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Could the Best of Tightrope Walkers Manage to Walk the Line Between Race-Consciousness and Race-Predominance? An Analysis of Race-Based Districting\(^1\) in Light of \textit{Miller v. Johnson}\(^2\)

\section{I. Introduction}

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

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

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


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

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

II. HISTORICAL BACKGROUND

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

5. See infra notes 10-130 and accompanying text.
6. See infra notes 131-42 and accompanying text.
7. See infra notes 143-220 and accompanying text.
8. See infra notes 221-313 and accompanying text.
9. See infra notes 314-18 and accompanying text.
13. See Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that a law barring interracial marriage violated the Equal Protection Clause, in part because it was based on a suspect classification—race). Under this analysis, the targeted state action is considered "presumptively invalid and can be upheld only upon an extraordinary justification." Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979); see also Plyler v. Doe, 457 U.S. 202, 216-17 (1982) (noting that state action premised upon racial classification is "presumptively invidious").
15. Miller v. Johnson, 115 S. Ct. 2475, 2482 (1995); see, e.g., Loving, 388 U.S. at 11-12 (noting that the Court has "consistently denied the constitutionality of measures which restrict the rights of citizens on account of race"); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (recognizing that a classification based on race must be viewed as "constitutionally suspect"); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (recognizing that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded
A. The Development of Strict Scrutiny Analysis in Racial Classifications

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

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

17. Id. at 487-88.
18. Id. at 494-95.
19. GIRARDEAU A. SPANN, RACE AGAINST THE COURT 105-06 (1993). The Court never adequately explained the reasoning behind the rule. Michael Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 256 (1991). Nevertheless, the rule itself is very clear: the mere allegation that a person was classified by race constitutes a claim. Id. at 255-56.
20. See, e.g., Hunter v. Erickson, 393 U.S. 385, 392-93 (1969) (holding invalid a municipal ordinance that prohibited a city council from taking measures to eliminate racial discrimination in housing absent a referendum); Hernandez v. Texas, 347 U.S. 475, 482 (1954) (invalidating state action that systematically prohibited Hispanics from participating on juries); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (declaring the systematic discrimination against Chinese laundry operators unconstitutional). In his treatise on constitutional law, Professor Laurence Tribe argued that “the device of strict scrutiny is most powerfully employed for the examination of political outcomes challenged as injurious to those groups in society which have occupied, as a consequence of widespread, insistent prejudice against them, the position of perennial losers in the political struggle.” LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1453-54 (2d ed. 1988). In Strauder v. West Virginia, the Court noted: “[The Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States.” 100 U.S. 303, 306 (1879).
The first major case where the Court claimed that the Equal Protection Clause protected whites as well as blacks was *Regents of the University of California v. Bakke.* In *Bakke,* the University of California at Davis Medical School rejected an applicant to its program purely because of a racial quota system that the University used in its admissions process. In this affirmative action case, the plurality noted that race-based classifications are subject to "stringent examination" and the Court's "‘most rigid scrutiny.’" The plurality found that the medical school failed to show that its race-based admissions program was created to respond to identified discrimination. As a result, the Court held that the school did not prove a compelling governmental interest to satisfy strict scrutiny review.

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

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22. Id. at 276-78.
23. Affirmative action programs are defined as "employment programs required by federal statutes and regulations designed to remedy discriminatory practices in hiring minority group members; i.e., positive steps designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination." BLACK'S LAW DICTIONARY 59 (6th ed. 1990).
25. Id. at 291 (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).
26. Id. at 309. Justice Powell, writing for the plurality, noted: "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." Id. at 307.
27. Id. at 319. Justice Powell stated:

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

Id. at 310.
29. Id. at 297-98 (Marshall, J., dissenting).
30. Id. at 270.
Although there was no majority opinion, five justices held that the school board’s action was unconstitutional. The plurality believed that strict scrutiny was appropriate because of the racial classification in the CBA, reasoning that the standard of review should not change solely because the classification at issue burdened a class of people who were not the traditional victims of discrimination. Because the school board’s actions were not narrowly tailored, the plurality concluded that the layoff plan violated the Equal Protection Clause.

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

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31. Id. at 272.
32. Id. at 283-84; id. at 294 (O'Connor, J., concurring in part and concurring in the judgment); id. at 295 (White, J., concurring in the judgment).
33. Id. at 273-74.
34. Id. at 283-84. Justice Powell noted that the “Court never has held that societal discrimination alone is sufficient to justify a racial classification.” Id. at 274.
35. 488 U.S. 469 (1989) (plurality opinion).
36. Id. at 511.
37. Id. at 493-94. The Court noted that “the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification,” and thus there is but one standard of review—strict scrutiny. Id. at 494 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279-80 (1986).
38. Id. at 493-94.
39. Id. at 493-95.
40. Id. at 493. In his concurring opinion in *Adarand Constructors, Inc. v. Pena*, Justice Thomas wrote:

> It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others. As to the races benefited, the classification could surely be called “benign.” Accordingly, whether a law relying on racial taxonomy is “benign” or “malign,” . . . either turns on whose ox is gored . . .
scrutiny is necessary to “smoke out” possible illegitimate uses of classifications.41 Second, she argued that the “stigmatic” harm often caused by race-based classifications may actually hurt the group the classification intended to benefit because they foster the idea that the favored group is less competent and inferior than the unfavored group.42 Finally, Justice O’Connor argued that strict scrutiny is necessary to achieve true race neutrality.43

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

The Supreme Court later limited its holding in Croson to state action.48 For congressional action, the Court used a lower standard of review—the “intermediate standard.”49 This distinction did not last long, with the Court’s decision in Adarand Constructors, Inc. v. Pena50 applying strict scrutiny across the board to state and congressional action alike.51 In Adarand, a division of the United States Department

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

41. Croson, 488 U.S. at 493.
42. Id. at 493-94 (citing University of California Regents v. Bakke, 438 U.S. 265, 298 (1978)). Justice O’Connor applied the same reasoning in the reapportionment context. See infra notes 270-77 and accompanying text.
43. Id. at 496.
44. Id. at 511.
45. Id. at 498-506.
46. Id. at 506.
47. Id. at 507-08.
49. Id. The Court in Metro Broadcasting held that
benign race-conscious measures mandated by Congress—even if those measures are not ‘remedial’ in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissi-
to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.

Id.

51. Id. at 2113.
of Transportation awarded a gravel and construction company with a contract for the construction of a highway. The company sought to subcontract a portion of the job to a smaller company. In conformity with federal law, the government placed a clause in the main contractor's agreement that provided additional monies if it subcontracted with a Disadvantaged Business Enterprise (DBE). Federal regulations define a DBE as a small business, a majority of which is owned and managed by disadvantaged individuals—predominantly minorities. While Adarand Constructors submitted the lowest bid, the company was denied the job because it did not qualify as a DBE. Adarand filed suit, claiming that race-based subcontracting clauses violate the Equal Protection Clause of the Fifth Amendment. The Court agreed, and moved the level of scrutiny for federal actions that discriminate on the basis of race from the intermediate standard of review to the strict scrutiny approach.

B. The Reapportionment Cases

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

52. Id. at 2102.
53. Id.
54. Id. at 2103-04.
55. 49 C.F.R. § 23.62 (1995). There is a rebuttable presumption that "women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, [and] Asian-Indian Americans" are disadvantaged individuals. Id.
56. Adarand, 115 S. Ct. at 2102.
57. Id. at 2104. For purposes of determining the appropriate standard of review, an analysis under either the Fifth or Fourteenth Amendments is identical. Id. at 2112-13.
58. Id. at 2113.
59. Gerrymandering is defined as "the process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose, as, for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines." BLACK'S LAW DICTIONARY, supra note 23, at 687.
60. See infra note 96 (explaining the vote dilution standard).
right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.\textsuperscript{61}

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

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

\textsuperscript{62} 364 U.S. 339 (1960).
\textsuperscript{63} Id. at 341.
\textsuperscript{64} Id. at 342. The Court in \textit{Shaw v. Reno} later stated that "\textit{Gomillion} . . . supports [the] contention that district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption." 113 S. Ct. 2816, 2826 (1993).
\textsuperscript{65} \textit{Gomillion}, 364 U.S. at 349 (Whittaker, J., concurring). Justice Whittaker reasoned that because blacks in the area still retained the right to vote, though outside of the city boundaries, it could not be a Fifteenth Amendment violation. \textit{Id.} (Whittaker, J., concurring). The Court has repeatedly reaffirmed Justice Whittaker's view. See, e.g., Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) (citing \textit{Gomillion} in support of the proposition that racial classifications are presumptively invalid); Whitcomb v. Chavis, 403 U.S. 124, 149 (1971) (citing \textit{Gomillion} to support the contention that the Court has not hesitated to strike down infringements of Fourteenth Amendment rights).
\textsuperscript{66} 369 U.S. 186 (1962).
\textsuperscript{67} Alexander A. Yanos, Note, \textit{Reconciling the Right to Vote with the Voting Rights Act}, 92 COLUM. L. REV. 1810, 1815 (1992); see also Burns v. Richardson, 384 U.S. 73, 88-89 (1966) (holding that properly apportioned multimember districts can violate the Equal Protection Clause if it can be shown "[they] operate to minimize or cancel out the voting strength of racial or political elements of the voting population"); Fortson v. Dorsey, 379 U.S. 433, 439 (1965) (upholding the constitutionality of multimember districts in general); Reynolds v. Simms, 377 U.S. 533, 560-61 (1964) (holding that legislators must not venture too far from the concept of one-man, one-vote in the way they apportion their districts); Gray v. Sanders, 372 U.S. 368, 379 (1963) (prohibiting states from diluting votes on the basis of race under the Fifteenth and Nineteenth Amendments).
\textsuperscript{68} \textit{Baker}, 369 U.S. at 191.
of voters thus diluting the votes of those from larger districts.69 The Court found that a legislature's reapportionment plan is a justiciable issue for the courts and invalidated the scheme.70 On the heels of Baker, the Court decided Wright v. Rockefeller,71 and extended the holding of Gomillion to congressional districting.72 In Wright, a minority group alleged that one of New York's four congressional districts was apportioned to exclude nonwhites from the district.73 While the Court ruled against the plaintiffs,74 it was unanimous in its belief that the allegation the statute "segregate[d] eligible voters by race and place of origin" was a valid constitutional claim.75 The only disagreement was whether the plaintiffs adequately proved their case.76 Following Baker and Wright, the Court faced a number of cases involving multimember redistricting schemes. The Court held many of the schemes violated the Fourteenth Amendment when enacted with both a discriminatory intent and a vote diluting effect.77 Nonetheless, by the 1970s, the Court had lessened its scrutiny of state reapportionment plans having a negative impact on minorities.78

69. Id. at 193-94. In the course of those 60 years, the voting age population of Tennessee had increased four fold. Id. at 192.
70. Id. at 237.
72. Id. at 58.
73. Id. at 53-54.
74. Id. at 56-58.
75. Id. at 56; id. at 58 (Harlan, J., concurring); id. at 59-62 (Douglas, J., dissenting).
76. Id. at 56-58; id. at 59 (Douglas, J., dissenting). The Court noted that two equally valid inferences arose from the plan, one that involved racial discrimination and another that did not. Id. at 56-57. The plaintiffs failed to prove that only one was valid. Id. Foreshadowing the Court's decision in Miller, Justice Douglas noted that segregating voters by race promotes polarized voting. Id. at 59 (Douglas, J., dissenting).
77. See, e.g., Kirkpatrick v. Preisler, 394 U.S. 526, 531-32 (1969) (holding that states are required to "make a good-faith effort to achieve precise mathematical equality" in drawing Congressional districts); Swann v. Adams, 385 U.S. 440 (1967) (holding a state redistricting scheme invalid because it substantially deviated from population equality).
78. See, e.g., Mahan v. Howell, 410 U.S. 315, 323 (1973) (holding that in the interest of "the normal functioning of state and local governments," states have more leeway in drawing state legislative districts than in drawing congressional districts); Gaffney v. Cummings, 412 U.S. 735, 745 (1973) (recognizing "that minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case" of unconstitutionality); Abate v. Mundt, 403 U.S. 182, 185 (1971) (holding that where a redistricting plan is "justified by legitimate state consid-
In 1976, the Court in *Beer v. United States*\(^7\) directly addressed the criteria a state must satisfy under section 5 of the Voting Rights Act to successfully attack claims that its redistricting plan has the effect of denying or abridging the right to vote based on race.\(^8\) In *Beer*, the City of New Orleans challenged the United States Justice Department, which rejected the city's reapportionment plan on the grounds that the plan failed to maximize black political representation.\(^9\) While the Court noted that the purpose of the Voting Rights Act was to do away with racial discrimination in the voting process,\(^10\) it recognized that the "purpose of [section 5] has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."\(^\) The Court held that an increase in minority representation is not required under the Voting Rights Act, only the development of voting procedures fair to minorities.\(^12\) The dissent argued that the Act requires minorities be given the opportunity to achieve representation in accordance with their numbers.\(^13\) In the

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9. *Id.* at 141. Notwithstanding the fact that there was a district with a significant black population, "[n]o Negro was elected to the New Orleans City Council during the decade from 1960 to 1970." *Id.* at 135.
10. *Id.* at 140.
11. *Id.* at 141. Nevertheless, the burden of proving that "the plan has neither the purpose, nor the effect, of 'abridging the right to vote on account of race or color'" rests with the state. Robert A. Blake, *A Step Toward a Colorblind Society: Shaw v. Reno*, 29 Wake Forest L. Rev. 937, 951 (1994) (quoting 42 U.S.C. § 1973 (1988)).
Court's next Term, Justice White, who wrote for the dissent in Beer, wrote for the majority in the Court's next reapportionment case, United Jewish Organizations of Williamsburgh, Inc. v. Carey.86

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

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

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

87. Id. at 155.
88. Id. at 161. Justice White, writing for the plurality, asserted that "neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment." Id.
89. Id.
90. Id. at 166-68. In Regents of the University of California v. Bakke, Justice Powell, writing for the majority, raised doubts concerning the expansive views supporting remedial racial classifications propounded by the Court in United Jewish Organizations, and thus limited the decision to gerrymandering cases. 438 U.S. 265, 305 (1978). This limitation expressed a reluctance among the Justices at that time to use racial considerations as a remedial measure. Bradley D. Whine, Note, Can You Get to Kings County from Interstate 85? A Reevaluation of United Jewish Organizations v. Carey in Light of Shaw v. Reno, 19 VT. L. REV. 843, 861 (1995).
93. Prior to 1982, § 2 was little more than a preamble to the Voting Rights Act. Abigail Thernstrom, More Notes From a Political Thicket, 44 EMORY L.J. 911, 925
sult of the 1980 census, North Carolina drafted a new districting scheme. Members of the black community challenged the redistricting scheme on the grounds that it impaired their ability, through the use of multimember districts, to elect representatives of their choice. In resolving this vote dilution claim, the Court interpreted section 2 as requiring that a totality of the circumstances test be used in determining whether the rights of a protected class to participate in the political system are violated. Under the specific facts at issue in *Thornburg*, the Court held that the use of multimember districts did violate section 2.

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

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

95. Id. at 35.
96. Id. at 48-50. To prove vote dilution, a plaintiff must first show that the minority group “is sufficiently large and geographically compact to constitute a majority in a single-member district.” Id. at 50. Second, it must be shown that the group is “politically cohesive.” Id. at 51. Finally, one plaintiff must prove that “the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.” Id. In *Growe v. Emison*, the Court applied the principles of *Thornburg* to single member districts, noting that “[i]t would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single member district.” 113 S. Ct. 1075, 1084 (1993).
97. *Thornburg*, 478 U.S. at 80. The Court noted that the state’s black population was “sufficiently large and contiguous to constitute effective voting majorities in single-member districts lying wholly within the boundaries of the multimember districts.” Id. at 38.
98. 113 S. Ct. 2816 (1993).
99. Id. at 2819.
100. Id. at 2820.
101. Id. at 2819.
partment on the grounds that a second majority-minority district could have been created.\textsuperscript{102} As a result, North Carolina redrafted its plan in accordance with the Department's wishes, and created two majority-minority districts.\textsuperscript{103} A group of residents sued, arguing that the new plan classified citizens according to race and thus was unconstitutional.\textsuperscript{104} In granting certiorari, the Court limited the appeal to the following question:  

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

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

\begin{itemize}
\item \textsuperscript{102} \textit{Id.} at 2819-20.
\item \textsuperscript{103} \textit{Id.} at 2820.
\item \textsuperscript{104} \textit{Id.}
\item \textsuperscript{105} \textit{Shaw} v. \textit{Barr}, 506 U.S. 1019, 1019 (1992).
\item \textsuperscript{106} In a vote dilution claim, the question is "whether a particular group has been unconstitutionally denied its chance to effectively influence the political process." \textit{Davis v. Bandemer}, 478 U.S. 109, 132-33 (1986). Thus, plaintiffs would have to "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." \textit{Id.} at 127. Unconstitutional discriminatory effect "occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." \textit{Id.} at 132.
\item \textsuperscript{107} \textit{Shaw}, 113 S. Ct. at 2824. Under the kind of conventional race discrimination approach advocated by Justice O'Connor, plaintiffs would be required only to establish an intentional race-based classification or disadvantage to trigger a strict scrutiny analysis. \textit{See, e.g., Palmore v. Sidoti}, 466 U.S. 429, 432-33 (1984) (noting that racial classifications trigger strict scrutiny).
\item \textsuperscript{108} \textit{Shaw}, 113 S. Ct. at 2829. This distinction is critical for if \textit{Shaw} were deemed a vote dilution claim, then the policy of stare decisis would dictate an alternate outcome. \textit{See James F. Blumstein, Racial Gerrymandering and Vote Dilution: Shaw v. Reno in Doctrinal Context}, 26 \textit{RUTGERS L.J.} 517, 540-48 (1995).
\end{itemize}
tioners.” Regardless, the Court asserted that “[l]aws that explicitly distinguish between individuals on racial grounds fall within the core of” the Equal Protection Clause. Accordingly, the Court noted that when government action is blatantly race-based, strict scrutiny applies. Thus, the government would have to show a compelling state interest and prove that the law is narrowly tailored to meet that state interest. In effect, the Constitution must be color-blind. The Court, finding the “bizarre” shape of the district clear proof that racial considerations prevailed over normal districting considerations, applied strict scrutiny and declared the action an unconstitutional infringement of the Equal Protection Clause. The Court noted that its judgment “express[ed] no view as to whether ‘the intentional creation of majority-minority districts, without more,’ always gives rise to an equal protection claim,” and held only that based on the facts before them, the plaintiffs had a cause of action. Thus, while it was clear after Shaw that bizarre districts trigger strict scrutiny, the Court provided little guidance.

110. Id. at 2824. It has been argued that “[m]ethodologically, one can view both Shaw and Bakke as rejecting a categorical, rule oriented form of legal decision for a more contextualized, standard-based approach.” Richard H. Pildes & Richard G. Niemi, Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno, 92 Mich. L. Rev. 483, 504 (1993).
111. Shaw, 113 S. Ct. at 2825. Strict scrutiny was applied in Shaw not because of an infringement of the fundamental right to vote, but because race is a suspect classification, and it was alleged the district was drawn on the basis of race. Blumstein, supra note 102, at 527. Professor John Ely has argued against that general idea, contending that “regardless of whether it is wise or unwise, it is not ‘suspect’ in a constitutional sense for a majority, any majority, to discriminate against itself.” John H. Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 727 (1974).
112. Shaw, 113 S. Ct. at 2825.
113. Id. at 2824. Shaw v. Reno was not the first Supreme Court case to refer to a “color-blind Constitution.” See id. In Plessy v. Ferguson, Justice Harlan wrote in a dissent: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens . . . . The law regards man as man, and takes no account of his surroundings or of his color . . . .” 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), overruled by Brown v. Board of Educ., 347 U.S. 483 (1954).
114. Shaw, 113 S. Ct. at 2828.
for the lower courts in determining the level at which racial consider-
ations become suspect.\textsuperscript{116}

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

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

\begin{itemize}
\item \textsuperscript{116} Blake, supra note 83, at 956. To some extent, Miller seemed designed to fill
this gap left open in Shaw.
\item \textsuperscript{117} 114 S. Ct. 2647 (1994).
\item \textsuperscript{118} Id. at 2651-52.
\item \textsuperscript{119} Id. at 2652.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id. at 2653.
\item \textsuperscript{123} Id. at 2659.
\item \textsuperscript{124} Id. at 2661.
\item \textsuperscript{125} Halpin, supra note 115, at 263. Shaw was not cited in the majority's opinion; however, Justice Kennedy, in a separate concurrence, noted that the issue of whether majority-minority districts were per se invalid was not before the Court. DeGrandy, 114 S. Ct. at 2667 (Kennedy, J., concurring). Foreshadowing his majority opinion in Miller, Justice Kennedy argued that Shaw causes government officials and courts to "recognize that explicit race-based districting embarks us on a most dangerous
course." Id. (Kennedy, J., concurring).
\item \textsuperscript{126} 115 S. Ct. 2431 (1995).
\item \textsuperscript{127} Id. at 2432. Twelve of the fifteen parishes within the district were split, as
\end{itemize}

1331
In the course of litigation, the Louisiana legislature redrafted its
districting scheme, and in doing so, dissolved the district in which the
plaintiffs lived. The Court ruled that because plaintiffs did not live in the
district they claimed was racially gerrymandered and failed to prove that they had been the subject of a racial
classification, they lacked standing on which to sue.

III. FACTS OF THE CASE

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

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


129. Id.

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


132. Id.

133. Id.

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

135. Id. at 2484.
been created. The Georgia General Assembly finally relented and
designed a third majority-black district, the Eleventh District, by clumping
together black neighborhoods from Atlanta, Savannah, and outlying ar-
eas, creating a district that spanned 200 miles and in some areas was
only as wide as the highway. Elections were held in accordance with
the newly approved districting plan and black candidates won in all three
majority-black districts.

Five white voters from the gerrymandered Eleventh District filed an
action against various state officials, claiming that the state action violat-
ed the Equal Protection Clause of the Fourteenth Amendment. A dis-
trict court panel agreed and held the districting invalid. The court de-
termined that racial considerations were the "overriding and predominant
force" in creating the districts and applied strict scrutiny. The United
States Supreme Court granted certiorari.

IV. ANALYSIS OF OPINION

A. Justice Kennedy's Majority Opinion

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

Because the shape of the district at issue in Miller was less dramatic than the
North Carolina district at issue in Shaw, the Miller Court could not simply apply
Shaw; it had to either expand the decision or retreat from it. Charles Fried,
Foreward: Revolutions?, 109 HARV. L. REV. 13, 64 (1995). Harvard Law Professor and
Massachusetts Supreme Court Justice Charles Fried noted three options available to
the Court in Miller: (1) to limit Shaw to the particular facts of the case; (2) to re-
verse itself, overturn Shaw, and "admit that the whole enterprise" was "miscon-
ceived"; or (3) apply the principles underlying Shaw to the new case. Id. The Miller
Court chose the last option. Id.
demands the same close scrutiny that we give other state laws that classify citizens by race." Justice Kennedy's opinion, while recognizing that a state's redistricting plan could be voided if it failed to pass Shaw's bizarreness test, stood for the proposition that it could also be voided where race "predominated" in the state's decision making.  

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

146. Id. at 2487.  
147. Id. at 2485-86 (quoting Mobile v. Bolden, 446 U.S. 55, 66 (1980)). Because majority-minority districts are never 100% minority, proponents of race-based districting argue that such districts are "among the least segregated . . . in the nation." Brief for the Congressional Black Caucus as Amicus Curiae at 19-20, Hays v. Louisiana, 115 S. Ct. 2475 (1995) (Nos. 94-558, 94-627). This argument is deceptive. White voters are included in majority-minority districts not out of some sense of integration, but simply as "filler people" to prevent minority votes from being wasted. T. Alexander Aleinkoff & Samuel Issacharoff, Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno, 92 MICH. L. REV. 588, 630-31 (1993). Whites that find themselves in majority-minority districts "should not be expected to compete in any genuine sense for electoral representation in [those districts,] lest they undo the preference given to the specified minority group." Id. at 631. Voting rights scholar Abigail Thernstrom noted: "Whites who think of running in a majority-black constituency are informed in no uncertain terms that the color of their skin disqualifies them; they are treading where they do not belong." Thernstrom, supra note 93, at 918.  
148. Miller, 115 S. Ct. at 2486.  
149. Id. at 2482. The Shaw Court noted that the central purpose of the Equal Protection Clause is "to prevent the states from purposefully discriminating between individuals on the basis of race." Shaw, 113 S. Ct. at 2824 (citing Washington v. Davis, 426 U.S. 229, 239 (1976)). Yet, others argue that race consciousness is a prerequisite to true equality. Justice Blackmun noted almost two decades earlier: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat persons equally, we must treat them differently." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part). The Court has recognized "that in order to remedy the effects of prior discrimination, it may be necessary to take race into account." Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) (plurality opinion).  
150. Miller, 115 S. Ct. at 2482 (quoting Bakke, 438 U.S. at 291); see also Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an ex-
dy declared that the doctrine of racial neutrality must be applied equally, without respect to whether a burden is placed on the minority or whether the majority accepts a burden upon itself.\textsuperscript{151} Government cannot favor groups because the Constitution recognizes only individuals.\textsuperscript{152} As a result, laws classifying citizens on the basis of race cannot be upheld unless they pass the Court's strict scrutiny test—narrowly tailored to achieve a compelling state interest.\textsuperscript{153} Justice Kennedy observed that

\textsuperscript{151} Miller, 115 S. Ct. at 2482; see also Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2110 (1995) ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited."); Powers v. Ohio, 111 S. Ct. 1364, 1370 (1991) ("It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree."); City of Richmond v. J.A. Croson Co., 488 U.S. 499, 504 (1989) (plurality opinion) (holding that strict scrutiny applies regardless of "the race of those burdened or benefited by a particular classification"); Bakke, 438 U.S. at 289-90 ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."). \textit{But cf.} Strauder v. West Virginia, 100 U.S. 303, 307 (1879) (arguing that post-Civil War Amendments were intended to bar discrimination against blacks).

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

\textsuperscript{153} Miller, 115 S. Ct. at 2486; see also Adarand, 115 S. Ct. at 2114; Shaw, 113 S. Ct. at 2825; Croson, 488 U.S. at 494; Wygant, 476 U.S. at 274, 280 n.6. Critics argue that if it is the race-based classification itself which causes the injury, then the Court's opinion in \textit{United States v. Hays}, 115 S. Ct. 2431 (1995), decided the same day as \textit{Miller}, in which the Court found plaintiffs lacked standing, seems wrongly
such a rule has been applied where the state attempts to racially discriminate in access to its public parks, buses, golf courses, beaches, and schools.\textsuperscript{154}

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

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

\textsuperscript{155} \textit{Miller}, 115 S. Ct. at 2483 (quoting \textit{Shaw}, 113 S. Ct. at 2824) (brackets in original).

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

\textsuperscript{157} \textit{Id.} at 2486.

\textsuperscript{158} \textit{Id.} at 2487 (citing \textit{Shaw}, 113 S. Ct. at 2826).

\textsuperscript{159} \textit{Id.} at 2486. Prior to \textit{Miller}, the lower courts were split on whether to recognize evidence other than bizarreness in establishing an Equal Protection Clause violation. See \textit{Shaw v. Hunt}, 861 F. Supp. 406, 431 (E.D.N.C. 1994) (noting that the bizarre shape of a district is constitutionally significant "only as circumstantial evidence that the disproportionate concentration of members of a particular race in certain districts
In determining the proof necessary to sustain an equal protection challenge, Justice Kennedy distinguished simple awareness of racial demographics from the predominance of race in the redistricting process.\textsuperscript{160} He noted that states will almost always take race into account in drawing their districts, but that does not necessarily mean that race has predominated in the process.\textsuperscript{161} He maintained that it is the plaintiff's burden to show, through either bizarreness in a district's shape or direct evidence of a legislature's intent, that the legislature was predominantly motivated by race in drawing its districts.\textsuperscript{162} A plaintiff makes this showing by proving that traditional districting principles, such as "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests," were less important to the legislature was something the line-drawers deliberately set about to accomplish"); Hays v. Louisiana, 839 F. Supp. 1188, 1195 (W.D. La. 1993), vacated, 114 S. Ct. 2731 (1994) (holding that gerrymandering may also be proved by "direct evidence that a legislature enacted a districting plan with the specific intent of segregating citizens into voting districts based on their race"); but see DeWitt v. Wilson, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994) (noting that a redistricting plan is invalid under Shaw only if it is "so dramatically irregular that [it] can only be explained as [an] attempt[] to segregate by [race]").

\textsuperscript{160} Miller, 115 S. Ct. at 2487.

\textsuperscript{161} Id. at 2488. A good explanation of racial predominance can be found in Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979). The Feeney Court wrote that "discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects . . . ."

\textsuperscript{162} Id. at 279 (citations omitted). Justice Kennedy recognized that this may be a difficult distinction to make, and thus believed courts should be very careful in adjudicating claimed violations of the Equal Protection Clause through race-based districting. Miller, 115 S. Ct. at 2488.

\textsuperscript{160} Id. at 2488. The Court earlier wrote in Mt. Healthy City School District Board of Education v. Doyle that the Equal Protection Clause is violated when race is a "substantial" or "motivating" factor in the state's decision making. 429 U.S. 274, 287 (1977). For Justice Ginsburg, legislative intent alone would not be sufficient proof—in her Miller dissent, she noted that in United Jewish Org. of Williamsburgh, Inc. v. Carey, "[f]ive justices specifically agreed that the intentional creation of majority-minority districts does not give rise to an equal protection claim, absent proof that the districting diluted the majority's voting strength." Miller, 115 S. Ct. at 2506 n.11 (Ginsburg, J., dissenting) (citing United Jewish Organizations of Williamsburgh v. Carey, 430 U.S. 144, 165 (1977)).
in drawing its districts than were racial considerations. Absent that showing, a state's good faith will be presumed.

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

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

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


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

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


170. Id. (citing Johnson v. Miller, 864 F. Supp. 1364, 1366, (S.D. Ga. 1994), aff'd, 115 S. Ct. 2475 (1995)). The Attorney General of Georgia strongly objected to the Department of Justice's demand that three majority-minority districts be created because the only way to comply would "violate all reasonable standards of compactness and
Kennedy noted that the United States Attorney General "would accept nothing less than abject surrender to its maximization agenda."\(^{171}\)

Once Justice Kennedy established race as the predominant factor in drawing the district, he applied the strict scrutiny standard of review to the redistricting plan.\(^{172}\) To prevail under this standard, the state must show that its plan is "narrowly tailored to achieve a compelling interest."\(^{173}\) While the Court found a strong state interest in eliminating the effects of past discrimination,\(^{174}\) it recognized that Georgia's true objective was to satisfy the demands of the Department of Justice.\(^{175}\) The Court reasoned that complying with the demands of the Justice Department, independent of any interest in remedying past discrimination, could not provide the compelling interest necessary to survive strict scrutiny.\(^{176}\) Justice Kennedy noted further: "When a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied."\(^{177}\) He reasoned that blind defer-
ence to the Justice Department’s objection would result in a “surrender[ ]
to the Executive Branch [of] our role in enforcing the constitutional
limits on race-based official action.” Justice Kennedy further deduced
that Georgia’s districting plan was not required by the Voting Rights
Act. He cited the district court’s finding that the Justice Department
had operated under a “black-maximization” policy, and stated: “Where-
ever a plan is ‘ameliorative,’ a term . . . used to describe plans increasing
the number of majority-minority districts, it ‘cannot violate [section five
of the Voting Rights Act] unless the new apportionment itself so dis-
criminates on the basis of race or color as to violate the Constitu-
tion.” Thus, the Act’s “non-regression” principle simply dictates that
so long as a state’s redistricting does not put minorities in a worse posi-

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

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

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

181. Miller, 115 S. Ct. at 2492 (quoting Beer v. United States, 425 U.S. 130, 141
(1976)). During the 1982 congressional debate on amending the Voting Rights Act, the
proponents of section 5 assured Congress that the Act would not be used to require
proportional representation for minorities. Katherine I. Butler, Affirmative Racial
Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of
Civil Rights in the Carter Administration stated: “[A]ssume . . . that no fairly-drawn
redistricting plan will result in minority control of [one] district, because of dispersed
minority residential patterns, for example. The Department’s response is not to de-
mand that the jurisdiction adopt a . . . gerrymandered districting plan to ensure . . .
proportional minority representation.” Id. at 604 n.20 (citing 1 Voting Rights Act:
on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess.
1380, 1388 (1982) (statement of former Assistant Attorney General for Civil Rights
Drew S. Days, III)).
tion than before redistricting, the plan is valid.\textsuperscript{182} As a result, Georgia's original plan, which created an additional majority-minority district, was valid under the Act.\textsuperscript{183}

B. Justice O'Connor's Concurring Opinion

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

C. Justice Stevens' Dissenting Opinion

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

\begin{itemize}
  \item \textsuperscript{182} Miller, 115 S. Ct. at 2492, 2493.
  \item \textsuperscript{183} Id. at 2492.
  \item \textsuperscript{184} Id. at 2497 (O'Connor, J., concurring). Despite Justice O'Connor's words, civil rights groups argue that the decision has created a presumption that all majority-minority districts are unlawful. Richard Willing, High Court Rejects Race-Based Districts; Decision Could Reverse Trend of More Blacks Elected to the U.S. House, DRETT NEWS, June 30, 1995, at A6.
  \item \textsuperscript{185} Miller, 115 S. Ct. at 2497 (O'Connor, J., concurring). Some scholars have interpreted Justice O'Connor's concurrence, which supplied the essential fifth vote, as significant retreat from Justice Kennedy's majority opinion. See Samuel Issacharoff, Groups and the Right to Vote, 44 EMORY L.J. 869, 876 n.36 (1995) (reasoning that O'Connor's concurrence makes the state of the law "unclear" insofar as she would require a "substantial disregard of customary and traditional practices").
  \item \textsuperscript{186} Id. (O'Connor, J., concurring). Justice O'Connor noted: "To invoke strict scrutiny, a plaintiff must show that the state relied on race in substantial disregard of customary and traditional practices." Id. (O'Connor, J., concurring).
  \item \textsuperscript{187} Miller, 115 S. Ct. at 2497 (O'Connor, J., dissenting); see also infra notes 198-220 (discussing Justice Ginsburg's dissenting opinion).
\end{itemize}
Second, the Court failed to identify which class of voters would have standing to sue and never "coherently articulated what injury this cause of action is designed to redress."

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

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

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

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

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

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


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

By his analysis, a redistricting plan that benefits a political minority does not violate the Equal Protection Clause because the Constitution does not bar a state from promoting the “fair representation of different groups.”

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

By his understanding of the Shaw representational harms argument,
Justice Stevens argued that a member of a district does not have standing unless most or all of the prevalent minority group vote for the same candidate and the winning candidate ignores his white constituents.\textsuperscript{196} Believing that the plaintiffs in \textit{Miller} failed that test, Justice Stevens would have dismissed the action.\textsuperscript{197}

D. \textbf{Justice Ginsburg's Dissenting Opinion}

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

\begin{center}
\begin{footnotesize}
196. \textit{Miller}, 115 S. Ct. at 2497 (Stevens, J., dissenting). In a case decided the same day as \textit{Miller}, however, the Court noted in dicta that "\textit{[w]here a plaintiff resides in a racially gerrymandered district, ... the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action.}" United States v. Hays, 115 S. Ct. 2431, 2436 (1995).
197. \textit{Miller}, 115 S. Ct. at 2499 (Stevens, J., dissenting).
198. \textit{Id.} (Ginsburg, J., dissenting); \textit{see also supra} note 164.
199. \textit{Miller}, 115 S. Ct. at 2499 (Ginsburg, J., dissenting). The Fifteenth Amendment requires as much, declaring that one's right to vote "shall not be denied ... by any state on account of race." U.S. CONST. amend. XV.
201. \textit{Miller}, 115 S. Ct. at 2506 (Ginsburg, J., dissenting).
203. \textit{Id.} (Ginsburg, J., dissenting).
204. \textit{Id.} (Ginsburg, J., dissenting).
\end{footnotesize}
\end{center}
In Justice Ginsburg's view, the Court's opinion expanded the scope of judicial intervention in redistricting cases.206 Under her interpretation of Shaw, judicial intervention in a state's redistricting plan on the basis of an Equal Protection Clause violation is limited to cases where a district's shape is "extremely irregular."206 She viewed the Court's decision as a move away from the Court's self-imposed limitation to intervene only where traditional districting practices are completely "set aside."207 She refused to link the use of race-based decisions with a strict scrutiny analysis, noting that in United Jewish Organizations of Williamsburgh, Inc. v. Carey,208 where "the state 'deliberately used race in a purposeful manner' to create majority-minority districts,... seven of eight Justices participating voted to uphold the State's plan without subjecting it to strict scrutiny."209

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

205. Id. at 2499-2500 (Ginsburg, J., dissenting).
206. Id. at 2499 (Ginsburg, J., dissenting) (citing Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993)). Justice Ginsburg's contention seems to run afoul from the spirit of Shaw. While the Court in Shaw pointed to the bizarre shape of the district in support of its holding, it also observed that laws which "explicitly distinguish between individuals on racial grounds" are not in line with the "central purpose" of the Equal Protection Clause. Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993). The Court noted that "[n]o inquiry into legislative purpose is necessary when a racial classification appears on the face of the statute." Id. In the absence of a facial classification, the Court has required a plaintiff to show the existence of intentional discrimination to trigger strict scrutiny. Washington v. Davis, 426 U.S. 229, 239 (1976). The Shaw Court used the bizarre shape of the district as evidence of the intentional use of race and thus demanded strict scrutiny. Shaw, 113 S. Ct. at 2827.
207. Miller, 115 S. Ct. at 2500 (Ginsburg, J., dissenting).
209. Miller, 115 S. Ct. at 2505 n.11 (Ginsburg, J., dissenting) (quoting United Jewish Org., 430 U.S. at 165). Justice Ginsburg's reasoning may be contrary to Gomillion v. Lightfoot, where boundary lines were redrawn to remove black voters from a city. 364 U.S. 339, 345-345 (1960). While blacks were deprived of a right to vote, this was also true of everyone living outside the city boundaries. Id. at 341. Thus, the claim was not based on a right of blacks to vote in city elections, but instead on the constitutional protection against inclusion and exclusion from a municipality on the basis of a racial classification. Id. at 346. As a result of the apparent inconsistency between the two cases, the majority in Miller held that "[t]o the extent any of the opinions in United Jewish Organizations can be interpreted as suggesting that a state's assignment of voters on the basis of race would be subject to anything but our strictest scrutiny, those views ought not to be deemed controlling." Miller, 115 S. Ct. at 2487-88.
the Georgia district. She pointed to the redistricting drafters' accommodation of a particular state senator by placing his son in the district and of a state representative by keeping his black neighborhood intact outside of the Eleventh District. She found the boundaries of the district distinguishable from the configuration at issue in Shaw, where the lines used to define the extremely irregular shape of the North Carolina district were drawn with race alone in mind. In her view, the Georgia district reflected the use of traditional districting principles with respect to size, shape, and political subdivisions. Justice Ginsburg noted that Georgia's Eleventh District was absent from a "statistically calculated list of the twenty-eight most bizarre districts in the United States." She also noted that the district's land area was about average, not out of proportion with other districts in the state, and was generally respectful of political boundaries, ranking about average among Georgia's districts in divided counties.

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

210. Miller, 115 S. Ct. at 2502 (Ginsburg, J., dissenting).
211. Id. at 2503-04 (Ginsburg, J., dissenting).
212. Id. at 2502 (quoting Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993)). Justice Ginsburg noted that the district at issue in Shaw spanned 160 miles and was, "for much of its length, no wider than the I-85 corridor." Id. at 2502 (Ginsburg, J., dissenting) (quoting Shaw, 113 S. Ct. at 2820-21). One of the district's legislators said, "If you drove down the interstate with both car doors open, you'd kill most of the people in the district." Id. (Ginsburg, J., dissenting) (quoting Shaw, 113 S. Ct. at 2820-21) (internal quotation marks omitted) (quoting WASH. POST, Apr. 20, 1993, at A4).
213. Id. at 2502-03 (Ginsburg, J., dissenting). Yet, as noted earlier, Justice Kennedy viewed such a distinction as less important in Miller because irrespective of the shape of Georgia's Eleventh District, there was direct evidence that racial considerations predominated. Id. at 2489; see also Johnson v. Miller, 864 F. Supp. 1354, 1372, 1378 (S.D. Ga. 1994), aff'd, 115 S. Ct. 2475 (1995).
214. Miller, 115 S. Ct. at 2502-03 (Ginsburg, J., dissenting).
215. Id. at 2504 (Ginsburg, J., dissenting) (citing Pildes & Niemi, supra note 110, at 565).
216. Id. (Ginsburg, J., dissenting) (citing Johnson, 864 F. Supp. at 1396 n.4 (Edmondson, J., dissenting)).
217. Id. (Ginsburg, J., dissenting). Yet, as noted earlier, Justice Kennedy judged the district not just according to its geometric shape, but as a whole, together with its racial and population densities. Id. at 2489.
218. Id. at 2504 (Ginsburg, J., dissenting).
219. Id. (Ginsburg, J., dissenting) (citing NATHAN GLAZER & DANIEL P. MOYNIHAN, BEYOND THE MELTING POT 19-20 (1963) ("Many elements—history, family and feeling, interest, formal organizational life—operate to keep much of New York life channeled within the bounds of [an] ethnic group."); E. LITT, BEYOND PLURALISM: ETHNIC POLITICS

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

V. IMPACT

A. Judicial Impact

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

Justice Ginsburg warned in her dissent that Miller's legacy will be increased litigation.223 By her analysis, determining when districting plans are predominantly motivated by race, and therefore impermissible,
will not be easy.\textsuperscript{224} She noted that “[g]enuine attention to traditional
districting practices and avoidance of bizarre configurations seemed,
under Shaw, to provide a safe harbor.”\textsuperscript{225} After Miller, Justice Ginsburg
suggested that states will know if their race-based districts are safe only
through litigation.\textsuperscript{226} She characterized the majority’s new standard as an
“invitation to litigat[ion]” anytime that plaintiffs “plausibly allege that
other factors carried less weight than race.”\textsuperscript{227} This may create a “catch-
22" for drafters of legislative districts, for “[i]f the state draws a majority-
black district, it can get sued by whites under uncertain standards, and if
it doesn’t draw them, it can be sued by minorities for failing to comply
with the Voting Rights Act.”\textsuperscript{228} In the end, Justice Ginsburg predicted
that a large number of federal judges will find themselves “drawn into
the fray.”\textsuperscript{229}

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

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

\textsuperscript{226} Miller, 115 S. Ct. at 2507 (Ginsburg, J., dissenting).

\textsuperscript{227} Id. at 2506 (Ginsburg, J., dissenting). Some fear that this new litigation will be
“skewed” by legislators whose primary allegiance is to their party. Leading Cases,
supra note 153, at 165.

\textsuperscript{228} Richard C. Reuben, A ‘Simple Command’ Creates Confusion: Validity of Thou-
sands of Redistricting Plans in Doubt After High Court Ruling, A.B.A. J., Sept. 1995,

\textsuperscript{229} Miller, 115 S. Ct. at 2507 (Ginsburg, J., dissenting); see also Reuben, supra
note 228, at 18 (arguing that we will see “a new era of trench litigation and debate
not seen in at least a generation”). Justice O’Connor, in her concurrence in Miller,
argued the contrary, noting that the decision “does not throw into doubt the vast
majority of the nation’s 435 congressional districts,” presuming that in the majority of
cases, the states have used “customary districting principles.” Miller, 115 S. Ct. at
2497 (O’Connor, J., concurring). In Dillard v. City of Greensboro, the first redistric-
ting case after Miller to make its way to the Federal Court of Appeals, black plain-
tiffs challenged the multimember districting scheme used in Alabama to elect its
county commissioners and city councils, alleging that it violated section 2 of the
Voting Rights Act. 74 F.2d 230, 231 (11th Cir. 1996). The City of Greensboro conced-
ed that their districting violated the Voting Rights Act, and submitted a new plan to
the Justice Department. Id. The Attorney General denied preclearance under section 5,
however, arguing that not enough majority-minority districts were created. Id. at
232. A magistrate judge, appointed by the district court, approved a plan submitted
by the black plaintiffs that created three majority-minority districts. Id. The Eleventh
Circuit held that Miller was controlling and remanded the case for a determination of
Civil rights groups, politicians, and others looked to *Miller* for the answers left unresolved after *Shaw*—primarily, the kind of role race can play in the redistricting process. The Court's answer in *Miller* was not particularly clear. In determining the role that race will play in drafting future districts, two issues must be addressed. First, the Court gave little guidance to lower courts on how to determine whether race was an impermissible predominant consideration in designing a district. *Miller* tells us that race is a predominant consideration when traditional districting principles are forsaken, but the Court provides little help in determining at what point these principles become forsaken. Second, the Court did not address whether race-based districting can be a remedy for past discrimination. Section 5 of the Voting Rights Act gives the Justice Department the authority to deny the preclearance of any retrogressive voting procedure. In *Shaw*, the Court wrote that “[a] reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression.” Nevertheless, the *Shaw* Court also noted that there is “a significant state interest in eradicating the effects of past racial discrimination.” The *Miller* Court reiterated that statement, but stated that because the State failed to argue that the district was created to remedy past discrimination, it was not an issue. In *City of Richmond v. J.A. Croson Co.*, the Court noted that an affirmative action plan would fulfill a compelling state interest where there was a “strong basis in evidence for [the] conclusion that remedial action was necessary.” In *Miller*, the Court used the same standard in analyzing race-based districting claims, noting its insistence on “a strong basis in evidence of the harm being remedied.” Yet, the Court did not elaborate

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


235. *Id.*


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

239. *Miller*, 115 S. Ct. at 2491. The Court's insinuation that remedial race-based districting may be constitutional seems to be self-contradictory. If classifications based
on the application of such a standard. Further, the scope of the decision is not clear. According to the director of the American Civil Liberties Union Voting Rights Project, "[t]he [Miller] opinion affects everything from congressional to school board and water districts." As a result of the decision, Georgia is not only dealing with its stricken congressional district, but is also looking into correcting its state legislative districts.

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

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

240. Reuben, supra note 228, at 18.

241. Id.


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

244. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (noting that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by insuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."); Adarand, 115 S. Ct. at 2113 (noting that "[t]he point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking."). Yet, states may find it almost impossible to satisfy the narrowly tailored prong because a court will almost always be able to come up with an alternative purpose that applies more traditional districting principles. Tricia A. Martinez, When Appearance Matters: Reapportionment Under the Voting Rights Act and Shaw v. Reno, 54 La. L. Rev. 1335, 1364 (1994).
disadvantaged minorities. Yet, even the conservative members of the Court are not in complete agreement on what strict scrutiny means. Justice Scalia noted in his concurring opinion in Adarand that “government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction.”

B. Societal Impact

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

245. Pildes & Niemi, supra note 110, at 504.
246. Adarand, 115 S. Ct. at 2118 (Scalia, J., concurring in part and concurring in the judgment).
248. Id. Harvard Professor Morton Horwitz noted that the Court’s demand for a color-blind Constitution “wishe[s] away existing racial realities with the same cruel formalism that was characteristic of the Court’s post-Civil War decisions.” Morton J. Horwitz, The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism, 107 Harv. L. Rev. 30, 106 (1993).
249. Dayna Cunningham, Insuring Access: Redistricting and Representation, Nat’l B. A. Mag., Dec. 8, 1994, at 13. Cunningham noted that “race continues to be the single most decisive determinant of political behavior in American life.” Id. One scholar noted:

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

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

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

251. Id.
252. Id. at 1373. In the wake of Miller, civil rights activists argue that the decision "could reduce the 38 [sic] congressional seats now held by African-Americans to merely a handful." Jan Crawford Greenburg, Race-Based Districts Banned: Vote Power of Blacks Jeopardized, Chi. Trib., June 30, 1995, at 1. Such projections may be somewhat dubious. First, those projections are based on past voting habits and do not take into account that racial attitudes are rapidly changing. Thernstrom, supra note 93, at 933. Thernstrom has noted that the record of black electoral success decades ago "tells us little about the prospects for such success today." Id. Second, those projections do not take into account that unfortunately blacks do not enter electoral races in the same numbers as whites do. Id. at 933. Simply stated, "black candidates cannot win races they do not enter." Id. Third, no candidate of any race can win an election if their political views are contrary to those of a majority of their electorate. Id. at 934. California Congressman Ronald V. Dellums has been repeatedly reelected as a black in a majority-white district because his left-leaning views are in-sync with his Berkeley electorate. Id. On the other end of the spectrum, Oklahoma Congressman J.C. Watts won his election as a black in a majority-white district because his conservative views matched those of Oklahoma voters. Id. Congressman Watts' election symbolizes the fact that conservative candidates in the South, whether black or white, do better than those who are "militantly liberal." Id.
254. Pildes, supra note 250, at 1370.
255. Id. at 1367.
256. Id. at 1370.

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caused state legislatures to adopt new districting schemes, this country saw "the largest increases in minority representation since the Voting Rights Act was passed."\(^{257}\) The number of majority-minority districts doubled, going from twenty-six to fifty-two.\(^{258}\) Further, there was a twenty-three percent increase in the number of majority-black state legislative districts.\(^{259}\) Today, blacks sit on city councils in numbers roughly proportional to their population.\(^{250}\) It can be argued that the increase in black representation in Congress has resulted in a greater say in issues of particular interest to the black community.\(^{251}\)

Members of the black community have criticized the Court for attempting to eliminate racial preferences, arguing its true effect is to eliminate preferences for blacks, leaving the "natural" preferences for whites in our society intact.\(^{252}\) Twenty years ago, four justices of the Supreme

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258. Id. at 59 (citing U.S. BUREAU OF THE CENSUS, *Number of Congressional Districts with Black or Hispanic Majorities Double, Census Bureau Says*, U.S. DEPARTMENT OF COMMERCE NEWS, Mar. 24, 1993).
259. Id.
260. Pildes, supra note 250, at 1367.
261. For example, in the first half of the Clinton Administration, the Congressional Black Caucus achieved major concessions in President Clinton’s budget and those conservative and moderate Democrats that sought to cap entitlements were partly defeated by caucus opposition. Kenneth J. Cooper, *For Enlarged Congressional Black Caucus, a New Kind of Impact*, WASH. POST, Sept. 19, 1993, at A4. Further, the Caucus successfully defeated the Clinton Administration’s nominee for Assistant Attorney General for Civil Rights because of his lukewarm support for majority-minority districts. Neil A. Lewis, *Clinton’s Choice For Rights Chief Is Withdrawing*, N.Y. TIMES, Dec. 18, 1993, at A1. On the other hand, it is also argued that these districts “marginalize the black elected officials upon whom the voters count to represent their interests effectively.” Thernstrom, supra note 93, at 935. Lani Guinier, a former United States Attorney General nominee noted: “[B]lacks elected from single-member districts have little control over policy choices made by their white counterparts. Thus, although it ensures more representatives, district-based black electoral success may not necessarily result in more responsive government.” Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L REV. 1077, 1080 (1991). Minorities may find their interests better represented by dispersing their votes over more “influence districts” because more elected officials would then owe their success to minority votes. Thernstrom, supra note 93, at 935. One commentator remarked: “In a representative democracy, the power of an interest group lies not in how many of its number are elected to office, but in how many elected officials it has the power to influence.” Jeffrey G. Hamilton, *Deeper into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court*, 43 EMORY L.J. 1519, 1550 (1994).
Court wrote that "we cannot . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens." From that point of view, the Miller case has a huge impact because it symbolizes for many that the Court is no longer responsive to the needs of minorities. Further, it may mean that there will be fewer blacks in Congress because the favorable district boundaries that place them in office could be changed. Consequently, Congress will be less representative of black interests as a whole. Aforementioned University of Michigan Law Professor Richard Pildes supports this theory. He concludes that a strong link exists between the race of the representative and the benefits provided to minorities. Among these benefits, Professor Pildes includes "improvements in municipal services in minority communities, increased use of minority contractors, more appointments of minorities to commissions and boards, the creation of police review boards, and general shifts in program priorities."

For others, the impact of Miller is very different. In Shaw v. Reno, the Court vocalized the problems inherent in race-based districting. Justice O'Connor associated "apartheid" with the "perception [behind race-based districting] that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." Additionally, Justice O'Connor viewed the Court's decision in Miller to mean "that districts that are 'set aside' for black representatives are unconstitutionally segregated by race, while districts that are drawn to protect white incumbents are simply following traditional districting principles." 

265. Id.
266. Pildes, supra note 250, at 1377.
267. Id.
268. Id; see also Rufus P. Browning et al., Protest is Not Enough: The Struggle of Blacks and Hispanics for Equality in Urban Politics 141, 168 (1984) (noting that "minority council members were important in linking minorities to city hall, in providing role models, and in sensitizing white colleagues to minority concerns."); James W. Button, Blacks and Social Change: Impact of the Civil Rights Movement in Southern Communities 226, 227 (1989) (explaining that "black representation on the inside . . . gave [black citizens] easy, constant, and relatively quick access to the decision making arena and to white leaders, both public and private.").
269. 113 S. Ct. 2816 (1993).
270. Id. at 2816. On the other hand, many proponents of race-based districting maintain that blacks are, for the most part, a unified people. J. Morgan Kousser, Shaw v. Reno and the Real World of Redistricting and Representation, 47 Rutgers L. J. 625, 648 (1995). They note that "[t]he vast majority of African-Americans are
such race-based standards as dangerous to our system of government. She cited cases noting that "[i]f our society is to continue to progress . . . it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury."272 Justice O'Connor believed that this injury continues because race-based districting "reinforce[s] the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin."273 Furthermore, Justice O'Connor wrote that such policies "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility."274 She stated that "[w]hen racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated . . . ."275 She also noted that "[r]acial gerrymandering . . . may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters.276 The majority in Shaw believed that race-based districts reinforce "racial stereotypes and threaten[] to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.277

driven toward unity because they are still discriminated against, and racial bloc voting is already a stark reality." Id.
271. Shaw, 113 S. Ct. at 2828.
272. Id. at 2827 (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630-31 (1991)).
273. Id. at 2832.
274. Id. at 2824 (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).
275. Id. at 2827 (quoting Wright v. Rockefeller, 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting)). One commentator noted: "Fostering election of officials who need not appeal to members of other races seems an odd way to pursue Martin Luther King, Jr.'s dream of a land where his children will not be judged by the color of their skin, but by the content of their character." Hamilton, supra note 261, at 1552 (quoting Stuart Taylor, Electing by Race, Am. Law., June 1991, at 54).
276. Shaw, 113 S. Ct. at 2832. Justice O'Connor previously noted in Metro Broadcasting, Inc. v. FCC that race-based assignments "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting), overruled by Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). To those on the other side however, race does matter. Kousser, supra note 270, at 662-65. They argue that black voters, especially in the South, are consistently more liberal than whites. Id.
277. Shaw, 113 S. Ct. at 2828. Conversely, promoters of majority-minority districts
Conservatives have long argued that discrimination breeds discrimination. In *Holder v. Hall*, Justice Thomas argued that race-based districts portend “disastrous implications,” creating “political homelands” that will inevitably “deepen racial divisions” because they are based on the assumption that blacks “all think alike on important matters of public policy.” It is true that a growing number of black officials appeal to voters across racial lines. For instance, in the 1994 Congress, eleven members of the Congressional Black Caucus represented districts where black voters were a minority.

Voting rights scholar Abigail Thernstrom examined mayoral races across the country and noted that in cities where the population exceed-
ed 50,000 people, "[s]ixty-seven percent of the black mayors elected . . . over the last thirty years have not had the benefit of a majority-black constituency." Blacks have also won gubernatorial and senatorial races where the vast majority of the voting population was white.

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

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

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

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

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


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


290. Reuben, *supra* note 228, at 19 (quoting Professor James Blumstein, Vanderbilt
that section 5 of the Voting Rights Act simply requires states to prevent minority voting rights from getting any worse.\textsuperscript{201}

In either case, \textit{Miller} will have an impact on the two-party system. The Republican Party has been making serious gains in the South in recent years.\textsuperscript{202} Many white Democrats and liberal scholars blame this erosion, at least in part, on the policy of race-based districting.\textsuperscript{203} One commentator noted:

\begin{quote}
[R]eapportionment not only siphoned solid Democratic votes from white districts, but also helped Republicans attract higher-caliber candidates and raise more money by giving them a better shot at winning those districts. In addition, when black voters were removed from marginally Republican districts, the Democrat's chances of winning such seats became that much slimmer.\textsuperscript{204}
\end{quote}

While it is true that race-based districts virtually assure that the representative from that district will be a Democrat (because minorities vote overwhelmingly Democratic), it may have the inevitable counter-effect of removing vital Democratic votes from neighboring districts, making them more Republican.\textsuperscript{205} It is no accident that a Republican President appointed the Attorney General who denied Georgia's redistricting plan and required that a third majority-minority district be created in Georgia.\textsuperscript{206} The Bush Administration's Assistant Attorney General for Civil Rights

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

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

297. Id.

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

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

Stuart Taylor, Jr., Electing by Race, Am. Law., June 1991, at 50.

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


301. Frank Parker, Voting Rights Enforcement in the Bush Administration: The Four Year Record, in Report on the Citizens Commission on Civil Rights, New Opportunities: Civil Rights at a Crossroads 118 (Susan M. Liss & William L. Taylor eds., 1992). According to a study by Allan J. Lichtman, Professor of History at American University, "Democrats actually fared a bit better in the nine states with new black districts [Alabama, Florida, Georgia, Louisiana, Maryland, North Carolina, Texas and Virginia] [sic] than in the 41 states with no such districts." Carter, supra note 293, at 862 (quoting Allan J. Lichtman, Redistricting, in Black and White: Quotas Aren't the Issue, N.Y. Times, Dec. 7, 1994, at A2). It was also noted that Democrats had their greatest losses in the senatorial and gubernatorial races, where redistricting is irrelevant. Id. The Lichtman study suggested that had the Democrats not lost a
part to the creativity of the legislative drafters who "made a concerted
effort both to create majority-minority districts and to preserve white in-
cumbents (sometimes of both parties) by clever maneuvering of district
lines that retained just enough of the core of the incumbents' political
bases to enable them to get reelected." For instance, almost three
quarters of black voters who were moved into majority-minority districts,
were moved from Republican dominated districts, where the black vote
was not having much of an effect. In its analysis of the 1994 election
results, the NAACP Legal Defense and Educational Fund noted that forty-
seven of the fifty-four seats which the Democrats lost "were either in
states without majority-minority districts, in white districts surrounded
by other white districts, or in districts in which the percentage of minori-
ty voters in post-1990 redistricting either increased or remained con-
stant." The NAACP argues that the existence of majority-minority dis-
tricts may have even prevented additional Democratic losses. A Dem-
ocratic task force examining the effect of majority-minority districts in
1994 somewhat supported the NAACP position, placing the figure at five
to nine Democrat seats lost due to redistricting. In the end, these
analyses may be somewhat dubious because they examined only the 1994
elections. Professor Pildes noted that "in order to determine the relative con-
tributions of ideology, race of the candidate, and other factors to voter
preferences, one election cannot be studied in isolation."

If one accepts the conventional wisdom that majority-minority districts
help Republicans, then clearly one of the big winners after Miller is the
Democratic Party. If the Democratic Party is truly more sensitive to mi-
nority interests than the Republican Party, the result may be that while
minorities will lose some representation by members of their own race,
their ideological representation, by those who share their same philosophy, will increase.\textsuperscript{308}

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

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

\textsuperscript{309} 478 U.S. 109 (1986).


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

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

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

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

315. *Id.* (Ginsburg, J., dissenting).
316. *Id.* at 2488.