University of Arkansas at Little Rock Law Review

Volume 19 | Issue 1 Article 5

1996

Constitutional Law—Equal Protection - Race Shall Not Be the Predominant Factor in Congressional District Drawing

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CONSTITUTIONAL LAW—EQUAL PROTECTION—RACE SHALL NOT BE THE PREDOMINANT FACTOR IN CONGRESSIONAL DISTRICT DRAWING. *Miller v. Johnson*, 115 S. Ct. 2475 (1995).

I. INTRODUCTION

Providing substance to *Shaw v. Reno*'s ruling that racial gerrymanders are justiciable,[1] *Miller v. Johnson* arose from Georgia to establish that congressional districts face strict scrutiny when race is the predominant factor in the drawing of their boundaries.[2]

Though black voters have traditionally filed suit under the Equal Protection Clause to secure constitutional rights,[3] the *Miller* plaintiffs were white voters alleging discrimination under the Equal Protection Clause.[4] This turn-about has proven complex and troubling,[5] especially in a state haunted by historical and contemporary images of racial discrimination in voting.[6] This note seeks to explain the origins of the Supreme Court's new test for racially motivated district drawing, a test resulting in an ironic extension of the Equal Protection Clause: the boundaries drawn to diminish racial discrimination are discriminatory themselves.

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1. 509 U.S. 630, 657 (1993). *See infra* notes 79-85 and accompanying text for an analysis of *Shaw*.

2. Miller v. Johnson, 115 S. Ct. 2475, 2488 (1995).

3. *See generally*, Holder v. Hall, 114 S. Ct. 2581 (1994) (concerning six black voters' allegations in part that a Georgia county's single member commission excluded and limited black influence in the political process in violation of the Fourteenth Amendment); Rogers v. Lodge, 458 U.S. 613 (1982) (concerning eight black citizens' complaint in part that a Georgia county's system of at-large elections violated the Fourteenth Amendment).

4. *Miller*, 115 S. Ct. at 2485. The Equal Protection Clause resides in the Fourteenth Amendment. The text of the amendment follows in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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 (emphasis added).

5. The New York Times accused the Supreme Court of eviscerating the Voting Rights Act and condemned the *Miller* decision as "bad law, sanctimoniously delivered." *Gutting the Voting Rights Act*, N.Y. TIMES, June 30, 1995, at A26.

6. *Miller*, 115 S. Ct. at 2501. After Reconstruction ended in 1877, Georgia effectively precluded blacks from voting through the use of poll taxes, white primaries, property requirements, and literacy tests. *Id.* Even as recently as 15 years ago, the Chairman of the Georgia House Reapportionment Committee declared, "'I don't want to draw nigger districts.'" Busbee v. Smith, 549 F. Supp. 494, 501 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

II. FACTS

The 1990 Decennial Census reported an increase in Georgia's population, adding an eleventh congressional seat to the state's ten member delegation.[7] Accordingly, the Georgia General Assembly called a special session in August 1991 to redraw its congressional districts.[8] Georgia had, however, to seek preclearance of its plan from the United States Department of Justice.[9]

Under the Voting Rights Act of 1965, Georgia is a covered jurisdiction.[10] As a result, the state must seek either administrative preclearance from the United States Attorney General[11] or approval from the United States District Court for the District of Columbia to enact changes in its voting procedures.[12]

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7. *Miller*, 115 S. Ct. at 2483. The Constitution requires that "[r]epresentatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . . The actual Enumeration . . . within every subsequent Term of ten years . . . ." U.S. CONST. art. I, § 2.

8. *Miller*, 115 S. Ct. at 2483.

9. *Id.*

10. 28 C.F.R. app. § 51 (1995). The United States Attorney General may designate covered jurisdictions to police regions of the country whose histories demonstrate the prior use of "tests or devices" to disenfranchise voters. As a consequence, the state must seek a declaratory judgment in the District Court of the District of Columbia or approval from the United States Attorney General to alter its voting "standard[s], practice[s], or procedure[s]." Voting Rights Act § 5, 42 U.S.C. § 1973c (1994). Further, the Attorney General's decision is not amenable to judicial review. Morris v. Gressette, 432 U.S. 491, 507 (1977).

11. Voting Rights Act § 5, 42 U.S.C. § 1973c (1994). The relevant text of the statute reads in pertinent part:

> Whenever a State or political subdivision with respect to which the prohibitions set forth [under 42 U.S.C. § 1973b(a) (1994)] . . . are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for 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 . . . and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification . . . : Provided, that such qualification . . . may be enforced . . . if [it] . . . has been submitted by the chief legal officer or other appropriate official of such State . . . to the Attorney General and . . . [he or she] has not interposed an objection within sixty days after such submission, . . . or upon good cause shown, to facilitate an expedited approval within sixty days . . . the Attorney General has affirmatively indicated that such objection will not be made.

Id. See *infra* notes 86-91 and accompanying text for an explanation of the history and purpose of the Voting Rights Act.

12. Voting Rights Act § 5, 42 U.S.C. § 1973c (1994). Justice Ginsburg, in dissent, observed that Georgia could have sought relief from the District Court of the District of

The General Assembly submitted its first congressional redistricting plan to the Department of Justice on October 1, 1991.[13] This plan contained two majority-black districts, the Fifth and Eleventh Districts.[14] This increased the number of Georgia's majority-black districts; previously, the state had only one.[15] However, the Department of Justice did not preclear this plan, reasoning that only two majority-minority districts[16] had been created, leaving some minority populations unrecognized because they were not placed in majority-black districts.[17] Georgia's General Assembly tried again with a new plan.[18] This resulted in an increase in the black voting age population in the Second District to forty-five percent while still retaining the Fifth and Eleventh majority-black districts.[19] However, the Department of Justice again refused preclearance.[20]

The grounds for the Justice Department's objection arose from a comparison of Georgia's plan to the American Civil Liberties Union's

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Columbia. *Miller*, 115 S. Ct. at 2504 (Ginsburg, J., dissenting). However, the state viewed this alternative as futile, given the similarities with Georgia's unsuccessful attempt in 1982 to contest preclearance demands. Johnson v. Miller, 864 F. Supp 1364, 1366 n.11 (S.D. Ga. 1994). The Georgia General Assembly enacted a reapportionment law in September 1981, Act of Sept. 22, 1981, 1981 Ga. Laws Extra. Sess. 131 (reapportioning Georgia's 10 congressional districts), resulting in the drawing of the controversial Fifth District in Atlanta. Busbee v. Smith, 549 F. Supp. 494, 498-500 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983). The Fifth District's boundaries split a cohesive black community and excluded recognized potential black candidates for the district. *Id.* at 499-500. The Attorney General objected to the plan pursuant to § 5 of the Voting Rights Act. *Id.* at 497. Subsequently, the state sought a declaratory judgment ruling that the reapportionment scheme did not deny or abridge blacks' right to vote. *Id.* at 497. However, the district court found that "[t]he only reason the Georgia General Assembly failed to enlarge the black population in the Fifth District . . . was solely because the population was of the black race." *Id.* at 514-15. Accordingly, the court denied relief. *Id.* at 518.

13. *Miller*, 115 S. Ct. at 2483.

14. *Id.* The Second District also contained a concentration of voting-age blacks of 35%. *Id.*

15. *Id.*

16. A majority-minority district may be defined as "an electoral district in which a majority of both the registered voters and the voting age population are members of the same racial minority." Shaw v. Hunt, 861 F. Supp. 408, 417 n.3 (E.D.N.C. 1994), *rev'd*, 116 S. Ct. 1894 (1996). Thus, a majority-black district would be a majority-minority district. Majority-minority districts themselves are not precluded as a per se distortion of minority voting strength by § 2 of the Voting Rights Act. Voinovich v. Quilter, 507 U.S. 146, 155 (1993).

17. *Miller*, 115 S. Ct. at 2483-84. For a listing of additional factors which the Justice Department uses in evaluating potentially adverse effects of proposed redistricting, see 28 C.F.R. § 51.59 (1995).

18. Johnson v. Miller, 864 F. Supp. 1354, 1364 (S.D. Ga. 1994).

19. *Id.*

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

(ACLU) "max-black" plan.[21] The plan, which was drawn for the General Assembly's black caucus, contained three majority-minority districts.[22] The Justice Department dictated that if demonstrable majority-minority districts could be created, then plans not including them were insufficient.[23]

This set the stage for the General Assembly's third attempt, which reflected the ACLU's max-black plan.[24] Using the ACLU's plan as a benchmark, this effort created three majority-minority districts. The result was a geographical "monstrosity."[25] The new Eleventh District combined black populations from metropolitan Atlanta with poor black populations from coastal Savannah, populations separated by both distance and culture.[26] Still, the Department of Justice approved the plan on April 2, 1992.[27]

Georgia subsequently held elections on November 4, 1992, and a black candidate was elected from each of the three majority-minority districts.[28] On January 13, 1994, *Miller v. Johnson* began when five white voters from the Eleventh District sued state officials.[29] They contended that the Eleventh District was a racial gerrymander[30] pursuant to *Shaw v. Reno*[31] in violation

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21. *Id.*

22. *Id.*

23. *Johnson*, 864 F. Supp. at 1363. Anyone can send plans to the Attorney General relevant to a voting procedure change in a district subject to § 5 of the Voting Rights Act. 28 C.F.R. § 51.29 (1995). In *Johnson*, the Justice Department compared such plans with the Assembly's schemes in order to analyze potential voting effects on black voting strength, "i.e., if an alternative proposal had found some clever means of further boosting African-American voting strength in Georgia, why hadn't the Assembly adopted it?" *Johnson*, 864 F. Supp. at 1368.

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

25. MICHAEL BARONE & GRANT UJIFUSA, ALMANAC OF AMERICAN POLITICS 356 (1993). Despite stretching from urban Atlanta to coastal Savannah, a distance of about 250 miles, 60% of all votes came from only three of 22 counties within the district. POLITICS IN AMERICA 421 (Phil Duncan ed., 1993).

26. *Miller*, 115 S. Ct. at 2484. The Court observed that "the social, political and economic makeup of the Eleventh District tells a tale of disparity, not community." *Id.*

27. *Id.*

28. *Id.* at 2485. Voters elected Cynthia McKinney from the Eleventh District. POLITICS IN AMERICA 420 (Phil Duncan, ed., 1993). From the majority-black Second and Fifth Districts, voters elected Sanford D. Bishop, Jr., *id.* at 396, and John Lewis, respectively. *Id.* at 402.

29. 115 S. Ct. 2475, 2485 (1995).

30. *Id.* A racial gerrymander is one in which a "legislature . . . *intentionally* draws one or more districts along racial lines or otherwise intentionally segregates citizens into voting districts based on their race." Hays v. Louisiana, 839 F. Supp. 1188, 1194 (W.D. La. 1993), *vacated and remanded*, 114 S. Ct. 2731 (1994).

31. Shaw v. Reno, 509 U.S. 630 (1993). *See infra* notes 79-85 and accompanying text for an explanation of *Shaw*.

of the Equal Protection Clause.[32] A three-judge panel[33] convened to hear the case and concluded that the boundaries of the Eleventh District were unconstitutional.[34]

III. BACKGROUND

Actions involving racial gerrymanders sit at the nexus of two voting rights issues.[35] Initially, gerrymanders require an analysis of the legitimacy of racially motivated apportionments designed to enhance minority representation.[36] Thus, equal protection issues of racial classification are triggered by the question of motivation. However, this weighs against another issue—the equality of votes—an issue that majority-minority districts are designed to address.[37]

A. The Historical Context of the Fourteenth Amendment

The Fourteenth Amendment is one of the primary guarantees of minority voting rights.[38] Ratified in 1868, the amendment came on the heels of the Civil War. A year earlier, the Reconstruction Act of 1867 succeeded in enfranchising blacks throughout the South.[39] However, gains in black political power were effectively terminated by the dawn of this century.[40] The reasons were myriad—the Hayes-Tilden Compromise of 1877,[41]

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32. *Miller*, 115 S. Ct. at 2485; *see supra* note 4 for the text of the Equal Protection Clause.

33. *Miller*, 115 S. Ct. at 2485. An action contesting the constitutionality of the apportionment of congressional districts requires a panel of three district court judges. 28 U.S.C. § 2284 (1988).

34. *Johnson*, 864 F. Supp. at 1393. One jurist, Judge Edmondson, dissented from the judgment. *Id.* at 1359.

35. Shaw v. Reno, 509 U.S. 630, 633 (1993).

36. *Id.*

37. *Id.*

38. Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities, in* QUIET REVOLUTION IN THE SOUTH 21, 21 (Chandler Davidson & Bernard Grofman eds., 1994). *See supra* note 4 for the pertinent text of the Fourteenth Amendment.

39. Paul Finkelman, *Introduction*, AFRICAN AMERICANS AND THE RIGHT TO VOTE, at viii (Paul Finkelman ed., 1992).

40. Davidson, *supra* note 38, at 21. *See also* Finkelman, *supra* note 39, at viii-ix, noting that "[b]y the eve of World War I blacks in the South made up as little as 2 percent of the voters in some states, and only as much as 15 percent in others."

41. Davidson, *supra* note 38, at 21. In 1876, republicans disputed election returns which gave democrat Samuel Tilden a winning margin of 250,000 votes in the popular presidential election. The following year, Congress appointed an Electoral Commission to determine the election outcome. To gain southern democrats' support for a decision naming

intimidation of black voters at the hands of southern whites,[42] and Supreme Court decisions gutting congressional enforcement measures[43] while allowing exclusionary devices like the poll tax.[44] Not until 1954 did the Court apply the Equal Protection Clause in a way that brought down racially discriminatory walls.[45] Finally, one-hundred years after Reconstruction, the federal government secured full voting rights for blacks through the passage of the Voting Rights Act of 1965.[46]

B. Racial Classifications

As early as 1886, the Supreme Court ruled that the application of laws to only certain minorities violated the Fourteenth Amendment.[47] In *Yick Wo v. Hopkins*, the San Francisco Board of Supervisors applied an ordinance licensing laundries constructed of wood in a discriminatory manner to prohibit Chinese laundries.[48] Looking beyond the face of the otherwise race-neutral ordinance, the Court held it invalid as a violation of the Equal Protection Clause.[49]

Rutherford Hayes the winner, republicans promised in part to withdraw federal troops from the South, effecting the compromise. ENCYCLOPEDIA OF AMERICAN HISTORY 300-02 (Richard B. Morris ed., 6th ed. 1982).

42. Davidson, *supra* note 38, at 21. One Mississippi democrat quoted in 1875 said, "Carry the election peaceably if we can, forcibly if we must." Finkelman, *supra* note 39, at viii.

43. Davidson, *supra* note 38, at 21. Congress passed the Civil Rights Act of 1875 to "mete out equal and exact justice to all, of whatever nativity, race, color or persuasion . . . ." Civil Rights Act of 1875, ch. 114, 18 Stat. 335. However, the *Civil Rights Cases* limited the scope of the Act to bar discrimination only from state action, not discrimination by individuals. Civil Rights Cases, 109 U.S. 3, 11 (1883) (holding the substantive sections of the Act unconstitutional).

44. Davidson, *supra* note 38, at 21. The case of *Breedlove v. Suttles* held that Georgia's poll tax was constitutional. Breedlove v. Suttles, 302 U.S. 277, 283-84 (1937).

45. *See* Brown v. Board of Educ., 347 U.S. 483 (1954) (holding that segregation in public schools solely on account of race is unequal). Ten years earlier the Court had held that black voters could not be precluded from Texas's whites-only democratic primary. Smith v. Allwright, 321 U.S. 649, 661-62, 664-65 (1944). *Smith* was the first significant breakthrough in Southern blacks' struggle for voting rights. DAVIDSON, *supra* note 38, at 22. However, *Smith* was an application of the Fifteenth Amendment, which forbids states from denying or abridging citizens the right to vote on account of race. *Smith*, 321 U.S. at 666. *See infra* note 53 for the text of the Fifteenth Amendment.

46. *See infra* notes 86-91 and accompanying text for an explanation of the Voting Rights Act, and *see supra* note 11 for the pertinent text of the Voting Rights Act.

47. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

48. *Id.* at 357-59.

49. *Id.* at 373. The Court stated:

> Though the law itself be fair on its face and impartial in appearance . . . if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between

Not until 1960 did the Court apply the *Yick Wo* analysis to the voting district context.[50] In *Gomillion v. Lightfoot*,[51] the state of Alabama passed an act changing the city of Tuskegee's boundaries, effectually depriving blacks from voting in municipal elections.[52] Though basing its decision on the Fifteenth Amendment,[53] the Court looked beyond the face of the act, as it had in *Yick Wo*, and invalidated Alabama's act.[54]

Four years later in *Wright v. Rockefeller*,[55] the Court entertained a Fourteenth Amendment challenge to Congressional district boundaries. Plaintiffs alleged that New York's 1961 congressional apportionment statute had drawn irrational districts with the intent and effect of segregating races.[56] However, the Court refused to reach the equal protection issue, holding that the lower court properly found that plaintiffs-appellants failed to prove that racial considerations motivated the drawing of the districts' boundaries.[57]

Despite the Court's insistence on discriminatory intent for an equal protection claim in *Wright*, uncertainty lingered concerning the elemental nature of intent. Was a clear racially disparate impact sufficient, or did the

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persons . . . the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373-74.

50. *See supra* notes 40-44 and accompanying text, explaining the reasons for the hiatus.

51. 364 U.S. 339 (1960).

52. *Id.* at 341.

53. *Id.* at 342. The Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged . . . by any State on account of race . . . ." U.S. CONST. amend. XV, § 1.

The petitioners also challenged the statute on Equal Protection grounds. *Gomillion*, 364 U.S. at 340. Concurring, Justice Whittaker wrote that "the decision should be rested not on the Fifteenth Amendment, but rather on the Equal Protection Clause of the Fourteenth Amendment to the Constitution." *Id.* at 349.

54. *Id.* at 347-48.

55. 376 U.S. 52 (1964).

56. *Id.* at 53-54.

57. *Id.* at 56, 58. The evidence in *Wright* contrasts with that in *Johnson v. Miller*. Plaintiffs presented no evidence "that the specific boundaries . . . were drawn on racial lines or that the Legislature was motivated by considerations of race, creed or country of origin in creating the districts." Wright v. Rockefeller, 211 F. Supp. 460, 462 (S.D.N.Y. 1962), *aff'd*, 376 U.S. 52 (1964). Instead, the plaintiffs relied solely on statistical evidence. *Id.*

Judge Feinberg, in his concurrence, presciently expounded the *Shaw* claim, noting "that racially drawn districts *per se* would also violate the Equal Protection Clause of the Fourteenth Amendment [is] . . . support[ed] in the *per curiam* decisions of the Supreme Court following *Brown v. Board of Educ.* . . . ." *Id.* at 468-69 (Feinberg, J., concurring) (noting *Wright* was a closer call than the majority opinion admitted). Nevertheless, Judge Feinberg did not find the evidence to be indicative of race as a motivation in New York's redistricting scheme, avoiding a prelude to *Miller*'s predominant factor test. *Id.* at 469, 471. *See infra* text accompanying notes 132-33 for an explanation of the predominant factor test.

Constitution require intent as well? The Supreme Court resolved the issue in *Washington v. Davis*, and mandated proof of intent for an equal protection claim.[58] The plaintiffs alleged that the District of Columbia's civil service test and other hiring procedures for police discriminated against black applicants.[59] The Court, however, declared that the racially disproportionate impact of the test was not enough to state an equal protection claim.[60]

The Court expanded the evidentiary scope of the intent inquiry in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[61] *Arlington Heights* dealt with a village council's denial of a rezoning request to create a low and moderate-income housing project within the village, a project likely to be racially integrated.[62] Noting that the village did not intentionally discriminate based on race,[63] the Court enumerated possible evidence of intent, to wit: the impact of the government action on different races, the historical background of the action, the events leading up to the action, substantive and procedural departures from normal governmental sequences, and legislative and administrative history.[64]

A year later in the landmark case of *Regents of the University of California v. Bakke*,[65] the Supreme Court dealt with a racial classification intended to remedy past discrimination. A white student brought an equal protection claim after being excluded from admission to the Medical School of the University of California at Davis.[66] The alleged violation was the use of race to screen applicants for a limited number of special admissions slots[67] to the entering class. Holding that the school's special admissions program was a racial classification, a majority of the Court concluded that racial distinctions of any kind are "inherently suspect"[68] but proceeded to

58. 426 U.S. 229, 239-40 (1976). The Court stated that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Id.* at 240.

59. *Id.* at 233.

60. *Id.* at 239. The Court did not preclude racial impact as evidence of a discriminatory racial purpose. *Id.* at 241. In fact, the "totality of the relevant facts" can imply an invidious discriminatory purpose. *Id.* at 242.

61. 429 U.S. 252 (1977).

62. *Id.* at 257-58.

63. *Id.* at 270.

64. *Id.* at 266-68. *See infra* note 131 and accompanying text for the Court's use of *Arlington Heights* in *Miller*.

65. 438 U.S. 265 (1978) (plurality opinion).

66. *Id.* at 276-78.

67. *Id.* at 276. The trial court found that white applicants were precluded from the 16 special admissions slots. Bakke v. Regents of the Univ. of Cal., 553 P.2d 1152, 1159 (Cal. 1976).

68. *Bakke*, 438 U.S. at 291 (Powell, J.). Justice Powell stated that "[r]acial and ethnic

apply two types of scrutiny[69] with mixed results. [70] A different group of five justices affirmed the California court's judgment admitting Bakke to the medical school,[71] with a plurality of four deciding on statutory, not constitutional grounds.[72]

Many years after *Bakke*,[73] the Supreme Court finally resolved its approach to remedial racial classifications in *City of Richmond v. J.A. Croson Co.*[74] The Court analyzed the constitutionality of a Richmond, Virginia, ordinance dealing with public works contracts.[75] The ordinance

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distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.* (concluding that the special admissions program was constitutionally invalid, but that race can be considered in admissions decisions when it is a non-dispositive factor).

69. *Bakke*, 438 U.S. at 291. Justice Powell would have applied current strict scrutiny. *Id.* Justices Brennan, White, Marshall, and Blackmun delineated a different approach, stating that it "should be strict—not ``strict' in theory and fatal in fact . . . ." *Id.* at 361-62 (quoting Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)). The latter justices' level of scrutiny considered whether a racial classification meant to remedy past discrimination met important governmental objectives and was substantially related to those objectives. *Bakke*, 438 U.S. at 359 (quoting Califano v. Webster, 430 U.S. 313, 317 (1977) (quoting Craig v. Boren, 429 U.S. 190, 197 (1976))).

Currently, equal protection cases submit to three standards of review: (1) the rational basis test, used when no basis for independent judicial examination of a government classification exists and which results in a violation only if the law has no rational relationship to a valid government interest; (2) the intermediate standard of review, applied notably to gender cases, under which a classification must bear a substantial relationship to an important government interest; and (3) strict scrutiny, applied to classifications of race or national origin, which necessitates that the classification be narrowly tailored to meet a compelling government interest. 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 18.3, at 20-22 (2d ed. 1992).

70. *Bakke*, 438 U.S. at 320. Justices Brennan, White, Marshall, and Blackmun agreed with Justice Powell as to the application of strict scrutiny and reached the constitutional issue concerning equal protection. *Id.* at 361-62. Unlike Justice Powell, however, this faction held the admissions program constitutional. *Id.* at 325.

71. *Bakke*, 438 U.S. at 320 (Burger, C.J., Powell, Stewart, Rehnquist, & Stevens, JJ.).

72. *Id.* at 320.

73. In the interim, the Court continued to wrestle with the proper standard of review for remedial racial classifications, notably in the context of personnel cases. For example, in *Wygant v. Jackson Board of Education*, a plurality of four justices agreed that strict scrutiny would apply when racial preferences were used in a school district's layoff procedures. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-74 (1986) (holding the measures unconstitutional). This was not enough, however, to establish strict scrutiny as a universal standard.

74. 488 U.S. 469 (1989). Earlier, the Court divided over the scrutiny applicable to a federal public works program using minority business enterprise classifications in Fullilove v. Klutznick, 448 U.S. 448 (1980). *Id.* at 453-56. A plurality held the statute constitutional under both strict and intermediate scrutiny. *Id.* at 491-92 (Burger, C.J.). Three justices upheld it on intermediate scrutiny alone. *Id.* at 519 (Marshall, J., concurring).

75. *Richmond*, 488 U.S. at 477.

required contractors to subcontract thirty percent of the dollar amount of their contracts to a class of subcontractors labeled minority business enterprises (MBEs).[76] Declaring that strict scrutiny applied to all racial classifications, the Court applied its most searching review,[77] and held the ordinance unconstitutional.[78]

The Court extended its application of the Equal Protection Clause to racial gerrymanders in *Shaw v. Reno.*[79] The North Carolina legislature created peculiarly shaped congressional districts in deference to preclearance objections made by the Justice Department.[80] Commentators characterized one of the districts as a "Rorschach ink-blot test"[81] and a "ketchup spill."[82] The *Shaw* plaintiffs filed suit in federal district court alleging that the district was a racial gerrymander violating the Fourteenth Amendment.[83] Deciding only whether the appellants stated an equal protection claim against the state appellees,[84] the Court held the congressional district so irrational on its face that it precluded any explanation other than racial segregation of voters does support a claim under the Equal Protection Clause.[85]

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76. *Id.* The ordinance defined an "MBE" as a business in which minorities who are either "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts" own or control 51% of the firm. *Id.* at 478.

77. *Id.* at 494 (O'Connor, J). For the first time, a majority of the Court agreed to apply strict scrutiny regardless of "the race of those burdened or benefited by a particular classification." *Id.* (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279-80 (1986)); *see also* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995) (O'Connor, J.) (holding that strict scrutiny also applies under the Fifth Amendment's due process clause to federal actions).

78. *Richmond*, 488 U.S. at 498, 508. The Court found no evidence identifying discrimination in the Richmond construction industry. *Id.* at 505. Thus, no compelling government interest existed. *Id.* The Court also disposed of the second prong of strict scrutiny, narrow tailoring, because no evidence existed that any minority other than blacks had suffered discrimination. *Id.* at 506. Further, the Court found that no race-neutral means or individualized procedures were considered. *Id.* at 507-08.

79. 509 U.S. 630 (1993).

80. Shaw v. Barr, 808 F. Supp. 461, 464 (E.D.N.C. 1992), *rev'd sub nom.* Shaw v. Reno, 509 U.S. 630 (1993). The North Carolina legislature had already created another bizarrely shaped majority-minority district, the First District. *Barr*, 808 F. Supp. at 463 n.2.

81. Max Boot, *Supreme Court Rules That "Bizarre" Districts May Be Gerrymanders,* CHRISTIAN SCI. MONITOR, June 30, 1993, at 7. The other district in *Shaw* was shaped like a snake. *Shaw*, 509 U.S. at 635. Though it was 160 miles long, it was no wider than the Interstate 85 corridor for much of its length. *Id.* This inspired one state legislator to remark that "if you drove down the interstate with both car doors open, you'd kill most of the people in the district." Joan Biskupic, *N.C. Case to Pose Test of Racial Redistricting: White Voters Challenge Black-Majority Map,* WASH. POST, Apr. 20, 1993, at A4.

82. *Back To The Ghetto?*, THE ECONOMIST, July 10, 1993, at 13.

83. *Barr,* 808 F. Supp. at 468.

84. *Shaw*, 509 U.S. at 658.

85. *Id.* (reversing the judgment of the district court and remanding for analysis of the racial gerrymander claim and if proven, a subsequent determination of whether the

C. The Equality of Votes

Persistent widespread discrimination in voting practices continued despite early court victories in the late 1950s.[86] Frustrated by the insidious nature of lingering devices used to deny blacks the franchise, Congress acted to ensure voting equality.[87] Pursuant to the Fifteenth Amendment,[88] Congress passed the Voting Rights Act of 1965[89] to eradicate racial discrimination in voting.[90] This new tool provided the government with several remedies–a suspension of literacy tests and similar devices, a suspension of new voting regulations until approval by federal authorities, and federal examiners to list qualified voters.[91]

However, the Supreme Court had not been listless in the area of voting rights. Prior to the Voting Rights Act, the Court held in *Baker v. Carr* that a vote dilution[92] claim was justiciable under the Fourteenth Amendment.[93]

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classification was narrowly tailored to further a compelling state interest). On remand, the district court held the plan did pass strict scrutiny. Shaw v. Hunt, 861 F. Supp. 408, 476 (E.D.N.C. 1994), *rev'd*, 116 S. Ct. 1894 (1996). Ultimately, the Supreme Court held on appeal that the district was not narrowly tailored to the State's compelling interest in complying with § 2 of the Voting Rights Act. Shaw v. Hunt II, 116 S. Ct. 1894 (1996).

Much criticism has been leveled at *Shaw v. Reno*. *See, e.g.*, A. Leon Higginbotham et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593 (1994) (comparing *Shaw* to *Plessy v. Ferguson* and *Dred Scott v. Sandford*); David Kairys, *Race Trilogy*, 67 TEMPLE L. REV. 1 (1994) (noting that *Shaw* has reversed racial roles); Earl M. Maltz, *Political Questions and Representational Politics: A Comment on Shaw v. Reno*, 26 RUTGERS L.J. 711 (1995) (arguing that *Shaw* falls within the nonjusticiable political question doctrine).

86. H.R. REP. NO. 439, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2440. Prosecution of voting-rights cases on an individual basis overwhelmed the ability of the Justice Department to enjoin continuing voting-rights violations on a discrete, case-by case level using prior civil rights legislation. Thus, the preclearance provisions of the Voting Rights Act of 1965 provided a mechanism under which the burden of proof and prosecution could be switched to the offending jurisdictions, braking efforts to circumvent minority voting equality. S. REP. NO. 417, 97th Cong., 2nd Sess. 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 182.

87. H.R. REP. NO. 439, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2440-42.

88. U.S. CONST. amend. XIV. *See supra* note 53 for the amendment's text.

89. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (1988)).

90. *See* H.R. REP. NO. 439, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2437. In 1966, the Supreme Court upheld the Voting Rights Act as a constitutional means of enforcing the Fifteenth Amendment. South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966) (noting that "millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live.").

91. Voting Rights Act, 42 U.S.C. § 1973-1973p (1988); H.R. REP. NO. 439, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2437.

92. A vote dilution claim involves an impairment of a group's ability to elect candidates of their choice by submerging a minority into a majority group district. Thornburg v.

Subsequently, plaintiffs in the landmark case of *Reynolds v. Sims*[94] asserted a denial of equal suffrage stemming from the Alabama legislature's failure to reapportion state legislative districts for fifty-three years.[95] Addressing the dilution claim, the Supreme Court held that seats in bicameral legislatures must be apportioned on a population basis[96] to secure equality of votes under the Equal Protection Clause.[97]

Following congressional enactment of the Voting Rights Act, the court explicated the retrogression test of section 5 of the Act in *Beer v. United States*.[98] The city of New Orleans had sought a declaratory judgment under section 5 of the Act[99] to implement a councilmanic reapportionment creating two majority black districts.[100] Under the prior apportionment scheme, no district had a majority of black voters.[101] In a holding limited to construing section 5 of the Voting Rights Act of 1965,[102] the Court declared that a

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Gingles, 478 U.S. 30, 46 n.12 (1986). A vote fragmentation claim is the splitting of "geographically cohesive minority groups that are large enough to constitute majorities in single-member districts . . . ." *Id.*; *see* Growe v. Emison, 507 U.S. 25, 40 (1993) (applying the *Gingles* test to a vote fragmentation claim). The Court has yet to rule on the validity of a third claim under § 2 of the Voting Rights Act, an "influence dilution" claim. Voinovich v. Quilter, 507 U.S. 146, 154 (1993) (addressing an influence dilution claim but holding on other grounds). In this latter claim, an otherwise influential minority in several districts is packed into a lesser number of super-majority majority-minority districts. *Id.*

93. Baker v. Carr, 369 U.S. 186, 237 (1962).

94. 377 U.S. 533 (1964).

95. *Id.* at 537, 540.

96. *Id.* at 568. The Court explained that the right to vote is "unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Id.* Earlier, *Gray v. Sanders* had established the famous "one person, one vote" maxim. Gray v. Sanders, 372 U.S. 368, 381 (1963). Extending *Gray*, *Wesberry v. Sanders* applied this principle to congressional apportionments. Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964) (basing its holding on Article I, § 2 of the U.S. Constitution, not the Equal Protection Clause of the Fourteenth Amendment).

97. *Reynolds*, 377 U.S. at 566.

98. 425 U.S. 130, 133 (1976). The retrogression test precludes a decrease in minority voting strength occurring as a result of redistricting. *Id.* at 141. Thus, a change meets the test "if minorities are equally well off or better off after the change than before it, even if the change leaves undisturbed a status quo that still does not fairly reflect minority voting strength." Hiroshi Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C.L. REV. 189, 195 (1983) (criticizing the reliability of the retrogression test).

99. *See supra* note 11 for the pertinent text of the Act.

100. *Beer*, 425 U.S. at 136. Though black population majorities composed both districts, only one of the two districts possessed a majority of black voters. *Id.*

101. *Id.* at 141-42.

102. 42 U.S.C. § 1973c (1988).

reapportionment enhancing the exercise of racial minorities' electoral franchise[103] does not dilute votes within the meaning of section 5.[104]

The following year, a divided Court considered whether a state's use of racial criteria to comply with the Voting Rights Act was a violation of the Equal Protection Clause or the Fifteenth Amendment.[105] In *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, the New York legislature split an Hasidic Jewish community of 30,000 people into two senate and two assembly seats.[106] The impetus for the split was a desire to secure the approval of the United States Attorney General[107] for reapportioning covered jurisdictions.[108] The plaintiffs alleged violations of the Fourteenth and Fifteenth Amendments, arguing that the plan would dilute residents' votes.[109] A plurality of the Court held that states could intentionally create majority-black districts to comply with section 5, allowing the use of race as a districting criterion.[110]

Despite the endurance of the Voting Rights Act in *United Jewish Organizations of Williamsburgh, Inc.*, the Court did effect a change in the Act.[111] In *City of Mobile v. Bolden*,[112] black plaintiffs brought suit alleging that at-large elections of a three-member city commission established a vote

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103. *Beer*, 425 U.S. at 141. The Court referred to such a plan as an "ameliorative" apportionment. *Id.*

104. *Id.* The Court based its reasoning on the rationale of the Act, "the purpose of § 5 has always been to insure that no voting procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.*

105. United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 148 (1977).

106. *Id.* at 152. Previously, the community had resided in one assembly district and one senate district. *Id.* *See infra* note 158 and accompanying text for more analysis of this case as applied to *Miller*.

107. *Carey*, 430 U.S. at 148, 152. The state reapportionment committee's own report stated that the changes were made to defeat Justice Department objections. *Id.*

108. *Id.* *See supra* note 10 for an explanation of covered jurisdictions.

109. *Carey*, 430 U.S. at 152-53. Interestingly, the plaintiffs also asserted that they were placed within districts because of race, further diluting their votes under the Fifteenth Amendment. *Id.* at 153. This assertion contrasts with *Shaw v. Reno*'s complaint, alleging improper racial classification under the Fourteenth Amendment. Shaw v. Reno, 509 U.S. 630, 637 (1993).

110. *Shaw*, 509 U.S. at 161, 162. Justice White commented that "[s]ection 5 and its authorization for racial redistricting where appropriate to avoid abridging the right to vote on account of race or color are constitutional." *Id.* at 161 (plurality opinion). In dissent, Chief Justice Burger responded, "If *Gomillion* teaches us anything, I had thought it was that drawing of political boundary lines with the sole, explicit objective of reaching a predetermined racial result cannot ordinarily be squared with the Constitution." *Id.* at 181.

111. S. REP. NO. 417, 97th Cong., 2nd Sess., 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 179 (restoring the pre-*Bolden* effects standard).

112. 446 U.S. 55 (1980).

dilution claim under the Equal Protection Clause.[113] Citing past precedents,[114] the Court stated that one must show more than disproportionate impact on race alone;[115] one must also show an intent to discriminate.[116]

As a result, Congress amended section 2 of the Voting Rights Act to require only a showing of discriminatory effect as a violation of the section.[117] The "results test,"[118] as this new standard was known, created a "totality of the circumstances"[119] inquiry to determine vote dilution injuries under section 2 of the Voting Rights Act.[120]

In sum, it was the Scylla of this amendment to the Voting Rights Act that forced Georgia into the Charybdis of *Shaw*'s equal protection claim.

IV. REASONING

Miller v. Johnson began when white voters from Georgia's Eleventh congressional district sued state officials alleging the 1990 congressional

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113. *Id.* at 58. Plaintiffs also claimed violations of § 2 of the Voting Rights Act of 1965 and the Fifteenth Amendment. *Id.* The Court held neither was meritorious. *Id.* at 61, 65.

114. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (discussed *supra* at notes 61-64 and accompanying text); Washington v. Davis, 426 U.S. 229 (1976) (discussed *supra* at notes 58-60 and accompanying text); Wright v. Rockefeller, 376 U.S. 52 (1964) (discussed *supra* at notes 55-57 and accompanying text).

115. City of Mobile v. Bolden, 446 U.S. 55, 70 (1980).

116. *Id.* at 69. The Court held that the plaintiffs had not met this burden. *Id.* at 70.

117. Voting Rights Act § 2, 42 U.S.C. § 1973(a) (1988) (amended 1992). The amended provision reads:

> 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 abridgement of the right of any citizen of the United States to vote on account of race or color . . . .

Id.

118. Thornburg v. Gingles, 478 U.S. 30, 35 (1986).

119. Voting Rights Act § 2, 42 U.S.C. § 1973(b) (1988). The relevant part of § 1973(b) states:

> A violation of subsection (a) is established if, based on the *totality of the circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice . . . .

Id. (emphasis added). Circumstances probative of vote dilution are the history of official discrimination touching voting, racial polarization in voting, voting practices offering opportunities for minority discrimination, denial of minority access to slating, discrimination in the social sphere impacting on voting, race-baiting political campaigns, and minority electoral success. S. REP. NO. 417, 97th Cong., 2nd Sess., 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07.

120. Voting Rights Act § 2. *See supra* note 119 for the change.

redistricting plan was a racial gerrymander.[121] A district court agreed with the plaintiffs and overturned the redistricting plan.[122]

Justice Kennedy authored the majority's opinion, which Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas joined. The Court premised its analysis on the Equal Protection Clause.[123] Current equal protection analysis holds that any classifications made on the basis of race are intrinsically suspect and require the highest level of judicial examination—strict scrutiny.[124] Consequently, these classifications must be "narrowly tailored to achiev[e] a compelling state interest."[125] Further, these principles apply to a State's creation of congressional districts under *Shaw v. Reno*.[126]

Turning to an analysis of *Shaw v. Reno*, the Court dispensed with the notion that a *Shaw* claim requires a threshold showing of bizarreness.[127] Initially, appellants argued that *Shaw* required a district's shape to be so bizarre that only race could explain its borders.[128] The Court, however, rejected this reading of *Shaw*.[129] Instead, shape is simply evidence that race was the legislature's dominant purpose in drawing the district.[130] Accordingly, evidence apart from shape is also relevant to establish race-based districting, and parties need not cross a threshold of bizarreness.[131]

The Court then set out the test for a racial gerrymander claim. A plaintiff must prove that race was the predominant factor motivating a

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121. 115 S. Ct. 2475, 2485 (1995).

122. Johnson v. Miller, 864 F. Supp. 1354, 1393 (S.D. Ga. 1994).

123. *Miller*, 115 S. Ct. at 2482. *See supra* note 4 for the text of the Equal Protection Clause.

124. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2111 (1995) (providing a doctrinal basis for strict scrutiny of all race-based classifications). *See supra* notes 74-78 and accompanying text for an explanation of *Croson*.

125. *Miller*, 115 S. Ct. at 2482.

126. *Id.* at 2483; Shaw v. Reno, 509 U.S. 630 (1993). *See supra* notes 79-85 and accompanying text for an analysis of *Shaw*.

127. *Miller*, 115 S. Ct. at 2485.

128. *Id.* at 2485, 2486. Others have mistakenly agreed with this test of appearance. *See, e.g.*, 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, 484 (1993) (describing *Shaw* as a "district appearance claim").

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

130. *Id.*

131. *Id.* at 2488. The Court has previously stated that "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face . . . . Absent a [stark] pattern . . . the Court must look to other evidence." Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977). *See supra* notes 61-64 and accompanying text for an analysis of *Arlington Heights*.

legislature's decision to include or exclude a significant number of voters from a particular district.[132] Doing so requires a showing that a legislature submerged the use of traditional districting principles to racial considerations.[133]

Applying the test to the facts, the Court affirmed the trial court's findings[134] and concluded that race was the "predominant, overriding factor" informing the General Assembly's drawing of the Eleventh District.[135] Failing the predominant factor test, Georgia's plan had to pass the Court's test of strict scrutiny.[136] Georgia argued that it had a compelling interest in meeting the Justice Department's preclearance mandates.[137] The Court refused to accept this argument, because it would have resulted in a surrender to the Executive Branch of the Court's power to enforce constitutional limits concerning official race-based action.[138]

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132. *Miller*, 115 S. Ct. at 2488. The Court recently dealt with a mixed motive case in which race was one of several considerations, *e.g.*, incumbency protection. Bush v. Vera, No. 94-805, 1996 WL 315857 at *5 (U.S. June 13, 1996). After an exhaustive review of the evidence, the Court upheld the district court's order declaring that certain Texas congressional districts were racial gerrymanders and unconstitutional under strict scrutiny review. *Id.* at *20.

133. *Miller*, 115 S. Ct. at 2488. These traditional factors are as follows: compactness, contiguity, and common community interests. *Id.*

134. *Id.* In addition to the shape and racial demographics of the Eleventh District, the Court listed the following evidence: the Justice Department's letters that only three majority-minority districts would suffice; the testimony of Linda Meggers, an expert on Georgia redistricting; the State of Georgia's admission that it would not have allowed the Macon-Savannah trade absent the Justice Department's objections; the State's admission that it split voting precincts to increase black population in the Eleventh District; and the State's concession in its brief to the Court that the Eleventh is a product of an intent to create a majority black district. *Id.* at 2489.

135. *Miller*, 115 S. Ct. at 2490. The Court found that the State's proffered explanations were not justified. *Id.* at 2489. The Court cited the Georgia Attorney General's objection to the Justice Department's insistence on a third majority-black district, an objection made on the grounds that it disregarded any standard of compactness or contiguity. *Id.* at 2489-90. The Court also did not find communities of interest in the Eleventh District. *Id.* at 2490. *See infra* note 157 for a refutation of this point.

136. *Id.* at 2490.

137. *Id.* at 2491. Though remedying the effects of past racial discrimination is a significant state interest, Shaw v. Reno, 509 U.S. 630, 656 (1993), Georgia did not make that argument. *Miller*, 115 S. Ct. at 2490. The Court noted the argument would have been specious anyway. *Id.* Nor was the Justice Department's max-black policy a compelling interest. *Id.* at 2491.

138. *Miller*, 115 S. Ct. at 2491. *See also* United States v. Nixon, 418 U.S. 683, 704 (1974) (stating that "judicial power . . . can no[t] be shared with the Executive Branch"); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (noting that "[i]t is emphatically the province and duty of the judicial department to say what the law is").

The Court concluded further that the Justice Department's previous objections were misplaced. Georgia's initial plans were ameliorative[139] and, therefore, not amenable to the Justice Department's attacks based on section 5 of the Voting Rights Act.[140] Thus, the Court ended the opinion with a rejection of the max-black policy, finding no intent on the part of Congress to extend the application of section 5 of the Voting Rights Act so widely.[141]

In conclusion, the Court affirmed the district court's judgment and remanded the case for further proceedings consistent with the decision.[142]

Justice O'Connor, concurring, agreed with the majority's test.[143] Her separate opinion sought to reassure states that the majority of congressional districts are constitutionally secure despite the presence of racial considerations in their creation.[144]

Justice Stevens dissented both individually and with Justice Ginsburg.[145] Distinguishing his opinion, he argued that the plaintiffs "suffered [no] legally cognizable injury."[146] He contended that the *Shaw* injury[147] was too

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139. *See supra* note 98 and accompanying text for an explanation of ameliorative plans. One scholar has said that *Miller* reaffirmed the Court's commitment to *Beer*. Richard C. Reuben, *A 'Simple Command' Creates Confusion*, A.B.A. J., Sept. 1995, at 19 (quoting Prof. James Blumstein of Vanderbilt University School of Law).

140. *Miller*, 115 S. Ct. at 2492.

141. *Id.* at 2493. The potential application of the Voting Rights Act in a subversive manner has not escaped notice. *See, e.g.*, ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION & MINORITY VOTING RIGHTS 235 (1987) (arguing that the Voting Rights Act has evolved from a beneficent law insuring equal votes to a divisive entitlement of equal racial representation). Justices Thomas and Scalia have also previously rejected this policy, stating "few devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act." Holder v. Hall, 114 S. Ct. 2581, 2599 (1994) (Thomas, J., concurring).

142. Miller v. Johnson, 115 S. Ct. 2475, 2494 (1995). On remand, the Georgia General Assembly failed to redraw the districts, and the task reverted to the district court. Johnson v. Miller, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995).

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

144. *Id.* Justice O'Connor sought to narrow the decision's implications, stating that its application would "help[] achieve *Shaw*'s basic objective of making extreme instances of gerrymandering subject to meaningful judicial review." *Id.*

145. *Id.* (Stevens, J., dissenting).

146. *Id.* (Stevens, J., dissenting).

147. Justice Stevens called this a "representational harm," and defined it using *Shaw*'s language as follows: "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Id.* (Stevens, J., dissenting) (quoting Shaw v. Reno, 509 U.S. 630, 648 (1993)).

elusive,[148] and that only a claim of vote dilution could sustain an injury on these facts.[149]

Justice Ginsburg, in her dissent,[150] disagreed with the Court over the degree to which legislative considerations of race offend the Equal Protection Clause.[151] Reiterating that courts are not the governmental branch best suited for drawing district lines,[152] Ginsburg explained the history of judicial involvement in redistricting in Georgia.[153] Historically, the Court applied the Equal Protection Clause to preclude the dilution of minority voting strength, *viz.*, apportionment plans.[154]

Distinguishing *Shaw v. Reno*[155] from that history, she observed that traditional redistricting factors were essentially excluded from consideration in the creation of the *Shaw* district.[156] Thus, *Shaw* differed from the present case because Georgia's Eleventh District did not subordinate traditional districting principles to race.[157]

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148. *Miller*, 115 S. Ct. at 2498 (Stevens, J., dissenting). The Court's analogy of a *Shaw* injury to desegregation cases troubled Justice Stevens. *Id.* (Stevens, J., dissenting). He felt the latter cases dealt with exclusionary policies, yet the *Miller* plaintiffs contested a measure concerning the inclusion of too many black voters in one district. *Id.* (Stevens, J., dissenting).

149. *Id.* (Stevens, J., dissenting). For Justice Stevens, a violation would occur "when [districting plans] serve no purpose other than to favor one segment . . . that may occupy a position of strength . . . or to disadvantage a politically weak segment of the community." *Id.* at 2499 (Stevens, J., dissenting) (quoting Karcher v. Dagget, 462 U.S. 725, 748 (1983) (Stevens, J., concurring)).

150. *Miller*, 115 S. Ct. at 2499 (Ginsburg, J., dissenting). She was joined by Justices Stevens, Breyer, and in part by Justice Souter. *Id.* (Ginsburg, J., dissenting).

151. *Id.* at 2500 (Ginsburg, J., dissenting). The dissent did find common ground on several points, to wit: that judicial intervention in redistricting is exceptional; that voting inequality has existed historically along racial lines; that legislatures must consider race when redistricting; and that states may recognize communities having a racial make-up. *Id.* (Ginsburg, J., dissenting).

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

153. *Miller*, 115 S. Ct. at 2500-02 (Ginsburg, J., dissenting). Justice Ginsburg listed devices the Georgia legislature had enacted to preclude post-Reconstruction voting by blacks, such as cumulative poll taxes, white primaries, and property and literacy tests. *Id.* at 2501 (Ginsburg, J., dissenting). Not until passage of the Voting Rights Act, with the Acts' consequent judicial involvement, were Georgians able to elect black congresspersons. *Id.* (Ginsburg, J., dissenting). Further, not until 1981 did Georgia gain a majority-minority district. *Id.* (Ginsburg, J., dissenting).

154. *Id.* at 2501 (Ginsburg, J., dissenting).

155. 509 U.S. 630 (1993).

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

157. *Id.* (Ginsburg, J., dissenting). The dissent pointed to the following traditional factors: the total land area of the district is average for the state; the length of the border is equivalent to other Georgia districts; relative to other districts in the state, the Eleventh District does not discount political subdivisions such as counties; and nonracial considerations were involved in its creation. *Id.* at 2503 (Ginsburg, J., dissenting). Nor did the dissent find on the *Miller* facts that the Justice Department forced the Eleventh District's boundaries on

The dissent also argued that apportionment itself was unique, refuting the majority's view that the Constitution's blinders permit the Court to see only individuals and not interest groups.[158] Ginsburg contended that districting requires that people be treated as groups, not individuals.[159] Accordingly, the history of strict scrutiny accounted for a consideration of group identity, precluding it from the context of majority voters' constitutional claims.[160]

Concluding with a Parthian blow, Justice Ginsburg argued that the Court's decision would "render[] redistricting perilous work" for states.[161] Consequently, Ginsburg predicted that only future litigation would assure states of secure districts.[162]

V. SIGNIFICANCE

The *Miller* decision is the Court's first case to determine when a racial gerrymander violates the Equal Protection Clause. Thus, *Miller* provides a test with which to sort racial gerrymander claims.[163]

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the General Assembly using the max-black plan as a model. *Miller*, 115 S. Ct. at 2504 (Ginsburg, J., dissenting). *See supra* note 135 and accompanying text for a refutation of this point.

158. *Id.* at 2505-06 (Ginsburg, J., dissenting). As authority for this proposition, Justice Ginsburg cited *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*. *Id.* at 2505 n.11 (Ginsburg, J., dissenting). Considering that case to be on point with *Miller*'s facts, Justice Ginsburg read *United Jewish Orgs.* as allowing for the intentional creation of majority-minority districts. *Id.* (Ginsburg, J., dissenting). Justice Ginsburg is not alone in her view. *See* Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 7 SUP. CT. REV. 245, 275-76 (1993) ("The claim that race-conscious redistricting was per se unconstitutional had been rejected by a fractured Supreme Court in *United Jewish Organizations v. Carey*."). However, the majority distinguished analogies to *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, which dealt with a vote dilution claim, not a racial gerrymander as in *Miller*. *Miller*, 115 S. Ct. at 2487.

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

160. *Id.* (Ginsburg, J., dissenting). The dissent noted the fact that the majority can exercise political power relieved the Court of the burden of applying "extraordinary judicial solicitude" in these cases. *Id.* at 2506 (Ginsburg, J., dissenting). Justice Souter did not concur in this part of the opinion. *Id.* at 2499.

161. *Id.* at 2507 (Ginsburg, J., dissenting).

162. *Miller*, 115 S. Ct. at 2507 (Ginsburg, J., dissenting). Gerald Gunther of Stanford Law School agreed, saying "the decision leaves a lot of questions unanswered." Reuben, *supra* note 139, at 18.

163. Commentators have sagely noted this need. *See, e.g.*, Alexander Aleinikoff & Samuel Issacharoff, *Race & Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 618 (1993) ("*Shaw* fails [to offer meaningful constitutional oversight] . . . unless state actors can put its commands into operation.").

Miller also appears vital as an extension of the majority's commitment to a race neutral application of the Constitution.[164] The Court appears willing to extend the Equal Protection Clause uniformly, viewing challenged laws without consideration of their racial histories. The Court's past decisions,[165] subjugating racial and ethnic classifications to an egalitarian paradigm,[166] make this plausible.

Further, the Court's treatment of the Justice Department's application of the Voting Rights Act reveals a limit on executive enforcement of the Act.[167] The Court is seemingly unwilling to balance the Fifteenth Amendment right to vote with the Equal Protection Clause,[168] instead choosing to draw a bright line on the issue of race-based districting.

Finally, the effect of *Miller* on all state-created districts is mammoth. Each state and local district is now open to attack based on the circumstances of its birth.[169] Notably, this includes Arkansas' own judi-cial districts which have already been challenged on equal protection grounds.[170]

VI. CONCLUSION

Miller v. Johnson sets out judicially manageable standards under which lower courts can resolve racial gerrymander claims. If race is the predominant factor in a legislature's decision to place voters inside or outside the

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164. *Cf.* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 309 (1991). Michael Klarman has characterized this as a shift from identifying racially discriminatory classifications using a functional analysis of a group's historical and contemporary power to a "relevance" approach which precludes application of racial classifications deemed irrelevant. *Id.*

165. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

166. Justice Scalia put it succinctly, saying "[i]n the eyes of government, we are just one race here. It is American." Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2119 (1995) (Scalia, J., concurring in part and concurring in the judgment).

167. *Miller*, 115 S. Ct. at 2493. The Court declared "[t]here is no indication Congress intended such a far-reaching application of § 5, so we reject the Justice Department's interpretation of the statute . . . ." *Id.*

168. *Id.* Though stating that a proper exercise of Congress's Fifteenth Amendment power was subject to Fourteenth Amendment limits, the Court avoided balancing the Voting Rights Act with equal protection mandates, concluding that the Justice Department's max-black policy was beyond the scope of Congress's intent. *Id.*

169. After the affirmance of *Miller v. Johnson*, the same Georgia court also declared the Second District unconstitutional. Johnson v. Miller, 922 F. Supp. 1552, 1556 (S.D. Ga. 1995). Georgia's state legislative districts were later challenged. *See* Johnson v. Miller, No. CIV. A. 196-140, 1996 WL 288936 (S.D. Ga. June 18, 1996) (refusing to grant a preliminary injunction for Georgia's July primaries).

170. Ronald Smothers, *Black Districts Under Fire in Arkansas*, ATLANTA J. & CONST., April 11, 1996, at D8.

borders of a congressional district, then the district fails as an unconstitutional racial classification. In determining whether racial intent is the predominant factor, the Court has incorporated past equal protection analysis, clearly enlarging the scope of the evidentiary inquiry beyond the facts in *Shaw v. Reno*. Therefore, racial gerrymander claims now fall squarely within established equal protection precedent.

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