas legislature could not be charged with a duty to follow traditional districting criteria because adherence to "'natural geographical boundaries, contiguity, compactness, and conformity to political subdivisions' " had never been used by Texas prior to this districting. *Id.* at 1952 (quoting *Vera v. Richards*, 861 F. Supp. 1304, 1333 (S.D. Tex. 1994), *aff'd sub nom.* *Bush v. Vera*, 116 S. Ct. 1941 (1996)). The Supreme Court agreed with the district court's finding that the challenged districts were proportionally so much more irregular than previous districts as to negate this argument. *See id.*
163. The Texas legislature's application for § 5 preclearance from the Department of Justice recognized a legislative consensus that the three new districts should "'allow members of racial, ethnic, and language minorities to elect Congressional representatives.' " *Id.* (quoting *Vera v. Richards*, 861 F. Supp. 1304, 1315 (S.D. Tex. 1994), *aff'd sub nom.* *Bush v. Vera*, 116 S. Ct. 1941 (1996)).
164. See *id.* Texas's redistricting computer program, REDAPPL, included racial data at the census block level (from the 1990 census), but party registration and past voting statistics were available only for larger voter tabulation districts. *See id.* at 1953.
165. See *id.* at 1954.
166. See *id.* at 1952.
167. See *id.* Strict scrutiny is required in redistricting only when race is the
The Court rejected Texas's argument that District 30,\(^{168}\) while non-compact and irregular in shape, was not a racial gerrymander,\(^ {169}\) but an attempt to join communities of interest.\(^ {170}\) As in Shaw II, the Court rejected this argument largely due to the fact that the Texas legislature did not consider the information supporting this claim at the time that redistricting occurred.\(^ {171}\) The Court similarly rejected the appellants' second argument that incumbency protection led to political gerrymandering.\(^ {172}\) While recognizing precedent for the position that political gerrymandering is not subject to strict scrutiny,\(^ {173}\) the Court stated that "to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation."\(^ {174}\) The boundaries of the interlocking districts, which crossed city limits, local election precincts, and voter tabulation districts, were found "'unexplainable on grounds other than ... racial quotas.'"\(^ {175}\) Thus, the Court applied strict scrutiny, rejecting Texas's argument that the legislature considered incumbency protection and other factors equally with race.\(^ {176}\)

Continuing its analysis, the Court held that none of the districts was narrowly tailored to serve a compelling state interest.\(^ {177}\)

\(^{168}\) District 30's population is 50% African-American and 17.1% Hispanic. See id. at 1954. Fifty-percent of the district's population is located in a compact central core with "narrow and bizarrely shaped tentacles" extending to the north and west. Id.

\(^{169}\) See id. at 1955.

\(^{170}\) See id. Texas's argument rested on the urban character of the district, as well as the shared media sources and major transportation lines to Dallas. See id. While finding some merit to this argument, the Court agreed with the district court's conclusion that there was no evidence that race had not predominated over these factors. See id.

\(^{171}\) See id. Specifically, the data were not available to the legislature in an "'organized fashion'" prior to the creation of District 30. Id. (quoting Vera v. Richards, 861 F. Supp. 1304, 1338 (S.D. Tex. 1994), aff'd sub nom. Bush v. Vera, 116 S. Ct. 1941 (1996)).

\(^{172}\) See id. at 1955-56. Approximately 97% of African-American voters in the Dallas area vote Democratic, and thus numerous Democratic incumbents in surrounding districts fought to keep these voters in their reconfigured area. See id. at 1956, 1959.

\(^{173}\) See id. at 1956; see also Davis v. Bandemer, 478 U.S. 109, 133-34 (1986) (overruling the district court's holding that any interference with an opportunity to elect a representative of choice, unless justified by a compelling state interest, is an equal protection violation, and requiring proof that the challenged plan will be detrimental enough to require federal court intervention).

\(^{174}\) Vera, 116 S. Ct. at 1956 (applying Powers v. Ohio, 499 U.S. 400, 410 (1991)).


\(^{176}\) See id. at 1958-60.

\(^{177}\) See id. at 1963.
Assuming that compliance with § 2 of the Voting Rights Act could be a compelling interest, the Court nevertheless rejected this defense, finding that the lack of compactness and the bizarre shape of the districts were evidence that the districts were not narrowly tailored. 178 The Court refused to adopt the district court’s view that narrow tailoring required a district with the “least possible amount of irregularity in shape.” 179 Instead, the Court held that a § 2 district that was “reasonably compact and regular” and that applied traditional districting principles would survive strict scrutiny. 180 The Court also rejected Texas’s second asserted state interest that the creation of majority-minority districts was a means of rectifying historical discrimination in voting. 181 As in Shaw II, the Court based its decision on the absence of both specific evidence of discrimination and a remedy directly applicable to the injury. 182 Finally, the Court rejected the argument that compliance with § 5 of the Voting Rights Act was a compelling state interest that justified the creation of District 18. 183 The Court regarded the increase in African-American representation within District 18 from 40.8% to 50.9% as augmentation, rather than mere maintenance, and thus not within § 5’s protection. 184 The Court appeared to restrict severely the future application of § 5 by finding that “[n]onretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral success; it merely mandates that the minority’s opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State’s actions.” 185

In pursuing a final determination in Shaw II, North Carolina’s counsel had two objectives: (1) to determine if North Carolina’s congressional districts were constitutional; and (2) to clarify the law

178. See id. at 1961.
180. Id. The Court emphasized that while bizarre shape on its own does not condemn a district, if a district must have an extremely irregular shape to meet the minority population requirement for a § 2 violation, then a state cannot be avoiding § 2 liability “because § 2 does not require a State to create . . . a district that is not ‘reasonably compact.’” Id. at 1961. Further, the appellants’ argument that bizarre shape raised questions regarding only motivation, and not narrow tailoring, was rejected by the Court as a misinterpretation of its holding in Miller v. Johnson, 115 S. Ct. 2475 (1995) (discussed supra at notes 95-114 and accompanying text). See Vera, 116 S. Ct. at 1961-62.
182. See id.
183. See id. at 1963.
184. See id.
185. Id.
on racial gerrymandering and vote dilution. While Shaw II definitely established that North Carolina’s District 12 is unconstitutional, it is unclear whether the decision clarified the law on racial gerrymandering. Following Shaw I, voting rights law was extremely unclear. The Shaw I Court held that a district “so bizarre on its face that it is unexplainable on grounds other than race” must be narrowly tailored to further a compelling state interest. However, the Court did not indicate whether evidence of discriminatory intent or bizarreness of shape was the determining factor. Shaw II provided the opportunity to clarify Shaw I because in Shaw II, the Court reviewed the application of the Shaw I guidelines. However, the Court failed to provide clarification, a fact noted by Justice O’Connor in her concurring opinion to Vera and by Justice Stevens in his dissents to Shaw II and Vera. Still, the Court continues moving forward in this area, although it has “struck out into a jurisprudential wilderness that lacks a definable constitutional core and threatens to create harms more significant than any suffered by the individual plaintiffs challenging these districts.”

In Shaw II and Vera, the Supreme Court confronted the constitutional limits of the deference given to state legislatures. While the majority opinions recognized that a state should be granted some leeway when drawing majority-minority districts, the

187. See id. At least one commentator disagrees with this interpretation. Benjamin Griffith has argued that Shaw II and Vera, combined with the previous cases, “form a coherent body of precedent” clearly establishing a judicial commitment to several principles of districting. Griffith, supra note 81, at 10-11. These principles include: encouraging the use of “traditional districting principles,” specifically “geographical compactness, contiguity, and respect for existing political subdivision boundaries”; discouraging the automatic use of racial stereotypes; clarifying the “responsibilities . . . of legislative bodies in the redistricting process”; and ending the use of irregularly shaped districts drawn without sufficient regard for “traditional districting principles.” Id. at 10-11.
189. See Vera, 116 S. Ct. at 1968 (O’Connor, J., concurring) (“I believe that States and lower courts are entitled to more definite guidance as they toil with the twin demands of the Fourteenth Amendment and the Voting Rights Act.”).
190. See Shaw II, 116 S. Ct. at 1907 (Stevens, J., dissenting) (finding the Court’s analysis of the compelling state interests raised by the state unsatisfactory).
191. See Vera, 116 S. Ct. at 1975 (Stevens, J., dissenting) (“The decisions issued today serve merely to reinforce my conviction that the Court has, with its ‘analytically distinct’ jurisprudence of racial gerrymandering, struck out into a jurisprudential wilderness that lacks a definable constitutional core . . . .” (citations omitted)).
192. Id. (Stevens, J., dissenting).
Justices also encouraged states to limit the amount of consideration given to race. By reviewing legislative intent and casting a critical eye to unusually shaped districts, the Court established special criteria limiting the application and use of majority-minority districts. Interestingly, these criteria seem to apply only to majority-minority districts; presumably, majority-Caucasian districts may be as bizarrely shaped as the legislature desires. Legislatures drawing congressional districts rarely are presented with just one option. Instead, several plans are likely to be offered during the process, and the end result is generally a compromise of objectives and potential results. In order to determine whether an injury has occurred in redistricting cases, the reviewing court needs to be aware of alternative plans. The need for this awareness effectively requires a court to consider all of the legislature's alternatives, including any plans submitted by legislators for the record, even if the plans lacked any likelihood of passage. A court's review of legislative choices, in addition to its review of the final result, pushes the prudential limits of federal jurisdiction. In effect, courts are required to determine if the legislature made the correct choice among its options, a finding that can only be subjective. By continuing to treat this type of suit as an equal protection claim, the Supreme Court has broadened the reach of federal courts in race-based challenges to government action. This result may be beneficial from the standpoint of

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193. See id. at 1990 (Stevens, J., dissenting).

194. For example, in the original redistricting in 1991 the legislature formally considered four different congressional plans, each with revisions, so that nine options were considered by the legislative body before the original submission for preclearance. See William R. Gilkenson, A Chronology of North Carolina Redistricting in the 1990s 7-12 (June 1996) (unpublished report, available from the North Carolina General Assembly, on file with the North Carolina Law Review).

Similarly, in the redistricting that followed Shaw II, nine plans and amendments were presented to legislative bodies or committees. Additional plans were considered in the negotiation process between the House and Senate redistricting committee chairs. All of these plans, including those never submitted to a legislative committee or the full body, were presented to the United States Department of Justice in the preclearance submission. See Information Supporting North Carolina's Section 5 Submission for Its 1997 Congressional Redistricting Plan ¶ 97C-27H (Apr. 9, 1997) (unpublished submission for § 5 preclearance to United States Department of Justice, available from the North Carolina General Assembly) [hereinafter Submission]. Because these documents are now public records, they also could be submitted to the district court judges for consideration on remand.

195. See Shaw II, 116 S. Ct. at 1909 (Stevens, J., dissenting) (noting the Court's traditional hesitancy in determining matters that are ultimately differences of opinion rather than discriminatory exclusion).

196. See id. (Stevens, J., dissenting).

197. See id. at 1912 (Stevens, J., dissenting).
ensuring state conscientiousness in redistricting. However, when considered with other procedural safeguards such as § 5 preclearance, continued judicial involvement threatens to tip the delicate state-federal balance.

Both of the dissents in Vera foreshadowed the questionable effects of continuing Shaw I's line of authority and creating a new realm of judicial review. Without the benefit of a clear legal standard as to what defines a constitutional district, and considering the exorbitant legal costs of pursuing a judicial determination, a state legislature may decide that its right to draw districts is not worth the price. Such a "vacuum of responsibility" at the state level shifts the burden of redistricting to federal courts. According to Justice Souter, the courts may no longer compel states to comply with federal districting requirements since no such requirements have been clearly set forth.

Similarly, states fearing involvement in a costly lawsuit or just the lengthy and time-consuming legislative process of drawing districts may abdicate their authority in favor of districts drawn by courts. This is precisely what occurred in Georgia following the Miller v. Johnson decision; when the state legislature was unable to reach a compromise on a new plan, it ultimately gave up and allowed the district court to draw the state's congressional district plan. If

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198. Justice Stevens argued that the Court's jurisprudence in this area continues to result in unintended consequences. Primarily, race has become the predominant factor in redistricting. See Vera, 116 S. Ct. at 1990 (Stevens, J., dissenting). Justice Stevens also noted that deference to states is challenged by the current path, a position at odds with the Court's recent protection of state sovereignty in Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996). See Vera, 116 S. Ct. at 1990 (Stevens, J., dissenting). Caught between the Voting Rights Act and the Court's current position, states will find avoiding litigation extremely difficult. See id. at 1991 (Stevens, J., dissenting). Justice Stevens questioned whether states will choose to forego their right to redistrict, or worse, allow political motives and power to overtake the process. See id. at 1991-92 (Stevens, J., dissenting).

Justice Souter raised similar concerns about the fate of redistricting in his Vera dissent. See id. at 1998-2000 (Souter, J., dissenting). Arguing that the Court's position undermines the traditional state principles used to establish a baseline for redistricting, he noted that the Court has traditionally recognized the associational character of voting, while Shaw I broke from this position. See id. at 2000-01 (Souter, J., dissenting). Unless the Court chooses to overrule Shaw I, it is left with two alternatives that raise objections of their own. See id. at 2007-09.

199. See Vera, 116 S. Ct. at 2007 (Souter, J., dissenting).

200. See id. at 2006-07 (Souter, J., dissenting).

201. 115 S. Ct. 2475 (1995); see also supra notes 95-114 and accompanying text (discussing Georgia's original redistricting review process and the Supreme Court opinion).

202. See Mark Sherman, Redistricting back in Hands of Federal Court, ATLANTA CONSTR., Sept. 13, 1995, at A1. In fact, observers and legislators began to view the role of
transferring the duty in the face of difficulty becomes commonplace, state legislatures that are split over non-racial issues, such as party affiliation, may separate themselves from the redistricting process, foisting the responsibility onto already overloaded district courts.

Shifting the responsibility for districting also causes harms other than impingement on state authority. As Justice Stevens warned, judicial preemption may reduce the integrity of the courts by removing their appearance of impartiality. As if acknowledging the unintended effect of its voting rights decisions, the Supreme Court recently took great pains to reiterate that congressional apportionment is a state responsibility. Yet, in Shaw II and Vera, the Court returned to its position of increasing federal authority by ruling districts unconstitutional without providing clear guidelines on the injury or acceptable means of correcting it. The Court forced states back into the federal courts by keeping them uninformed of the requirements for a constitutional district.

By advocating the states' role in districting, but obscuring the states' alternatives, the Court's decisions manifest the underlying federal courts in redistricting in a new light during the Georgia legislature's special session on redistricting. Whereas court intervention was viewed initially as a means of forcing legislators to draw new boundaries quickly, it ultimately had the reverse effect. After Republicans in the General Assembly saw early congressional maps drawn by the Democratic leadership that placed GOP incumbents in the same new districts, they took the position that "they'd just as soon take their chances with the courts." Kathey Alexander, Retreat on Redistricting, ATLANTA CONST., Sept. 13, 1995, at C2. Similar thoughts were expressed by black legislators after seeing the maps drawn by white Democrats. See id. Instead of leading to coalition-building, the possibility of judicial intervention led to divisive entrenchment. The complexity of the requirements placed on legislatures is evident in Lieutenant Governor Pierre Howard's statement that the fault in not agreeing on a new plan lay in "trying to settle a legal issue in a political session." Id. However, redistricting is inherently legal and political, and the legislature is the governmental body charged with striking the balance.

203. See Vera, 116 S. Ct. at 1991 (Stevens, J., dissenting); see also id. at 1999 n.2 (Souter, J., dissenting) (noting the Court's historical reluctance to enter into this "political thicket"). Of course, these warnings should sound familiar, as dissenting Justices have warned the Court of the potential effect of its involvement in this area since 1962. See, e.g., Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.");

204. See Voinovich v. Quilter, 507 U.S. 146, 156 (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."). The conflict between state and federal powers is discussed more fully infra notes 205-17 and accompanying text.
tension between judicial activism and states’ rights.\textsuperscript{205} The Constitution gives state legislatures the power to create districts for the election of members of the House of Representatives,\textsuperscript{206} and the Supreme Court traditionally has limited its involvement in this area.\textsuperscript{207} In Shaw I, the Court first departed from this respect for state authority and adopted a less traditional interpretation of the Fourteenth Amendment.\textsuperscript{208} Rather than identifying the suit as a racial gerrymandering claim similar to those previously reviewed,\textsuperscript{209} the Court loosely recognized the harm done to the plaintiff by a plan that used race as an indicator of individuals who think and act alike, and presumably prefer the same political candidates.\textsuperscript{210} According to the Court, it followed that representatives of a district established as a majority-minority district view themselves as representing the specified majority within the district, rather than the individual constituents.\textsuperscript{211} Justice Souter argued in his Vera dissent that this line

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  \item 205. See supra notes 16-20 and accompanying text.
  \item 206. See U.S. CONST. art. I, § 4, cl. 1.
  \item 207. See Vera, 116 S. Ct. at 1999 (Souter, J., dissenting) (noting the Court’s deference to state legislative authority over districting, as evidenced by the Court’s use of traditional state districting practices as a baseline for determining the acceptability of districting plans); see also JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 734-35 (5th ed. 1995) (recognizing that pre-Shaw I rulings generally fell into three categories: (1) rulings that corrected specific acts of voting discrimination; (2) rulings that allowed Congress some regulatory authority over state and local elections; and (3) rulings that lacked clear direction on the extent to which Congress and states might act to help minority voters).
  \item 208. See Vera, 116 S. Ct. at 2001 (Souter, J., dissenting) (observing that Shaw I “broke abruptly with these standards [of judicial deference], including the very understanding of equal protection as a practical guarantee against harm to some class singled out for disparate treatment”).
  \item 209. See id. (Souter, J., dissenting); see also Davis v. Bandemer, 478 U.S. 109, 124-25 (1986) (finding that a lack of opportunity for members of a racial or political group to elect representatives of their choice results in a justiciable question); Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960) (recognizing that state action may not be taken to withdraw the vote from a group of citizens).
  \item 210. See Vera, 116 S. Ct. at 2002 (Souter, J., dissenting). This injury has been interpreted as an “expressive” harm that “results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about.” Richard H. Pildes & Richard G. Niemi, Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno, 92 MICH. L. REV. 483, 506-07 (1993). Under this rubric, a legislative action may cause harm based on the meaning it conveys about traditional values, regardless of the effect actually created. See id. at 507.
  \item 211. See Vera, 116 S. Ct. at 2002 (Souter, J., dissenting); see also Shaw v. Reno, 509 U.S. 630, 648 (1993) (Shaw I) (“Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro .... That system ... is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the
of cases was particularly dangerous because the cases did not state a “practical standard for distinguishing between the lawful and unlawful use of race.”\textsuperscript{212} Indeed, Justice Souter argued that the Court failed to identify the injury required for a claim. Instead, the Court’s analysis focused on a harm commonly found among voters dissatisfied with the use of race in the allocation of political power.\textsuperscript{213} Justice Souter’s position that the Court failed to define clearly the requisite injury is manifested in the difficulty state legislatures have in creating redistricting plans. A state’s representatives hardly can avoid causing an injury to its citizens if they cannot determine what the injury is.

Harm of this type would seem to affect all races equally, and thus would not violate the Fourteenth Amendment under the traditional interpretation of the Equal Protection Clause.\textsuperscript{214} However, the Court in \textit{Shaw I} recognized a cognizable claim under the Equal Protection Clause, but failed to delineate clearly what legislative action would be viewed as a violation. The resulting confusion has led state legislatures to depend upon our nation’s courts, and ultimately upon the Supreme Court, for guidance in determining what criteria they may contemplate in the redistricting

\[\text{constitutional sense.}'" \text{(quoting Wright v. Rockefeller, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting)).} \]

Although it is unclear whether this divisive representation by a candidate has occurred in any majority-minority districts, the inverse—individual constituents believing themselves to be unrepresented—has been noticed by some representatives. Cynthia McKinney, a Representative from Georgia’s Eleventh District, found her support from white constituents slipping following the filing of the Georgia lawsuit. She notes the farmers’ tour she organized in 1994 to meet with the Secretary of Agriculture over the drought in Georgia: despite an organized effort and mailings to every farmer in the District, she was unable to get a single white farmer from the Eleventh District to join the tour. \textit{See Morning Edition} (NPR radio broadcast, Apr. 19, 1995), \textit{available in LEXIS, News Library, Arcnews File}. Cynthia McKinney’s reelection following the reconfiguring of Georgia's districts by the federal court also may be a testimonial to this point. After her district was reduced from 64% African-American to approximately one-third African-American, she survived a tough reelection campaign by running a multiracial campaign and drawing heavily on women voters and supporters. \textit{See John Nichols, Georgia’s Cinderella Story: Soccer Moms Meet Welfare Moms in the Redistricted Campaign of Cynthia McKinney}, \textit{NATION}, Nov. 11, 1996, at 16, 16-19.

\textsuperscript{212} \textit{Vera}, 116 S. Ct. at 1998 (Souter, J., dissenting). In his statement that “[t]his is so for reasons that go to the conceptual bone,” \textit{id.}, Justice Souter seemed to indicate that the Court lacks a majority consensus on any one interpretation. This underlying division within the Court was evident in the cases preceding \textit{Shaw II} and \textit{Vera}, discussed \textit{supra} in notes 70-114 and accompanying text, and may have reached a pinnacle in these two opinions.

\textsuperscript{213} \textit{See Vera}, 116 S. Ct. at 1998 (Souter, J., dissenting).

\textsuperscript{214} \textit{See id.} at 2001-02 (Souter, J., dissenting).
According to Justice Stevens, these cases force states to "draw the precise district[s] that [they] believe[] a federal court would have the power to impose." In effect, the principles of federalism have been reversed. Instead of the Court following the lead of state legislatures in determining acceptable standards, the state legislatures are looking to the Court for permissible factors and criteria in establishing their districts.

Despite this conflict between states' rights and judicial intervention, the Court continues to refine standards for reviewing legislative redistricting. This refinement has included additional

215. See id. at 1998 (Souter, J., dissenting).
216. Shaw II, 116 S. Ct. at 1922 (Stevens, J., dissenting).
217. The strain that this competition between state and federal rights creates within the Court is evident in the Justices' votes. Four of the nine Justices—Justices Stevens, Souter, Ginsburg, and Breyer—have either authored or joined opinions indicating their concern with the federalism conflict. See Vera, 116 S. Ct. at 1998 (Souter, J., dissenting) (joined by Justices Ginsburg and Breyer); Shaw II, 116 S. Ct. at 1921-22 (Stevens, J., dissenting) (joined by Justices Ginsburg and Breyer); Miller v. Johnson, 115 S. Ct. 2475, 2499-500 (Ginsburg, J., dissenting) (joined by Justices Stevens, Souter, and Breyer). Ironically, Justice O'Connor, the only member of the Court to have served in a state legislature and a strong states' rights advocate, has not argued this position. The notable absence of Justice O'Connor on this issue, and the fact that most of the Justices opposed to this entrance into state action are relatively recent appointees, suggest the possibility of future changes in the Court's decisions.

218. Although a majority of the Court is well-settled on the application of strict scrutiny in this context, Justice Stevens continues to argue that a different standard should be applied in situations where the majority attempts to increase the effectiveness of minority involvement in the democratic institution. See Shaw II, 116 S. Ct. at 1907 (Stevens, J., dissenting). Justice Stevens first suggested a three-part vote dilution test in City of Mobile v. Bolden, 446 U.S. 55, 90 (1980) (Stevens, J., concurring). He provided an objective analysis protecting districting systems based on a "good government" approach, even if the decision-making process had been compromised by ulterior motives. See id. at 90-91 (Stevens, J., concurring). In subsequent opinions, Justice Stevens expanded his criticism of the subjective motivational system applied by the Court. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 513-14 (1989) (Stevens, J., concurring in part and concurring in the judgment); Rogers v. Lodge, 458 U.S. 613, 637 (1982) (Stevens, J., dissenting). This form of analysis benefits the decision-making body because it recognizes a vote dilution claim only when a neutral justification cannot be articulated convincingly. See Joan F. Hartman, Racial Vote Dilution and Separation of Power: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative Results Standards, 50 GEO. WASH. L. REV. 689, 722-24 (1982).

While consistent in this view, Justice Stevens alone advocates it. Several Justices are likely to be hostile to the idea; both Justice Kennedy and Justice Thomas in separate concurring opinions to Vera noted that the Court's summary affirmation of DeWin v. Wilson, 856 F. Supp. 1409 (E.D. Cal. 1994), summarily aff'd in part and dismissed in part, 115 S. Ct. 2637 (1995), resolved only the issue of constitutionality between the parties and did not indicate any acceptance of the conscious use of race. See Vera, 116 S. Ct. at 1971 (Kennedy, J., concurring); id. at 1973 (Thomas, J., concurring in the judgment). Also, given the opportunity in previous cases to establish a lower standard of review for benign
review of the requirements of the Voting Rights Act. Because North Carolina and Texas both raised compliance with the Voting Rights Act as a possible compelling state interest, *Shaw II* and *Vera* provide further insight into the current interpretation of § 2 and § 5, and the role of these sections in legislative redistricting.

Section 5 of the Voting Rights Act requires the Attorney General to review proposed changes in districting plans and to determine that the proposed changes do not "have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."\(^\text{219}\) The Supreme Court has interpreted this requirement as meaning only that a proposed plan may not result in retrogression of the opportunity of members of a minority group to elect representatives of their choice—''the plan need not augment or enhance that right.'\(^\text{221}\) In *Vera*, the Court extended its interpretation of nonretrogression to include the proportion of minorities within a district.\(^\text{222}\) By increasing the proportion of minorities in the districts, Texas did more than was necessary to ensure that its new plan did not result in a retrogression of minority opportunity.\(^\text{223}\)

The greatest effect of the Court's use of strict scrutiny in redistricting cases has been the narrowing of § 5. *Shaw II* was consistent with the *Miller* decision in its criticism of the Department of Justice's interpretation of § 5.\(^\text{224}\)^ *Shaw II* was particularly critical of racial classification, the Supreme Court has refused to do so. See *Croson*, 488 U.S. at 493 (plurality opinion).\(^\text{220}\) By definition, any plan that is "ameliorative" has increased an individual's opportunity to elect a candidate of her choice, and therefore is considered nonretrogressive. The terms do not have identical meanings, but "ameliorative" may be used instead of "nonretrogressive." Cf. RICHARD K. SCHEIR ET AL., VOTING RIGHTS & DEMOCRACY 55 (1997) (stating that an ameliorative plan demonstrates a greater level of concern for minority voting than does a nonretrogressive plan).

222. The Court found that District 18 was not narrowly tailored to comply with § 5 because it increased the proportion of African-Americans within the district from 40.8% (at the time of the 1980 census) to 50.9% (following the 1990 census). See *Vera*, 116 S. Ct. at 1963. Texas argued that this change was necessary because minority candidates previously had been elected from the district and the increase ensured continued minority success. See id. In denying this contention, the plurality opinion stated that nonretrogression is not to be applied to minority candidates' actual success, but to the minority population's opportunity to elect representatives of its choice. See id.

223. See id.

224. Compare *Miller* v. Johnson, 115 S. Ct. 2475, 2493 (1995) ("In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld."), with *Shaw II*, 116 S. Ct. at 1904 ("We again reject the Department's expansive interpretation of § 5.").
the Justice Department’s policy of intentional maximization of majority-minority districts.\textsuperscript{225} In \textit{Miller}, the Court contrasted “nonretrogressive” and “ameliorative” plans.\textsuperscript{226} Any plan that provides greater opportunity for minority success appears to be ameliorative, and is nonretrogressive by definition.\textsuperscript{227} Thus, any redistricting plan that includes more majority-minority districts than previously existed must be precleared under § 5, even if more majority-minority districts could be created.\textsuperscript{228}

Section 5 may be interpreted as having two different prongs for possible violations: the “purpose” prong\textsuperscript{229} and the “results” prong.\textsuperscript{230} In \textit{Shaw II}, the United States contended that the Justice Department properly denied preclearance because North Carolina’s proposed plan violated the purpose prong of § 5.\textsuperscript{231} However, in \textit{Shaw II} and in \textit{Vera}, the Court applied a pure results standard.\textsuperscript{232} Under a results-

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  \item \textsuperscript{225} Compare \textit{Miller}, 115 S. Ct. at 2492 (“Wherever a plan is ‘ameliorative,’ ... it ‘cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color ...’” (quoting \textit{Beer} v. United States, 425 U.S. 130, 141 (1976))), \textit{with Shaw II}, 116 S. Ct. at 1904 (holding that North Carolina’s original plan was indisputably ameliorative and thus could not be subject to § 5 liability).
  \item \textsuperscript{226} \textit{See Miller}, 115 S. Ct. at 2492.
  \item \textsuperscript{227} \textit{See id.}
  \item \textsuperscript{228} \textit{See id.} (“The State’s policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that the plan ‘so discriminates on the basis of race or color as to violate the Constitution.’” (quoting \textit{Beer}, 425 U.S. at 141)). Under this interpretation, North Carolina’s stated interest in avoiding § 5 liability was rejected. A majority of the Court has not said whether a valid interest in avoiding § 5 liability could be a compelling interest for state action, though Justice Stevens would find that it is. \textit{See Shaw II}, 116 S. Ct. at 1918 (Stevens, J., dissenting). His view appears to be reasonable, and probably is acceptable to the rest of the Court, especially when considered in application to the preclearance process as codified. When the Attorney General notifies a submitting authority of its decision to object to the proposed plan, the authority has limited options. Under the guidelines, the submitting authority may ask the Attorney General to reconsider the objection or seek a declaratory judgment from the United States District Court for the District of Columbia. \textit{See 28 C.F.R. § 51.44} (1995). Taking remedial action consistent with the Attorney General’s suggestions likely would provide the least expensive and most timely solution for states. Thus, if the Attorney General were to interpret § 5 correctly, acting in accordance with the request would seem to be a compelling state interest.
  \item \textsuperscript{229} The “purpose” prong refers to the guideline established by § 5 that the proposed change “does not have the purpose” of reducing voting strength based on race. 42 U.S.C. § 1973c (1994).
  \item \textsuperscript{230} The “results” prong refers to § 5’s requirement that any change be denied that has the effect of denying or abridging the right to vote.” \textit{Id.}
  \item \textsuperscript{231} \textit{See Shaw II}, 116 S. Ct. at 1904.
  \item \textsuperscript{232} \textit{See Vera}, 116 S. Ct. at 1963; \textit{Shaw II}, 116 S. Ct. at 1904. Most recently, the Court explained its position on § 5 in \textit{Reno v. Bossier Parish School Board}, 117 S. Ct. 1491, 1501 (1997). In considering the use of § 2 evidence for a § 5 determination, the Court noted once again the two prongs of § 5. The Court explained that it has interpreted the purpose
only interpretation, changes that do not have a clear racial effect would be allowed even if the intent was to reduce a racial group’s voting strength incrementally. This interpretation conflicts with the plain language of § 5. Furthermore, in 1982, Congress amended § 2 of the Voting Rights Act to counteract a similarly narrow interpretation of that provision. In its interpretation of § 5, the Court clearly established that in the choice between “what will do” and “what might have been,” “what will do” is sufficient.

Despite the Court’s sharp criticism of the Attorney General’s maximization principles, states requiring judicial preclearance must still present a plan with sufficient minority representation to receive approval from the Department of Justice. This appears to place states between the proverbial rock and a hard place—they must undertake action that optimizes minority involvement in order to satisfy the Justice Department, but they must do so without altering the preferred position of the white majority and thereby risking a Shaw claim. The Justice Department’s new interpretation of § 5 therefore becomes crucial to state legislatures attempting to draw constitutional districts. According to Deval Patrick, the former Assistant United States Attorney General for Civil Rights:

These decisions do not mean the end of minority representation as we know it. They certainly do not mean that states can abandon their obligation under the Voting Rights Act and the Constitution to ensure fair representation and provide minority voters with an equal opportunity to elect candidates of their choice.

Speaking after Shaw II, Patrick recognized that the Justice Department had been chastised severely by the Court. He also acknowledged that § 5 clearly did not stand for the principle that if a

language of this portion in accordance with the purpose language underlying § 5, which ensures that voting changes do not result in retrogression. See id. at 1501-02. Under this interpretation, the only results violation is retrogression. See id. at 1502. Because the Court found that “evidence of a plan’s dilutive impact may be relevant” to the purpose prong of § 5 but is not necessarily “dispositive of that inquiry,” id., it is clear that the purpose prong still exists, even if it is unclear what it now means.

233. See 42 U.S.C. § 1973c (stating that a districting plan may not have the “purpose” or the “effect” of “abridging the right to vote”).

234. See supra notes 41-43 and accompanying text (discussing the congressional purpose behind § 2).

235. In fact, echoing the questions raised by the states’ rights issue, see supra notes 183-85, 193-200 and accompanying text, if a state chooses to do more than absolutely necessary to improve minority voting strength it will not only have done more than § 5 requires, but may also find itself liable for doing too much.

236. Remarks of Deval Patrick, supra note 1.

237. See id.
legislature *can* draw a majority-minority district, it must do so.\textsuperscript{238} However, the Justice Department intends to continue to be an active participant in the redistricting process, and will require that states provide valid and nonpretextual explanations of any subordination of traditional redistricting principles.\textsuperscript{239} The Voting Rights Act still requires fair representation and equal opportunity in votes cast, and the Justice Department will not "cede its responsibility to enforce the Voting Rights Act with vigor and tenacity."\textsuperscript{240} Whether this means that states still must meet two different standards both to satisfy § 5 preclearance and to bar a *Shaw* claim remains undetermined.\textsuperscript{241}

A second compelling state interest defense that North Carolina raised in *Shaw II* and that Texas raised in *Vera* was compliance with

\textsuperscript{238} See *id.* While Deval Patrick was not in his current position at the time that Georgia and North Carolina were denied preclearance, he argued that it is not and never has been the policy of the Justice Department to require maximization. See *id.* In support of this assertion, he noted that the Justice Department often precleared plans that contained less than the maximum number of majority-minority districts available. See *id.* On a theoretical basis, he argued that majority-minority districts should not be created to provide for proportional minority candidates because "[n]o discrete group in our society has such a vested right. Moreover, experience has shown that minorities can be effectively represented by whites—and vice versa—most of the time." *Id.* But, he noted, the political process should be equally open to all citizens. See *id.* Justice Stevens made much this same point in his dissent to *Shaw II*: "There is no necessary correlation between race-based districting assignments and inadequate representation. . . . Indeed, any assumption that such a correlation exists could only be based on a stereotypical assumption about the kind of representation that politicians elected by minority voters are capable of providing." *Shaw II*, 116 S. Ct. at 1911 (Stevens, J., dissenting) (citations omitted).

\textsuperscript{239} Remarks of Deval Patrick, *supra* note 1. While the administration of the Justice Department’s Civil Rights Division certainly will change following Mr. Patrick’s resignation, presumably the sentiment he expressed will continue.

\textsuperscript{240} *Id.*

\textsuperscript{241} Double standards are especially troublesome to states once litigation begins. North Carolina and Texas found their submissions and proceedings seeking § 5 preclearance used as evidence against them in *Shaw II* and *Vera* to show that race had been the predominant factor in drawing districts. See *Vera*, 116 S. Ct. at 1952-53; *Shaw II*, 116 S. Ct. at 1904. This is an ironic twist, as the purpose of preclearance is to assure the Attorney General that the interests of minority voters have been adequately considered and protected; thus, the submissions are likely to focus on these factors. See *Vera*, 116 S. Ct. at 1985 (Stevens, J., dissenting).

Both the North Carolina and Texas districts also were challenged initially as political gerrymanders. See *Pope v. Blue*, 809 F. Supp. 392, 394 (W.D.N.C.) (original North Carolina challenge), *summarily aff’d*, 506 U.S. 801 (1992); *Terrazas v. Slagle*, 789 F. Supp. 828, 830 (W.D. Tex.) (original Texas challenge), *aff’d*, 505 U.S. 1214 (1992). In the Texas case, the district court and the plurality of Justice O’Connor, Chief Justice Rehnquist, and Justice Kennedy construed the earlier testimony of state representatives that "race was the primary consideration in the construction of District 30" as undercutting the state’s claim that race was only one of several motivating factors. See *Vera*, 116 S. Ct. at 1957. Thus, the adversarial process of maximizing the benefits of one’s case provides dangerous pitfalls for the next challenge.
§ 2 of the Voting Rights Act. Section 2 is broader than § 5, and provides that "[n]o voting qualification or ... procedure shall be imposed or applied by any State ... which results in the denial or abridgment of the right of any citizen ... to vote on account of race or color." In Shaw II and Vera, the Court assumed for the sake of argument that § 2 compliance was a compelling state interest, but rejected the North Carolina and Texas plans for not being narrowly tailored. The Court never reached the question of whether compliance with § 2 is, in fact, a compelling state interest.

While the Court did not resolve the question of whether § 2 compliance is a compelling state interest, it did address narrow tailoring, the second stage of strict scrutiny review. The Court addressed two factors determining whether a majority-minority district created under § 2 is narrowly tailored: (1) the geographic compactness of the minority group and district; and (2) the need for a direct correlation between the injured minorities and the remedy district.

A minority group must be geographically compact in order for § 2 to necessitate a majority-minority district. Compactness is a basic element of § 2 districts, and has been required since the Court established the Gingles factors. If members of a minority group do not live sufficiently close together, § 2 does not require a state legislature to draw a non-compact district. Thus, when a non-compact district is drawn to include a non-compact minority population, the fact that the district is narrowly tailored does not establish its constitutionality because § 2 does not even require the district. The plurality opinion in Vera found this reasoning

243. See Vera, 116 S. Ct. at 1960; Shaw II, 116 S. Ct. at 1905. However, in three separate opinions in Vera, five of the Justices expressly stated that compliance with § 2 is a compelling state interest. See Vera, 116 S. Ct. at 1969 (O'Connor, J., concurring); id. at 1989 (Stevens, J., dissenting); id. at 2007 (Souter, J., dissenting). Justices Ginsburg and Breyer joined Justices Stevens's and Souter's dissents. See id. at 1950.
245. See Gingles, 478 U.S. at 50. The first requirement is that the minority group be sufficiently large and geographically compact to form a majority in a single-member district. See id. The second requirement is that the minority group be politically cohesive, and the third requirement is that the minority group be able to demonstrate that the majority votes sufficiently as a bloc to defeat the minority candidate. See id. at 51.
246. See id. at 50.
consistent with the opinion in Johnson v. DeGrandy.\textsuperscript{247} Justice Stevens argued that narrowly tailoring a district to remedy a § 2 violation is not as constrained as the Vera plurality suggested. In his dissenting opinion in Vera, Justice Stevens asserted that a state’s remedy for a § 2 violation is not limited to drawing compact majority-minority districts.\textsuperscript{248} Instead, Justice Stevens stated that a non-compact district may be narrowly tailored when created by a state legislature, although not necessarily if decreed as a judicial remedy.\textsuperscript{249} Furthermore, in his Shaw II dissent Justice Stevens relied on DeGrandy, the same precedent cited by the majority, to argue that North Carolina’s plan was narrowly tailored based on the inclusion of a second majority-minority district.\textsuperscript{250} According to Justice Stevens, the second district protected the state against a potential claim that more districts could have been drawn, and established that the plan was based on the “totality of the circumstances.”\textsuperscript{251}

Writing for the Court in Shaw II, Chief Justice Rehnquist specifically debated Justice Stevens’s interpretation of DeGrandy. He found Justice Stevens’s use of DeGrandy flawed based on Justice Stevens’s failure to acknowledge the DeGrandy Court’s presumption that the Florida districts at issue in that case were lawfully drawn, and on the express statement in DeGrandy that a § 2 claim required the “possibility of creating more than the existing number of reasonably compact districts.”\textsuperscript{252} Thus, according to the Chief

\textsuperscript{247} See Vera, 116 S. Ct. at 1961 (“If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district; if a reasonably compact district can be created, nothing in § 2 requires the race-based creation of a district that is far from compact.”). But, while § 2 does not require a non-compact district, it does not forbid such a district either, as long as the criteria used to develop the district are acceptable. See id. at 1972 (Kennedy, J., concurring).

\textsuperscript{248} See id. at 1989 (Stevens, J., dissenting).

\textsuperscript{249} See id. (Stevens, J., dissenting).

\textsuperscript{250} See Shaw II, 116 S. Ct. at 1920-21 (Stevens, J., dissenting).

\textsuperscript{251} Id. (Stevens, J., dissenting). After considering the Gingles preconditions, a court or districting group should then review the “totality of the circumstances” to determine whether members of a protected class have less opportunity to participate in the electoral process, thereby establishing a § 2 violation. See id. at 1905 (citing Johnson v. DeGrandy, 512 U.S. 997, 1000 (1994)); see also supra notes 83-94 and accompanying text (reviewing DeGrandy).

\textsuperscript{252} Shaw II, 116 S. Ct. at 1906 n.8 (quoting DeGrandy, 512 U.S. at 1008) (alteration in original). Justice Stevens also made the compelling argument that in requiring states to draw districts both compact and narrowly tailored under these circumstances, the Court is requiring a state to “draw the precise district that it believes a federal court would have the power to impose. . . . [T]his forces States to imagine the legally ‘correct’ outcome of a
Justice, the Court should compare the proposed plan to the status quo, not to other plans that could possibly be created.

Two Justices joined Justice Stevens' dissents in Shaw II and Vera, making the correlation between narrowly tailored and non-compact districts appear somewhat unsettled. Since DeGrandy arguably supports either position, a future shift in the majority on this issue is possible. In any future review of narrow tailoring, the determining factor may be the shape of the district and the geographically compact presence of the minority population. Where minority groups form substantial portions of the population within a relatively small area, a comparatively easy § 2 claim may arise. However, when minorities form a substantial portion of the total population but do not live in segregated units, the intent behind § 2 is much more difficult to discern. The debate continues because a majority of the Court has not clearly identified the balancing point between representative and contortionist districts.

The second factor in narrow tailoring of a § 2 district is whether the § 2 district directly remedies the injured minority group. On this point, the Shaw II Court is clear. If a § 2 defense is pled, the remedy district must address the established § 2 violation. North Carolina's Twelfth District did not encompass the areas of the state in which the Gingles criteria suggested a violation existed, although there was some argument as to whether the district included some of these areas. In the absence of a § 2 injury to the general

lawsuit that has not even been filed.” Id. at 1922 (Stevens, J., dissenting); see also supra notes 193-200 and accompanying text (discussing this intrusion upon states rights).

253. See Vera, 116 S. Ct. at 1989 (Stevens, J., dissenting) (joined by Justices Ginsburg and Breyer); Shaw II, 116 S. Ct. at 1920-21 (Stevens, J., dissenting) (same).

254. Justice Stevens's argument blurred the distinction between a § 2 and a § 5 Voting Rights Act claim. Typically, district maximization arguments have arisen in the context of § 5 liability. See supra notes 109-14 and accompanying text. Here, Justice Stevens raised it with a § 2 claim, based on the numerical or geographical criteria within the Gingles preconditions. For the Court to accept this position, it must be willing to accept Justice Stevens's contention that non-compact districts may be an acceptable remedy. Otherwise, the maximization argument is moot because the compactness requirement is inherently self-limiting.

255. Indeed, this is the historical precedent behind the Voting Rights Act. In order to submerge minority voting presence, states drew districts to separate geographically compact communities, thus dividing the votes among several district, so that none of the votes had a chance of being combined with those of similar interests. See supra note 25 and accompanying text.

256. This situation is exactly that faced in North Carolina. African-Americans make up approximately 22% of the total population, but are dispersed throughout the state.

257. See Shaw II, 116 S. Ct. at 1906.

258. See id. at 1906-07 (noting that District 12 incorporates the same urban component that alternative majority-minority districts have included).
population, the Court held that a generalized remedy was inappropriate, rejecting North Carolina’s “general injury” interpretation of § 2. The Court asserted that § 2 was designed to protect the right of each individual to vote, whereas the “general injury” interpretation sought to guarantee the right to vote to minorities as a group.

In addition to compliance with the Voting Rights Act, North Carolina and Texas raised remedying past discrimination as a compelling state interest. In both Shaw II and Vera, the Supreme Court rejected this justification for the challenged districts. The Court did not deny that either state had a history of discrimination, or that the effects of discrimination remained, as exemplified by the bloc voting of the white population. However, the Court in Shaw II found that North Carolina’s legislators lacked sufficient background information during the redistricting process for past discrimination to provide a compelling state interest. Instead of a generalized injury, the Court wanted evidence of “identified discrimination” and a “strong basis in evidence” that remedial action was necessary. These criteria do not eliminate this historical interest as a defense, but they do establish a need for certain evaluations to be performed so that the evidence is before legislators during the redistricting process. The Gingles criteria are the most accepted form of

259. See id. at 1906 (“To accept that the district may be placed anywhere implies that the claim, and hence the coordinate right to an undiluted vote ..., belongs to the minority as a group and not to its individual members. It does not.”).

260. See id. However, the contradiction in wording between the Voting Rights Act and the Fourteenth Amendment exemplifies the conflict in their intent. Compare 42 U.S.C. § 1973 (1994) (stating that a violation of the right to vote occurs when “the political processes ... are not equally open to participation by members of a class of citizens”), with U.S. CONST. amend. XIV, § 1, cl. 1 (stating that no state may “deny to any person” the equal protection of the laws). The Equal Protection Clause consistently has been applied to claims of individuals; it is unlikely that the Court would be willing to establish compliance with § 2 as a compelling state interest if the claim were brought on behalf of a protected group rather than the individual.

261. See Vera, 116 S. Ct. at 1962-63; Shaw II, 116 S. Ct. at 1902-03.

262. See Shaw II, 116 S. Ct. at 1902-03. The district court, which would have validated the district, did not accept this argument as compelling. See id.; see also Vera, 116 S. Ct. at 1963 (reiterating this point established in Shaw II).

263. See Vera, 116 S. Ct. at 1962; Shaw II, 116 S. Ct. at 1902-03. However, the Court has provided little guidance as to what evidence will be acceptable.

264. The evaluations must be compiled and available at the time the districts are drawn. In Shaw II, the Supreme Court noted that two reports compiled by a historian and a social scientist supported the legislature’s contentions; however, since these reports were prepared for litigation, they were disallowed by the Court because the legislature could not have previously relied upon them. See Shaw II, 116 S. Ct. at 1903. In Vera, Texas had relied on its history of voting discrimination exhibited in the case law and § 5 Voting
evaluating vote dilution, and they are essential to a § 2 claim.\textsuperscript{265} Although not expressly stated, the Court appeared to require that the strong basis in evidence test for a § 2 claim be satisfied for a successful use of this defense.

The Court's requirement of strong, timely evidence of discrimination is consistent with its requirements for proof in a traditional vote dilution claim;\textsuperscript{266} however, the effect is different because the state must have established its position prior to a suit being filed. Legislators may not rely on their own awareness of political and social norms within the state if they are to present successfully a "strong basis in evidence." Evidence of this type would only be anecdotal in nature; however, in the absence of a recent study or survey of voting in the state, this may be the only evidence available. If scholarly studies verifying the legislators' anecdotal evidence are performed later, they will be denigrated by the Court as post hoc rationalizations.\textsuperscript{267}

Taken together, the majority and plurality opinions in \textit{Shaw II} and \textit{Vera} indicate the Court's current position, as well as future issues that are likely to arise. While leaving open some questions, such as the increased tension between federal courts and state legislatures,\textsuperscript{268} and the continued recognition of a claim without an articulable injury,\textsuperscript{269} these decisions do indicate factors for state legislatures to consider when determining whether a district is justified by a compelling state interest, and whether it is narrowly tailored to satisfy such an interest.\textsuperscript{270} Because of the Court's closely divided position, Justice O'Connor's separate concurring opinion deserves special attention as an indicator of how the open questions may be further resolved.

Justice O'Connor's concurrence to \textit{Vera}\textsuperscript{271} is significant for two primary reasons. First, Justice O'Connor specifically stated that her

\begin{footnotesize}
\begin{enumerate}
\item Rights Act coverage as a historical record, but the Court apparently did not find this material satisfactory. \textit{See Vera}, 116 S. Ct. at 1962-63.
\item \textit{See supra} notes 67-69 and accompanying text.
\item \textit{See Growe v. Emison}, 507 U.S. 25, 41-42 (1993) (finding the district court in error for assuming the presence of racial bloc voting rather than requiring plaintiffs to prove that such voting occurred in the specific area); \textit{Thornburg v. Gingles}, 478 U.S. 30, 52-53 (1986) (determining a racial bloc voting claim based primarily on a special study prepared for plaintiffs).
\item \textit{See Vera}, 116 S. Ct. at 1955; \textit{Shaw II}, 116 S. Ct. at 1903.
\item \textit{See supra} notes 193-204 and accompanying text.
\item \textit{See supra} notes 208-17 and accompanying text.
\item \textit{See supra} notes 219-67 and accompanying text.
\item Justice O'Connor signed the plurality opinion, but wrote a separate concurring opinion to explain her reasoning. \textit{See Vera}, 116 S. Ct. at 1968 (O'Connor, J., concurring).
\end{enumerate}
\end{footnotesize}
intent was to provide a more structured framework for the general principles articulated in the Shaw II majority and Vera plurality opinions. Second, Justice O'Connor appears to be the Court's swing vote on this issue. Most of the Justices have articulated and maintained their respective positions. Justices Stevens, Souter, Ginsburg, and Breyer are firmly opposed to limiting the application of the Voting Rights Act, particularly when it has been used to increase minority participation in the electoral process. Chief Justice Rehnquist, and Justices Kennedy, Scalia, and Thomas believe just as firmly that these restrictions are necessary to safeguard the Fourteenth Amendment. Justice O'Connor, however, is a moving target; her opinions have varied in their valuation of factors, and districting groups have had difficulty determining what will win her approval. Moreover, she appears to have been the deciding vote in several voting rights cases. Because of her position as the swing vote, some commentators believe that Justice O'Connor's Vera concurrence reveals the necessary guidelines for drawing constitutional districts.

272. See id. at 1969 (O'Connor, J., concurring).
274. See Vera, 116 S. Ct. at 1971-72 (Kennedy, J., concurring); id. at 1973 (Thomas, J., concurring in the judgment) (joined by Justice Scalia). Chief Justice Rehnquist's position is inferred from the fact that he authored the Shaw II opinion and joined the majority in these cases. See Vera, 116 S. Ct. at 1950; Shaw II, 116 S. Ct. at 1899; Miller, 115 S. Ct. at 2482.
275. Interview with Adam Stein, Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., in Chapel Hill, N.C. (Sept. 17, 1996). Some scholars have speculated that Justice O'Connor initially voted to affirm the North Carolina District Court decision, holding that District 12 was narrowly tailored, but found the Texas districts unconstitutional. She then wrote this concurrence to establish the analysis she used in reaching these decisions. As the Supreme Court's deliberations are not public, this theory is based purely on circumstantial evidence. See Under the Dome, Scholars Speculate on 12th, NEWS & OBSERVER (Raleigh, N.C.), July 24, 1996, at A3.
276. See Vera, 116 S. Ct. at 1950 (providing the third vote to the plurality opinion, with two Justices concurring in the judgment, and filing her own concurring opinion); Shaw II, 116 S. Ct. at 1898 (providing the fifth vote to the majority opinion); Miller, 115 S. Ct. at 2482 (joining the five-Justice majority, but also filing a concurring opinion); Shaw v. Reno, 509 U.S. 630, 632 (1993) (Shaw I) (joining the five-Justice majority and delivering the opinion of the Court).
Justice O'Connor's first guideline provides that "so long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny." In support of this proposition, she cites both the plurality opinion and the dissenting opinions of Justices Stevens and Souter. Curiously, this point is more strongly supported by the text of the dissenting opinions. For instance, in his analysis, Justice Stevens considered the Texas redistricting plan on a factor-by-factor basis, asserting that at least two traditional nonracial factors—community and incumbency protection—were not subordinated to race. In opinion was "perhaps the most important opinion in either case"); Edwin M. Speas, Jr., Senior Deputy Attorney General, Remarks at the Meeting of the Senate Select Committee on Redistricting (July 10, 1996) (transcript available in Submission, supra note 194, ¶ 97C-26F-4D(1)).


279. See id. (O'Connor, J., concurring) (citing id. at 1951-52 (plurality opinion); id. at 1976-78 & n.8, 1985 (Stevens, J., dissenting); id. at 2003, 2007, 2011 (Souter, J., dissenting)). Justice O'Connor also emphasized that strict scrutiny is applicable when there is a nexus between the neglect of traditional districting criteria and that neglect is due to the misuse of race. See id. at 1969 (O'Connor, J., concurring).

280. See id. at 1977-78 (Stevens, J., dissenting) (theorizing that all equal protection determinations are really a form of rational basis scrutiny, that the term "strict scrutiny" describes only the likelihood of success, and that classifications based on race rarely have been considered to have a legitimate basis); id. at 2003 (Souter, J., dissenting) (advocating that the court not find a Shaw I injury when attention was paid to race simply to remedy or avoid dilution, and supporting the plurality opinion that strict scrutiny not be applicable in all situations). But both dissents also noted that while the plurality may hold open the option of something less than strict scrutiny, it has failed to exercise that position. See id. at 1977 (Stevens, J., dissenting) ("The plurality's statement that strict scrutiny 'does [not] apply to all cases of intentional creation of majority-minority districts,' merely caps a long line of discussions, stretching from Shaw I to Shaw II, which have both expressly and implicitly set forth precisely that conclusion." (citation omitted)); id. at 2003 (Souter, J., dissenting).

281. See id. at 1985-86 (Stevens, J., dissenting). While the district court found the appellants' descriptions of the communities of interest based on "land use, family demographics, and transportation corridors" as an accurate depiction of the district, it decided these were not legitimate legislative considerations because they lacked evidentiary support. See id. at 1985 (Stevens, J., dissenting) (citations omitted).

282. See id. at 1986-87 (Stevens, J., dissenting). This argument is even more convincing due to the strong evidence supporting it. The fact that Justice O'Connor did not accept it is puzzling because she is the only current member of the Court to have held political office, and she tends to apply a very "politics is politics" approach to questions of political intervention. See Davis v. Bandemer, 478 U.S. 109, 144-45 (1985) (O'Connor, J., concurring in the judgment). Justice O'Connor views the two issues as entirely separate—while race is a matter of biology, political affiliation is key to the political trade and judicial intervention in this area creates risk in the legislative arena. See id. at 161 (O'Connor, J., concurring in the judgment). It is possible that Justice O'Connor neglected
contrast, Justice Thomas, concurring in the judgment and joined by Justice Scalia, argued that strict scrutiny applied to all race-based classifications by the government. Once a state created a majority-minority district, as Texas admitted it did, the state crossed beyond mere awareness of race. Under these circumstances, Justices Thomas and Scalia believed that the plan should be subjected to strict scrutiny. Meanwhile, in his concurring opinion, Justice Kennedy took issue with Justice O'Connor's assertion that strict scrutiny is applicable only when race predominates.

In drawing a new district, it may be helpful to limit the consideration of race. However, such a limitation is inherently weak in the long run. Once a majority-minority district is created and a minority representative is elected, a districting organization can no longer consider that district in terms of race. Section 5 cannot be used to justify an increase in the percentage of minorities within the district, even if the party responsible for drawing new districts considers such a measure necessary to provide for incumbency protection. Thus, in an ironic twist, the minority representative will be denied incumbency protection to which non-minority representatives are entitled. Other race-neutral districting criteria are not required by the Constitution, but have been adopted by the Court based on the general criteria used by states. However, the Court did not give any weight to the fact that North Carolina and Texas followed their own historical application of contiguity and to recognize the political factors present in order to keep the case strictly racial, and therefore justiciable in her opinion. Whether Justice O'Connor's concurrence can be relied upon in future cases seems to depend on whether it is believed that the Texas appellants made a successful case for incumbency protection as the predominant consideration.

283. See Vera, 116 S. Ct. at 1972-74 (Thomas, J., concurring in the judgment).
284. See id. (Thomas, J., concurring in the judgment). The methodology used by Justice Thomas is confusing, as he draws a line between forms of intent, finding that intentional creations occur when “a majority-minority district is created ‘because of’ and not merely ‘in spite of,’ racial demographics.” Id. at 1973 (Thomas, J., concurring).
285. See id. at 1971 (Kennedy, J., concurring). He considers this position dicta and not binding on himself or the Court. See id. (Kennedy, J., concurring).
286. See id. at 2008 (Souter, J., dissenting). Justice Souter's hypothesis is based on the fact that party affiliation may not be an acceptable proxy for protecting race and the limit to which race may be considered still has not been clearly defined. See id. (Souter, J., dissenting). This point is key because in order for minorities to be elected, they must first win a primary within their own party; thus, the presence of members of the candidate's own party can be insufficient to aid a minority candidate if racial bloc voting exists within the party.
287. See id. at 2007-08 (Souter, J., dissenting).
respect (or lack of it) for political boundaries. Thus, it is difficult to conceive of a future case in which Justice O'Connor will find that traditional criteria have not been subordinated to race.

Justice O'Connor's second guideline states that when racially polarized voting exists, § 2 prohibits states from drawing districting schemes "that would have the effect that minority voters 'have less opportunity than other members of the electorate to . . . elect representatives of their choice.'" Her plurality opinion in Vera indicates that states must demonstrate this effect by showing the presence of the Gingles factors. As with her first guideline, Justice O'Connor supports her second guideline by referencing both the plurality and the dissenting opinions. Although not contradicted directly, this position is not as secure as Justice O'Connor would have it appear. Justice O'Connor's statement that § 2 prevents districts that provide "less opportunity" to minority voters could be referring to the principle of retrogression. However, in Vera, Shaw II, and Miller, the Court narrowed the concept of retrogression in the context of § 5, thereby limiting the enforcement arm of the statute, particularly with regards to an ameliorative districting plan that increases the percentage of minorities within a district. Justice O'Connor's statement that § 2 prevents districts that provide "less opportunity" for minority voters is at odds with this narrow interpretation of § 5. If, however, "less opportunity" does not refer to retrogression, then it is unclear exactly what voting infringement Justice O'Connor is referencing.

In her third guideline, Justice O'Connor states that avoiding a § 2 violation is a compelling state interest. Although a majority of the current Justices probably agree with Justice O'Connor, that fact

288. See id. at 1987 (Stevens, J., dissenting). Specifically, North Carolina has set its own guidelines for contiguity, and recognizes point contiguity, while Texas has never placed a priority on maintaining political boundaries. See id. at 1952.


290. Speaking for the Court, Justice O'Connor disagreed with Justice Stevens's and Justice Souter's warnings that a legislature will have to draw the district that federal courts would choose, arguing instead that a reasonably drawn district, subject to the state's discretion, will be able to pass strict scrutiny. But she noted that "[s]trict scrutiny remains, nonetheless, strict." Id. at 1961. This admonition is immediately followed by an application of the Gingles preconditions to establish a "strong basis in evidence." Id.

291. See id. at 1970 (O'Connor, J., concurring).

292. See id. (O'Connor, J., concurring).

293. See Johnson v. DeGrandy, 512 U.S. 997, 1028-29 (1994) (Kennedy, J., concurring in part and concurring in the judgment) (emphasizing that this decision interpreted only the application of the Voting Rights Act and not its constitutionality); see also Vera, 116 S.
could change with a change in the makeup of the Court. Chief Justice Rehnquist might hold that § 2 is not a compelling state interest, and given the opportunity, Justices Scalia and Thomas would likely declare the entire Voting Rights Act unconstitutional. Additionally, Justice O'Connor does not recognize a blanket § 2 defense, but instead qualifies this compelling state interest with the requirement that the Gingles factors be present and that there be a "strong basis in evidence" that the Gingles preconditions have been satisfied. Thus far, a "strong basis in evidence" has been defined only in the negative. A generalized assumption does not provide a "strong basis in evidence," even if the assumption is based on state legislators' personal experience and knowledge of their districts and communities; in addition, a "strong basis in evidence" cannot be established with findings compiled after the initiation of litigation.

According to Justice O'Connor's fourth guideline, "if a State pursues that compelling interest by creating a district that 'substantially addresses' the potential liability ... and does not deviate substantially from a hypothetical court-drawn § 2 district for predominantly racial reasons, ... its districting plan will be deemed narrowly tailored." Oddly, Justice O'Connor seems to be on the most solid ground with her weakest point. This guideline is directly in line with the Court's decision in Shaw II rejecting the generalized remedy defense, and with the decision in Vera that District 30 was unacceptably altered because race was used as a proxy. However, Justice O'Connor's guideline includes the qualification that the district must "not deviate substantially from a hypothetical court-drawn § 2 district." This qualification substantially weakens the

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Ct. at 1998 (Souter, J., dissenting) (noting that Justice O'Connor's separate opinion reassures the viability of § 2); supra note 243 and accompanying text (reviewing the previous opinions of the Justices on the status of § 2).


296. See id. (O'Connor, J., concurring); see also id. at 1986 (Stevens, J., dissenting) (recognizing that state legislators are not allowed to rely on their own experience); Shaw II, 116 S. Ct. at 1903 (denying credibility to North Carolina's evidence of racial discrimination in voting dated 1994).


300. Vera, 116 S. Ct. at 1970 (O'Connor, J., concurring) (emphasis added). Justice Souter noted in dissent that this is merely a foreshadowing of what may be the Court's ultimate position and determination if it does not curb this judicial trend. See id. at 2008-09 (Souter, J., dissenting). As yet, states have not been required to comply so closely with a judicial interpretation. Such a conclusion portends that clear guidelines would be
statement on constitutional principle. Every Justice has agreed at some point that the primary responsibility for drawing congressional districts rests with states and their legislatures, yet Justice O'Connor's guideline requires a state to second-guess successfully the Court's supplementary role, and draw districts in accordance with the Court's hypothetical preferences.

In her final guideline, Justice O'Connor reiterated that "districts that are bizarrely shaped and non-compact, and that otherwise neglect traditional districting principles and deviate substantially from the hypothetical court-drawn district, for predominantly racial reasons, are unconstitutional." This guideline is subject to the same criticism of forcing compliance with a hypothetical court-drawn district. More important is the contrast between Justice O'Connor's presentation of these factors and the actual application of the factors by the Court. When presented by Justice O'Connor and laid out as above, the accumulation of factors that must occur for a district to be regarded as unconstitutional seems fairly substantial. In application, though, these factors are combined and seem to fall together in a domino-like effect. For example, if a district is bizarrely shaped it will probably be non-compact. The Court's strong emphasis on racial factors means that any non-compact majority-minority district must have been accomplished by a subordination of traditional districting principles, an action that the Court would not have undertaken in a hypothetical Court-drawn plan. Therefore, the district would be unconstitutional.

Justice O'Connor's point-by-point analysis seems to neglect the manner in which each of these factors interrelates, and ignores their established for states as to how and what factors the Court would consider, but the price for such clarity is significant. Once established, states would not be able to deviate based on any factor that would affect compactness, and state discretion would be severely limited. See id. (Souter, J., dissenting).

301. See id. at 1960 (plurality opinion of Justice O'Connor, Chief Justice Rehnquist, and Justice Kennedy); id. at 1998-99 (Souter, J., dissenting) (joined by Justices Ginsburg and Breyer); id. at 1990 (Stevens, J., dissenting); Miller v. Johnson, 115 S. Ct. 2475, 2488 (1995) (recognizing in a majority decision joined by Justices Scalia and Thomas that reapportionment is the duty and responsibility of the state); cf. Voinovich v. Quilter, 507 U.S. 146, 156 (1993) (noting in a unanimous decision that redistricting is a domain of the state, in a case involving state legislative apportionment).

302. Justice Kennedy rejected the narrow tailoring analysis that Justice O'Connor suggested. See Vera, 116 S. Ct. at 1972 (Kennedy, J., concurring). He would have held that a second predominant-factor inquiry is unnecessary because if a race-based district cannot be justified under §2, it is not serving a compelling interest. See id. (Kennedy, J., concurring). It is unclear whether Justice Kennedy rejected the intentional creation of a majority-minority district or just the process for determining narrow tailoring.

303. Id. at 1970 (O'Connor, J., concurring).
cumulative impact. Thus, Justice O'Connor's concurrence seems less likely to reveal the requirements necessary to influence the Court. If the Court applies these guidelines as general principles, rather than as specific criteria, then Justice O'Connor's concurrence may be a sufficient measuring tool for constitutionality. Loosely interpreted, the guidelines Justice O'Connor suggested could be considered a mission statement for the Voting Rights Act: Allow limited flexibility in remedying racial discrimination, once clearly identified, but bar race from becoming the predominant consideration of legislatures in redistricting. Viewing the Voting Rights Act in this limited manner may restrict its application, but may also preserve its constitutionality. Unfortunately, until the Court decides its next redistricting case, it is unclear whether the Court will apply a broad or narrow lens to redistricting review.

Despite the unsettled nature of the law, the districting process continues for state and local governments. Several procedural changes are likely to occur as a result of the judicial pronouncements in Shaw II and Vera. The most obvious procedural change is that in order to provide a § 2 defense, state districting decision-makers must clearly present the § 2 case at the outset of the process. Generalized assumptions are insufficient and the state can protect itself only by establishing a strong basis of evidence on which to rely. While this preventive measure will add to the time and cost of the redistricting process, it will cost less than trying to litigate in its absence. However, the legislative process itself makes it difficult to establish a body of evidence on which all of the legislators rely. The legislative branch rarely, if ever, can be instructed as a whole on the statistical factors present throughout the area. The substantive educational process will have to occur at the committee level. Committee-level education should be acceptable to the Court, as long as the general body is provided with findings of fact, but the Court has not ruled definitively on this point.

A state or municipality also may protect itself by establishing at the outset what criteria it considers relevant to redistricting decisions.


305. In different contexts, the Supreme Court has upheld legislative action by a committee as acceptable to represent action by the body, so long as the action is not judicial in nature. Compare Nixon v. United States, 506 U.S. 224, 227 (1993) (accepting impeachment trial by committee of Senate when transcripts but not full evidence were made available to the full body), with INS v. Chadha, 462 U.S. 919, 959 (1983) (holding that a congressional veto power exercised at the committee level in immigration proceeding was unconstitutional).
If it then abides by its own factors, it may contend fairly that it applied traditional guidelines. To be even more effective, this listing should establish a hierarchy of criteria that does not include race as a top priority.

A second procedural change after Shaw II and Vera is likely to be an increased focus on the creation of "influence districts" rather than majority-minority districts. Influence districts are districts that include a substantial percentage, but not a majority, of minorities. These districts also include groups of majority voters less likely to engage in racial bloc voting, and who are more likely to be receptive to coalition-building. There is no settled rule on the percentage of minorities that must be present in a district in order to influence it; generally, courts have considered influence districts to be districts in which at least twenty-five percent of the voters belong to a minority group. However, courts also have recognized that in close elections substantially smaller groups may be influential.

In Gingles, the Supreme Court expressly left open the possibility of influence districts. The Court noted that the standards it was creating for a §2 violation did not necessarily "pertain to[] a claim brought by a minority group[] that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multi-member district impairs its ability to influence elections." In two recent decisions, Holder v. Hall and Voinovich v. Quilter, the Supreme Court expressly avoided answering the


307. The court in Rural West Tennessee African-American Affairs Council, Inc. v. McWherter, 877 F. Supp. 1096 (W.D. Tenn.), aff'd, 116 S. Ct. 42 (1995), considered this question extensively and advocated a standard rule that any district in which a minority group composed 25% to 50% of the voting age population be considered an influence district. See id. at 1104. While not ruling out the possibility that smaller districts could be influential, the Court found that the proof required for an influence district under these circumstances would be difficult because the amount of influence would vary with each close election. See id.

308. Thornburg v. Gingles, 478 U.S. 30, 46-47 (1986) (emphasis added); see also Growe v. Emison, 507 U.S. 25, 41 (1993) (noting that Gingles left open the possibility of influence dilution claims and that the viability of such districts was not addressed in this case either).

309. 114 S. Ct. 2581, 2596 (1994) (recognizing that the definition of what is an effective vote may be further altered, particularly in light of the reserved question as to whether a vote dilution claim may be brought for failure to create minority "influence" districts).

310. 507 U.S. 146 (1993). The plaintiffs in this case charged that Ohio's legislative apportionment scheme "packed" minorities into minority and "super-majority" districts, thereby diluting the more extensive voting strength they would have had if influence districts had been created instead. See id. at 149-50. Justice O'Connor delivered the opinion for a unanimous Court. See id. at 148. The Court evaluated the plaintiffs' claim while expressly reserving judgment on the question of whether an influence dilution claim
question of whether influence districts are constitutional. The question generally has arisen in the context of determining whether § 2 requires the creation of an influence district where there is an insufficient minority population to comprise a majority-minority district. The circuits are split on the question and decisions have taken three different directions. Most of the courts have applied the Gingles factors strictly, finding that plaintiffs were unable to raise a § 2 claim because they could not meet the first precondition, requiring that a minority group be large and compact enough to form a majority in a single member district. The decision in McNeil v. Springfield Park District was definitive in its rejection of the influence-district claim. In McNeil, the Seventh Circuit argued that the Supreme Court established three requirements for a § 2 claim and that to recognize another claim based on “ability to influence” would obliterate the Supreme Court’s bright-line test. The McNeil court warned that doing away with the bright-line test would flood the courts with marginal § 2 claims that would be difficult to resolve because the ability to influence an election is much harder to

311. See Latino Political Action Comm. v. City of Boston, 784 F.2d 409, 415 (1st Cir. 1986). This case, involving “packing” of districts, was decided prior to Gingles. In denying the claims of Hispanic voters, the court noted that the small Hispanic population was spread throughout the city; thus, a claim was not present because rather than “‘cracking’ a cohesive Hispanic community the district lines merely fails [sic] to string together dispersed pockets of Hispanic population to maximize its voting strength.” Id. at 415 (citations omitted). Similarly, the Asian minority vote, comprising 2.69% of the population, was found so small that its submergence was inevitable, but that in close elections the minority group could have significant influence in swinging electoral outcomes. See id.; see also Hastert v. State Bd. of Elections, 777 F. Supp. 634, 653 (N.D. Ill. 1991) (agreeing with other courts that the Voting Rights Act does not preclude influence dilution claims, but finding that before identifying an injury and fashioning an appropriate remedy, it was necessary to determine that the majority-of-minorities precondition for a single-member district was met); Skorepa v. City of Chula Vista, 723 F. Supp. 1384, 1391 (S.D. Cal. 1989) (noting that until the Supreme Court expands § 2 claims to influence districts, the District Court for the Southern District of California will not recognize such claims based solely on a footnote in the Gingles opinion).

312. 851 F.2d 957 (7th Cir. 1988).

313. Id. at 947. Judge Cudahy noted that the Supreme Court finally had enunciated a clear standard in Gingles, which the Court had failed to do in prior decisions and which the Senate had failed to do in its 1982 report. By affirming the district court’s summary judgment for the defendants in McNeil, Judge Cudahy prevented a full hearing on the matter; the facts suggest that such a hearing would have shown that cohesive bloc voting did not exist to bar the election of a candidate chosen by the African-American community. See J. Morgan Kousser, Beyond Gingles: Influence Districts and the Pragmatic Tradition in Voting Rights Law, 27 U.S.F. L. REV. 551, 570-71 (1993).
establish than the ability to \textit{win} an election.\textsuperscript{314} Interestingly, the minority population in \textit{McNeil} comprised forty-three percent of the voting age population. Thus, the crossover voting necessary to win an election was minimal. If the court had applied the \textit{Gingles} factors as a unitary test, which it claimed to do, the court likely would have affirmed the validity of influence district claims and would have found sufficient evidence to entertain the plaintiff's claim.\textsuperscript{315}

\textit{Garza v. County of Los Angeles}\textsuperscript{316} took a second direction. The Court of Appeals for the Ninth Circuit affirmed the lower court's holding that the \textit{Gingles} factors apply when plaintiffs seek to establish a § 2 claim based on disparate impact.\textsuperscript{319} However, when plaintiffs can present evidence of disparate \textit{intent} in the drawing of the districts, establishment of the \textit{Gingles} factors is presumed.\textsuperscript{319} Thus, under \textit{Garza}, plaintiffs must establish the three preconditions only when a claim rests on the disparate impact of a facially neutral electoral scheme. The court rejected the county's argument that it was acceptable to dilute Hispanic votes in order to protect Anglo

\textsuperscript{314} See \textit{McNeil}, 851 F.2d at 947. This portion of the \textit{McNeil} opinion has been most often cited in later decisions, noting the general concern over a flood of difficult claims with little evidentiary support. Judge Cudahy supported his reliance on the bright-line test with Justice O'Connor's concurrence to the \textit{Gingles} opinion. See \textit{id}. However, Justice O'Connor's opinion expressly adopted no view as to whether it should be a threshold requirement for a minority group to show the ability to constitute a minority in a single-member district. Instead, she noted that the difference between the "ability to influence" and the "ability to elect" is a fine line, and groups not large enough to form a majority in a district still may be able to demonstrate sufficient voting strength to elect candidates of their choice. See \textit{Thornburg v. Gingles}, 478 U.S. 30, 90 (1986) (O'Connor, concurring in the judgment). Indeed, in \textit{Voinovich}, in considering an influence dilution claim \textit{arguendo}, the Court's opinion, authored by Justice O'Connor, noted that the first \textit{Gingles} precondition would have to be modified or eliminated in this context. See \textit{Voinovich}, 507 U.S. at 158. Because the claim was dismissed on other grounds, the Court did not give significant consideration to this point, but it also did not appear concerned with the effect of such a change.

Since the \textit{McNeil} decision, the Supreme Court appears to have opened up the floodgates of litigation with the \textit{Shaw} decision. The presence of so many claims in which no clearly defined injury has been established adds credence to Judge Cudahy's concern that the § 2 cases be clearly decided to prevent every district from being challenged as a Voting Rights violation.

\textsuperscript{315} See \textit{Kousser}, \textit{supra} note 313, at 571. The second precondition—cohesiveness of the minority group—is presumably present; moreover, the third precondition—racial bloc voting—supports the plaintiffs' claim and influence districts as a whole. Based on school-board elections, the minority-choice candidate also would be able to win an election at times with a minimum of crossover support. See \textit{id}.

\textsuperscript{316} 918 F.2d 763 (9th Cir. 1990).

\textsuperscript{317} See \textit{id} at 770. Disparate impact occurs when statutes or ordinances are facially neutral, but have a disparate effect due to their administration or other factors.

\textsuperscript{318} See \textit{id}.
incumbents in the absence of a sufficient majority of minorities.\textsuperscript{319} The court held that once evidence of intent was found, only some evidence of injury was necessary to establish that a "meaningful remedy" could be imposed.\textsuperscript{320}

The third and final judicial position with respect to influence districts, which only one court has recognized, is that such districts may be \textit{required} under § 2. In \textit{Armour v. Ohio},\textsuperscript{321} a three judge panel of the United States District Court for the Northern District of Ohio rejected an application of the \textit{Gingles} preconditions in all circumstances and instead applied a "totality of the circumstances" review derived from § 2(b).\textsuperscript{322} Ohio adopted a redistricting plan that called for drawing majority-minority districts wherever possible. If, however, a minority concentration was insufficient to constitute a majority in a district, it was disregarded.\textsuperscript{323} As a result of this policy, the community of Youngstown, Ohio was split between two districts so that the community comprised twenty-five percent of one district and eleven percent of the second district. The plaintiffs argued that an alternative district with a thirty-six percent minority population and containing ninety-nine percent of the minority communities

\begin{itemize}
\item \textsuperscript{319} See id. at 769. Historically, the Hispanic voting population had been fragmented in order to dilute the vote and protect incumbents. At the time the districts in question were drawn, it was possible to have created one of the five districts with a majority of Hispanic voters using data as of 1988 projections. See id. The trial in district court ran three months and consisted of extensive statistical data presented by expert witnesses as to whether a 48\% or 52\% Hispanic district could be created based on projections from 1980 data. The district court agreed with the plaintiffs and found that a district with a majority of voting-age Latinos could have been drawn. Even if this could not be established, enough cross-over voting had been established that a nearly-50\% district would be effective in electing a candidate of choice from the Latino community. Finally, even if these determinations were disputable, redistricting had discriminated against the Latinos in the past, establishing a violation of the Voting Rights Act. A three-judge panel of the United States Court of Appeals for the Ninth Circuit upheld the district court decision but focused entirely on discriminatory intent, thereby avoiding the statistical mire created by the two possible discriminatory effect definitions. See id. at 771; Kousser, \textit{supra} note 313, at 571-73.
\item \textsuperscript{320} See \textit{Garza}, 918 F.2d at 771; Kousser, \textit{supra} note 313, at 572-73.
\item \textsuperscript{321} 775 F. Supp. 1044 (N.D. Ohio 1991).
\item \textsuperscript{322} See id. at 1053-58. "A violation of subsection (a) of this section is established if, \textit{based on the totality of circumstances}, it is shown that the political processes leading to nomination or election . . . are not equally open to participation . . ." 42 U.S.C. § 1973(b) (1994) (emphasis added); see also Rural W. Tenn. African-Am. Affairs Council, Inc. v. McWherter, 877 F. Supp. 1096, 1101-02 (W.D. Tenn.) (stating that the underlying purpose of a "totality of the circumstances" test is to decide whether a legislature's voluntary creation of an influence district may be counted as a factor in determining whether a § 2 violation is present), aff'd, 116 S. Ct. 42 (1995). If this is the case, conversely, influence districts may be recognized as a defensive strategy for states.
\item \textsuperscript{323} See \textit{Armour}, 775 F. Supp. at 1061; Kousser, \textit{supra} note 313, at 573-74.
\end{itemize}
could have been drawn, and that splitting the community limited the ability of minorities to influence elections. Following an extensive review of the circumstances, including the history of racism in the area, discrimination in electoral politics, effects of discrimination, racial polarization and political cohesiveness, and the responsiveness of elected officials, the district court agreed that the voters of this African-American community were deprived of their opportunity to elect a candidate of their choice.

However, while ruling that an influence district should be drawn under these circumstances, the court also noted that its decision could have detrimental effects. Drawing an influence district will aid the minority community in electing a candidate of its choice; however, it will not necessarily aid African-American voters in electing a candidate of their own race. This result is perfectly acceptable under §2, which expressly notes that no group is guaranteed proportional representation. However, many advocates view redistricting as a means of increasing the number of minority representatives, and influence districts may not assist in this goal. Even majority-minority districts do not guarantee success to minority candidates. The fact that most majority-minority districts have elected minority representatives fosters this perception of guaranteed success. Influence districts may successfully provide greater support for minority concerns, but they will not necessarily

325. See Armour, 775 F. Supp. at 1053-58.
326. See id. at 1059-60.
327. See 42 U.S.C. § 1973(b) (1994) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population").
328. See Grofman et al., supra note 50, at 117. Grofman and his co-authors strongly disagree with the position taken by the court in Armour, noting that judicial challenge of influence districts could present difficulties as great as those involved with §2 claims prior to the establishment of the Gingles criteria. See id. They argue:

If minorities have no opportunity to elect one of their own and they would be apt to do so if given the choice, it is paternalistic to say that they should be content with their supposed opportunity to influence elections of white representatives. . . . [I]f one claims that increasing the number of black voters in a district ipso facto increases their influence, then it would seem to follow that the influence of black voters is reduced in those districts from which black voters are removed. When there are "electibility" claims at issue, there is a natural threshold.

Id. at 117-18.
increase minority presence. This is particularly true where one political party predominates in the district. In a single-party district, the presence of racial bloc voting may prevent a minority candidate from gaining a majority of the votes. In the general election, the candidate will need to be responsive to all sizable constituency groups, but in the primary, the candidate can focus on specific constituencies.

Although the focus of the Voting Rights Act is protecting the right to vote, many people consider representation by minorities to be equally important. Minority representation provides a visible image of minority voting success. In addition, elected officials who are minorities can support the minority community by providing role models to future legislators and familiar faces to constituents seeking to work with government. Admittedly, these benefits are often intangible, but they historically have been considered very real to the minority community.

At least one court has recognized that influence districts may be a useful compromise that allows vote dilution claims to proceed, but that avoids the creation of an entitlement to proportional representation. While the United States Court of Appeals for the First Circuit did not mandate the creation of a minority influence district on remand in Uno v. City of Holyoke, it required a district court to consider the opportunity for an influence district. The Hispanic population comprised thirty-one percent of the city of Holyoke. The court's holding required the district court to determine whether the Hispanic population's voting strength was diluted. That determination involved considering whether the Hispanic population possibly could form an influence district. However, the court obviously supported the creation of influence districts as a means of lessening the "balkanization" of electoral

330. See ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 239-40 (1987) (finding that office holding by minorities heightens confidence in minority political competence); cf. Remarks of Deval Patrick, supra note 1 (noting that minority representatives provide more than "symbolic significance" because they also improve "the whole business and public integrity of governing"). But cf. Shaw II, 116 S. Ct. at 1903 n.5 (noting the Supreme Court has previously not found promoting role models for students to be a compelling interest).

331. See Uno v. City of Holyoke, 72 F.3d 973, 991 (1st Cir. 1995).

332. See id. This action was brought by a group of Hispanic voters challenging Holyoke's alderman election system under the Voting Rights Act. See id. at 977.

333. See id. at 978.

334. See id. at 990.

335. See id.
districts along racial lines.\textsuperscript{336}

In a footnote, the Uno court recognized what may be the greatest remaining stumbling block to effective influence districts: an influence district offers a true opportunity for minority involvement in the electoral process only if it includes sufficient crossover voters willing to join with the minority group in electing representatives of their own choice.\textsuperscript{337} This alludes to the second problem with recognizing influence districts: the third Gingles precondition requires proof that "the white majority votes sufficiently as a bloc to enable it ... to defeat the minority's preferred candidate."\textsuperscript{338} In order to create an effective influence district, the minority population would have to be grouped with sympathetic majority voters. This group, by definition, would be unlikely to engage in the majority bloc voting required for a § 2 violation. Thus, it appears that although influence districts are useful in bridging the gaps inherent to voting rights litigation, they can be created based only on a "totality of the circumstances" review, not under a claim based on the Gingles preconditions.\textsuperscript{339}

For influence districts to be utilized effectively, the districting

\textsuperscript{336} See id. at 991 ("Influence districts, on the other hand, are to be prized as a means of encouraging both voters and candidates to dismantle the barriers that wall off racial groups and replace those barriers with voting coalitions."). In Rural West Tennessee African-American Affairs Council, Inc. v. McWherter, 877 F. Supp. 1096 (W.D. Tenn), aff'd, 116 S. Ct. 42 (1995), the three-judge district court panel assessed the legislative history surrounding the 1982 amendment to § 2, particularly the proportionality provision. See id. at 1104. The 1982 amendments to § 2 included an important compromise: "Provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b) (1994). This phrase, known as the "Dole Compromise," was added to make it clear that the addition of a results standard did not add a proportionality requirement as well. See supra notes 42-43 and accompanying text. Although there was considerable debate on whether this phrase was necessary, the general consensus was that proportionality was not required. See Rural W. Tenn., 877 F. Supp. at 1104.

\textsuperscript{337} See Uno, 72 F.3d at 991 n.13. Once elected, the representatives also must be responsive to the needs of the minority voters as well as the majority population for a minority influence district to have a true effect on the community. See id.

\textsuperscript{338} Thornburg v. Gingles, 478 U.S. 30, 51 (1986).

\textsuperscript{339} No court has specifically ruled on the conflict between influence districts and this third precondition. The fact that courts have expressed concern about the first precondition and not this one may indicate either that it will be ignored in the analysis, or that while some evidence of majority bloc voting must be found to exist, it need not exist within the influence district as drawn. This second interpretation is unlikely based on the Supreme Court's criticism of North Carolina's view that the presence of a § 2 violation allowed a remedial majority-minority district to be drawn anywhere within the state. See Shaw II, 116 S. Ct. at 1006; Transcript of Oral Argument, Shaw II (No. 94-923, 94-924), available in 1995 WL 729891, *44-*46.
body must accept two factors that differentiate influence districts from majority-minority districts. First, establishing or requiring influence districts blurs the bright-line test established by the Court in *Gingles.* Thus, establishing an influence dilution claim may be even more difficult than establishing the already difficult vote dilution claim. There is also the risk that redistricting committees, judges, or other parties may decide that influence districts are "better" for minorities than majority-minority districts, thereby failing to create reasonable majority-minority districts. However, the controversy currently surrounding vote dilution claims emphasizes that, even with a bright-line test, the constitutionality of districts is a difficult determination. Second, influence districts may give minorities false hope of electing minority candidates. Influence districts allow minority voters to have a significant impact on the final vote; however, the minority community's vote may be split in a primary, allowing a non-minority candidate to proceed to the general election. Historically, civil rights groups have not advocated influence districts because sufficient majority bloc voting typically existed to overcome the minority influence. However, in

340. See Grofman et al., *supra* note 50, at 117.

341. See Kousser, *supra* note 313, at 587-89. A bright-line rule does not guarantee that all minorities will be given proper consideration by the courts. In some courts, the *Gingles* factors have been interpreted to develop formalistic criteria for judicial relief, in effect creating a "catch-22" under which the ability to succeed in electing minority-preferred candidates must be proven before relief will be granted, but success is not possible until the relief is granted. See *id.* at 588. Additionally, some commentators have argued that a bright-line test is not appropriate for consideration of Voting Rights Act cases at all. Rather, certain factors may be considered as guidelines, but the ultimate determination of a violation should rely on an assessment of the "totality of the circumstances." Under this argument, a test serves merely to aid judicial administration of election claims, but undermines the court's duty imposed by Congress to assess whether the plaintiffs have suffered a remedial injury. See, e.g., Beth A. Levene, Comment, Influence-Dilution Claims Under the Voting Rights Act, 1995 U. Chi. Legal F. 457, 470-71.

A parallel argument is that while majority-minority districts aid those groups of the minority population centrally located and sufficient to constitute a district, small clusters of minorities deserve protection as much as large groups. See Kousser, *supra* note 313, at 586. This point is particularly appropriate in North Carolina and similarly situated states where the minority population, although significant in number, is not concentrated in one area. If a colorblind society is the goal, increasing the dispersion of minorities and majorities throughout the community would seem to go hand in hand. If, however, minorities who do not live within the "minority area" are penalized by less electoral influence, then there is no incentive for this integration.

342. See Pierre-Louis, *supra* note 329, at 1226-27. While the creation of a majority-minority district almost always results in the election of a minority representative, influence districts do not yield the same results. See *id.* at 1227-28.

343. See *id.* at 1227 n.54 ("We didn't have much respect for influence districts. We thought that was a misnomer, really, a kind of phantom that does not yield real political
recent elections, majority voters have begun greater crossover voting and communities' ethnicities have become increasingly mixed.344 Candidates have, in turn, become more dependent on and interested in courting the minority vote. In addition, a minority community may receive greater support from numerous representatives elected from a greater number of minority influence districts than from a single elected minority representative from a majority-minority district. Thus, where three influence districts are created rather than one or two majority-minority districts, there will be three elected representatives responsive to their minority constituency, thereby increasing the number of votes on minority-supported issues.345 If these results are acceptable, it is evident that influence districts offer dispersed minority groups, such as those present in North Carolina, an excellent opportunity to elect representatives of their choice, if not their race. In drawing new congressional districts, the North Carolina legislature should strongly consider the possibility of drawing additional influence districts instead of strict majority-minority districts only.

Whether intentionally or by default, another possible trend is an abdication of authority by the legislature to allow either courts, a commission of experts, or experts appointed by a court to design districts. While court-drawn districts are controversial, they can already be found in many areas.346 The second alternative is districts drawn by a panel of experts. Under this system, a bipartisan or nonpartisan committee is established to study and propose a congressional apportionment plan, which is then submitted to the

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344. See id. at 1228-29. By courting the minority vote and other disenfranchised members of the populace, representatives from the Sixth District of South Carolina and the Fifth District of Missouri have been able to win elections without a majority of support from the white population. These representatives have been able to cultivate the support of the minority community by being attentive to its needs, but are not necessarily members of the community themselves. See id.

345. Rural West Tennessee African-American Affairs Council, Inc. v. McWherter, 877 F. Supp. 1096 (W.D. Tenn.), aff’d, 116 S. Ct. 42 (1995), provides anecdotal evidence of this type of situation. In this case, involving state legislative districts, testimony of two white senators representing districts with an influential minority population was recounted. Senator Stephen Cohen cited the effectiveness of influence districts on the legislative proposal to make Martin Luther King, Jr.'s birthday a state holiday, a measure that passed by one vote. If a majority-minority district had been created instead, another conservative white senator would have been elected rather than a senator responsive to an influential minority community; therefore, the measure may have failed. See id. at 1105.

346. See supra note 202 for a discussion of the court-drawn maps in Georgia.
The legislature may either accept or reject the plan, but may not alter it. This system has gained support from a variety of sources. In 1995, New Jersey voters amended their state constitution to create a permanent, bipartisan Redistricting Commission at the beginning of each decade. This amendment succeeded, in part, because of the controversy surrounding the state's previous two attempts to redraw districts.

Dan Morales, Attorney General for the State of Texas, and Robinson Everett, the plaintiffs' attorney in Shaw I and II, have advocated similar plans in the interest of removing partisan politics from the redistricting process. In effect, these attorneys represent support for redistricting commissions on both sides of the courtroom. In addition, nonpartisan groups such as the League of Women Voters and Common Cause have endorsed this system. However, the creation of a commission may not necessarily overcome the political process. For instance, any commission would be staffed by political appointees, thus perpetuating partisanship and special-interest influence over the panel. The third possibility, districts


348. See id.


350. See id.

351. See Dan Morales, Time for Texas to Change It's [sic] Ways, TEX. HISPANIC MAG. (Aug. 1995) <http://www.txhisp.com/aug_95/morales.html>. "Members of the commission could include, not only members of both parties, but also legal and demographic experts well versed in the complexities of redistricting. This commission, detached from the need to preserve political careers, could make independent decisions on behalf of the public interest, not partisan interests." Id. Robinson Everett, in conversations with the author and in numerous public discussions, has advocated that a panel of experts be appointed to redraw North Carolina's districts. Professor Everett argues that the districts should be drawn without regard to race or partisan interests. Interview with Robinson O. Everett, Professor of Law at Duke University in Durham, N.C. (Sept. 22, 1996).

352. The Common Cause plan is well-delineated and provides an easy illustration of factors such a system would take into consideration. Under the model, legitimate partisan interests are provided for by the appointment of two commissioners from each major party, plus the election of a fifth member by the party-appointed members, to serve as the commission's chair. To be eligible for commission membership, individuals would not be permitted to have held office within two years prior to selection, or within four years after the effective date of the plan. They would also be prohibited from holding office in a political party or working as a registered lobbyist within a certain time frame surrounding the commission's work. Specific standards and guidelines would then be established for the commission's use in drawing a new plan. See Common Cause Issue: Reapportionment and Redistricting, supra note 347; cf. Martin Dyckman, Editorial, Let's End the Chaos, ST. PETERSBURG TIMES, Dec. 17, 1992, at 27A (advocating redistricting by a nonpartisan commission, rather than by the legislature).
drawn by special masters appointed by courts, has been used in special situations, but these districts are not immune to challenge.\textsuperscript{353}

In the wake of \textit{Shaw II} and \textit{Vera}, one trend that is likely to continue despite the Court’s disapproval is the increasing role of technology in the districting process.\textsuperscript{354} While mapmakers have had access to racial information at the census bloc level since 1980, improving technology has allowed mapmakers to employ it effectively only since 1990. Prior to computers, district maps were drawn with magic markers and crayons.\textsuperscript{355} Now, computers allow a mapmaker to sit at a display terminal with the state map, create a district, and receive a profile of the area, including population, race, political affiliation, and past voting history.\textsuperscript{356} With each change of the map, the data are retabulated, allowing mapmakers to be fully aware of the effects of any changes.\textsuperscript{357} The database behind this technology is composed primarily of information from two sources: basic demographic data from the Census Bureau and political information from the county elections bureau.\textsuperscript{358} Information from the Census Bureau is broken down into census blocks, generally comprising about a dozen houses.\textsuperscript{359} County board of elections information is normally limited to wards or precincts, a larger area than the census block.\textsuperscript{360} Thus, racial information is available at a

\textsuperscript{353} In California, a breakdown in the legislative process allowed the state supreme court to intervene. See Wilson v. Eu, 823 P.2d 545, 547 (Cal. 1992). When Governor Wilson vetoed the California legislature’s reapportionment plan in September 1991, “the California Supreme Court issued a mandate and appointed three retired California judges to serve as Special Masters to resolve the election year crisis.” DeWitt v. Wilson, 856 F. Supp. 1409, 1410 (E.D. Cal.), aff’d, 115 S. Ct. 2637 (1994). The Masters held a series of public hearings and reviewed 22 proposed plans. They ultimately rejected every proposed plan as in conflict with the guidelines and considerations established by the state supreme court for redistricting. The Masters then drew their own redistricting plan, which was approved by the California Supreme Court. See \textit{id}. at 1411. The plan was challenged by a group of voters and upheld by a panel of three district court judges. See \textit{id}. at 1410. On appeal, the Supreme Court affirmed the judgment without opinion. See DeWitt v. Wilson, 115 S. Ct. 2637 (1994) (mem.).

\textsuperscript{354} See \textit{Vera}, 116 S. Ct. at 1953. The Supreme Court used the Texas redistricting computer program, REDAPPL, as evidence that race received undue consideration in the redistricting process, based on the presence of this redistricting tool. See \textit{id}.


\textsuperscript{356} See \textit{id}.

\textsuperscript{357} See \textit{id}.

\textsuperscript{358} See \textit{id}.

\textsuperscript{359} See \textit{id}.

\textsuperscript{360} See \textit{id}. When this information is assimilated to form the database, some interpretation of the data is required because the boundaries of each district are not necessarily identical. However, for the 2000 census, the states and Census Bureau are working together to create more consistent boundaries, thereby increasing the accuracy
much finer level than current political data provide.\textsuperscript{361} This information allows mapmakers to discern not only whether a district is black or white, and Republican or Democrat, but also whether it is likely to be influenced politically by social issues or will tend to vote a straight-party ticket. While the Supreme Court disapproves of using this detailed information in drawing districts, the Court's adherence to the standard of population equality encourages state legislatures to use these programs to create districts nearly equal in population.\textsuperscript{362} It is unrealistic to encourage legislatures to take advantage of the technological innovations in one area, but command them to ignore the technology in another area. Further, due to the requirements of the Voting Rights Act, the racial information must be considered at some point.\textsuperscript{363} Both the technology and information available have improved greatly in the last five years, and regardless of the Court's disapproval, state legislatures will continue to use the information to their advantage.

The most drastic changes in voting may be at the state and local level. By altering the election system from single representative to multi-representative districts,\textsuperscript{364} and by applying new methods of tabulation, some jurisdictions may remove the burden of redistricting altogether. Civil rights advocates are strongly in favor of programs such as limited voting,\textsuperscript{365} cumulative voting,\textsuperscript{366} preference voting,\textsuperscript{367} and accessibility of the information. See id.

\textsuperscript{361} North Carolina's redistricting program, currently in use, not only allows access to information about voters' race, but also includes precinct reports from three previous statewide elections. The three elections currently compared are the 1990 U.S. Senate race, 1988 Lieutenant Governor race, and 1988 Court of Appeals race. See Memorandum to Senate Select Committee on Redistricting & House Committee on Congressional Redistricting, for House Bill 586, Mar. 26, 1997, at 28 [hereinafter Memorandum].

\textsuperscript{362} In \textit{Karcher v. Daggett}, 462 U.S. 725 (1983), the Court invalidated a New Jersey redistricting plan in which the maximum deviation between districts was only 0.6984\%, and the average deviation was 726 people from the ideal population of 526,059. See \textit{id.} at 728, 744. Further, the Court refused to set a de minimis level of population inequality, believing the state legislatures would strive to achieve the de minimis level, rather than absolute equality. See \textit{id.} at 731. Instead, it interpreted the Constitution to permit "only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." \textit{Id.} at 730 (citation omitted).

\textsuperscript{363} See 42 U.S.C. § 1973 (1994) (establishing a § 2 violation when a protected class is denied equal opportunity to participate in elections); \textit{id.} § 1973c (establishing a § 5 violation when a voting change results in less electoral opportunity based on race or color).


\textsuperscript{365} Limited voting is based on the principle of representational government and the idea that a group comprising only 51\% of the constituency should not be allowed to control
and combined forms. The alternative voting methods provide the same result as race-conscious districting and minority representation by minorities, but do so without the divisive line-drawing process. These options are not available for congressional districts, however, as a federal statute requires representatives to be elected from single representative districts. The difficulty present in redistricting probably has not reached the level necessary for a statutory change, especially a change allowing a process as complicated as these forms of multi-representative districts require.

Through this analysis and application it appears that although the standards of the Supreme Court are not clearly defined, new congressional districts can be formed that satisfy the requirements of the Constitution. The Voting Rights Act was created by Congress in order to protect and equally apply the right to vote. However, the effect of this Act is unclear when applied to congressional redistricting plans created by states that provide greater minority opportunity than minimally required. Within the past seven years the Supreme Court reviewed five important cases—Shaw v. Reno

the entire governmental body merely because of its majority status. It works by allotting voters fewer votes than the number of seats available—i.e., a voter may be allowed to vote for two candidates when there are five positions available. By limiting each voter to two votes, the same majority is prevented from controlling all five seats. A well-organized minority group is then able to control at least one seat, provided it is sufficiently large. In the current hypothetical, a minority group would need to comprise approximately 28% or more of the voting pool effectively to control one seat. See id. at 252-53.

366. Under cumulative voting, voters are allotted as many votes as there are seats available. The voter may choose to use all of her votes for one candidate, split them among five different candidates, or divide them in some other manner. Minority groups may concentrate all of their votes on one candidate, if they have a strong preference. The same majority is then prevented from controlling all five seats. In a five-seat election, a cohesive minority group, comprising only one-sixth of the voting population, could then control one of the five seats. See id.

367. Preference voting is the most complicated method. Each voter is given one ballot for the number of candidates running. The voter then ranks the candidates, but is not required to rank all of the candidates. When the votes are tabulated, any "wasted" votes—votes without which a candidate would still win, or votes with which a candidate could not possibly win—are transferred to the voter's next preferred candidate. The vote transfer process is difficult to explain, and this complexity poses the greatest barrier to acceptance of this method, particularly because of the priority placed on easily understandable voting rules in our society. See id.

368. See id. at 255. Like territorial districts, alternative voting systems have side effects as well. They may allow extremist fringe groups a greater opportunity for representation, slow the democratic process with deadlock, and increase the costs of candidates by requiring campaigning in a larger area. See id. at 256-57.

(Shaw I), Johnson v. DeGrandy, Miller v. Johnson, Shaw v. Hunt (Shaw II), and Bush v. Vera—that rapidly developed the judicial precedent in this area. Theoretically, these cases should have built upon each other to develop a clear line of precedent. That has not occurred. Instead, the Court has yet to define clearly the constitutional injury underlying this cause of action, or to explain what actions states may take without violating the Constitution.

Shaw II and Vera continue this path into jurisprudential wilderness. In both cases, the Court continued to avoid making a clear statement of the injury. However, the Court’s analyses in those cases may provide some indication of what activity crosses the boundaries and becomes unconstitutional. Essentially, if a state does not base redistricting predominantly on race, justifies any majority-minority districts by information establishing a possible § 2 claim under the Voting Rights Act, and does not rely on § 5 to create a new majority-minority district, the state safely may create a congressional districting plan with majority-minority districts.

As a result of the difficult and expensive situation states are currently in, those states subject to § 5 preclearance requirements may move to find alternative solutions. States subject to § 5 preclearance are encountering the majority of difficulties. These states may elect to continue redistricting, but may use influence districts as a middle ground between unconstitutional use of race and the preclearance requirement that minorities be represented fairly and be capable of electing representatives of their choice. Structurally, states may choose to create districts through redistricting committees that remove politics from the process, may choose to use influence districts that avoid strict scrutiny, or may choose to advocate changes in the federal law that eliminate single representative congressional districts.

In the future, this tension will continue; districting plans, and indeed the very constitutionality of the Voting Rights Act itself, hang in the balance. The heart of this tension is the conflict between the Justice Department’s desire to ensure that legislative bodies are racially representative of their constituencies, and the Supreme Court’s desire to ensure a colorblind society. Resolution of this conflict ultimately depends upon interpretation of the primary goal

370. See Vera, 116 S. Ct. at 1975 (Stevens, J., dissenting).
of the Voting Rights Act, legislation torn between these competing ideals.

M. ELAINE HAMMOND
APPENDIX A: THE HAMMOND CONGRESSIONAL PLAN

Very little congressional redistricting has occurred since the Supreme Court guidelines established in *Shaw II* and *Vera*. In Texas, a federal district court ordered the congressional districts redrawn prior to the November 1996 elections. After finding the districts unconstitutional, the court chose not to delay creating new districts until the next election. This decision resulted in judicially drawn districts. The March primary results were thrown out, and all the candidates were placed on the November 5th ballot. Because none of the candidates in the three districts won by a majority of the vote, a special run-off election in December was required.

In North Carolina, a federal district court allowed the challenged districts to remain in place for the 1996 elections and ordered new plans to be submitted to the three-judge panel by April 1, 1997. This decision left the North Carolina legislature with the task of configuring districts acceptable to the district court. The North Carolina legislature chose to create a new congressional plan because the legislators clearly viewed redistricting as their responsibility and duty. Of course, the creation of the new plan was not accomplished with ease, and involved significant political compromise. The plan proposed by the legislature is analyzed in Appendix B based on considerations developed from *Shaw II* and *Vera*.

Prior to the state legislature’s redistricting attempt, the author

372. M. Elaine Hammond is a research assistant for Senator Marc Basnight, President Pro Tempore of the N.C. Senate. She created the Hammond Congressional Plan using the North Carolina Legislative Drafting System. This system, containing a computerized database with census and elections data, is available to the general public. The legislative staff provides assistance in accessing the system and drawing districts. The author greatly appreciates the technical support of Dan Frey and Mike Michael in drawing the plan. In addition, Gerry Cohen, director of legislative drafting, provided his expertise in fine-tuning the Hammond Plan to reach its objectives. The figures included in the appendix are drawn from a printout of the plan, which is available on the legislative drafting computer. A full printout is also on file with the author.


375. Following the Supreme Court decision in *Shaw II*, both the North Carolina House and Senate appointed committees to advise the state Attorney General’s office on whether a new plan could be created in time for the November 1996 elections and to begin considering possible redistricting plans. In addition, the House Rules Committee presented an alternative plan to the public during the legislative session, but it was never voted on. H.B. 72, 141st. Leg., 2d Extra Sess. (N.C. 1996).
attempted to formulate a new congressional districting plan for North Carolina. The goal of this exercise was to take the theories extrapolated from the Supreme Court opinions in Shaw II and Vera and apply them to the actual facts and figures with which North Carolina's legislators would be required to work in the redistricting process. A map of the Hammond Congressional Plan is included. Following is a step-by-step discussion of the process and the map that resulted.

First, in order to protect against a § 2 claim, the criteria and considerations in the process were established at the outset. Based on the Court's opinions, the following factors were applied: a focus on relatively compact districts, incumbency protection, maintenance of communities of interests, respect for county and voting precinct boundaries wherever possible, and nonretrogression of minority electoral achievements. Several things should be noted about these factors.

**Shape:** Justice O'Connor is the Justice primarily concerned with shape, and her opinions on this factor have ranged from considering shape a determinative factor,\(^376\) to finding shape irrelevant,\(^377\) to determining that shape is a consideration.\(^378\) In light of this variance, the goal of this plan was to create districts reasonably compact, but to balance the interests in an "attractive district" with the other competing considerations—in effect, to keep shape from being the predominant consideration. In so doing, it is important to note that boundaries which may follow North Carolina's county and voting precinct lines will not necessarily be regular in appearance. Generally, districts are very abstractly shaped and boundaries curve and bend around everything from cities to natural land formations. Unlike some areas of the country, particularly the Midwest, "compact" in North Carolina does not necessarily mean "regularly shaped."

**Incumbency protection:** Lines were drawn to keep incumbents within their districts wherever possible.\(^379\) Although the population

\(^{376}\) See Shaw v. Reno, 509 U.S. 630, 647 (1993) (Shaw I) ("[W]e believe that reapportionment is one area in which appearances do matter.").

\(^{377}\) See Miller v. Johnson, 115 S. Ct. 2475, 2488 (1995) ("[P]arties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness.").

\(^{378}\) See Vera, 116 S. Ct. at 1953 ("We do not hold that any one of these factors is independently sufficient to require strict scrutiny. The Constitution does not mandate regularity of district shape . . . .").

\(^{379}\) Congressional representatives are not required to reside within their district. In
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statistics are the same as those used in 1990, several of the incumbents have changed. The most significant change is that two of the current incumbents are minorities who theoretically should receive the same protection as the other incumbents. If racial bloc voting is a factor in their districts, race should be considered in this determination. In *Vera*, the Court placed its greatest restriction thus far on incumbency protection, strongly admonishing Texas that incumbency protection does not mean incumbents may choose their electorate. Therefore, while districts in this proposed plan were neither taken away from incumbents nor shifted significantly in party affiliation, they were not tailored to meet the specific appeals of candidates.

Communities of Interest: Wherever possible, districts have been created with unifying characteristics. Most commonly this means grouping urban areas such as the Research Triangle Park into one district and keeping rural areas in similarly rural districts. Similarly, county lines have been maintained when possible. The plan presented does not have any split precincts; however, it currently has a population variance from the ideal ranging from -0.11% to 0.15%, or 1450 people. By law, congressional districts must be drawn to be exactly equal; therefore, if this plan were applied, voting precincts would have to be split to reach the exact number of voters.

North Carolina, two current representatives live outside their districts: Sue Myrick (9th District) and Walter Jones (3rd District). Drawing any plan in which all the representatives live within their districts is almost impossible with the current incumbents because two of the representatives, Sue Myrick (9th District) and Mel Watt (12th District), reside within the same voting precinct. However, all the incumbents remain in their current districts and retain significant portions of their constituencies. The plan does not place the incumbent representatives in conflict with each other.

The 1990 census results are used, as well as electoral information from 1988 and 1990.

See supra notes 193, 286-87 and accompanying text. Because one representative, Mel Watt, was elected from an unconstitutional district, the level of protection he should receive is questionable. Since the other majority-minority district was not declared unconstitutional, the incumbency protection provided to that district's representative should be identical to that other incumbents receive.


Admittedly, this is a much easier task when the candidates are unaware the plan is even being drawn.

Due to the great variance in population between urban and rural areas, the districts may not appear to be equally drawn, although the population variance is limited.

See Karcher v. Daggett, 462 U.S. 725, 730-31 (1983); see also supra note 362 (reviewing the Supreme Court's holding in *Karcher*).

The reality is that, for exact equality, any plan will require some splitting of precincts because although the districts are required to be equal, precincts are of varying
As the attached map indicates, this plan follows the general layout of the current congressional plan, but is substantially more compact and less divisive. Only eighteen counties have been split, and no county is split between more than two districts, as opposed to the current plan in which District 12 splits ten counties, five of which are cut into three different districts. Politically, four districts could be considered Democratic districts, three to four could be considered Republican districts, and three to four could be considered swing districts based on election results.

The most significant difference in this plan is the absence of majority-minority districts. There are no true majority-minority districts in the Hammond Congressional Plan because of the inability to create a relatively compact district with greater than 50% minority representation. Instead, to maintain minority representation, the plan relies on minority influence districts. Admittedly, this is a risky move. If this plan were submitted to the Justice Department for preclearance, it is unclear whether the department would consider influence districts a justifiable way of maintaining the current level of minority representation. Furthermore, influence districts do not guarantee the election of minority representatives, but merely provide an opportunity for the election of the minority choice candidate. The effectual difference is a result of the primary system. If a district is overwhelmingly Democratic, as is the case in District 1, the minority candidate must be able to win a primary with only the minority vote. In a general election, many people may vote along party lines regardless of race, but in a primary the Democratic vote will be split among the candidates and, if a high degree of racial bloc voting is present, the minority candidate will not be supported by a significant amount of voter crossover. Under the proposed plan,

size. Finding contiguous precincts that satisfy the other requirements and have a completely equal population balance is impossible.

387. In North Carolina, 63.57% voters are registered Democrats, while 30.80% are registered Republicans, but this is not an entirely accurate reflection of how the citizens actually vote, according to the election results comparing votes by precinct with registration of the precinct. Traditionally, North Carolina, like most of the South, has been predominantly Democratic. Historically, elections often were determined in the primaries; for example, there might be three Democratic candidates in the primary, but no Republican candidate in the general election. Therefore, voters would register as Democrats in order to have a vote in the election, regardless of their support for the party platform.

388. This is not to say that districts with minority representation greater than 50% cannot be drawn. However, such districts cannot be drawn without sacrificing other factors such as shape or communities of interest.
District 1, which has an African-American incumbent, is a predominantly rural district with a population that is 45% minority. This minority percentage is the highest of any of the districts in the state, but it is not a guaranteed minority electorate. Although this northeast section of the state has the highest concentration of minority population, it also has a history of significant racial bloc voting. In addition, all of the districts are affected by differences in the proportion of the total population that is of voting age. Whereas the districts are allocated based on total population, the voting age population is smaller. Statistically, when voting age population is considered, the percentage of the black population that is of voting age is lower than the percentage of the white population that is of voting age. Thus, in District 1, African-Americans comprise only 42.04% of the voting age population, whereas 45.56% of the total population is African American.

North Carolina’s current District 12 is the congressional district actually declared unconstitutional in Shaw II. The district runs from Charlotte to Durham, a distance of approximately 150 miles. District 12 has a 56.63% minority population. The District 12 proposed in this Comment is significantly shorter and more compact. It includes the heart of Charlotte and extends north to Winston-Salem. Although wider and more visually appealing than the current district, it remains somewhat “snaky” in nature. However, this results in part from the urban and industrial development along Interstates 85 and 40. As a result of these modifications, the minority population comprises only 36.91% of the total population in this district. Depending on the definition used, this technically does not comprise an influence district. However, the district maintains its potential as a majority-minority district based on two

389. The current representative is an African-American woman, Eva Clayton.
390. Forty of North Carolina’s one hundred counties are subject to § 5 judicial preclearance, and most of the counties in this district require preclearance. Electoral results by voting precinct for three statewide elections, which are built into the computer plan, enable an easy comparison of how individuals actually vote in the area, as opposed to their registration. One of the races is the 1990 Senate election, a very high-profile race pitting long-time conservative incumbent Jesse Helms against Harvey Gantt, a liberal African-American. In the proposed District 1, Harvey Gantt received only 50.29% of the vote, while the other comparisons—the Lieutenant Governor’s race of 1988 and Court of Appeals race of 1988—resulted in 59.21% and 66.95% support, respectively, for the Democratic candidate.
391. African-Americans are particularly affected by the difference in voting age population in determining effective voting equality. See GROFMAN ET AL., supra note 50, at 151 n.50. The difference results from the fact that only individuals over the age of 18 are counted in the voting age population. See id. at 118.
factors. First, the minority population percentage is high enough within the Democratic party to allow a minority candidate an equal opportunity to win a primary race. Second, although there is some history of racial bloc voting in this area, it is less significant than in other parts of the state. Also, this area has experienced considerably more growth than most areas of the state, except for the Research Triangle Park, so the historical racial bloc voting may not continue to be as pervasive as in other areas. As with the other minority influence district, the African-American voting-age population is lower, comprising only 33.48% of the electorate.

Racial considerations also were taken into account in the southern part of the state. In 1991, when the Justice Department originally denied approval of the first plan submitted, it noted that the potential for a second majority-minority district existed in the south-central portion of the state. District 7 takes this into consideration. Under the proposed plan, 27.78% of the population in District 7 is black. However, this area is the home of the Lumbee Indians, and 8.34% of the population within the district is Native-American. Traditionally, the African-American and Native-American populations vote together in the general election, but not in the primary. Therefore, while the minority groups in this area should have a significant impact on elections, the likelihood of electing a minority candidate is much less significant.

The plan tries to keep self-identified communities together

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393. For example, in the senatorial race of 1990, Harvey Gantt won 61.33% of the vote in this district. In two other statewide comparisons—the Lieutenant Governor's race of 1988 and the Court of Appeals race of 1988—the Democratic candidate also won this area but received only 54.6% and 52.68% of the vote respectively. Thus, the minority candidate actually had greater support.

394. There has been a significant change in the incumbency in this area. In 1991, Charlie Rose was the long-time Democratic incumbent. Since that time, Rose has retired, and in 1996 a new Democrat, Mike McIntyre, was elected. Many considered the strong interest in protecting Rose's seat to be one of the reasons the second majority-minority district was drawn in the Piedmont area rather than in the south-central part of the state. *Cf.* Conference, *supra* note 86, at 18-19 (arguing that state political concerns led to the drawing of District 12 in the Piedmont area after preclearance was originally denied).

395. *See Shaw II*, 116 S. Ct. at 1904 (reviewing the disadvantages of an alternative proposed plan under which a majority-minority district depended on the cohesion of African-American and Native-American voters when no such pattern was evident); *see also id.* at 1920 n.20 (Stevens, J., dissenting) (noting trial testimony by Gerry Cohen indicating that these population groups had voted together in statewide elections); Interview with Gerry Cohen, Director of N.C. Legislative Drafting, in Raleigh, N.C. (Nov. 14, 1996) (reconciling these statements regarding North Carolina voting patterns).
wherever possible. District 3 runs along the coast and includes all of the Outer Banks. It is registered overwhelmingly Democratic, but Republican candidates have received a majority of the vote in two of the three comparison elections. While District 4 splits three counties, it basically consists of the three municipalities comprising the Research Triangle Park. This area is influenced by the three universities comprising the triangle and the high-tech industries their presence has spawned. Residents in the area commonly live in one city and commute to another city for work. District 5 runs along the North Carolina/Virginia border and is a mixed community. Although most of the voters are registered Democrats, it is a solid Republican voting district and currently has a Republican representative. District 6 includes Greensboro and is similar to District 5. It is also Republican in character and is currently represented by a Republican. District 8 runs through the south-central area of the state. It is a bipartisan district, but is socially conservative in its voting. District 9 picks up the south Charlotte area and the surrounding counties. It provides a strong Republican constituency for the incumbent. District 10 is made up of the northwest corner of the state, a mountain region. It is a strong Republican district. District 11 includes the lower western mountain region and is also Republican in voting.

In conclusion, the Hammond Congressional Plan is a politically balanced plan with two minority influence districts. In addition, it addresses the need for a compact shape, incumbency protection, and maintaining communities of interest. The use of minority influence districts aids in the constitutionality of the district, but could cause it to run afoul of the additional Voting Rights Act requirements, discussed in connection with the North Carolina House/Senate Plan.

396. The winning percentages were as follows: Senatorial Race, Republican 1990—55.75%; Lieutenant Governor, Republican 1988—50.84%; Court of Appeals, Democratic 1988—56.1%.
397. The Research Triangle Park is formed by Chapel Hill in Orange County, Durham in Durham County, and Raleigh in Wake County. Each of these municipalities is the home of a large university: the University of North Carolina at Chapel Hill, Duke University in Durham, and North Carolina State University in Raleigh.
398. The current representative is Richard Burr. In the three comparison elections, the Republican candidate won the election with 61% of the vote in the 1990 Senate race, 54% in the 1988 Lieutenant Governor race, and 52% in the 1988 Court of Appeals race.
399. Howard Coble is the district's current representative.
400. This determination is extrapolated from previous election results: Senatorial race, Gantt (D) 42.08%, Helms (R) 57.92%; Lieutenant Governor, (D) 50.37%, (R) 49.63%; Court of Appeals, (D) 49.5%, (R) 50.5%.
401. Sue Myrick currently represents District 9.
in the following appendix.
On Thursday, March 27, 1997, shortly before the federal court deadline, the North Carolina legislature approved a new redistricting proposal that was presented to the three-judge panel for review and the United States Attorney General’s office for preclearance.\textsuperscript{402} Although a plan drawn by a judicial panel is exempt from the preclearance requirement, if the judicial panel merely accepts the legislative plan, then preclearance is still required.\textsuperscript{403} The plan received preclearance from the United States Department of Justice on June 9, 1997, but no court has yet ruled on its constitutionality.

Applying the Supreme Court’s position on the constitutional and statutory issues involved in redistricting, the proposed plan appears to be constitutional. Following is a review of the factors and considerations.

**Shape, Contiguity and Race:** Each of the twelve districts is contiguous and as regular in shape as geography and current political boundaries allow. The proposed plan does not include any district sections joined by point contiguity, of which the Supreme Court has been critical.

The proposed District 12 runs 105 miles, as opposed to 160 miles under the current plan. It is the third shortest of the twelve districts. Due to the dense, urban population of the district, it contains less land than most other districts, which may contribute to its “snaky” appearance. The proposed district is wider than the current one. The Supreme Court has been critical of extremely narrow districts using single precincts to reach minority populations,\textsuperscript{404} but this district appears sufficiently wide and consistent in nature to counter this criticism. In addition, it connects the urban centers of three cities\textsuperscript{405} via an industrial, developed corridor that distinguishes these areas from other parts of their counties. Only six counties were split

\textsuperscript{402} See Dennis Patterson, 12th District Compromise Plan Approved by Senate, \textit{Herald-Sun} (Durham, N.C.), Mar. 28, 1997, at A6.


\textsuperscript{404} See Vera, 116 S. Ct. at 1955. At one point in the northern area of Mecklenburg County, the district is actually only one precinct wide; however, this precinct is sufficiently wide and covers all of the towns within this northern portion. \textit{See Memorandum, supra} note 361, at 41.

\textsuperscript{405} The cities of Charlotte, Greensboro, and Winston-Salem are joined by this district. The Greensboro and Winston-Salem areas in particular are often joined in self-identification.
in its creation.  

Supreme Court holdings regarding shape have varied between the Court's Shaw I statement that in redistricting "appearances do matter," and its Miller opinion that shape is not determinative. In Shaw II, the Court tried to establish a middle ground between its earlier Shaw I and Miller opinions regarding race. Under this middle ground, the proposed District 12 should be acceptable. If the Court applies a stricter review of shape, the fact that it is still narrow may cause it to lose the "beauty pageant."  

District 1 is considerably more compact and cohesive than in the original plan. While the current plan is often described as hook-shaped, it is now a solid mass composed primarily of whole counties. The African-American population of District 1 is now 50.27% of the total population. However, the African-American voting age population is only 46.54% of the population; thus, while the district qualifies as a majority-minority district on total population, it is only an influence district when voting age is considered.  

As Justice Stevens noted in his Vera dissent, only majority-minority district compactness appears to be affected by the most

406. See Memorandum, supra note 361, at 40.
407. See supra notes 133-58 and accompanying text.
408. See supra notes 75-79 and accompanying text. The majority of the Supreme Court did not place strong emphasis on an attractive district, see Shaw II, 116 S. Ct. at 1901 (noting briefly the district court's observation that the district is "highly irregular"), but relied heavily on the "geographically compact" component of § 2 to deny this defense, see id. at 1906. This should be an appropriate test of whether that is what the Court truly believes.
409. District 1 contains 10 whole counties and 10 split counties. See Memorandum, supra note 361, at 29.
410. See id. at 25.
411. See id. at 26. The percentage of African-American registered voters drops even lower to 44.89% of the population. See id. at 27. While voting-age population could be used to determine whether a majority-minority district is present, the population of registered voters probably cannot. Presumably, the difference is that while voting age may not be controlled, the number of registered voters can be increased through voting drives.
412. This was a serious point of contention for several minority legislators. One legislator, Representative Mickey Michaux, introduced three alternative maps in the House voting. Each of the alternatives was defeated but placed into the record. See Christopher Kirkpatrick, House OKs Compromise Map for Redrawn Districts, HERALD-STN (Durham, N.C.), Mar. 27, 1997, at A1. Bowing to the political factors of redistricting, another legislator, Senator Frank Ballance, made it clear that although he voted for the plan, he believed North Carolina seriously risked losing "the flavor of our congressional representation" with the redrawn districts, noting that prior to the 1992 elections, under the unconstitutional plan, it had been 91 years since an African-American represented the state in Congress. See Submission, supra note 194, at ¶ 97C-28F-4F(2).
recent Supreme Court opinions. District 12 is no longer a majority-minority district. Under the state's proposed plan it has a total African-American population of 46.67%. Presumably, this district may have an extremely bizarre shape without triggering the same concerns for predominant consideration. Similarly, the shape of all other districts is unlikely to be considered. However, the boundaries of all the other districts conform to county and precinct lines with limited changes to satisfy population requirements, and the following considerations indicate that race was not the predominant consideration.

**Respect for Political Boundaries:** The proposed congressional district boundaries consistently follow county and precinct lines. The proposed plan requires twenty-two counties and two precincts to be split. No county has been split by more than two districts, a factor that seemed to concern the Court in the *Shaw I* opinion. This plan has a total deviation from population equality of 0.27%. This deviation is less than the deviation found unconstitutional in *Karcher v. Daggett*, but because the Court decided not to issue a safe harbor of acceptable deviation, it is unclear whether this is still close enough to zero deviation to satisfy the "one person-one vote" requirement. Rather than unnecessarily splitting more districts, the legislature adopted a secondary plan with similar features and no deviation. The bill that passed provides that the second plan automatically becomes the new plan should the original one be found unconstitutional because the deviation is too great. This plan results in the splitting of twelve precincts.

**Incumbency Protection:** Political affiliation registration is an ineffective guide to voting in North Carolina. Due to heavy Democratic registration, past election results are a more useful guide. Using these results, the proposed plan results in a six Democratic, six Republican district split—the current state representation.

The Court has noted two areas of difficulty regarding political considerations, both of which the plan attempts to address. First, incumbents have been protected, but not to the point that incumbents choose their constituency based on their own political

417. *See id.*
appeal. Each of the incumbents remains in a district with a partisan make-up consistent with the district that each representative currently represents. However, this fact does not mean that the voters are the same. For instance, while District 4 remains a strong Democratic district, the current representative, David Price, was elected from a district with a considerably different electorate predominantly from Wake and Orange Counties. The proposed District 4 includes all of Durham County and portions of Person County and excludes a section of Wake County. Thus, Representative Price will need to identify and establish ties with local communities to gain reelection.

Second, political affiliation has not been used as a proxy for race, thereby avoiding strict scrutiny. Political affiliation, voting patterns, past election results, and legislators' experience are all factors that can be considered in redistricting without triggering strict scrutiny, so long as such information is not used as a proxy for race. In North Carolina, the voting information used acceptably identifies party affiliation and support.

Communities of Interest: The Supreme Court recognizes that maintaining communities of interest is a valid consideration for redistricting. Each of the districts recognizes and maintains different communities within North Carolina. For example, District 1 is a mix of rural-agriculture and manufacturing areas. District 3 contains most of the state's coastal regions and adjoining river basins. The entire Research Triangle area, including the municipalities of Chapel Hill, Durham, and Raleigh, is contained in District 4. Districts 10 and 11 consist of the mountain and foothill regions. District 12 follows the business development corridor along Interstates 85 and 40 and contains the urban cores of Charlotte, Greensboro, and Winston-Salem. Although population uniformity has required some deviation, the proposed plan actually goes beyond the Supreme Court's requirements by applying the principle of maintaining communities of interest to all districts, not just to the plan's majority-minority district.

Section 5 of the Voting Rights Act: The proposed plan contains

420. See Memorandum, supra note 361, at 28.
421. See Kirkpatrick, supra note 412.
422. See Vera, 116 S. Ct. at 1956.
423. See id.
424. See id. at 1955.
425. The attached map indicates the location of the districts within North Carolina.
one minority and one influence district. By the Supreme Court standard of non-retrogression, it should qualify for § 5 preclearance. The redrawn Georgia districts spawned the most recent Supreme Court case on this issue. In Georgia, the district court panel drew a plan that reduced the number of majority-minority districts from three to one. Various voters and the United States Attorney General's office challenged this reduction on five grounds, including a claim that it was retrogressive under § 5. The Supreme Court held that the unconstitutional 1992 plan was not the appropriate benchmark for a § 5 comparison. Instead, the appropriate measure of comparison was the 1982 congressional plan, containing one majority-minority district out of ten districts. The Court rejected the appellants' argument that with the increase in the number of Georgia representatives, the minority representation should maintain the same proportional representation. North Carolina's decrease from two majority-minority districts to one such district and an influence district is less drastic than Georgia's decrease in majority-minority districts. Therefore, it, too, will most likely be acceptable, particularly since it is a true increase of one over North Carolina's last constitutional plan, which comprised only ten districts.

Section 2 of the Voting Rights Act: Each of the Gingles factors is present in the northeast section of North Carolina, so the failure to create a majority-minority district risks a challenge from minority voters under § 2. While the Supreme Court has not held that

426. See supra notes 219-35 and accompanying text.
428. See id. at 1929-30.
429. See id. at 1930.
430. See id. at 1939.
431. See id.
432. See id.
433. Following the November 1996 general election, Robert Engstrom, a Professor of Political Science at the University of New Orleans, performed an election analysis similar to ones he performed during the Shaw litigation. His study focused on the senatorial race between Jesse Helms and Harvey Gantt, an African-American candidate. Professor Engstrom's study found that the correlation between racial composition of a district and voting was statistically significant. Further, he found that in counties in the northeast region of the state the vote is more racially divided than in the state as a whole. See Letter from Richard L. Engstrom, Professor, University of New Orleans, to Anita S. Hodgkiss, Attorney, Ferguson, Stein, Wallas, Adkins, Gresham, & Sumter (Feb. 7, 1997) (on file with author). A copy of the letter was sent to each member of the Senate select committee on redistricting so that the legislators were aware of the continued presence of racial bloc voting during the redistricting process. See Letter from Anita S. Hodgkiss, Attorney, Ferguson, Stein, Wallas, Adkins, Gresham, & Sumter, to Senator Roy Cooper, Chair,
compliance with § 2 is a compelling state interest, a majority of the Court has taken that position in various opinions.\textsuperscript{434} Thus, the creation of District 1 as a majority-minority district likely will be considered to be based on a compelling state interest. Further, the District is concentrated in one quadrant of the state and consists of ten whole counties and ten split counties. It certainly appears to be narrowly tailored to meet the compelling state interest.

District 12 is no longer a true majority-minority district, but the minority population within the district should be capable of successfully obtaining minority representation. Past election results available for this area support this proposition.\textsuperscript{435} The proposed District 12 currently is represented by Mel Watt, an African-American. This district is no longer a majority-minority district, but it appears winnable for a candidate such as Watt. If a minority were not elected from this district in the future, the congressperson still would be representative of the district because a serious candidate could not afford to be unresponsive to 49% of the population. Thus, the district remains within the constitutional guidelines. The fact that success has not been maximized through a majority-minority district should not expose it to a § 2 challenge.

The use of an influence district in the District 12 area is particularly advantageous because it bridges the tension between the Fourteenth Amendment and the Voting Rights Act. Despite a minority population of twenty-two percent within the state, the difficulties in achieving a second compact majority-minority district exhibit the dispersion of the minority population. The significant proportion of minorities in the district guarantees that the minority population will not be neglected by the representative because an effective political campaign will require platforms that appeal to biracial communities of voters. This echoes the Supreme Court position that the right to vote is guaranteed to the individual and not the group. Influence districts such as District 12 will allow all of the constituents to elect a representative responsive to their needs and desires.

While the proposed congressional district plan appears to be constitutional, the true test may be of the legislative process itself. In preparing and presenting this plan, the North Carolina legislature

\textsuperscript{434} See supra notes 292-93 and accompanying text.

\textsuperscript{435} The election data included in the state program show that Harvey Gantt received 66.49% of the vote from the proposed District 12 in 1990. This indicates that the population of this district includes enough crossover voters to elect a minority candidate.
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clearly intended to provide its actions with § 2 protection. When the initial Senate plan was proposed, Senator Roy Cooper, the Chair of the Senate Select Committee on Redistricting, clearly presented the factors considered in drawing districts. The legislature considered geographic fairness, reasonable compactness, communities of interest, racial fairness, reasonable political fairness, precinct boundaries, county boundaries when reasonably possible, core geographic area of the current districts and their incumbents, the potential to achieve agreement between the House and Senate, and most importantly, the constitutionality of the plan. The recognition of one majority-minority district and one influence district was supported by the independent study on racially polarized voting in North Carolina. These same considerations were reiterated in the presentations on the House and Senate floor. Further, when alternate plans with a more cohesive appearance were presented, the objections to them clearly were based on factors besides shape that seemed to make the plans unconstitutional. In addition to racial factors, the legislators focused on maintaining partisan political balance. Finally, the legislature dedicated itself to completing this task because the members recognized that it was their duty, and that if they failed to successfully uphold that duty at this juncture, the responsibility of redistricting might be removed from them forever.

Comparing the Hammond Congressional Plan and House/Senate Proposed Plan, the most significant difference is that the legislature’s proposed plan creates District 1 as a majority-minority district. Due to the history of racial bloc voting in this area, and the report showing its continued presence, the legislative proposal is preferable. However, there are other advantages to the Hammond proposed plan. For example, in the Hammond plan, District 7 is a minority-influence district that provides a greater opportunity for minority influence outside of just Districts 1 and 12. Considering the sizable African-American and Native-American populations in this area, this region appears to be another area where minorities may need to be protected according to § 2 guidelines, particularly if § 2 is found to apply to influence districts in the future.

The true success of any plan may be measured by its opposition. Robinson Everett, the attorney who successfully brought the Shaw

436. See Submission, supra note 194, ¶ 97C-28F-4D(2).
437. See supra note 433 and accompanying text.
suits, already has stated that he is opposed to the legislature's proposed plan and plans to challenge it in court because District 12 remains "oddly shaped," insinuating an unconstitutional use of race. 

Meanwhile, the NAACP and African-American community leaders are considering challenging the plan for its failure to provide greater minority representation. The irony is that while the Supreme Court arguments focused on race, the majority of legislative debate was over the political balance; both political parties sought to use this as an opportunity to expand their political base, and they ultimately secured the status quo.

Redistricting North Carolina's Congressional Districts:
The North Carolina House/Senate Congressional Plan-1997