University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 149 NOVEMBER 2000 NO. 1

ARTICLES

RECONNECTING DOCTRINE AND PURPOSE: A COMPREHENSIVE APPROACH TO STRICT SCRUTINY AFTER *ADARAND* AND *SHAW*

PETER J. RUBIN†

† Associate Professor of Law, Georgetown University. B.A., 1984, Yale University; J.D., 1988, Harvard University.

I would like to express my particular gratitude to Professor Laurence Tribe of the Harvard Law School for his support, friendship, and encouragement of this project. My thanks go also to Professor Martha Minow of the Harvard Law School, Professor Michael Dorf of the Columbia Law School, Professor Robert Schapiro of the Emory Law School, Howard Shapiro, Robert Malley, and David Halperin for their helpful comments on earlier drafts of this Article, and to Professor Akhil Amar of the Yale Law School for a long conversation that helped me clarify the point I make about bizarrely shaped districts in Part III.B of this Article. I am also grateful to the members of the faculty workshop at Georgetown at which an early draft of this piece was presented, especially Alex Aleinikoff, Peter Byrne, Mike Seidman, and Robin West, and to Dean Judy Areen of the Georgetown University Law Center for her generosity in awarding me the writer's grant which made completion of this Article possible.

Strict scrutiny has become something of a talisman.[1] While some

[1] "Strict scrutiny" is the name given to the method by which courts purport to evaluate governmental actions that classify people on a "suspect" basis, such as race, or that infringe upon fundamental rights. Although run-of-the-mill government action will be subjected to what is called the "rational basis test," and upheld if it is "rationally related to a legitimate governmental purpose," when strict scrutiny is applied, a court must ask whether the challenged government action is "narrowly tailored" to serve a "compelling government interest." If it is not, it will be invalidated. The phrase "strict scrutiny" made its first appearance in modern constitutional law in Justice Douglas's opinion for the Court in *Skinner v. Oklahoma*. 316 U.S. 535, 541 (1942) (applying strict scrutiny and then invalidating a law that punished with sterilization individuals convicted of larceny but not those convicted of embezzlement because the law "involved[d] one of the basic civil rights of man"); *see also* Korematsu v. United States, 323 U.S. 214, 216 (1944) (concluding that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and that "courts must subject them to the most rigid scrutiny"). Although the formal concept of strict scrutiny developed in the area of equal protection, it now pervades many areas of constitutional law. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 120 S. Ct. 1878, 1886 (2000) (applying strict scrutiny under the Free Speech Clause of the First Amendment to a content-based speech restriction); Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 532 (1993) (applying strict scrutiny under the Free Exercise Clause to a law whose object was the suppression of religious conduct).

commentators score debating points by identifying those rare cases in which governmental actions have survived it,[2] most have concluded that a judicial determination to apply "strict scrutiny" is little more than a way to describe the conclusion that a particular governmental action is invalid: Professor Gunther's "'strict' in theory and fatal in fact" formulation[3] must rank with Justice Stewart's subjective test for obscenity[4] as one of the most famous epithets in American constitutional law.

In the courts, strict scrutiny is essentially invoked, not employed. Despite its name—strict "scrutiny"—it ordinarily amounts to a finding of invalidity, not a tool of analysis. Moreover, discussion about the propriety of invoking strict scrutiny is typically divorced from any concern about the purposes that close judicial examination of a constitutionally troublesome statute or regulation might actually serve. The application of strict scrutiny thus threatens a cookie-cutter approach to questions of constitutional dimension. While this is, at the present moment, of most obvious importance in relation to the constitutional status of race-based plans of affirmative action, its significance goes well beyond that.

The goal of this Article is to suggest a comprehensive solution to the problem of the nature of strict scrutiny. The Article will set forth a conceptual framework for analysis of governmental actions that raise concerns of constitutional moment. This framework is designed to preserve the multidimensionality of the problems such governmental actions present. Although it will refer frequently to *judicial* evaluation of governmental action, my hope is that the tools it describes will be as useful ex ante to legislators and officials of the executive branch who may be considering certain actions as to courts called upon to review them in the face of subsequent legal challenges.

This Article will synthesize some extraordinarily important but fragmentary insights various people—including, perhaps most signifi-

---

[2] *See, e.g.*, Burson v. Freeman, 504 U.S. 191 (1992); Austin v. Michigan State Chamber of Commerce, 494 U.S. 652, 666 (1990); Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (controlling opinion of Powell, J.); Burns v. Fortson, 410 U.S. 686 (1973) (per curiam); Marston v. Lewis, 410 U.S. 679 (1973); Roe v. Wade, 410 U.S. 113, 163 (1973) (stating that after viability a state's interest in potential life becomes "compelling"); Korematsu v. United States, 323 U.S. 214 (1944).

[3] Gerald Gunther, *The Supreme Court, 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[4] *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it.").

cantly, John Hart Ely—have had about what strict scrutiny is for and how it should be applied. Because these insights have, indeed, been fragmentary (even when offering themselves as breathtakingly global), they require supplementation and integration. The examples in the Article will come primarily from the various settings in which the government may seek to take race-conscious action, but it will also make use of examples beyond race to show what is involved, drawing extensively on the Court's own jurisprudence to demonstrate the explanatory power of the ideas put forth. And, although it will be most immediately concerned with strict scrutiny in the context of race, many of the insights and conclusions included in it should have salience beyond that context.

This Article will also use a detailed evaluation of the case of race-conscious districting to demonstrate the appropriate application of the framework it sets forth. At the same time it will address some of the harder theoretical problems lurking beneath the Court's analysis in its recent series of voting rights cases. In the end, this Article concludes that, even when formally strict, judicial scrutiny under the Equal Protection Clause must be ever sensitive to the circumstances in which government seeks to act and to the methods by which it seeks to achieve even its legitimate ends. If it fails to do so, "strict scrutiny" may become little more than a Procrustean bed, rigidly invalidating certain government actions regardless of the consequences for the very equality that is the animating principle behind the Equal Protection Clause.

INTRODUCTION

I have chosen to focus on race and equal protection in this Article because, at present, the question of the nature of strict scrutiny is especially important in that context. With the announcement in *Adarand Constructors, Inc. v. Pena* that all racial classifications by government including those used in plans of affirmative action henceforth will be subject to strict scrutiny,[5] the most important question involving race and the Constitution now facing the Supreme Court is what that strict scrutiny will look like.

Applying the test articulated in *Adarand* and its precursor, *City of*

[5] 515 U.S. 200, 235 (1995) ("Our action today makes explicit [that] Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

Richmond v. J.A. Croson Co.,[6] lower courts recently have invalidated several affirmative action plans. Most notably, the United States Court of Appeals for the Fifth Circuit held in *Hopwood v. Texas* that race may never be taken account of in admissions to state institutions of higher learning for the purpose of fostering diversity.[7] This holding essentially concluded that the portion of Justice Powell's controlling opinion in *Regents of the University of California v. Bakke* that had for a generation delineated the permissible scope of affirmative action in state-run higher education did not state the law. Rather, the Fifth Circuit found that *Croson* and *Adarand* had adopted a stricter standard under which the use by the state of Texas of race for purposes of affirmative action in university admissions could not be constitutionally justified.[8] The Fourth Circuit has held that, under *Croson*, the Constitution does not permit a state to create merit-based college scholarships for which only African Americans are eligible.[9] And, most recently, the First Circuit has held that, although it may be designed to ensure diversity in the student body, the affirmative action plan of the Boston Latin School likewise fails strict scrutiny because its use of race cannot be justified.[10]

Although the *Adarand* Court insisted that the strict scrutiny it requires is not to be "strict in theory, but fatal in fact,"[11] the Court has let those of these decisions that have come before it stand. With the Courts of Appeals each likely to face the question whether affirmative action, particularly affirmative action in higher education, is constitutionally permissible—a question that was long thought to have been answered in the affirmative by the Supreme Court in *Bakke*—the Supreme Court will eventually have to face the hard question head on: In application, what form will the strict scrutiny called for by *Adarand* and *Croson* take?

---

[6] 488 U.S. 469 (1989) (holding that affirmative action plans adopted by the States are subject to strict scrutiny).

[7] 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

[8] *See id.* at 944-46.

[9] *See* Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

[10] *See* Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998).

[11] *Adarand*, 515 U.S. at 237 (citation omitted). In fact, the Court professed that "[s]trict scrutiny . . . evaluates carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not." *Id.* at 228. On the same day that *Adarand* was decided, Justice O'Connor, the author of the Court's *Adarand* decision, wrote another opinion in which she again expressed the view that "it is not true that strict scrutiny is 'strict in theory, but fatal in fact.'" Missouri v. Jenkins, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring) (citation omitted).

There is reason for concern about the Court's ability to provide an adequate answer to this question. The Court has had a particularly difficult time answering the parallel question—what should the nature of strict scrutiny be?—in the related context of race-conscious electoral districting. In a spate of decisions beginning with *Shaw v. Reno* (*Shaw* or *Shaw I*),[12] the same five-Justice majority that decided *Adarand* has held over the last several years that strict scrutiny must be the norm in at least most cases where the government consciously uses race in drawing electoral district lines.[13] Although the controlling opinions of the Court always suggest that there are circumstances in which the intentional use of race in electoral districting may be justified—for example, where it is necessary to prevent discriminatory "dilution" of the votes of members of a racial minority group—in practice, the Court since *Shaw I* has invalidated every district line drawn on the basis of race brought before it in a fully briefed and argued case.[14] This has been true even though the districts at issue have been drawn precisely to comply with the antidiscrimination command contained in the Voting Rights Act of 1965 ("V.R.A." or the "Act").[15] The Supreme Court has thus not only held that the intentional creation of majority-black electoral districts is presumptively unconstitutional—that is the reason such districts must be subjected to strict scrutiny—it has at least laid the groundwork for an argument that the practical effect of judicial scrutiny of such districts will *always* be the invalidation of the government's use of race, regardless of the justifications that

---

[12] 509 U.S. 630 (1993).

[13] *See* Bush v. Vera, 517 U.S. 952 (plurality opinion) (1996); Shaw v. Hunt, 517 U.S. 899 (1996) (*Shaw II*); Miller v. Johnson, 515 U.S. 900 (1995).

[14] The Court has, however, summarily affirmed a three-judge district court decision upholding a districting plan that intentionally used race. *See* DeWitt v. Wilson, 515 U.S. 1170 (1995) (summary affirmance). The Court also reversed a grant of summary judgment in favor of plaintiffs challenging the new districting plan drawn up to replace the plan that was before the Court in *Shaw I*, a plan that was ultimately held invalid in *Shaw II*, 517 U.S. 899 (1996). *See* Hunt v. Cromartie, 526 U.S. 541 (1999) (*Cromartie I*). In *Cromartie I*, the Court remanded the case to the three-judge district court for trial on the question whether race was in fact the predominant factor motivating the legislature's districting decision. *See Cromartie I*, 526 U.S. at 554 ("Perhaps, after trial, the evidence will support a finding that race was the State's predominant motive . . . .").

[15] *Cf.* Johnson v. DeGrandy, 512 U.S. 947, 1020 (1994) (noting that "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity" guaranteed by section 2 of the Act). The Court has not formally invalidated any part of the V.R.A., but has repeatedly resolved conflicts between the V.R.A. and the *Shaw* cause of action by weakening the antidiscrimination requirements imposed by the Act. *See infra* notes 136-37 and accompanying text.

support it.

On the other side, those members of the Court who disagree with *Shaw* have offered no approach that would preserve the V.R.A. while at the same time proving satisfactory to a Court majority that is overwhelmingly concerned with the use by government of racial classifications. Beginning with Justice Stevens's dissent in *Shaw I*, and in all the succeeding dissents in the *Shaw* line of cases, no constitutional alternative has been proposed except to permit the use of race in districting, subject only to rational basis review, unless and until it reaches the point of diluting the votes of the members of one or another racial group, that is, so submerging their votes among those of a hostile majority that they are denied the opportunity to participate equally in the process of electoral politics. But in an age in which a majority of the Supreme Court is inherently skeptical of the use of race by government—where, indeed, the Court purports virtually always to "strictly" scrutinize race-based governmental action—rational basis scrutiny is neither an adequate nor a realistic alternative.

A solution to the problem of strict scrutiny is thus needed both urgently and for the long haul. With respect to voting rights, the new decennial census, which will be accompanied by redistricting, is already underway. The Court has recently granted review to consider for a *third* time the congressional district lines drawn in North Carolina under the 1990 census in order to comply with the V.R.A.[16] This will provide it a final opportunity to clarify the meaning of *Shaw*, and its relationship to the V.R.A., before the flood of lawsuits that redistricting in light of the 2000 census will inevitably generate. Without some rethinking, the continued vitality of *Shaw* may well result in the evisceration of the V.R.A., a landmark civil rights statute. Yet that provision has proven an extraordinarily successful tool for breaking down the patterns of racially polarized voting that have historically led to the exclusion of members of racial minority groups from the political process.

Even more significantly, as to the broader question of strict scrutiny, the Court will undoubtedly soon have to confront the meaning of *Croson* and *Adarand* for affirmative action in higher education, in government employment, and in contracting. Its decisions will have re-

[16] *See* Hunt v. Cromartie (*Cromartie II*), 120 S. Ct. 2715 (2000) (noting probable jurisdiction). The Court considered the constitutionality of North Carolina's district lines in *Shaw I* and *Shaw II*. It did not reach their merits in *Cromartie I*, 526 U.S. 541 (1999), where it concluded that the district court should not have invalidated on a motion for summary judgment the new lines adopted in response to *Shaw II*.

percussions far beyond the governmental contexts in which they apply. And the Court's failure to conceive a workable version of strict scrutiny in the context of electoral districting bodes ill for the far more pervasive problem of strict scrutiny of affirmative action plans called for by the decisions in *Croson* and *Adarand.*

The goal of this Article is to reconnect the idea of searching judicial examination of governmental actions to its theoretical moorings. Returning to first principles, I seek to articulate an approach to strict scrutiny that is tailored to the concerns that legitimately give rise to a need for close judicial examination of certain governmental actions and that will predictably lead to defensible results regardless of the context in which it is used.

In Part I of this Article, I propose a unified framework for strict scrutiny of race-conscious government action. The framework is sensitive to the contexts in which race may be used by government and is appropriately tailored to address the concerns raised by the use of race in each of those distinct contexts, the very concerns that justify the use of strict scrutiny in the first place.

I begin in Part I.A.1 by identifying the question that equal protection analysis is designed to answer. Without this basic grounding, there can be no principled basis for assessing any approach to the close judicial scrutiny of governmental classifications under the Equal Protection Clause. In Part I.A.2 I then examine the costs—the harms and risks—that actually justify strict scrutiny of classifications that are based on race. I propose an analysis that avoids some of the pitfalls that have plagued analyses that rely, for example, solely, or at least principally, on conditions of prejudice or of political powerlessness to justify the use of strict scrutiny.[17] These analyses, while pathbreaking at the time they were undertaken and a source of continuing illumination, may in retrospect be seen to lump together phenomena that are in fact quite distinct and to sometimes smooth over analytical difficulties[18] without shedding much helpful light on the several discrete purposes strict scrutiny properly serves.

In Part I.B I put forward the framework for strict scrutiny of race-

---

[17] *See, e.g.*, United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

[18] *See, e.g.*, Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985) (observing that discreteness and insularity may actually help a group in coalition building); Lea Brilmayer, Carolene, *Conflicts, and the Fate of the "Inside-Outsider"*, 134 U. PA. L. REV. 1291, 1331-33 (1986) (arguing that there must be substantive content in any theory that lets unelected judges say what result a properly functioning democratic process should have produced).

conscious government action I have described, a framework that is responsive to the harms that are present or absent in the particular contexts in which race is used by government. I examine the way in which the tools of strict scrutiny—ordinarily phrased in an undifferentiated way as a search for "compelling" interests and an examination of "narrow tailoring"—should operate along different dimensions if they are to serve the purposes for which that scrutiny is properly employed. The undifferentiated labels placed on these tools may hide the several discrete operations that they perform, operations that should be more demanding or more relaxed depending upon the circumstances they have been invoked to address.

Central to my analysis, I develop a taxonomy of race-conscious government action, identifying the ways in which different types of race-conscious action raise different concerns. In particular, I identify some harms that have ordinarily been neglected in the literature, harms that are present whenever race is used and that, I conclude, justify some form of close judicial examination of all governmental uses of race.

I then demonstrate by concrete example the approach I have described under which close judicial evaluation of the government's use of race could best be tailored to address the particular concerns or harms that are present when race is used in various contexts. In contrast to theories that posit, under whatever label, a continuous, one-dimensional spectrum of standards of review ranging from minimum rationality through intermediate and up to strict, varying in accord with the degree of supposed "suspectness" or "invidiousness" of the criterion of classification employed and in response to the level of "importance" or "fundamentality" of the right or interest distributed or affected,[19] and in contrast to the cookie-cutter version of strict scrutiny some of the Court's recent decisions now threaten to impose (a version that essentially equates the need for close examination with the imperative of constitutional invalidation),[20] this study explores dimensions along which appropriately "strict" scrutiny of governmental actions should rationally be calibrated to address in each different context the particular concerns that warrant close examination in the first place.

In Part I.B I also test the validity of the framework I propose both against Supreme Court case law from outside the voting rights area—

---

[19] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting) (arguing that the Court's cases describe such a spectrum).

[20] *See supra* text accompanying notes 13-15.

some of it familiar, some of it largely overlooked—and against factual situations taken from real life, concluding not only that that framework will consistently lead to sensible results, but also that, at least until *Shaw I* was decided, the Court's equal protection jurisprudence described an approach much like the one I propose.

In Parts II and III, I address the case of race-conscious electoral districting. Part II sets out in detail some of the background. In Part II.A I describe the legal landscape in the area of voting rights in the pre-*Shaw* era: specifically, I describe the requirements contained in sections 2 and 5 of the V.R.A., the constitutional prohibition on racial vote dilution, and the way in which the V.R.A. may require states or their political subdivisions to draw electoral district lines on the basis of race in order to combat discrimination in the form of racially polarized voting. In Part II.B I examine the superimposition upon the law of voting rights of the racial-gerrymandering cause of action recognized in *Shaw I.* I describe and assess the Court's evaluation of the race-conscious districts at issue in *Shaw I* and its follow-on cases, particularly *Miller v. Johnson*[21] and *Bush v. Vera.*[22] I also describe and critique the approach advocated by the dissenters in those cases.

In Part III I apply the analytical framework set out in Part I to the case of race-conscious electoral districting. Part III.A describes the way in which race-conscious electoral districts would properly fit into that framework. Part III.B addresses two of the most puzzling aspects of the *Shaw* line of cases: the on-again off-again concern with the bizarre shapes of the electoral districts at issue and the use of words like "apartheid" to describe districts with a slight African American majority.[23] I suggest there that the two may be related, and explore the intuition reflected in the cases, but which the Court has never adequately explained, that there is something different and worse about bizarrely shaped majority-minority electoral districts. I try to fit the concern about district shape into the long line of race-discrimination cases decided by the Court including *Brown*[24] and *Bakke*,[25] and I conclude that, although it may be based upon a mistaken understanding of the facts in the race-conscious districting cases, the idea that the bizarre shape of a district could cause additional harm may provide a way to rationalize the *Shaw* line of cases and to harmonize it both with

---

[21] 515 U.S. 900 (1995).

[22] 517 U.S. 952 (1996).

[23] *Shaw I*, 509 U.S. 630, 647 (1993).

[24] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[25] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

the approach I put forward here and with the Court's other equal protection jurisprudence.

Finally, in Part III.C I return to the application of strict scrutiny to race-conscious districts, and particularly to the question of "narrow tailoring" in light of the availability of race-neutral means of addressing discrimination in voting—that is, the availability of systems of cumulative voting and the like that do not depend on governmental creation of electoral districts at all. These systems, advocated by some commentators and embraced by some courts, would permit states to comply with the antidiscrimination commands of the V.R.A. and the pre-*Shaw* vote dilution cases without the use of racial classifications. Indeed, unless the rigidity expressed thus far in the *Shaw* line of cases is relaxed, or our commitment to end discrimination against minorities in voting is abandoned, the use of such systems may ultimately stand as one of the few alternatives for conducting elections legally open to the states in the presence of racially polarized voting.

Despite the superficial appeal of such solutions, I conclude that, although the adoption of systems that do not rely on districting would indeed eliminate some of the problems of discrimination in voting, they might also remove some of the stabilizing aspects of the traditional system of district-based elections. In particular, they could lower the bars to election that have tended to keep extremist candidates from succeeding in obtaining elective office. I conclude that these mechanisms of non-district-based voting are not narrowly addressed to the problem of discrimination in voting on the basis of race, and that they could work an undesirable and radical transformation in the nature of representative democracy in the United States. I therefore argue that an appropriately constructed strict scrutiny would not require governmental authorities seeking to comply with the antidiscrimination command of the V.R.A. to adopt these race-neutral alternatives instead of drawing district lines that take race into account.

I. A BETTER EQUAL PROTECTION: A COMPREHENSIVE METHOD FOR EVALUATING RACE-CONSCIOUS GOVERNMENT ACTION UNDER THE EQUAL PROTECTION CLAUSE

A. *Evaluating Race-Conscious Government Action: Cataloguing the Harms That Justify Strict Scrutiny*

1. What is Strict Scrutiny?

Take a step back from the formulae and standards of review for

evaluating racial classifications about which courts and constitutional law commentators always debate. In evaluating any racial classification by government under the Equal Protection Clause,[26] the question is always the same: Is there a genuine difference between the groups that are treated differently that renders the difference in treatment rational, and does the disparate treatment serve a sufficiently important goal that it transcends whatever harm is done by the use of the line drawn by the particular law?[27] Although reasonable people may differ in the judgments they will make in answering this question, it is asked by judges all along the ideological spectrum, from those most sympathetic to the use of race by government in certain circumstances, such as in plans of affirmative action,[28] to those who are most

---

[26] U.S. CONST. amend. XIV, § 1.

[27] The formulation I have used is my own. After thinking about this question for some time both inside and outside the classroom, I have concluded that it comes closest to capturing what judges and others do when they evaluate a line drawn on the basis of race. It owes a lot to Justice Stevens's formulation, although it departs from it in some ways. Justice Stevens, of course, has written that the very use of formalized standards of review obfuscates, rather than clarifies, the inquiry into the constitutional validity of various governmental classifications. He has argued that the equal protection inquiry is always the same:

> I am inclined to believe that what has become known as the [tiered] analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.

Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring). He has written further that:

> In my own approach to these cases, I have always asked myself whether I could find a "rational basis" for the classification at issue. The term "rational," of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word "rational"—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring) (citations omitted).

This formulation, which requires only that an "impartial lawmaker could logically believe" both that the classification served a legitimate purpose and that the benefit wrought by its use transcends its harm, seems to me unduly deferential to the challenged governmental action in light of my conception of the appropriate role of the judiciary both in evaluating the reality of the difference between groups treated differently and in determining whether the benefits wrought by the governmental classification actually outweigh its cost.

[28] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 535 (1989) (Marshall, J., dissenting) (stating that "race-conscious classifications designed to further remedial goals are permissible if they are 'substantially related to achievement' of 'important governmental objectives'") (citations omitted).

opposed to it.[29] Strict scrutiny is, necessarily and inescapably, a tool to help in reaching an answer to this question.

The traditional formulation, however, of the inquiry made by courts employing strict scrutiny—is the classification at issue narrowly tailored to serve a compelling governmental interest?—masks the several dimensions in which this tool actually operates. In terms of strict scrutiny, the requirement of a "compelling governmental interest" serves at least two purposes. First, it permits a reviewing court to make a determination concerning the importance of the government's goal. Second, the use of the "compelling" label incorporates the idea that the costs of using a particular type of classification are great enough that the achievement even of most legitimate governmental purposes will not outweigh the harm wrought by use of the classification.

By contrast, the inquiry into narrow tailoring—into the fit between classification and proffered goal—serves at least three distinct purposes. First, it ensures that the stated purpose was indeed the actual purpose behind the classification. A narrow tailoring inquiry can help to "smoke out" illegitimate purposes by demonstrating that the classification does not, in fact, serve the stated, legitimate purpose.[30] Second, it checks stereotyped thinking. When a classification is based not on a factual distinction between one and another group, but on a stereotype, that classification will fail the narrow tailoring inquiry. Finally, even when the classification does correlate with some genuine distinction between the two groups, the narrow tailoring inquiry assures that the classification only will be used when there is some degree of necessity for its use if the governmental purpose is to be achieved. This aspect of the narrow tailoring inquiry is not really about "fit," but about comparing the marginal benefits and costs of the use of a particular classification with those of some alternative if there is one. (Thus, in the context of a racial classification, if there were no race-neutral alternative we might say that the classification is "narrowly tailored" in the sense that it is "necessary" to serve its purpose or, put another way, the "least restrictive" alternative.) In this fi-

---

[29] *See, e.g., id.* at 520-21 (Scalia, J., concurring) (concluding that "a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates" could justify the use of a racial classification by a state or local government, even though such a classification would ordinarily be impermissible because it aggravates the "tendency . . . to classify and judge men and women on the basis of their country of origin or the color of their skin").

[30] *Cf. id.* at 493 (plurality opinion) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race . . . .").

nal regard, the narrow tailoring inquiry prevents the use of certain classifications, even when they make sense, or are "rational" in the economic sense, with regard to the government's immediate purpose, because the costs of their use are so great that they should not be used without some degree of necessity.

2. What Actually Triggers Strict Scrutiny?

a. *A New Approach to Suspectness*

If the question in all equal protection cases is the same, why do we only sometimes use the tool of strict scrutiny? The answer must be that certain lines drawn by government cannot be permitted before they have undergone particularly close examination. But which ones? In order to figure out the appropriate shape that close judicial examination of classifications like those based on race should take, we must unpack the various reasons such government actions should be viewed with a "skeptical" eye.[31]

Racial classifications of course form the paradigmatic case for strict scrutiny. And, since not all classifications trigger strict scrutiny, there must be something about the character of race that renders it different for equal protection purposes from other characteristics. Precisely what this "something" is has frequently been addressed as part of the question of what renders the use of a particular characteristic an "inherently suspect" basis upon which to make a governmental distinction.[32]

The reasons the use of race may have been deemed "suspect" has generated an enormous amount of comment and literature.[33] But although this discussion by courts and commentators has focused upon the abstract characteristics of various classifications, strict scrutiny, as I will describe, must be triggered by—and, indeed, the Court's cases demonstrate that it is in fact utilized in response to—the presence of

---

[31] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 228 (1995).

[32] Graham v. Richardson, 403 U.S. 365, 372 (1971) (discussing alienage); *see also* Korematsu v. United States, 323 U.S. 214, 216 (1944) (announcing that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect").

[33] *See, e.g.*, ELY, *supra* note 17, at 145-72; Ackerman, *supra* note 18, at 742-46; Mark Tushnet, *"... And Only Wealth Will Buy You Justice"—Some Notes on The Supreme Court, 1972 Term*, 1974 WISC. L. REV. 177, 181 (suggesting that at least some findings of suspectness can best be explained as reflecting a desire to help the middle class); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1755 & n.5 (1996).

particular risks and harms that have constitutional dimension.

The Supreme Court has never provided a comprehensive explanation of the concept of suspectness, but it has taken the approach that certain abstract characteristics of particular classes render constitutionally suspect laws that disadvantage members of those classes. Among the relevant criteria identified in Court decisions have been "discrete[ness] and insular[ity],"[34] inability to compete on an equal footing in the political process,[35] possession of "obvious, immutable or distinguishing characteristics" essentially irrelevant to the purpose for which a government decision is made,[36] "status of birth" for which the individual bears no responsibility,[37] a history of "prejudice"[38] or "discrimination"[39] against the group in question, and the risk of stigma[40] or stereotype.[41]

But explanations for close judicial scrutiny that turn on abstract categorization of governmental action are not adequate. For example, despite its continued appeal and undoubted relevance, failure of the political process—the first index of constitutional suspectness articulated by the Court in the modern era,[42] and, thanks largely to Dean Ely's landmark work,[43] the one most fully explored in the literature—cannot be a sufficient explanation for the decision to apply strict scrutiny to racial classifications.

This is not so merely because public choice theory concludes, in essence, that discrete and insular minorities are, in fact, unusually likely to be advantaged in the representative political process,[44] nor because of the holdings in cases like *Adarand* and *Croson*—holdings that cannot be explained by any theory of representation reinforcement—that racial classifications that are harmful to whites must be

---

[34] United States v. Carolene Prods., 304 U.S. 144, 152-53 n.4 (1938) (dictum).

[35] *See* Lyng v. Castillo, 477 U.S. 635, 638 (1986) (referring to "political[] powerless[ness]").

[36] *Id.*

[37] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 176 (1972).

[38] *Carolene Prods.*, 304 U.S. at 152-53 n.4.

[39] *Lyng*, 477 U.S. at 638.

[40] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 360 (1978) (Brennan, White, Marshall, & Blackmun, JJ.).

[41] *See, e.g.*, *Croson*, 488 U.S. at 493-94.

[42] *See Carolene Prods.*, 304 U.S. at 152-53 n.4 (1938).

[43] ELY, *supra* note 17.

[44] *See* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1884-90 (1992); *see also* Ackerman, *supra* note 18, at 723-24.

subject to strict scrutiny. To begin with, whatever the empirical truth about public choice theory, and whatever one thinks of the merits of the Court's decisions in *Croson* and *Adarand,* surely an invidious, racially discriminatory law would not lose its abhorrent quality simply because it was the product of a smoothly functioning democratic process. Similarly, discrimination against an historically disadvantaged minority group such as African Americans would be no less immoral simply because it could be shown that the members of that group no longer constitute a "discrete and insular" minority within the broader American community. And finally, in light of the deeply rooted history of prejudicial attitudes toward African Americans, it is utterly unrealistic to assume that the full participation by African Americans in the political process would eradicate all official acts of racial discrimination.

Ultimately, no approach that relies on the abstract characteristics of the classification or the disadvantaged class in order to determine when strict scrutiny should apply is satisfactory. Although the characteristics to which the Court has pointed are of undoubted relevance, the Court's cases make it clear that no constellation of one or more of them *necessarily* renders a classification suspect. Some classifications made on the basis of immutable characteristics, of status that is not of the individual's own making, or of characteristics that have historically engendered discrimination have not been deemed suspect and have not been subjected to strict scrutiny.[45] At the same time, classifications based on certain characteristics that have formally been reviewed under a deferential rational basis test because they have not been deemed suspect under the Court's current approach have nonetheless *sometimes* been subjected to closer examination.[46] From the other side, despite reaching the conclusion that alienage *is* "inherently suspect," the Court has found it necessary to create an ad hoc exception so that in many circumstances that purportedly suspect classification is *itself*

---

[45] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982) (illegal alienage); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313-14 (1976) (age); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (wealth).

[46] Compare, for example, *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985), applying covertly heightened scrutiny to a zoning ordinance applied to deny a use permit for a group home for the mentally retarded, with *Heller v. Doe,* 509 U.S. 312 (1993), applying deferential rational basis scrutiny to a distinction between the mentally retarded and the mentally ill that bore more heavily on the former. *See also* Romer v. Evans, 517 U.S. 620 (1996) (examining closely the fit between a state constitutional amendment that discriminated against homosexuals and its asserted purpose before invalidating it under what was formally called rational basis scrutiny).

subject only to rational basis scrutiny.[47] Indeed, the inadequacy of reliance on abstract characterization of classifications is reflected, too, in the Court's very inability even to articulate consistently the list of the characteristics that are supposedly relevant to a conclusion of suspectness.[48]

The theoretical inadequacies of any approach based on consideration in the abstract of the characteristics of a particular class or classification, and the Court's inability to apply this approach with any even apparent consistency, suggest that there is a need for a different way of understanding what should and does trigger strict scrutiny. An examination of the Court's cases provides just such an understanding: the only comprehensive explanation for the Court's decisions in this area must be that a decision to examine a classification closely reflects a judgment that there are particular harms or risks that may render the use of a characteristic in the particular way at issue inconsistent with basic principles of human dignity.

b. *Constitutionally Significant Risks and Harms Associated with Government's Use of Race*

The only adequate explanation—as both a descriptive and a normative matter—for application of strict scrutiny to classifications

---

[47] *Compare* Graham v. Richardson, 403 U.S. 365, 371-72 (1971) ("[C]lassifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny."), *with* Foley v. Connelie, 435 U.S. 291, 295-97 (1978) (describing an exception under which classifications that deny aliens the right to hold jobs that "involve[] discretionary decisionmaking, or execution of policy, which substantially affects members of the political community"—a category so broad it was held to include the job of state highway patrolman—are subjected only to rational basis scrutiny).

[48] Compare, for example, the formulations used in *Kimel v. Florida Board of Regents*, 120 S. Ct. 631, 645-46 (2000) (asserting that "age is not a suspect classification" because it "cannot be characterized as so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy;" "older persons . . . have not been subjected to a history of purposeful unequal treatment;" and "[o]ld age also does not define a discrete and insular minority" (quotation marks and citations omitted)), *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) ("Close relatives are not a 'suspect' or 'quasi-suspect' class. As a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless."), and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 218 (noting that Justice Powell's controlling opinion in *Bakke* had rejected the argument "that 'strict scrutiny' should apply only to classifications that disadvantage discrete and insular minorities" and had concluded that "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination," regardless of whether the disadvantaged group met that description (quotation marks and citations omitted)).

based on race must be that the government's use of race is frequently inconsistent with notions of human dignity. It is essential to any rational approach to strict scrutiny of racial classifications to articulate the costs that may be associated with the government's use of race that may render it so. What risks may it carry with it? What harms does it work? Because the Equal Protection Clause is concerned both with governmental purposes and with weighing marginal costs and benefits, the requirements even of formally "strict" judicial scrutiny should vary with the context in which the government seeks to use race, depending upon the particular risks and harms the use of race at issue may entail. It is therefore essential to any rational approach to strict scrutiny of racial classifications to articulate the risks and harms that may be imposed by those classifications. In *Croson*, the plurality concluded that "searching judicial inquiry" was necessary to distinguish legitimate from illegitimate uses of race by government.[49] Only by understanding the harms that race-conscious government action can cause—the things that ordinarily render it illegitimate—can one determine the appropriate nature of that close judicial scrutiny.

The harms that justify strict scrutiny of racial classifications are broader than a mere list of "cognizable" injuries.[50] Strict scrutiny amounts to judicial intervention to address society-wide injuries without regard for whether the plaintiff could allege these harms under the traditional rules of standing. Indeed, to some extent the very idea of strict scrutiny gives the lie to the narrow conception of the judicial role often expressed in the law of standing. Undoubtedly, a plaintiff who is himself injured by the government's use of race must meet the requirements of Article III standing. But once a plaintiff with standing comes on the scene, society-wide injuries that might not be redressable within some notions of individualized injury in fact are a but-for trigger for judicial investigation into, and possible invalidation of, statutes, regulations, and other governmental acts. Strict scrutiny, and the potential invalidation of government action it entails, is necessarily concerned with a wide class of injuries—some of which are society-wide and some of which are imposed only on the individual.

Race, of course, is rarely relevant to any appropriate governmental

---

[49] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); *see also Adarand*, 515 U.S. at 230 (noting that the job of the court applying strict scrutiny is to determine the "ultimate validity" of the law before it).

[50] *See, e.g.*, Allen v. Knight, 468 U.S. 737, 755-56 (1984) (holding that "abstract stigmatic injury" is not cognizable and that the plaintiffs therefore lacked Article III standing).

decision. But this alone does not support the conclusion that it must be subjected to strict scrutiny. A decision to deny all people who share some apparently irrelevant characteristic—say they were born on a Monday—might be deemed arbitrary and therefore unlawful, but the usual irrelevance of that characteristic alone would not render its use inherently suspect.

In addition, there is the historical and current cultural significance of this particular, ordinarily irrelevant characteristic: unlike the status of being born on a Monday, race has been used for hundreds of years to deny people individualized consideration—for jobs, housing, places in school, and the like. Historically, despite its rare relevance, skin color has often been understood to signify inferiority and to carry a badge of stigma. African Americans have been understood to be "degraded"[51] and contact with them has sometimes been regarded by members of the socially dominant racial group as disgusting.[52] This history gives race cultural significance today. Racial divisions are also persistent, and feelings of hostility between racial groups can be particularly virulent.

In light of this history, then, what are the harms and risks that may accompany the use of race by government to classify individuals?

First, there is a risk that, when race is used to classify, it is being used as it traditionally was: to harm an unpopular group, to indicate that the members of that group are unfit to partake of something given to others or to associate with members of the group to which the lawmakers belong, and to convey in this way the community's judgment about the inherent worth of people of different kinds. The use of race is suspect, in part, because in light of the principles that underlie our nation—principles codified in the Equal Protection Clause—the goal of harming members of a particular racial group on the basis of stereotypical views about differences in human worth is illegitimate. This risk suggests that all uses of race must be scrutinized to ensure that race is not in fact being used to harm the disadvantaged group for no reason other than racial hostility.

Second, and relatedly, there is the risk that the use of race reflects nothing more than racial politics, a desire to reward the members of (at least ordinarily) one's own racial group. In light of the continued salience of racial categories in our society, and the immutability of

---

[51] Plessy v. Ferguson, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

[52] *See generally* Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law,* 97 MICH. L. REV. 564, 590-91 (1998) (discussing the belief underlying segregation that contact with blacks would corrupt or contaminate whites).

race, the divisions such politics will reinforce along racial lines are likely to have an enduring and deeply personally significant cast. Racial politics means that members of the out group are—or at least are likely to feel as if they are—not full members of the polity. At bedrock, the exclusion of individuals from the polity on the basis of a trait so tied up with identity is inconsistent with the very notion of American democracy. It sends the message that we are not one people comprised of myriad individuals, but several competing peoples. This reinforces racial hostility. In light of the history of race, the perpetuation of racial divisions that would be wrought by racial politics is likely to be particularly harmful, both to the historically disadvantaged group and to society at large. Close examination of racial classifications is therefore necessary to ensure that they reflect something more than "simple racial politics."[53]

Third, there is a risk that race is being used for reasons that reflect nothing more than erroneous stereotypes. Maybe, even if its purpose is not to impose harm, the use of race reflects an unjustified presumption about the group. Strict scrutiny serves, in part, to address the special risk that the decisionmaker has assumed something about a racial group that is untrue. It requires a reviewing court to examine the decision closely, and to check itself to ensure that the same type of thinking does not infect its own decision whether to permit the classification to stand.

Concerns about a particular group's representation in the political process are significant because they are relevant to these three risks. Where a group is persistently outvoted because of prejudice[54]—or is not represented at all[55]—the likelihood that a classification is being used in these ways increases.

Although I have referred to the risk of erroneous stereotype, skepticism about the use of race cannot be overcome merely by a showing that race is "relevant" in the sense that it *accurately* correlates with some consideration related to a legitimate governmental purpose. That is, even accurate racial generalizations may not ordinarily form

---

[53] *Croson*, 488 U.S. at 493.

[54] This is the type of process failure suggested by footnote 4 in *Carolene Products*, which speaks of "prejudice against discrete and insular minorities" as a "special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." United States v. Carolene Prods., 304 U.S. 144, 152-53 n.4 (1938).

[55] This may have been a concern, for example, that led the Court to closely examine the discrimination against the mentally retarded struck down in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

the basis for governmental decisionmaking if they deny individualized consideration on the basis of race. For example, even if the percentage of African Americans among Ph.D.s in a particular field is, for whatever reason, disproportionately small, a governmental employer seeking only such Ph.D.s to fill a job could not limit his consideration only to white people. The use of race would not be considered "narrowly tailored" to serve any "compelling governmental interest." Where entitlement to a benefit turns on a certain skill or personal quality, consideration for that benefit cannot be denied on the basis of race, just because the use of race might be deemed, in a mathematical sense, "rational." Race cannot be used as a proxy for some other characteristic when that other characteristic itself can be measured. Race thus is treated differently than other proxies for relevant characteristics, which may ordinarily be used by government.[56]

This reflects at least two additional risks. *Fourth*, the use of race, even if it could be said rationally to further some legitimate purpose, may perpetuate a negative racial stereotype. Even where race is not being used to deny a benefit, every use of race carries the risk that it will reinforce a badge of racial inferiority by perpetuating a negative racial stereotype. Racial classifications that serve to reinforce a negative racial stereotype will not always obviously reflect a judgment of inferiority. They may reinforce stereotypes that are double-edged swords—apparently positive traits that can be turned against members of the group. Thus, negative racial stereotypes may include the belief that members of a group are inherently "more clever," for example, or "more friendly." Identification of such negative racial stereotypes may require some knowledge of the history of social attitudes toward the group in question.

Fifth, and perhaps more fundamentally, to make a decision to grant or deny someone something on the basis of a characteristic such as race, which is loaded with cultural significance, denies a person treatment as an individual in a way that other sorting mechanisms do not. This is in part because of the ordinary irrelevance of the characteristic, but it is also because the use of a trait that has a great deal of (especially negative) cultural significance—even when that characteristic correlates with some real and relevant difference—is likely to reinforce an individual's sense that he or she is perceived simply as an

[56] *See* Rubin, *supra* note 52 at 572-73 ("We routinely and necessarily make decisions on the basis of generalizations about various characteristics of the people we meet.... [However,] when an antidiscrimination law is passed suddenly one characteristic can no longer permissibly be used in decisionmaking.").

indistinct and fungible member of his or her racial or ethnic group. In this regard it is also significant that race and ethnicity, again, remain closely tied up with many individuals' sense of identity. Thus, if, as one perhaps apocryphal story has it, it turned out that liking Jell-O for dessert was the best predictor of who would be a good fighter pilot, and if the Air Force took to using enjoyment of Jell-O as a screening mechanism for determining who could be considered for pilot training, those excluded from that one opportunity on this basis likely would not feel the sting of being denied evaluation as an individual in the same way they would if they had been denied the opportunity on the basis of race—or at least not feel it as strongly.

Finally, there are two distinct harms that will *always* be caused by the very use of a racial classification, regardless of whether it is being used to disadvantage any individual. Although the Supreme Court has not identified these as distinct harms, their presence means that the government's use of race should *always* require justification:

Sixth, at the broadest level, the very use of race to identify people, whether by government or by anyone else, will, at the margin, inevitably have some divisive effect on the races by reinforcing the belief in inherent racial differences, regardless of its correlation with traditional stereotypes. This will be so regardless of the particular law's impact on the individual so classified. Any use of race may perpetuate the type of stereotyped thinking that lies at the heart of discriminatory attitudes. The belief in inherent racial difference that may be fostered or reinforced by the use of race is antithetical to the American vision of equality.

Seventh, at the most personal level, the use of race to classify individuals may well cause a dignitary harm to individuals who are classified according to race, regardless of whether anyone is disadvantaged on the basis of their racial identity. This is something like the denial-of-individual-treatment harm, but it does not depend upon the purpose for which race is being used. In a nation in which, according to a fundamental organizing principle of society, ideally skin color would have no significance, the very identification of a person on the basis of his or her race may well be felt as an affront.

Of course, as their descriptions make clear, these risks and harms overlap and are interrelated. But it is the presence or absence of these seven distinct harms that justifies close judicial examination of race-conscious acts by government—and it is the presence or absence of the same or similar risks and harms that will properly lead to a conclusion that any classification should be subject to searching review.

Determining the point at which a particular classification inevitably presents a sufficient constellation of such risks and harms that it should be deemed "suspect" and always subjected to what can be described as formally strict scrutiny is beyond the scope of this Article. It is worth observing, however, that the conclusion that what is important are the particular risks and harms inherent in any governmental action suggests that the name "suspect classification" may be of less utility than its prominence in the current jurisprudence of equal protection suggests. In certain circumstances, the use of even otherwise insignificant lines may give rise to concerns that call for close examination. This can explain, for example, the Court's decisions in cases like *United States Department of Agriculture v. Moreno*[57] and *City of Cleburne v. Cleburne Living Center*[58] to closely examine classifications that it has not deemed inherently suspect. On the other hand, even acknowledging that it is the harms and risks involved in particular cases that justify close scrutiny rather than anything that can definitively be said in the abstract about a particular classification, the use of the "suspect" label and the invocation of formally strict scrutiny may well play an important role in giving guidance to courts and government officials about what the Equal Protection Clause requires of them.

In any event, the important conclusion for present purposes is that, if properly structured, the strict scrutiny called for by *Adarand* and *Croson,* as well as by *Shaw I* and its progeny, should provide a reviewing court with an answer to the equal protection question ("Is there a genuine difference between the two groups that renders the difference in treatment rational, and does the disparate treatment serve a sufficiently important goal that it transcends whatever harm is done by the use of the line drawn by the particular law?") in light of the particular constellation of harms that may be wrought by the use of race before it. This is the only way that "strict scrutiny" can serve the purpose for which it is inescapably designed.

Whatever the formal description of the scrutiny applied to race-conscious government decisionmaking, the strength of the justification that is required will necessarily vary with the context in which the government seeks to use race and the types of risks and harms its use

---

[57] 413 U.S. 528 (1973) (purporting to apply "rational basis" scrutiny, but then closely examining and invalidating a classification designed to deny food stamps to "hippies" who had chosen to live together despite being unrelated to each other).

[58] 473 U.S. 432 (1985) (purporting to apply "rational basis" scrutiny, but then closely examining and invalidating a denial of a use permit for a group home for the mentally retarded).

of race may entail. Similarly, the extent to which racial classification must not be used in favor of available, but inferior, race-neutral alternatives will vary in the same way. For example, the strength of the interest required to justify the collection of racial data for statistical purposes will undoubtedly be less than the strength of the interest required for denying a person a government benefit on the basis of race.

Despite the Court's potentially confusing insistence in *Adarand* that in reviewing race-conscious classifications, courts must use a "consisten[t]" standard,[59] the Court's decisions demonstrate the vitality of this principle. Indeed, it appears to have been explicitly recognized by the *Adarand* Court, which said that it understood "the difference between 'an engine of oppression' and an effort 'to foster equality in society,'" and explained that the uniform use of "strict" scrutiny did not mean automatic invalidation of laws that classify on the basis of race.[60]

B. *A Proposal for a Strict Scrutiny That Serves Its Purpose*

In any approach to strict scrutiny, the touchstone for analysis must be equality—after all, the text of the constitutional provision at issue guarantees "equal protection of the laws."[61] As described above, in light of the history of racial discrimination in the United States, the harms that inescapably inhere in the classification of persons by race, and the dangers that always accompany it, any use of race in government decisionmaking requires substantial justification. Indeed, if the need for racial classification were ever presumed, the law could work to hamper the evolution of racial equality, rather than to further it.

The costs of race-conscious government action, however, will vary with the circumstances and the particular way in which race is used. Given the purpose of equal protection analysis, the amount of leeway given government officials to address problems, even through race-conscious action, should vary with the costs of the particular action the government seeks to undertake. At one extreme are racial classifications used to deny members of a traditionally disfavored group,

---

[59] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) (asserting that "consistency" of approach is one of the "three general propositions" about review of governmental racial classifications established by the Court's precedents).

[60] *Id.* (quoting *id.* at 243 (Stevens, J., dissenting)).

[61] U.S. CONST. amend. XIV, § 1.

classically African Americans, some good enjoyed by everyone else.[62] These impose all of the traditional harms of old-fashioned racial discrimination. At the other extreme are uses of race that impose minimal harm on people of any race, for example, a request by the Census Bureau that people indicate their race on a census form. There are also uses of race that are in the middle. The use of race in districting, for example, is a distinct kind of race-conscious government action whose validity must be assessed on the basis of its own characteristics; it falls somewhere in between these two extremes.

If it is to play a role in helping to answer the equal protection question, strict scrutiny must be flexible enough to recognize that different uses of race pose different risks and impose different harms. To determine what risks and harms are present requires a careful examination of the factual circumstances and social contexts in which the use of race by government has taken place.

1. Describing This Approach: A Taxonomy of Race-Conscious Government Action

The Court's cases can be understood to describe a taxonomy of race-conscious government action that contains four discrete categories.[63] Applying the principle described above, the characteristics of each type of race-conscious action call for a unique degree of justification. Indeed, although the Court has never expressly acknowledged these different categories, its equal protection cases from a wide range of areas, from well known affirmative action opinions to obscure decisions involving desegregation, can best be understood to describe just such an approach.

a. *Category One: Classifications That Disadvantage Members of Historically Disfavored Racial Minority Groups*

The most common way in which racial classifications have been used in American history has been to deny rights or benefits to mem-

[62] For simplicity, I will generally use examples in which there are only two relevant racial groups, a white majority and an historically disadvantaged African American minority. I will not refer either to the complexities that arise when a polity contains members of more than one historically disadvantaged racial minority group or to those that arise when individuals identify themselves with more than one racial or ethnic group. Nor in general will I address the complex issue of categories that may be considered more or less analogous to race, such as sex or sexual orientation.

[63] These categories fall along a continuum, and could analytically, although not usefully, be further subdivided.

bers of historically disfavored racial minority groups, archetypally African Americans. Racial classifications that disadvantage African Americans present all the risks and costs I have described above. With regard to this first category of race-based classification, Professor Gunther's famous 1972 description of strict scrutiny remains true today. Scrutiny of such classifications has been "'strict' in theory and fatal in fact."[64] No such classification has been upheld since *Brown v. Board of Education*[65] was decided in 1954.

This category includes not only those classifications that deny something concrete or tangible to African Americans, but also those classifications that separate black people from white, even if they appear to treat the members of each group equally. This latter point is the teaching of *Brown*. Although the point has been clouded by those who argue that *Brown* issued a constitutional command that government must act in a colorblind fashion,[66] the holding of *Brown* was not that the classification and separation of the races in public schools was *ab initio* an impermissible violation of the rights of all citizens because it classified individuals on the basis of race. Rather, *Brown* held that the black children's individual rights were violated by segregating them on the basis of race because of the harm segregation imposed upon them.[67]

In its formulation, the *Brown* Court said of the black schoolchildren: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[68] The Court might have emphasized the objective harm wrought by the pervasive system of official apartheid as well as the subjective feelings of the black students. But the historic step in *Brown* was the examination of the use of race in its social context and the recognition that, in the context of public education, "stigmatic" harm to blacks inheres in the governmental separation of people on the basis of race, notwithstanding the provision of formal equality.[69] It was the harm to members of the disadvantaged

---

[64] Gunther, *supra* note 3, at 8.

[65] 347 U.S. 483 (1954).

[66] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

[67] *Brown*, 347 U.S. at 494-95.

[68] *Id.* at 494.

[69] *See id.* at 495 ("[W]e hold that *the plaintiffs and others similarly situated* for whom the actions have been brought are, by reason of the segregation complained of, de-

group that brought segregation, even if formally equal, within the remedial ambit of the Equal Protection Clause.

Conservative scholars in the years following *Brown* criticized the decision on the ground that separate-but-equal segregation could not truly be said to disadvantage blacks on the basis of their race.[70] The best defense of *Brown*, one that remains persuasive today, was put forward by Professor Black, who defended the decision in *Brown* as an appropriate response to a denial of equality on the basis of race:

> [S]egregation was imposed on one race by the other race; consent was not invited or required.... This fact... confirms the picture which a casual or deep observer is likely to form... not of mutual separation of whites and Negroes, but of one in-group enjoying full normal communal life and one out-group that is banned from this life and forced into an inferior one of its own....
>
> Segregation is historically and contemporaneously associated in a functioning complex with practices which are indisputably and grossly discriminatory.... Here we have two things. First, a certain group of people is "segregated." Secondly, at about the same time, the very same group of people, down to the last man and woman, is barred, or sought to be barred, from the common political life of the community—from all political power....
>
> ....
>
> ... Our question is whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid.
>
> ....
>
> I conclude... that the Court had the soundest reasons for judging that segregation violates the fourteenth amendment. These reasons make up the simple syllogism with which I began: The fourteenth amendment commands equality, and segregation as we know it is inequality.[71]

---

prived of the equal protection of the laws guaranteed by the Fourteenth Amendment." (emphasis added)).

[70] More specifically, Professor Wechsler wrote that the only basis upon which the decision could be sustained was that segregation denied black schoolchildren the right to associate with white schoolchildren. He concluded, however, that there was no neutral basis for preferring the claim of blacks to a right to associate over the claim of whites to a right to choose not to. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32-34 (1959).

[71] Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 425-28 (1960).

This understanding of the decisions outlawing segregation has not been superseded by a view that they outlaw all race-conscious government action.[72] Indeed, in a significant portion of its 1992 opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court again expressed the view that the *Brown* decision was based on the fact that racial segregation "treats the black race as inferior."[73] The Court in *Casey* concluded that the decision in *Brown* to overrule *Plessy v. Ferguson*[74] was justified precisely because of the Court's recognition of the actual inequality inherent in segregation:

> The Court in *Brown* addressed th[e] facts [concerning the nature of segregation] by observing that whatever may have been the understanding in *Plessy*'s time of the power of segregation to stigmatize those who were segregated with a "badge of inferiority," it was clear by 1954 that legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal. . . . While we think *Plessy* was wrong the day it was decided, we must also recognize that the *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required.[75]

Brown rests upon the imposition of disadvantage based on membership in the disfavored racial minority group, not on any broader principle forbidding all race-conscious government action.[76] The use of race to segregate, then, is invalid under equal protection principles precisely because it imposes a disadvantage on African Americans on the basis of their race.[77]

---

[72] There is, however, a compelling argument that when government provides services and facilities, white and black people alike have a substantive due process right that the services not be provided in a segregated manner. *Cf.* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (holding that the operation of segregated schools in the District of Columbia violates Due Process). This would have afforded an alternative basis for the decision in *Brown*.

[73] 505 U.S. 833, 862 (1992).

[74] 163 U.S. 537 (1896).

[75] *Casey*, 505 U.S. at 863 (citation omitted).

[76] Likewise, it is the continued social meaning of segregation, and not, as Justice Thomas would have it, "the idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites," that justifies the continued court-ordered desegregation of public schools. Missouri v. Jenkins, 515 U.S. 70, 119 (1995) (Thomas, J., concurring).

[77] Those few other judicially invalidated racial classifications that may appear at first blush to treat the members of both races equally in reality also imposed a detriment upon blacks. In *Loving v. Virginia*, 388 U.S. 1 (1967), the anti-miscegenation law prevented blacks from marrying people they could have married if they were white, and whites from marrying people they could have married if they were black. The

One can create bizarre hypotheticals in which we can imagine a race-based classification in this first category that might be upheld. But it would have to serve goals of the very highest order (that is the meaning of "compelling" state interest in this context) and it would only be permissible if the cost of any alternative would itself compromise a goal of similar importance (that is a concept that is captured in part by the idea of "narrow tailoring"). For example, Justice Stevens has suggested that race could be used in choosing an undercover police officer to infiltrate a criminal group all of whose members were of the same race.[78] In such a circumstance, the only race-neutral alternatives would be not to enforce the law against the group or to risk the life of an officer.[79] Nonetheless, racial classifications in this first category are impermissible unless they serve the most important purpose, and if race-neutral alternatives exist, they must be used unless the costs would be very grave indeed.

b. *Category Two: Racial Classifications That Benefit Members of Historically Disfavored Groups*

A second category of racial classifications includes those that benefit members of historically disfavored groups, particularly African Americans. These are race-conscious plans of affirmative action. These classifications take different forms and work in different ways, but normally they are brought before courts because they favor blacks (or members of other historically disadvantaged groups) in the distribution of some scarce resource. This imposes a concomitant disad-

---

statute thus imposed detrimental inequality upon members of both races. Different individual members of each group were disadvantaged on the basis of their race. Such "evenhanded" discrimination is, of course, discrimination nonetheless. In *Anderson v. Martin*, 375 U.S. 399 (1964), a Louisiana statute required that the race of each candidate for election be placed next to his name on each ballot. Portions of *Anderson* suggest that the Court understood the statute, "in the light of 'private attitudes and pressures' towards Negroes at the time of its enactment," to have amounted to harmful discrimination against black candidates. *Id.* at 403 (citation omitted); *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-16, at 1481 n.9 (2d ed. 1988) (discussing *Anderson*).

[78] *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 314 (1986) (Stevens, J., dissenting).

[79] In recent years, it has been suggested that it would be permissible to use race to determine which police officers to send to particular neighborhoods to enforce the law. In many contexts, such a use of race would likely be held impermissible, amounting to nothing more than government bowing to the privately held prejudices of the citizenry. *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (holding that the potential prejudice towards a child living with a stepparent of a different race is not a permissible consideration for the removal of the child from its natural mother because the law cannot be used to give effect to private prejudices).

vantage upon members of the white majority (or other historically advantaged group).

Although the Supreme Court has recently ruled in *Adarand Constructors, Inc. v. Pena*[80] that these classifications, whether employed by the states or the federal government, are all to be subjected to formally strict scrutiny, it has also strongly suggested that such race-conscious action can in some circumstances be justified. The *Adarand* plurality wrote:

> [W]e wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.[81]

The use of race in these circumstances presents good reason for searching examination, but these uses of race do not present all the risks inherent in racial classifications that burden historically disfavored groups. As with all racial classifications, there are the dignitary and divisive harms described above. These are substantial costs, and their presence means race should not be used casually. There is some risk, too, that an affirmative action plan might reflect nothing more than racial politics. There is also the risk of stereotype, although in this circumstance the risk is a paternalistic stereotype that help is

---

[80] 515 U.S. 200 (1995).

[81] *Id.* at 237 (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., and Kennedy & Thomas, JJ.) (citations omitted). Although neither the Court nor Justice Scalia, who concurred in part and concurred in the judgment, indicated precisely what portions of Justice O'Connor's opinion he did not join, this portion is almost certainly inconsistent with his views. Each of the four dissenting Justices took at least as broad a view of the permissibility of race-conscious action to benefit members of historically disadvantaged minority groups as did the plurality. *See id.* at 243 (Stevens, J., joined by Ginsburg, J., dissenting) (distinguishing invidious discrimination from remedial race-based preferences); *id.* at 265-66 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting) (agreeing with Justice Stevens's conclusion that stare decisis compelled application of *Fullilove v. Klutznick*, 448 U.S. 448 (1980), under which a minority business enterprise set-aside was upheld); *id.* at 271 (Ginsburg, J., joined by Breyer, J., dissenting) (maintaining that the Court should defer to Congressional legislation enacted to overcome historic racial subjugation). The 1987 case mentioned in the quotation is *United States v. Paradise*, 480 U.S. 149 (1987).

needed where it is not, rather than a stereotype of unfitness.

These risks can be addressed by a careful examination, first by the adopting authority and subsequently by any reviewing court, of the actual situation of the members of each group in the context in which race has been used, to ensure that the benefit conferred addresses some genuine difference in the real-world situation of the group being given aid and that the benefits of any such program outweigh any costs imposed on members of the historically disadvantaged group.

But there is far less risk in this category, especially when the authorities adopting the plan are not themselves members of the historically disadvantaged group,[82] that such classifications are being used solely to impose upon either group a demeaning and dehumanizing badge of inferiority by implying that one group is unfit to partake of a benefit given to others.[83] Indeed, the quality of affirmative action differs substantially from that of traditional racial discrimination because those who are disadvantaged by affirmative action have suffered no history of official or private discrimination that, in its social context, has been used to deny the human dignity, indeed the very humanity, of all the individuals in the group.

This suggests both that there are lower (although significant) costs associated with the use of race in the second category, and that there is a greater possibility that such race-conscious actions are, in fact, justifiable. Undoubtedly, it is true that there is some incidental

---

[82] *See* ELY, *supra* note 17, at 170 ("There is no danger that the coalition that makes up the white majority in our society is going to deny to whites generally their right to equal concern and respect.").

[83] I intentionally avoid the "discrete and insular minority" formulation initially articulated in *Carolene Products* as a basis for distinguishing affirmative action from invidious discrimination. It seems to me inadequate to say that the problem of racial discrimination by government is solely one of a failure of certain groups to be represented in the political process. As described above, *see supra* text accompanying notes 42-44, I do not believe that once an historically disadvantaged minority group such as African Americans is no longer "discrete and insular," discrimination against members of that group should be any more permissible. Nor, in light of the deeply rooted history of prejudicial attitudes toward African Americans, do I think that black participation in the political process is likely to eradicate all official acts of racial discrimination. I do think that members of the historically dominant racial group, whites, are unlikely to act to harm members of their own group because of racial hatred of whites, or a view that whites are inherently inferior to blacks. By contrast, psychological and sociological studies tend to suggest that members of historically disfavored groups may in fact internalize and act upon negative views of their own group. *See* Castaneda v. Partida, 430 U.S. 482, 503 (1977) (Marshall, J., concurring) ("Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority.").

cost to affirmative action plans in that they reinforce (or perhaps even create) an impression of disability on the part of the group that the legislature seeks to help. Affirmative action can foster a sense that, without help, its beneficiaries are unable to compete. It can also reinforce preexisting divisions, creating resentment on both sides. But, unlike the exclusion of, or reservation of special roles for, people on the basis of their race, a decision by members of the traditionally dominant group to invite members of the traditionally disfavored group to participate with them in some desirable activity cannot, on balance, send a dehumanizing message about the members of the traditionally disfavored group. And, as the plurality observed in *Adarand*, a history of separation of, and discrimination against, African Americans has left a world in which, at least for now, race-conscious actions that benefit them may indeed serve some significant governmental purposes.

Consistent with this, although race-conscious government actions of this type have triggered genuinely searching judicial review, the Supreme Court has not always found racial classifications in this second category impermissible. Of course, for many years, a debate among the members of the Court raged in its affirmative action cases about the appropriate level of judicial scrutiny. But if *Adarand* truly signals the end of the era in which the level of scrutiny almost invariably predicts each case's outcome—and when coupled with the Court's decision in *Romer v. Evans*,[84] in which it invalidated a classification based on sexual orientation while applying what it described as "rational basis" scrutiny, there is at least some evidence of a trend in that direction—it may be appropriate to say, as the *Adarand* plurality did, that the scrutiny applied to these classifications, however it is described, has in practice not been the fatal scrutiny applied to race-based classifications that materially disadvantage or forcibly separate the members of an historically disadvantaged minority group.

Indeed, every member of the Court to address the issue, except Justice Scalia, has agreed that in certain circumstances even state governments, which do not have the special responsibility to enforce through appropriate legislation the Equal Protection Clause of the Fourteenth Amendment,[85] are permitted to provide some people who are not themselves the immediate victims of discrimination with a privilege on the basis of membership in an historically disadvantaged

[84] 517 U.S. 620 (1996).

[85] *Cf.* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

racial minority group, despite the concomitant disadvantage imposed on other individuals on the basis of their membership in the white majority.[86] The Court has held in majority or controlling opinions that there are two interests that suffice to justify the use of race-based affirmative action: the interest in diversity and the interest in remedying "past and present" discrimination.

First, applying the "strict scrutiny" formulation, the controlling opinion in what at least for now remains the Supreme Court's leading affirmative action case, *Regents of the University of California v. Bakke*, approved of the use of race by a state government for the purpose of achieving racial diversity.[87] Second, the Court in *Local 28, Sheet Metal*

---

[86] *Compare, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program."), *with* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J., concurring) ("[A] State may 'undo the effects of past discrimination' in the sense of giving the identified victim of state discrimination that which it wrongfully denied him .... That is worlds apart from the system here, in which those to be disadvantaged are identified solely by race."). Justice Thomas has not commented upon this question since his elevation to the Supreme Court, although he joined the language in *Adarand* that is quoted *supra* at text accompanying note 81.

[87] 438 U.S. 265, 314 (Powell, J.) (concluding that the "interest of [student] diversity is compelling in the context of a university's admissions program"). In *Bakke*, a fractured Court struck down the affirmative action plan adopted by the Medical School of the University of California at Davis, which set aside a certain number of positions in each incoming class for members of historically disadvantaged racial minority groups. Justice Powell held it invalid on constitutional grounds. *See id.* at 315-20 (Powell, J.). Four other members of the Court held it invalid under a federal statute. *See id.* at 408-21 (Stevens, J., joined by Burger, C.J., and Stewart & Rehnquist, JJ., concurring in the judgment in part and dissenting in part) (holding that Section 601 of the Civil Rights Act of 1964 prohibits the use of race as a "basis of excluding anyone from participation in a federally funded program").

The Court, however, also reversed the judgment of the court below that race could not be taken into account at all by the University of California at Davis in its admissions plan. The Court concluded that affirmative action plans that take race into account as "one element" to be weighed in the admissions process do pass constitutional muster. *Id.* at 318 (Powell, J.); *id.* at 320 (opinion of the Court by Powell, J., joined by Brennan, White, Marshall, & Blackmun, JJ.) (approving a "properly devised admissions program involving the competitive consideration of race and ethnic origin").

Although only Justice Powell applied "strict" scrutiny, his conclusion that the interest in diversity is sufficiently "compelling" to justify the use of race in medical school admissions does amount to a holding of the Court. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (Stewart, Powell, & Stevens, JJ.)). The interest in diversity recognized by Justice Powell

Workers' International Association v. EEOC, purporting again to apply strict scrutiny, upheld the conscious use of race by a court in creating a racial quota for membership and advancement in a union as a remedy for the union's past discrimination.[88] The same result was reached in the controlling opinion in *United States v. Paradise*, in which a court order imposing race-based numerical goals for hiring by the Alabama State Police as a remedy for past and present discrimination was challenged.[89] The Court has also twice upheld race-conscious actions by the federal government that provided a benefit to the members of historically disadvantaged minority groups, first in *Fullilove v. Klutznick*,[90] where the justification was remedying past discrimination, and again (applying formally "intermediate" scrutiny) in *Metro Broadcasting, Inc. v. FCC*,[91] where the justification was the attainment of diversity.

Although the Court has thus at various times labeled "compelling" the interests it believes are sufficient to permit a state to take race-conscious action, these interests could not justify a use of race that provided something unequal and inferior to an historically disadvantaged racial group. For example, a mandatory blacks-only public school, imposing a Category One racial discrimination of the type described above, could not be justified under the Equal Protection Clause on the ground that it "remedied past discrimination" by instilling pride and values in black students in order to permit them to overcome the racism of the society of which they, like all schoolchil-

---

in *Bakke* has not always been recognized in subsequent opinions in the Court's affirmative action cases. *Compare* Metro Broad., Inc. v. FCC, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting) ("Modern equal protection doctrine has recognized only one [compelling] interest: remedying the effects of racial discrimination."), *with* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."). The status of Justice Powell's opinion has become controversial. *See, e.g.*, Hopwood v. Texas, 78 F.3d 932, 944-45 (5th Cir. 1996) ("[T]he *Bakke* Court did not express a majority view and is questionable as binding precedent.").

[88] 478 U.S. 421 (1986). The strength of this interest is less controversial. *See, e.g.*, Shaw v. Hunt (*Shaw II*), 517 U.S. 899, 909 (1996) ("A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions."); United States v. Paradise, 480 U.S. 149, 196 (1987) (O'Connor, J., dissenting) (stating that there is "a compelling interest in remedying past and present discrimination").

[89] 480 U.S. 149 (1987).

[90] 448 U.S. 448 (1980).

[91] 497 U.S. 547 (1990), *overruled in part by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

dren, are being trained to be full members.[92] In light of the cost of segregation, such a purpose would not be found adequately "compelling."

Nor in its past approval of race-conscious government action in this second category has the Court applied the same requirement of "narrow tailoring" that we saw in Category One. In that context, the "narrow tailoring" requirement is "used to require consideration of whether lawful alternative and less restrictive means could have been used."[93] Yet, even in those cases in which the Court has indicated race-based government action of this second kind may be permissible, the conscious use of race has not always been the least restrictive means of achieving the government's asserted goal.

For example, the goal of attaining a diverse student body, approved as a "compelling" interest by the controlling opinion in *Bakke*, could have been achieved without race-conscious government action by selecting the student body at random. Of course, insisting on such an approach would have required the University of California to choose between, on the one hand, a diverse student body and, on the other hand, one that was tailored to ensure the inclusion, and an appropriate mix, of those nonracial qualities and qualifications that have traditionally been valued in the creation of a student community. The holding in *Bakke* means that in terms of narrow tailoring, the Court genuinely requires only that the use of race for purposes of affirmative action be the least restrictive means of achieving the government's goal *without compromising other important governmental objectives.*

---

[92] On the other hand, if a separate educational facility were made available exclusively for voluntary attendance by members of a racial minority—for example, if a community opened a public school in which only black students might voluntarily enroll—the government's use of race *might* fall into this second category. Several such experimental schools have been suggested in recent years as a way to provide better educational opportunity and a nurturing, discrimination-free environment for black students, particularly African American males. *See generally* Michael John Weber, Note, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099, 1100 & nn.5-10 (1993).

The exclusion of white students would not render such a school unconstitutional ab initio, and the voluntary nature of the school might well neutralize the stigma of exclusion that rendered the school in *Brown* unequal. If the school could be justified by a strong interest, the achievement of which required drawing a racial line, such as the situation of black students in light of discrimination in the community, it might be held permissible. Evaluation of any such experimental school, however, would require an intensive, case-specific inquiry, and the risk that the formally voluntary school might come to be viewed as a de facto black school and the other schools as de facto white might well suffice to invalidate it.

[93] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986) (plurality opinion).

Neither the plurality opinion in *City of Richmond v. J.A. Croson Co.*, which requires that state-enacted affirmative action plans be subjected to formally strict scrutiny, nor the plurality opinion in *Adarand* purports to disturb the conclusions reached in the Court's prior cases that race-based affirmative action sometimes may pass constitutional muster under that test. Indeed, the plurality opinion in *Adarand* states that "[t]he point of strict scrutiny is to 'differentiate between' permissible and impermissible governmental uses of race."[94] This point was made again by its author, Justice O'Connor, in her concurring opinion in *Missouri v. Jenkins*, which was handed down on the same day: "It is only by applying strict scrutiny that we can distinguish between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination."[95]

As the cases demonstrate, because classifications in Category Two raise fewer concerns than race-conscious action in Category One, strict scrutiny takes a slightly different shape: the idea of "compelling" state interests is somewhat relaxed. Interests that may justify the use of race in Category Two would be too weak to be accepted in justification of Category One racial classifications. Similarly, the narrow tailoring requirement is somewhat relaxed: the government need not prove absolute necessity. Its use of race may be accepted even in the presence of a race-neutral alternative if the use of that alternative would require the sacrifice of some other important value. This change in the nature of strict scrutiny is justified by the very nature of the equal protection inquiry. Where the harms and risks associated with the use of race are reduced, the strength of the required justifications and the degree of required necessity for the use of race should be commensurately lower.

c. *Category Three: Classifications for Purposes of Districting*

i. A Third Category

Assessment of these first two categories would exhaust most scholarly discussion of race-based classifications.[96] The use of race to draw geographic districts, however, represents a distinct third category of race-conscious government action that previously has not been de-

---

[94] 515 U.S. at 228 (quoting *id.* at 245 (Stevens, J., dissenting)).

[95] 515 U.S. 70, 112 (1995) (O'Connor, J., concurring).

[96] *See, e.g.*, STONE ET AL., CONSTITUTIONAL LAW 595-697 (3d ed. 1996).

scribed as such in the literature. For the same reasons that affirmative action is somewhat easier to justify than the traditional form of discrimination against members of historically disfavored racial groups, race-conscious districting that does not segregate the races should be somewhat easier to justify than affirmative action.

Plans of districting are used to place every person in one or another administrative unit within a jurisdiction. On whatever basis districting plans are drawn, they do not deny anyone the good it is their immediate purpose to distribute. A fairly simple case of districting, for example, is the drawing of school attendance zones. (The analysis of school attendance zones is easier than that of electoral districts, the focus of much of the rest of this Article, because the quality of one's placement in one or another district does not depend on the aggregation of one's actions with those of the others placed in the same district.)

Notwithstanding the basis upon which they are drawn, school attendance zones place every child in a school. One can imagine a school district deciding to integrate its segregated public schools by drawing attendance zones that take the race of individuals in the jurisdiction into account. (Race of course will never be the only factor; to be workable, attendance zones will have to meet some minimum requirements of compactness and contiguity.)

Although the use of race for this purpose will share with other race-conscious actions many of the costs described above, it does not exclude, so there is little risk that race-conscious districting that does not segregate will send a message that members of one or the other group are inferior and unfit to partake of some otherwise available public good on the basis of their race. Nor, for the same reason, could such districting reflect racial politics.

Moreover, when race is used for drawing school attendance zones it does not supplant some substantive criteria for evaluating students that could be called "merit-based" and that would otherwise be used to distribute the good in question. Thus, unlike the affirmative action plans deemed permissible by the Court in *Bakke*, not only will a plan of school attendance zones drawn to take race into account never result in a person's exclusion from school altogether, it will not result in the exclusion from a particular school, on the basis of race, of any person who would otherwise have been entitled to admission to that school on some arguably merit-based race-neutral criteria.

This is one of the essential objections to affirmative action put forward by its opponents. For example, Martin Peretz has written that

"[t]he regime of racial and ethnic set-asides in education and employment makes victims of others who, on simple standards of merit, would have won the places reserved now by custom and law for members of particular groups."[97] The use of race in districting does not deny anyone anything to which they would otherwise be entitled.

For this same reason, in a districting context, there is no risk, as there is in the context of affirmative action, that a government body taking account of race is acting on the basis of a belief that blacks are less able than whites or inherently in need of assistance.[98] Nor can it reasonably be thought that a deliberately integrative plan of school attendance zones would send an incidental message that blacks are inferior to whites or less able to compete. If race is considered in a districting decision that integrates schools, it will supplant only some other essentially administrative procedure for assigning students to schools, not some arguably merit-based substantive criteria by which students would otherwise have been assigned to schools.

The absence of these costs distinguishes the use of race to draw school attendance zones from the uses of race in Category Two, race-conscious affirmative action. In light of the equal protection question that scrutiny of racial classifications is designed to help answer (a question that requires weighing the benefits against the costs of each use of race), the absence of these harms should mean that under a properly calibrated form of strict scrutiny, the use of race in this type of districting should be more easily justified, upon a lesser showing of relative necessity, than should the use of race for purposes of affirmative action.

This is not to say that the use of race in this third category is cost-

---

[97] Martin Peretz, *A Class Thing*, THE NEW REPUBLIC, Oct. 31, 1994, at 11, 12.

[98] Justice Thomas has suggested that a desire for integration must be based on the view that blacks can only be educated if they are placed in the classroom with whites. *See* Missouri v. Jenkins, 515 U.S. 70, 118-19 (1995) (Thomas, J., concurring) ("In effect, the court [below] found that racial imbalances . . . continued to inflict harm on black students. This position appears to rest upon the idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites."). If that were, in fact, the basis for *Brown*'s conclusion that segregation is harmful to African American children, it would have to be overruled. But *Brown* does not depend upon a view that black children can only learn if placed next to white children. Rather, the best explanation for *Brown* is that, against the backdrop of the history and cultural meaning of race in the United States today, the separation of African Americans from other citizens sends a stigmatizing message about the members of that race. *See supra* text accompanying notes 68-77. As long as segregation retains the harmful (and unlawful) character of sending a stigmatic message of inferiority to members of the historically disadvantaged group, it cannot be that *integration* is harmful in the same way.

free. There undoubtedly are costs to the use of race to integrate school districts, costs that warrant close examination. To begin with, when race is used there is still the threat of stigmatizing a group by placing people in *separate* attendance zones on the basis of race. The precise way in which race-based lines are being used therefore must be closely examined. If lines are drawn that segregate, a districting plan that takes race into account will actually fall into the first category of race-conscious action and would likely be unjustifiable.

There is also the risk that the decision to use race is based on an inaccurate racial generalization. In the example where schools within a district are being integrated, ensuring that the use of race in drawing attendance zone lines was not based on stereotype would require a fairly sensitive appraisal of the racial circumstance in the local community. In most social contexts in which the separation of the races would be understood to indicate the inferiority of African Americans, race will have sufficient independent meaning that a conclusion that integration is a valuable good will be easily supported. But in a social context in which race was truly meaningless—presumably one in which members of different races mixed freely and, thus, in which a school with a particular racial composition was not especially noteworthy—a decision to use a racial classification to insure integration of the schools would be based on an inaccurate presumption about race and its significance and not on the present reality of the situation of the members of the racial minority.

There may also be tangible harms imposed by a race-conscious districting plan that should be cognizable in court. For example, as a result of integrating school attendance zones (and in light of patterns of residential segregation), members of one or another race might have to travel farther to get to school than they would have under a scheme that did not take race into account. And, in a typical American jurisdiction, a decision to integrate formerly segregated schools would likely require white students to attend worse schools than they otherwise would have.[99] It is true that no one is entitled to assignment to any particular school and that these harms might therefore normally have been imposed by the line-drawing authority at its discre-

[99] Black schoolchildren also might be subjected, for example, to the hateful stares (and perhaps worse) of their new white classmates, something to which they would not have been subjected had they not been placed in classrooms whose racial composition was deliberately mixed. But these harms, the result of private prejudice, could not form the basis for a governmental decision not to integrate schools. *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

tion. But, as a general rule, simply because an individual may be denied a benefit at the government's discretion does not mean that the government may deny that benefit to an individual on the basis of race. The Supreme Court has repeatedly held that even those decisions to deny a good that may ordinarily be taken by the government on any basis may not be made on the basis of race.[100]

Finally, as described above, the very use of race by government always carries a cost to dignity, and it always involves the risk that, to some degree, it will reinforce and perpetuate ideas of difference that are inherently divisive. For these reasons, every suggestion of racial difference should be held impermissible if it does not meet a substantial and genuine need.

These risks and costs require close examination and justification. However, because a plan like the one described above does not deny anyone on the basis of race a good or benefit to which he or she is entitled, the validity, under an appropriately framed judicial inquiry, of any such plan that has an integrative effect and that is adopted in a community in which race continues to have social significance should be easier to establish than the validity of a race-based Category Two plan of affirmative action.

To begin with, in the face of persistent racial separation in public and private life, integrating the classroom itself is valuable for society. There are powerful arguments that just as segregation is bad, so long as race continues to have salience in our pluralist society, integration itself is a positive good. Where race is taken into account for purposes of drawing school attendance zones in order to integrate a public school system, the interest in integration (or "diversity") is the same as (or maybe, given the impressionability of young children, even stronger than) it is in the context of college admissions. Yet, the costs are fewer. In college admissions, the result at the margin may be the rejection of a white candidate in favor of a member of a racial minority group. In drawing school attendance zones this will not be the case. Indeed, the permissibility of the use of race in districting to integrate public schools follows *a fortiori* from the reasoning in *Bakke*.

In addition, using race to integrate a school system may also be justified by a second, remedial purpose. A segregated school, even what we would describe as merely a de facto segregated school, may well have a discriminatory effect upon African American children,

[100] *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 89 (1986) (addressing governmental use of peremptory challenges in jury selection).

sending a stigmatizing message of inferiority. Although the Supreme Court has distinguished de jure and de facto segregation for constitutional purposes, as Professor Bickel concluded, the stigmatic message of segregated schools likely will not depend on the mechanism that causes the racial separation.[101] This stigmatic message is likely to be reinforced when, as is frequently the case, the school in which African American students find themselves is substantially worse in terms of resources, teacher quality, student-teacher ratios, and the like than the all-white school across town. Surely these students will not miss the sting of the message this sends.

Indeed, in a circumstance in which because of residential segregation race-neutral attendance zones would produce segregated schools, that school segregation may or may not be the product of intentional discrimination. The patterns of residential segregation that cause de facto segregation of course may themselves be the product of, among other things, acts of private (and, indeed, frequently public) discrimination.[102] There is also the possibility of intentional discrimination on the part of school officials who at one point in time adopted the very school assignment plan that resulted in fact in segregated schools.

In light of the distinctive nature of districting, under a properly conceived and consistently applied approach to strict scrutiny of racial classifications, either the interest in diversity or the interest in preventing the discriminatory effect of the operation of a segregated school system would likely suffice to justify the use of race in drawing school attendance zones that insure public school integration.

Consistent with this view, in a little-remarked companion case to

---

[101] Professor Bickel wrote:

> If a Negro child perceives his separation as discriminatory and invidious, he is not, in a society a hundred years removed from slavery, going to make fine distinctions about the source of a particular separation. The Court [in *Brown*] implied as much when it quoted with approval a statement by a lower-court judge to the effect that the detrimental consequences of school segregation were heightened—merely heightened—when segregation had the sanction of law.

ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 119-20 (Yale Univ. Press 1978) (originally published 1970).

[102] See, for example, the statement of Senator Brooke in support of the passage of the Federal Fair Housing Act, Title VIII of the Civil Rights Act of 1968: "Discrimination in the sale and rental of housing has been the root cause of the widespread patterns of de facto segregation which characterize America's residential neighborhoods." 114 CONG. REC. 2524 (1968) (statement of Sen. Brooke). *See also* Freeman v. Pitts, 503 U.S. 467, 507 (1992) (Souter, J., concurring) (recognizing instances in which "demographic change toward segregated residential patterns is itself caused by past school segregation and the patterns of thinking that segregation creates").

Swann v. Charlotte-Mecklenburg Board of Education[103] that involved the voluntary adoption of a race-conscious school attendance zone plan by a county school board attempting to respond to conditions of segregation, the Supreme Court upheld the school attendance zones at issue. In *McDaniel v. Barresi*, the Court held that race-conscious districting was an appropriate method for a school board to use voluntarily in the disestablishment of a segregated school system even in the absence of a judicial finding of a constitutional violation.[104]

It is true that, even in the absence of such a finding, a jurisdiction that has previously maintained a de jure segregated school system has an affirmative duty under the Constitution not merely to stop discriminating, but to disestablish the dual school system,[105] and that this would itself ordinarily require that race be taken into account in drawing school attendance zones. Indeed, the *McDaniel* Court said that this was the purpose for which racial assignment was being used in that particular case.[106] Nonetheless, the *McDaniel* Court described such race-conscious assignment as an "exercise of [state school authorities'] discretionary powers to assign students within their school systems."[107]

Consistent with this, in another companion case to *Swann*, *North Carolina State Board of Education v. Swann*, the Court explained that "school authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable *quite apart from any constitutional requirements.*"[108] Indeed, to like effect

---

[103] 402 U.S. 1 (1971).

[104] 402 U.S. 39, 42 (1971); *see also id.* at 40 n.1 (stating, but not relying on the fact, that the adoption of the plan at issue might have come in response to the urging of federal officials).

[105] Green v. County Sch. Bd., 391 U.S. 430, 437-38 (1968).

[106] 402 U.S. at 40, 41 (describing the action of the County Board of Education as a "voluntary program to desegregate its public schools," adopted as part of its "affirmative duty to disestablish the dual school system").

[107] *Id.* at 42.

[108] 402 U.S. 43, 45 (1971) (emphasis added). *North Carolina State Board of Education* came from a school system that had been adjudicated to have operated a de jure segregated school system. The Court held that it was beyond the bounds of constitutional permissibility for the state authorities' discretion to be exercised in a way that "inhibit[s] or obstruct[s] the operation of a unitary school system." *Id.* The Court struck down a North Carolina law forbidding North Carolina school districts from assigning students to any school "on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins." N.C. GEN. STAT. § 115-176.1 (Supp. 1969). The Court held that this violated the Constitution not only because it might purport to obstruct remedies ordered by the district court, but

is the language in *Swann* itself:

> School authorities . . . might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . . .[109]

The decision in *McDaniel*, and the language from *North Carolina Board of Education* and *Swann*, is what one would expect under a framework for examination of race-conscious government action like that proposed by this Article. Although it is certainly arguable that the board of education in *McDaniel* sought to achieve only the self-evidently overriding purpose of fulfilling its constitutional obligation to disestablish its dual school system, the language in *Swann* demonstrates a willingness to accept a justification that would not, by itself, have been held sufficient to justify affirmative action plans like those approved in *Bakke*, plans that would ultimately have the effect at the margin of denying some members of the white majority from places in a university that they would otherwise obtain.[110]

Even more clearly, the decision in *McDaniel* also necessarily re-

---

also because it would prevent constitutionally compelled remedial action by the school board:

> [T]he statute exploits an apparently neutral form to control school assignment plans by directing that they be "color blind": that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education*, 347 U.S. 483 (1954). Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.

402 U.S. at 45-46.

[109] 402 U.S. 1, 16 (1971). The Court went on to say by comparison that, in the absence of a finding of a constitutional violation, a federal court would lack authority to implement a similar policy. *Id.*

[110] Indeed, Justice Douglas distinguished affirmative action from race-conscious districting for purposes of integration on just this basis:

> In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, we stated that as a matter of educational policy school authorities could, within their broad discretion, specify that each school within its district have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole, in order to disestablish a dual school system. But there is a crucial difference between the policy suggested in *Swann* and that under consideration here: the *Swann* policy would impinge on no person's constitutional rights, because no one would be excluded from a public school and no one has a right to attend a segregated public school.

DeFunis v. Odegaard, 416 U.S. 312, 336 n.18 (1974) (Douglas, J., dissenting).

flects a more forgiving requirement of narrow tailoring. This is precisely what one would predict in this context if the Court's scrutiny were appropriately tailored to address the risks and harms attendant upon government's use of race. As we have seen, when government seeks to take actions on the basis of race that fall into Category One, the category containing race-conscious government actions that harm members of historically disadvantaged racial minority groups, government will essentially never be permitted to reject a race-neutral alternative. In Category Two, and specifically as seen in the *Bakke* case, race-neutral alternatives have not been required where using them would obligate government to abandon other important goals.

Logically, where a use of race, because of context, raises even fewer of the concerns associated with traditional, invidious racial discrimination, the degree of necessity that would have to be shown to justify it should be less. Assuming a sufficiently important interest, a reviewing court evaluating a race-conscious action in this third category, Category Three, should not require the use of race-neutral alternatives where their use would compromise other substantial values, even if those values are somewhat less significant than those that would have been compromised by the use of race-neutral alternatives in a case like *Bakke*.

The *McDaniel* decision undeniably reflects just such an approach to the question of necessity. In any case in which race-conscious attendance zones are justified by a desire to integrate a city or county's schools—as was also true in the case of medical school admissions—a race-neutral lottery system could be used to achieve the same goal. Furthermore, the sacrifice required by use of a lottery in this context would be *less* significant than the sacrifice that would be required by adoption of such a system for university admissions. For unlike the use of a lottery for admission to a college or medical school, such a mechanism could be employed for public school assignments without requiring abandonment of a system of merit-based admission to a scarce number of places in a class. The state's interest in avoiding that race-neutral alternative would seem to be less powerful than in *Bakke*. Yet, the *McDaniel* Court did not require county school authorities to use this race-neutral alternative.

Of course, there would be substantial costs to such a system: depending upon how the system was designed, children from a single neighborhood might not be able to attend the same school together, the burdens of transportation could be enormous, and the system might entail all manner of administrative difficulties. Still, avoidance

of such costs would not permit a state to engage in any traditional form of invidious discrimination.

To say that the outcome of *McDaniel* was consistent with a rational approach to strict scrutiny of governmental uses of race, however, is not to approve of the approach the Court's opinion took in reaching its result. *McDaniel* was decided before *Croson* or *Adarand*. Indeed, it was decided before *Bakke*. The Court did not use the language of strict or heightened scrutiny. Nor did the Court pause long in its unanimous two and one-half page opinion to assess the strength of the government's interest or the necessity of the use of race to the achievement of the government's purpose.[111]

Such a casual approach—perhaps explicable in *McDaniel* in part by the background of resistance to *Brown* against which it was decided—would only be appropriate if the racial classification were essentially harmless. As described above, however, even the use of race to integrate public schools carries with it some costs. In fact, even on the more easily measured "tangible" level, the use of race approved in *McDaniel* did impose some disadvantage on certain individuals on the basis of their race. Among the plaintiffs in *McDaniel* were parents of black schoolchildren who, under the County Board of Education's race-based plan, were required to walk "about one and one-half miles" to the school to which they had been assigned, whereas prior to the adoption of the race-conscious plan "they had attended a school located within two blocks of their homes."[112] Similarly, among the plaintiffs were the parents of white schoolchildren who were "'bussed' to schools located much further from their residences than other schools previously attended."[113] The imposition of these harms alone on the basis of race would require an exacting framework for examining the use of race in drawing school attendance lines—a more exacting framework than the Court's opinion in *McDaniel* articulated.

ii. Examining the Hypothesis That the Narrow-Tailoring Inquiry Varies with the Harms Judicial Scrutiny Is Invoked to Address

At this point, it may be worthwhile to evaluate more broadly the validity of my claim that the appropriate judicial scrutiny of a challenged governmental classification depends upon the risks and harms

---

[111] *See* 402 U.S. at 40-42.

[112] Barresi v. Browne, 175 S.E.2d 649, 651 (Ga. 1970), *rev'd sub nom.* McDaniel v. Barresi, 402 U.S. 39 (1971).

[113] *Id.*

that inhere in the use of that classification in its particular context. In particular, it may be valuable to evaluate my suggestion that in certain circumstances it would be appropriate to employ a kind of close judicial scrutiny more forgiving than that employed to assess race-conscious affirmative action in Category Two. To do this by assessing the strength of various purposes that might be held to justify particular uses of race would be a tricky business, since, even if it is widely shared, the judgment of the weight or strength of a particular governmental interest is ultimately and necessarily subjective. The nature of the narrow-tailoring requirement, however, and in particular of the aspect that asks about the necessity for the use of a particular classification, is far easier to evaluate. It is to this aspect of judicial scrutiny, therefore, that I turn.

I have suggested that there is a continuum of necessity along which each of the categories of race-conscious action described so far falls. Classifications that disadvantage an historically disadvantaged group will be permitted only where absolutely necessary to serve a sufficiently important purpose; classifications that disadvantage the majority, such as affirmative action, will be permitted where the use of any race-neutral alternative to achieve the government's purpose would require the sacrifice of other important values; classifications that disadvantage neither group, but that merely place people in (integrated) districts will be permitted where the use of any race-neutral alternative would entail significant costs.

It may be possible to see more clearly the way that a rational system of judicial review would calibrate the requirement of relative necessity to the context in which the classification at issue has been used, and in particular to the harm the classification may engender in that context, by examining an example from outside the world of race. It is an example that we encounter unthinkingly every day, one that would seem to raise profound equal protection questions except for circumstances that limit the extent to which the traditional concerns described above are implicated: segregation on the basis of sex in the provision of public restroom facilities.

Many distinctions on the basis of gender are and ought to be anathema to the Equal Protection Clause. Indeed, the Supreme Court has recently suggested that gender discrimination might be a candidate for the "most stringent judicial scrutiny" that is currently applied to classifications based on race.[114] The Court has called for

[114] *See* United States v. Virginia, 518 U.S. 515, 532 n.6 (1996) (noting that "thus far"

"careful[] inspect[ion]"[115] of gender classifications: "[T]he proffered justification [must be] 'exceedingly persuasive.' . . . The State must show 'at least that the [challenged] classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."'"[116]

Whether segregation on the basis of sex in higher education might be permissible in some circumstances under this standard remains an open and difficult question.[117] Because the social meaning of separation of the sexes is not always one of subjugation,[118] however, there may be less reason for concern about segregation by gender in certain circumstances outside the educational context. If the framework I have described accurately reflects a rational approach to scrutinizing governmental classifications, one would expect that in such circumstances gender-neutral alternatives would not be as stringently required by the Equal Protection Clause even as race-neutral alternatives would be in the second category of race-conscious action described above. That is, there may be circumstances in which segregation on the basis of gender will be deemed permissible despite the availability of gender-neutral alternatives that might with little cost achieve the government's goal.

Imagine a court is being asked to review the widespread system of publicly maintained separate-but-equal men's and women's bathrooms. The interests served by the provision in public buildings of separate bathrooms presumably include respecting the privacy of individuals who wish not to use a bathroom in the presence of someone of the opposite sex, and perhaps the provision of facilities that meet the different physiological needs and characteristics of the two sexes. When bathrooms are built in public buildings, ordinarily for use by more than one person at a time, they are designated for one or the other sex.

---

that type of scrutiny has been "reserved . . . for classifications based on race or national origin"). The Court in *Virginia* asserted, apparently to draw a parallel between scrutiny of race-based and gender-based classifications, that strict scrutiny of racial classifications (like the "skeptical scrutiny" of gender classifications it employed in that case) did not "inevitably" lead to a finding of unconstitutionality. *See id.*

[115] *Id.* at 532.

[116] *Id.* at 533 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (quoting Wengler v. Druggists Mut. Ins. Co., 466 U.S. 142, 150 (1980))).

[117] *See id.* at 534 n.7 (reserving the question).

[118] *Cf.* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 351 (1987) (suggesting that separation only "obtains its shameful meaning from the historical and cultural context in which it is used").

But segregation on the basis of gender is not necessary to achieve the interests described. Those goals could be achieved in a gender-neutral fashion by the installation of individual bathrooms, open to anyone, one person at a time. Indeed, this is the system most of us use in our homes and that is used in some public settings—for example, on airplanes.

If faced with a challenge to the system of officially sanctioned separate-but-equal men's and women's bathrooms, however, a court would probably not require the government to go to the expense of equipping its buildings with a multitude of individual bathrooms, each of which would then be freely available to members of either sex. Rather, the government would probably be permitted to continue to build bathrooms that allow several people to use them at once, and to classify who may use each bathroom on the basis of sex.

The government's only interest (aside from traditional ways of thinking) in organizing the bathrooms in its buildings in this way rather than using gender-neutral alternatives is its interest in saving money. In essence, we could say that, in light of the sensibilities of most people in our culture, the use of this gender classification is a necessary means for achieving the goal of obtaining economies of scale in plumbing installation. In light of the fact that the harm imposed on women by single-sex bathrooms is widely thought to approach zero—the risk of stigma to women from separate sex bathrooms is at most considered slight when compared, for example, to the risk of stigma from the maintenance of single race bathrooms[119]—and despite application of formally searching judicial scrutiny, it is a safe bet that almost no court would require government to employ the gender-neutral alternative. If it were judged, however, that the social meaning of single-sex bathrooms was to connote the inferiority of women, more concerns would be raised and the result would likely be different.[120]

---

[119] *See id.* at 351-52 ("Our society does not ordinarily interpret sex-segregated toilet facilities as designating the inferiority of women. By contrast, the black who is asked to use a different public bathroom from that of a white companion of the same gender is stigmatized."); *see also* Richard A. Wasserstrom, *Racism, Sexism and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 592-94 (1977) (observing that sex-segregated toilet facilities, unlike those segregated by race, imply "no notion of the possibility of contamination; or even directly of inferiority and superiority").

[120] Indeed, if the desire that many people have not to share a bathroom with a person of the opposite sex were itself judged to be nothing more than a reflection of stereotypical thinking, the government might not be able to respond to a ruling striking down its separate-but-equal system by building single-person (even gender-nonspecific) bathrooms. It might be required instead to desegregate all preexisting

d. *Category Four: Uses of Race Unrelated to the Distribution of Benefits or Burdens*

Finally, to complete the picture, I must briefly mention the category of race-conscious government action that imposes the least cost—that which is not used to distribute goods at all. Perhaps the only use of race in this category, Category Four, is the collection of racial information for statistical purposes. An example would be a requirement that a person identify himself by race on a census form. This is race-conscious government action. The government requires people who are black to write "black" on the form, and people who are white to write "white"—or, more typically today, to check one or another box indicating race.[121]

This presents some of the risks described above, but will have substantially fewer costs even than the use of race in drawing a district line. It will draw attention to race, and will therefore have some incidental divisive cost. It may cause some people a dignitary harm by suggesting to people who would like to think otherwise that their race is in some way relevant to some aspect of public life. Yet, in the act of requiring this information, no benefit or burden is distributed on a racial basis. Many of the risks and harms that may be caused by the use of race thus are absent here.

What costs there are require justification. If racial data is collected without justification, it may suggest that race is relevant where it is not. On the other hand, the costs attendant upon such collection are relatively low. Consequently, the justification required need not be so powerful. The benefit gained from the collection of racial data for almost any purpose for which it is actually relevant would likely outweigh the costs.

---

men-only and women-only bathrooms. *Cf.* Palmore v. Sidoti, 466 U.S. 429 (1984) (ruling that the federal Constitution prohibits state actors from giving effect to private discrimination); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (requiring government to integrate its formerly segregated public schools). *But cf.* Palmer v. Thompson, 403 U.S. 217 (1970) (allowing government to close formerly race-segregated swimming pools rather than integrate them). Interestingly, the government would appear to have no interest in designating single-person bathrooms as men- or women-only, aside from traditional ways of thinking and, perhaps, related stereotypical views of women's need for protection from bathrooms men have been using.

[121] Of course, at present there is an ongoing debate about the racial and ethnic categories that should be used for data collection purposes on the census form, and about the usefulness and vitality of traditional racial categories. *See generally, e.g.*, Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995). As I have in general throughout this Article, however, I will continue for simplicity of analysis to utilize the example in which there are only two racial groups in the relevant jurisdiction, "black" and "white."

This case does not come up much, but in *Tancil v. Woolls* the Supreme Court did summarily affirm the decision of a district court upholding the portion of Virginia's divorce statute that required the inclusion in any divorce decree of the race of the parties, but striking down those state provisions that called for the maintenance of separate white and black voting and property tax records.[122] The district court concluded that such racial notation could be upheld if "the purpose is legitimate, the reason justifiable."[123] It upheld the race-conscious collection of information, concluding that "[v]ital statistics, obviously, are aided by denotation in the divorce decrees of the race of the parties."[124] It struck down the maintenance of separate tax and real estate records, concluding that it served "no other purpose than to classify and distinguish official records on the basis of race or color."[125] The collection of racial data has more recently been upheld against constitutional challenge in the lower courts.[126]

The district court in *Tancil* probably should have required articulation of a specific purpose beyond the maintenance of "vital statistics" that required the collection of racial data. It is likely true, however, that in light of the history of discrimination and its aftermath in this country, the costs entailed by governmental collection of racial data like that at issue in that case are justified by the need to measure the persistence of racial disparities in a number of social contexts. Perhaps somewhat counterintuitively, the collection of racial data may be necessary in other settings to ensure that no discrimination is taking place. For example, in order to ensure that peremptory challenges are not used in a racially discriminatory fashion, courts now ask citizens called for jury service to indicate their race.[127] By contrast, because it always does entail some costs, the purposeless, thoughtless, or casual use of race by government, or the use of race only for its own sake, should never be held permissible, even in this final category.

---

[122] Tancil v. Woolls, 379 U.S. 19 (1964) (per curiam), *aff'g* Hamm v. Virginia State Bd. of Elections, 230 F. Supp. 156 (E.D. Va. 1964).

[123] *Hamm*, 230 F. Supp. at 158.

[124] *Id.*

[125] *Id.*

[126] *See, e.g.*, Caulfield v. Bd. of Educ., 583 F.2d 605, 611-12 (2d Cir. 1978) ("[T]he Constitution itself does not condemn the collection of [racial] data."); United States v. New Hampshire, 539 F.2d 277, 281 (1st Cir. 1976) (allowing collection of racial data as "a reasonable and proper means of assuring equality in employment").

[127] *See, e.g.*, United States v. Ovalle, 136 F.3d 1092, 1096-97 (6th Cir. 1998) (describing jury questionnaires that require potential jurors to indicate their race and that inform them that the information "is required solely to avoid discrimination in jury selection").

2. Conclusion

All of this is not to say that the outcome of judicial evaluation of any one of these types of uses of race is foreordained. The assessment of the significance of the harms wrought even by the least harmful use of race is a matter of judgment upon which reasonable people certainly can, and do, differ, as are the strength of the government's interests and the importance of any competing values that might be sacrificed if the government were forced to use a race-neutral alternative. Thus, if one concluded, as Justice Scalia has, that the costs of the classification of individuals on the basis of race in perpetuating the idea of difference is so great that it can virtually never be overcome, one might also conclude that virtually no use of race by government can ever be justified.[128]

The point, however, is that different uses of race do present different risks and harms. If strict scrutiny is not calibrated to those risks and harms, it will be loosed from its moorings. A rigid cookie-cutter version of strict scrutiny may result in the invalidation of race-conscious government action even where invalidation is not justified by reference to the principles that warrant the very imposition of strict scrutiny in the first instance. Consistent with this, the Court's cases outside the race-conscious districting context describe an approach that varies depending upon the context in which race is used—an approach tailored to the costs associated with each use.

There may be an infinite number of circumstances in which government may seek to take race-conscious action. In light of the reasons why race-conscious government action is normally impermissible, a court trying to determine whether a particular governmental action that takes race into account is justified must examine both the way in which the government seeks to use race and the circumstances in which it seeks to act. An error in approach would divorce strict scrutiny from the underlying purposes of the Equal Protection Clause and could, not coincidentally, inappropriately hobble government in its

---

[128] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) ("To pursue the concept of racial entitlement—even for the most benign and admirable of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring) ("The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution to the first problem that aggravates the second is no solution at all.").

ability to address discrimination.

II. VOTE DILUTION, RACE-CONSCIOUS DISTRICTING, AND THE *SHAW V. RENO* CAUSE OF ACTION

In the remainder of this Article, I will apply the framework I have described to one of the most complicated equal protection problems: the problem of race-conscious electoral districting. Since *Croson* and, indeed, since *Adarand,* this is the area in which the Supreme Court has had the most experience applying strict scrutiny to racial classifications, and it is one in which the Court has had an extraordinary amount of difficulty. Since *Shaw I* was decided in 1993, the Supreme Court has applied "strict scrutiny" to plans of electoral districting that have been drawn on the basis of race. In a series of subsequent cases, *Miller v. Johnson,*[129] *Shaw v. Hunt* (*Shaw II*),[130] and *Bush v. Vera,*[131] the Court has struggled to make clear what it meant in *Shaw I,* and there have been fits and starts as the Court has tried to explain what triggers strict scrutiny when electoral district lines are drawn, what that scrutiny entails, and when race may be used by government in drawing electoral district lines to *prevent* discrimination.

Although the Court majority continues to suggest that *Shaw* strict scrutiny—like the strict scrutiny called for by *Croson* and *Adarand*—will not always be fatal, since *Shaw* the Court has in fact invalidated every district line drawn on the basis of race that it has considered in a fully briefed and argued case.[132] At the same time, the Supreme Court has also reaffirmed that the creation of black-majority districts is sometimes actually *required* to comply with the command of equality contained in section 2 of the V.R.A.[133] Indeed, in a controlling opinion in *Bush v. Vera,*[134] Justice O'Connor purported to explain that *Shaw* does not mean that the use of race in response to the command of section 2 of the V.R.A. is prohibited. Compliance with that law, she concluded, is a "compelling state interest" and race-conscious districts that are narrowly tailored to the goal of such compliance therefore

---

[129] 515 U.S. 900 (1993).

[130] 517 U.S. 899 (1996).

[131] 517 U.S. 952 (1996).

[132] *See supra* note 14 and accompanying text.

[133] *See* Johnson v. DeGrandy, 512 U.S. 997, 1020 (1994) (acknowledging that "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity" guaranteed by section 2 of the V.R.A.).

[134] 517 U.S. 952 (1996).

will not be invalidated.[135] This conclusion, however, appears to be more theoretical than real. Because under Justice O'Connor's analysis the very features that appear to trigger *Shaw* scrutiny will also defeat the claim of narrow tailoring, in *Bush* itself (in which a state drew race-conscious districts in an attempt to comply with section 2) the districting plan was struck down under *Shaw*.

The states thus find themselves in a box. They appear, under federal antidiscrimination law, to be both required to use and prohibited from using race as they draw their electoral district lines. When confronted with this reality, the Court has not engaged in the analytical rethinking that would be required to make the law more coherent. Rather, apparently intent on holding the line on *Shaw*, but unwilling explicitly to strike down the V.R.A., the Court has repeatedly loosened the states' bind by weakening the command of the Act,[136] most recently last Term in *Reno v. Bossier Parish School Board* (*Bossier Parish II*),[137] in order to avoid the conclusion that compliance with the antidiscrimination command of the statute would require the very use of race in electoral districting that *Shaw* strict scrutiny seems poised to condemn. The consequence of this has been to render V.R.A. analysis less coherent and its command of equal opportunity in voting less effective.

Those members of the Court who disagree with *Shaw* have suggested only rational basis scrutiny for districting plans that classify according to race, unless and until they actually dilute the voting strength of one or another racial group. The framework for assessing the use of race in drawing electoral districts first set out in *Shaw I* and

---

[135] *Id.* at 992 (O'Connor, J., concurring).

[136] *See* Reno v. Bossier Parish Sch. Bd. (*Bossier Parish II*), 120 S. Ct. 866, 869 (2000) (holding, remarkably, that the prohibition in section 5 of the V.R.A. of any change in state law with respect to voting that has "the purpose . . . of denying or abridging the right to vote on account of race or color," actually *permits* government action that intentionally discriminates against African Americans, so long as the intended discriminatory effect is no worse than what was in place before the change in the law (citations omitted)); Bush v. Vera, 517 U.S. 952, 979-81 (1996) (concluding that section 2 of the V.R.A. cannot require creation of a noncompact majority-minority district and that a district that deviates from traditional districting principles cannot be "narrowly tailored" to preventing a violation of section 2 of the V.R.A.); Miller v. Johnson, 515 U.S. 900, 924-27 (1995) (concluding that the failure to draw a proportionate number of black-majority districts could not support a finding of discriminatory purpose under section 5 of the V.R.A., and suggesting that any reading of the V.R.A. that requires race-conscious government action "brings the Act . . . into tension with the Fourteenth Amendment").

[137] 120 S. Ct. 866 (2000).

applied by the Supreme Court in its succeeding decisions in *Miller*,[138] *Bush*,[139] and *Shaw II*,[140] thus has proven incoherent and unworkable, yet no realistic alternative that maintains the system of geographically based districting has been put forward.

The need for a solution to this problem is urgent. The Court is poised again to consider the nature of *Shaw* scrutiny, having recently granted review in *Hunt v. Cromartie* (*Cromartie II*),[141] in which it will, for a *third* time, evaluate the districts drawn in North Carolina to comply with the V.R.A. Without some rethinking, the vitality of *Shaw* may well result in the evisceration of that landmark statute.

Evaluating the use of race in electoral districting requires some background, which will be provided in this Part. In Part II.A I will describe in some detail the law of voting rights in order to explain how race may be used in drawing electoral district lines in order to combat discrimination. In Part II.B I will turn to the actual evaluation of the resulting race-conscious districts, examining the approach put forward in *Shaw* and its follow-on cases, and the alternative suggested by the dissenters in those cases. In the next Part, Part III, I will apply to the case of race-conscious districting the method I have described in Part I.

A. *The Use of Race-Conscious Districts to Address Minority Vote Dilution Under the Voting Rights Act of 1965*

In the case of drawing electoral districts, race has sometimes been used to comply with the antidiscrimination command set out in the V.R.A.[142] Voting rights law in the United States is concerned primarily with prohibiting discrimination in voting. The right to be free from discrimination in voting has several distinct aspects. Many are formal and quite obvious: the right to vote includes the right to be free to register to vote, the right to cast ballots, and the right to have those ballots counted. Some aspects of the right to vote are more subtle. The right to vote also includes the right to have an equally weighted vote, that is a vote that plays a role in the selection of candidates equal to that of any other. Protection of this right is guaranteed in the

---

[138] 515 U.S. 900 (1995).

[139] 517 U.S. 952 (1996).

[140] 517 U.S. 899 (1996).

[141] 120 S. Ct. 2715 (2000).

[142] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973, 1973a-1973p (1994)).

United States by the "one person-one vote" principle, which requires all the members of most representative bodies to be chosen from districts whose populations are equal.[143] This principle ensures that each voter will have an equal say in the election of a polity's representatives.

The right to vote also has long been held to include the right not to have one's vote "diluted" on an impermissible basis such as race.[144] Racial vote dilution can occur only in the presence of racial polarization among voters. It is the result of the interaction between the votes cast by individuals in the voting booth, and the mechanism adopted by the government for aggregating those votes. In its simplest form, where a substantial percentage of voters of one race refuse to vote for a candidate supported by people of a different race, and where a state employs a mechanism to aggregate votes that ensures that such voters form a majority of the electorate in a particular election, a racial minority group may find itself persistently outvoted. Despite the removal of formal obstacles to registration and the casting of ballots, members of a racial minority group may find their votes "submerged" in a sea of hostile votes, and their voting strength "diluted."

Where there is racially polarized voting, the most usual mechanism for addressing the problem of vote dilution has been to draw some electoral districts that contain a particular racial mix, ensuring that the votes of members of the racial minority group can, at least in theory, actually contribute to the election of a candidate. To understand the way in which race-conscious districting may be used to prevent minority vote dilution, it may be helpful to examine briefly the history of the V.R.A. and the dilutive practices that were sometimes adopted in response to it.

1. The History of Racial Discrimination in Voting

The right to vote is the *sine qua non* of citizenship in a representative democracy. But beginning in colonial times, and for almost the first one hundred years of this Nation's independence, African

---

[143] *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964) (requiring apportionment based on population in state legislative districts); Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964) (applying the "one person-one vote" rule to congressional districts). In some special contexts, such as those applicable to elections for water or irrigation districts, the "one person-one vote" rule does not apply. *See, e.g.*, Ball v. James, 451 U.S. 355, 368 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 729-30 (1973). Nor does it apply in the U.S. Senate, where less populous states are entitled to the same two Senators as more populous ones. *See* U.S. CONST. amend. XVII.

[144] *See, e.g.*, White v. Regester, 412 U.S. 755, 765 (1973).

Americans were excluded from suffrage. Immediately before the Civil War, even free blacks were denied the right to vote in the United States except in most of New England and, if they met a property requirement inapplicable to whites, in New York.[145] Voting discrimination has not been limited in the United States to any one region,[146] and the history of voting discrimination has not been a pretty one.

The institutionalized denial of the right to vote in the southern states followed the abolition of slavery. During Reconstruction, there was high black voter turnout throughout the South, and, at least in the first years of Reconstruction, the election of many black officials at every level of government.[147] But with the end of Reconstruction and the withdrawal of federal troops in 1877, blacks in the South were systematically deprived, first of an effective right to vote, then of the right to vote at all.

During the first decades after the end of Reconstruction, there was widespread coercion and intimidation of black voters throughout the South, but blacks did continue to vote.[148] As an initial matter, however, the votes of blacks were systematically rendered ineffective. There were racial gerrymanders which diluted black voting strength. In Mississippi, for example, black voters were "packed" into a "shoestring"-shaped district, which left five other districts with white majorities. Alabama carefully "cracked," or fragmented, its black voters, distributing them among six districts in which their votes would be submerged among those of white majorities.[149] Southern jurisdictions

---

[145] *See* Chandler Davidson, *The Voting Rights Act: A Brief History, in* CONTROVERSIES IN MINORITY VOTING 7, 7 & n.2 (Bernard Grofman & Chandler Davidson eds., 1992). Blacks were denied the right to vote in Connecticut, and were required in New York to possess property worth $250 before they could vote. The right of free blacks to vote had, apparently, been more widespread in the United States at the time of the adoption of the Constitution. *Id.*

[146] In the four years *after* the Civil War, whites denied black voters equal suffrage in eight of eleven referenda held in northern states on the issue. *Id.* at 8.

[147] The turnout of eligible black male voters in presidential and gubernatorial elections during Reconstruction has been estimated to be as high as two-thirds. *See* Davidson, *supra* note 145, at 10. One commentator has estimated that in 1872, 324 black state legislators and Congressmen were elected from the 11 states that had been members of the Confederacy. J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions, in* CONTROVERSIES IN MINORITY VOTING, *supra* note 145, at 135, 139-40. It must be recognized, however, that these officeholders were subject to an "overall pattern of white [Republican] political control." ERIC FONER, RECONSTRUCTION 355 (1988).

[148] *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 53-54 (3d ed. 1974).

[149] *See* FONER, *supra* note 147, at 590.

with white majorities also adopted at-large voting mechanisms to submerge black votes that could have formed a majority in some smaller districts.[150] Powers formerly held by black-dominated local governments were transferred to white-controlled legislatures,[151] and elective offices were replaced by appointive ones.[152] Finally, under Democratic control of the electoral process, election fraud became an "art form."[153]

By the late 1890s and early 1900s, despite the command of the Fifteenth Amendment that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude,"[154] legal disenfranchisement of blacks through state constitutional amendment became the norm throughout the South, at about the same time as the adoption of the largest number of laws mandating segregation in most facets of life.[155] In most southern states, blacks were denied the vote by facially neutral qualifications for voting which either disproportionately excluded blacks from suffrage, or were applied in such a way as to have that effect. These included literacy tests or property requirements for voting coupled with either "grandfather clauses," clauses permitting registration to people who could "understand" certain material, or "good character clauses," by which whites otherwise unable to meet the literacy or property requirements might be permitted to vote.[156] In addition, all the southern states adopted poll taxes, some of which were cumulative, which also included com-

---

[150] *See* Kousser, *supra* note 147, at 144.

[151] *See* FONER, *supra* note 147, at 591.

[152] *See* Kousser, *supra* note 147, at 144.

[153] *Id.* at 143; *see also* FONER, *supra* note 147, at 590.

[154] U.S. CONST. amend. XV, § 1. The Fifteenth Amendment, passed in 1870, by its terms outlaws discrimination in voting. Section 2 of the Fifteenth Amendment provides that "[t]he Congress shall have power to enforce this article by appropriate legislation." *Id.* at § 2. The Fifteenth Amendment was not the first Civil War Amendment to address voting rights. Section 2 of the Fourteenth Amendment, adopted in 1868 (section 1 of which overruled *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), by conferring federal and state citizenship upon black Americans), also attempted to coerce the southern states into not denying or abridging the right of blacks to vote by reducing each state's representation in Congress by a proportion equal to the percentage of "the male inhabitants of such State, being twenty-one years of age" affected by any such denial or abridgement. U.S. CONST. amend. XIV, § 2. Despite post-Reconstruction denial of the right to vote, this provision was never utilized.

[155] *See generally* WOODWARD, *supra* note 148, at 83-85, 97-102 (discussing the proliferation of laws relating to segregation).

[156] *Id.* at 84.

plex procedures for compliance.[157] The disproportionate effect of these laws was enhanced by their arbitrary application to exclude blacks. As historian C. Vann Woodward has written: "[t]he effectiveness of disfranchisement is suggested by a comparison of the number of registered Negro voters in Louisiana in 1896, when there were 130,334 and in 1904 [after the adoption of literacy, property and poll tax qualifications], when there were 1,342."[158] The southern states also adopted whites-only Democratic primaries, which excluded blacks from participation in what was normally the only significant stage of the electoral process.[159]

To the extent that these mechanisms were struck down as unconstitutional—Oklahoma's grandfather clause was held invalid in *Guinn v. United States* in 1915,[160] and the white primary was invalidated in several cases spanning from 1944 to 1953,[161] but the poll tax was not struck down until 1966 when the Supreme Court announced the decision in *Harper v. Virginia Board of Elections*[162]—new variants emerged to replace them. Whatever mechanisms were in place for qualifying voters, they were applied so as to prevent blacks from voting, regardless of the formal level of discretion given to local election officials.[163]

2. Adoption of the Voting Rights Act and the Recurrence of Dilutive Practices

Attempts to register black voters in the South in the early 1960s met with a violent response. In early 1965, the Southern Christian Leadership Conference, under the leadership of Martin Luther King, Jr., began a campaign for voting rights in Selma, Alabama. On March 7, 1965, state and local police in Selma beat and tear-gassed peaceful civil rights demonstrators attempting to march from Selma to Mont-

---

[157] *Id.*

[158] *Id.* at 85.

[159] *Id.*

[160] 238 U.S. 347 (1915).

[161] *See* Smith v. Allwright, 321 U.S. 649 (1944) (finding Texas's all-white primary system unconstitutional); *see also* Terry v. Adams, 345 U.S. 461 (1953) (invalidating exclusion of blacks from the almost always dispositive pre-primary election of the "Jaybird Democratic Association"). Progress toward judicial protection from voting discrimination was by no means smooth. *Smith* in fact overruled *Grovey v. Townsend*, 295 U.S. 45 (1935), in which the Court had, just nine years before, upheld Texas's whites-only primary against a constitutional challenge.

[162] 383 U.S. 663 (1966).

[163] *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 312-14 (1966) (describing the way in which voter registration laws were applied before adoption of the V.R.A. to prevent blacks from voting).

gomery, the state capital. The Selma crisis, which included the murders of three civil rights workers, enraged people in the rest of the nation. Eight days later, President Johnson introduced the V.R.A. in an address before Congress. On August 3, 1965, the V.R.A. passed the House by a vote of 328 to 74. The next day, it passed the Senate by a vote of 79 to 18, and two days later, the President signed this long-overdue response to discrimination in voting into law.

The V.R.A. had a substantial impact in providing a sharp increase in minority voter registration and access to the voting booth.[164] It has had a tremendous impact in opening the doors of America's elected offices to representatives supported by members of the African American community. Although the V.R.A. does not presume that people should vote for representatives of their own ethnic group, this often happens, especially when members of an ethnic group are first able to exercise political power. The dramatic increase in the number of black elected officials since 1965 is the clearest reflection of the increased participation in voting by African Americans wrought by the passage of the Act. In 1965 there were approximately 500 black elected officials nationwide; by 1990, there were over 7200.[165]

Nonetheless, in the presence of polarized voting along racial lines, members of racial minority groups have remained vulnerable to actions that render their newly protected voting strength ineffective, particularly through plans of electoral districting. As formal barriers to black participation in elections fell following the passage of the V.R.A., some state and local governments responded by attempting to blunt the force of newly protected black votes. They took varied approaches similar to those taken by the southern states in the years following Reconstruction. The devices used to weaken the impact of increased political participation by African Americans included, for example, replacing elective offices with appointive ones[166] and annex-

---

[164] *See* Issacharoff, *supra* note 44, at 1838 n.25 (discussing the impact of the V.R.A. and the Freedom Rides on voter registration). The provisions of the Act have not been completely effective. Race-neutral restrictions on the time and place of voter registration that survived passage of the V.R.A. have had a disparate impact on black voter registration. *See id.* These obstacles to voter registration may in part be overcome by the National Voter Registration Act of 1993, the so-called "motor voter" law. Under this statute, states must permit individuals to register to vote for elections for federal office "by application made simultaneously with an application for a motor vehicle driver's license." 42 U.S.C. § 1973gg-2 (1994).

[165] FRANK R. PARKER, BLACK VOTES COUNT 1 (1990).

[166] *See* Allen v. State Bd. of Elections, 393 U.S. 544, 550-51 (1969) (describing a 1966 Mississippi law changing several county offices to appointive offices).

ing land on which additional white voters resided.[167]

The responses to increased black voter registration also included the adoption of systems of election that limited black voting strength. The size, shape, and number of electoral districts were sometimes altered. Where once there had been electoral districts, state and local governments adopted systems of at-large voting. Black voters with common interests who might have banded together to elect a representative from one or another district found their votes submerged among those of a hostile, white majority that could control the outcome of the at-large election for each seat.[168] In addition, there were gerrymanders of the more familiar kind: electoral district lines were simply redrawn so as to weaken black voting power. Sometimes district lines were drawn to disperse black voters in small numbers among many districts, in which they would form an ineffectual minority (a process called "cracking" in the vernacular of voting rights).[169] At other times black voters were "packed" into districts in which they constituted an excessive majority, rendering many of their votes in that district superfluous while removing their influence from surrounding districts.[170] Runoff requirements were adopted that had the effect of insuring that even a black candidate who won a plurality of votes could not gain elective office in the face of unified white opposition.[171] Provisions to prevent "single-shot" voting were also imposed.[172]

---

[167] *See* City of Richmond v. United States, 422 U.S. 358 (1975) (upholding an annexation reducing the relative strength of the minority race, where the postannexation system fairly recognized the minority's political potential). For a detailed description of some of the techniques used to blunt African American voting power, see generally PARKER, *supra* note 165.

[168] Following passage of the V.R.A., "[a]lmost every [southern state] legislature, from Texas to Virginia, employed multimember districts in both houses (although Georgia and Texas have no multimember senate districts) which consequently remained virtually all white despite dramatic increases in black voting strength." Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment, in* MINORITY VOTE DILUTION 85, 88 (Chandler Davidson ed., 1984) (citation omitted).

[169] *Id.* at 89-92. For example, the black population of the Mississippi Delta lived within a single congressional district between 1882 and 1966. Although the contours of the district were not always the same, the district containing the Delta was sixty-six percent black in 1960 (when it was the Third District), and fifty-nine percent black between 1962 and 1966 (when it was the Second District). After passage of the V.R.A., the Delta's black population was split among four different congressional districts, each of which was majority white in voting age population. *Id.* at 89.

[170] *See id.* at 96-99.

[171] Runoff requirements ultimately prevent the white vote from being split among two or more candidates. In the circumstances of most racially polarized communities, a runoff requirement "creates a de facto white primary." Pamela S. Karlan, *Maps and Misreadings: The Role of Geographical Compactness in Racial Vote Dilution Litigation,* 24

In the parlance of voting rights law, these mechanisms all "dilute" minority voting strength. They do not deny the right to vote by formally preventing members of the minority group from casting ballots; where members of the minority group are like-minded about the candidate they support, these mechanisms operate to deny their votes effect by preventing them from being aggregated in such a way as to successfully lead to the election of the minority-preferred candidate.[173]

The precise scope of the invasion wrought by dilutive electoral systems is hard to describe. It is an extraordinarily difficult task to say what the benchmark "fair" aggregative mechanism would be against which a challenged electoral system ought to be measured.[174] There are an infinite number of possible configurations. And ordinarily, one has no right to be placed in a district in which like-minded voters form a majority.

But the intentional aggregation of voters on the basis of race in a way that is likely to result in the votes of members of one race being meaningless is undoubtedly a form of invidious race discrimination. As long as black voters continue to have cohesive communities of interest, the harm done to them by these discriminatory mechanisms is no less real than denial of the franchise itself. To begin with, even the

---

HARV. C.R.-C.L. L. REV. 173, 187 n.54 (1989). The favored candidate among the white voters will come in at least second, even if black support amounting to a plurality of the votes cast is uniformly behind another candidate. The white voters' candidate will then be assured of election in the runoff on the basis of white support.

[172] Single-shot voting involves voting for only a single candidate when one is entitled to vote for several members of an electoral slate to fill several seats in a single election. Anti-single-shot provisions include "full slate" rules—direct prohibitions on single-shot voting—which require voters in multimember districts to vote for as many candidates as there are positions to fill as a prerequisite to having their ballots counted. Under such provisions, if there is a single minority-preferred candidate, a minority voter cannot simply vote for him or her (that is, the voter cannot practice single-shot voting). Instead, each minority voter is bound also to vote for other candidates, actually helping them to outpoll the minority-preferred candidate. "Numbered post" systems, in which candidates in a multimember district declare their candidacy for a particular seat (or "numbered post"), have a similar effect because a supporter of one candidate can gain no advantage by denying his or her vote to a candidate for a different numbered post. *See id.* at 187 n.53. A regime of staggered terms for representatives from multimember districts works the same way. *See id.*

[173] In this regard, Professor Karlan has usefully distinguished between the right to vote as a right to "participation," a right not formally denied by the dilutive mechanisms I have described, and the right to vote as a right to "aggregation," which is necessary for "[t]he primary function of voting." *See generally* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709-20 (1993) (outlining a taxonomy of the "rights to vote").

[174] *See id.* at 1714-15 (discussing discarded baseline notions of what a fair aggregation would produce).

sense of what Professor Karlan has called "civic inclusion,"[175] engendered by formal participation in the franchise, is diminished: there are symbolic harms in having the ability to cast only a meaningless vote. There is denial of the right to participate fairly in the democratic process by which government officials are chosen. And there is the additional concrete harm of having one disfavored ethnic community's voice simply not present in the legislative bodies that pass laws affecting the members of that community. Finally, where black votes are diluted, elected officials tend to be unresponsive to the needs of the African American community.[176] This is especially true at the local level and where the black community is residentially segregated.[177] The concrete result of vote dilution will frequently be discrimination in provision of government services and distribution of public resources.

Evidence of discriminatory minority vote dilution is familiar in recent American history. The most obvious example has been the failure in some jurisdictions to elect black officeholders despite the presence of a substantial African American population. Although the debate about race-conscious electoral districting frequently turns to the question of the election of African Americans to office, clear analysis requires us to remember that it is the right of the voters to elect the candidate of their choice that is significant, *not* the election of a person of a particular race. Indeed, the idea that certain seats in a legislature must be reserved for members of a particular race would turn on its head the American notion of equality, which has as its goal the erasure, rather than the preservation, of distinctions based on race.

Nevertheless, because one could expect the election of members of each race in rough proportionality to their representation in the population were race irrelevant to election, the failure of states with substantial African American populations ever to elect a member of the black community to Congress is powerful evidence both of racial polarization in voting and of an electoral system that consistently operates to limit black voters' chances of garnering representation.

---

[175] *Id.* at 1710.

[176] *See* Andrew P. Miller & Mark A. Packman, *Amended Section 2 of the Voting Rights Act: What is the Intent of the Results Test?*, 36 EMORY L.J. 1, 21 (1987) (isolating responsiveness to racial minorities as the most important factor in voting dilution cases decided before section 2 of the Act was amended).

[177] *See, e.g.*, Perkins v. City of West Helena, 675 F.2d 201, 210-11 (8th Cir. 1982) (describing unresponsiveness in the provision of municipal services in a city with a dilutive at-large electoral system).

Thus, to give but one example, although South Carolina's population is 29.8% black,[178] not a single black person was elected to Congress from any Congressional District within the state for almost 100 years, between 1896 and 1992.[179] This is strong evidence of minority vote dilution.

The dilution of minority voting strength is not confined to any one region. There is evidence of minority vote dilution in the northern as well as the southern United States.[180] Nor are dilutive practices a thing of the past.[181]

3. Understanding the Law's Focus on Mechanisms for Aggregating Votes

To see when and why race-conscious districting might be an appropriate response to the problem of minority vote dilution, it is necessary to have both a comprehensible definition of discriminatory minority vote dilution and an understanding of the limitations on law's ability to address it. The former has been clouded by recent decisions of the Supreme Court, and the latter has been missing altogether from both the case law and the literature on voting rights.

---

[178] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION, SOCIAL AND ECONOMIC CHARACTERISTICS: SOUTH CAROLINA 10 (1993).

[179] *See* MICHAEL BARONE & GRANT UJIFASA, THE ALMANAC OF AMERICAN POLITICS 2000, at 1454 (Eleanor Evans ed., 1999) (describing the election in 1992 of the first African American representative from South Carolina since 1897).

[180] For just one example, see *United Jewish Organization of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977), in which the United States Attorney General interposed an objection under the V.R.A. to New York's state legislative apportionment plan, and required district lines to be redrawn, on the ground that the original plan had the purpose or effect of denying or abridging the right to vote on the basis of race.

[181] For example, in 1987 the County Commission of Etowah County, Alabama, which is responsible primarily for upkeep of county roads, responded to the election from a newly drawn, black-majority district of the first black County Commissioner in its history by altering the rules of the Commission to prevent the newly elected Commissioner from exercising power. *See* Presley v. Etowah County Comm'n, 502 U.S. 491, 521 (1992) (Stevens, J., dissenting) ("The two resolutions adopted by the Etowah County Commission on August 25, 1987, less than nine months after the county's first black Commissioner took office, were an obvious response to the redistricting of the county that produced a majority black district from which a black Commissioner was elected."). Until that time, road funds had been divided among districts within the county, and decisions about spending within each district had been within the power of the individual Commissioner from that district. *Id.* at 495-98 (opinion of the Court). Under the new rules, the Commission required a majority vote before funds could be spent anywhere in the county. *Id.* at 497. The Supreme Court held that the bait-and-switch perpetrated on black voters by Etowah County was not tied closely enough to voting to have been prohibited by the V.R.A. *Id.* at 506.

To begin with, the operation of a dilutive plan of electoral districting is not complex. Electoral districting plans by themselves merely place the land on which individuals live in one or another district. The capacity of a districting plan to render less effective the voting strength of one or another group depends on the interaction of that plan with the acts of the individual voters it places in each district, that is, with the way they cast their ballots. The effect of every electoral system thus depends on both the behavior of the voters in the voting booth and the mechanism chosen to aggregate their votes.

Ideally, voting strength would be measured against a hypothetical world in which race was irrelevant to the votes cast. In such a case, there would be no "dilution" of any group's voting strength, not because districting would be done in a way that would give each group full ("undiluted") strength, but because the very *concept* of dilution would be inapplicable. Where race does not correlate with votes, every districting plan would have an essentially random impact upon some voters of each race. Because they would not have cohesive interests as a group, voters of one race could not be denied effective voting strength by any districting plan.

Although one could attempt to replicate through law a world without voter discrimination, any such attempt would run into grave constitutional—and, indeed, practical—difficulty. Antidiscrimination laws do sometimes try to provide a remedy that would return the complainant to where he or she would have been but for an act of discrimination, but to combat voting discrimination in this way would require invalidating the outcomes of elections that are decided on the basis of individual votes cast on a discriminatory basis.

In some circumstances, that might not be an obstacle to the invalidation of certain electoral outcomes. Although the act of voting has been understood in American law as a private act,[182] there is certainly a sense in which the casting of ballots could be viewed as state action with respect to which the Fourteenth Amendment's Equal Protection Clause would apply. Laws that are adopted by ballot initiative, for example, are not immune from invalidation on constitutional grounds, even when discriminatory intent is a part of the constitutional equation.[183]

---

[182] *See* Rogers v. Lodge, 458 U.S. 613, 647 n.30 (1982) (Stevens, J., dissenting) (arguing that casting of ballots is not state action).

[183] *See, e.g.*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 484 (1982) (concluding in the course of striking down a ballot initiative that "purposeful discrimination is the condition that offends the Constitution" (internal quotation marks and cita-

On the other hand, inquiry into the selection of representatives by popular vote raises some at least apparently different constitutional concerns. It is true that, in a nation in which the people are sovereign, voting could be described as the ultimate legislative act. At the moment of the election, there is no line between the governed and the governing. The voters hold governmental power. (Indeed, when votes are cast on ballot initiatives, as they are in some states, the election is in every sense a "legislative" act.)

Even when viewed as an action by a private party, the casting of a ballot in an election for office has some characteristics of state action: its purpose is the selection of representatives in a governmental body, and it is given effect by governmental machinery. These factors played a significant role in the Supreme Court's conclusion that the act of a private party exercising a peremptory challenge in a civil case, a similar type of private act, rose to the level of state action.[184] One can at least imagine a legal regime in which individual votes found after investigation to have been cast on a discriminatory basis, like peremptory challenges brought on the basis of race, would be held invalid.[185]

The law, however, could not work in this way without doing violence to other constitutional values. The very secrecy of the ballot, although a part of the American system of voting only since the late nineteenth century, is itself of constitutional dimension. Although the Constitution nowhere mentions the secret ballot, and the Supreme Court has not addressed the question, several lower courts have found the right to cast one's ballot in secret to be a fundamental one protected by the Constitution.[186] The ballot undoubtedly also has at least some expressive component that is protected by the First Amendment.[187]

---

tions omitted)).

[184] *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 626, 622 (1991) (describing selection of jurors by private parties as "determining representation on a governmental body" with the "overt, significant assistance of state officials").

[185] Of course, unlike peremptory challenges, the power to vote is not ordinarily understood to have been "conferred" on the people by the government. The power to vote precedes government itself.

[186] *See, e.g.*, Anderson v. Mills, 664 F.2d 600, 608 (6th Cir. 1981) (asserting that secret ballots safeguard the purity of the election process); *cf. Rogers*, 458 U.S. at 647 n.30 (1982) (Stevens, J., dissenting) (suggesting that secrecy of the ballot is constitutionally protected).

[187] *But see* Burdick v. Takushi, 504 U.S. 428, 438 (1992) (rejecting a First Amendment challenge to a Hawaii law prohibiting write-in ballots in part because attributing a "generalized expressive function" to elections "would undermine the ability of States to operate elections fairly and efficiently").

Permitting government agents, including judges, to assess the basis on which individual votes have been cast would violate these constitutional principles. Indeed, even the suggestion of governmental review of an individual's vote could chill its conscientious exercise and destroy the vitality of democracy.

In addition, the invalidation of racially tinged election results could well give judges authority beyond their ability. Where a ballot initiative is struck down, the consequence is merely invalidation of a law. Were the election of an individual held to be tainted with racial animus, the consequence—whether through invalidation of the tainted votes or of the outcome of the election itself—could ultimately be the installation in office of the other candidate. Merely holding a new election might not be an effective remedy because voter discrimination might well persist. Yet to permit a court to order a losing candidate into office on the basis of necessarily speculative judgments of what the election result would have looked like had one factor (race) been removed from the voters' hearts and minds would likely go well beyond the scope of judicial—indeed, perhaps, of human—competence.

4. The Legal Prohibition of Minority Vote Dilution and the Definition of Undiluted Minority Voting Strength

The voting booth, in fact, has not been where the law has addressed the problem of racial vote dilution. Neither Congress nor the courts has given even the explanation that I have suggested above for the decision not to invalidate votes cast on a discriminatory basis. Indeed, I know of no explicit analysis in either legislative history, judicial opinion, or scholarly commentary of the reasons for the choice of approach that Congress and the courts have taken. Nonetheless, the law has uniformly addressed vote dilution not by scrutiny into individuals' voting behavior, but by examining the use of vote-aggregating mechanisms that blunt the effectiveness of minority votes.

Significantly, this means that antidiscrimination law, at least as it currently stands, does not directly address racially polarized voting, the *sine qua non* of vote dilution. Rather, where there is racially cohesive bloc voting, the law takes it as a given. The law addresses only the "dilution" of one racial group's voting strength through the use of particular tools of vote aggregation.

To determine whether a plan of electoral districting dilutes minority voting strength, one must have a definition of "undiluted" minority voting strength against which to measure it. Likewise, the way

in which race may be required to combat discrimination under the V.R.A. depends on that very definition. The definition of undiluted minority voting strength is thus the critical question in voting discrimination law.

Sections 2[188] and 5[189] of the V.R.A. both address the problem of minority vote dilution through imposing requirements upon the mechanisms used to aggregate votes. The 1965 Act was a novel and far-reaching piece of legislation. At the time of its adoption, section 2 prohibited discrimination in voting in language mirroring that of the Fifteenth Amendment to the Constitution. As originally enacted, section 2 of the V.R.A. provided: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."[190]

Section 5 has always been more complicated. Several of the Act's provisions, including section 5, apply only to certain jurisdictions around the country that have exhibited indicia of racial discrimination with respect to voting. Specifically, coverage under these provisions was limited at the time of the bill's adoption to those jurisdictions found by the Attorney General of the United States both to have utilized as of November 1964 certain tests or devices for voter registration (for example, literacy tests) and to have had below-average levels of voter registration or participation. These circumstances together typically reflect discrimination in voting on the basis of race.[191] Section 4 of the Act temporarily suspended the use of those tests and devices by covered jurisdictions.[192] And, under several of the Act's provi-

---

[188] Section 2 is codified as amended at 42 U.S.C. § 1973 (1994).

[189] Section 5 is codified as amended at 42 U.S.C. § 1973c (1994).

[190] Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437.

[191] Section 5 applied on its effective date to states or their subdivisions found to have required on November 1, 1964, "that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class," and in which less than fifty percent of the population either was registered to vote on November 1, 1964, or voted in the presidential election of November 1964. *Id.* §§ 4-5, 79 Stat. at 438-39 (codified as amended at 42 U.S.C. §§ 1973b(b), (c), 1973c (1994)). The Supreme Court held the coverage formula of the Act constitutional in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

[192] *See* Voting Rights Act § 4, 79 Stat. at 438-39 (codified at 42 U.S.C. § 1973b (1994)).

sions, the Attorney General was permitted to appoint federal voting examiners to be sent to covered jurisdictions to ensure that those qualified to register to vote could do so.[193]

Under section 5 of the V.R.A., a covered jurisdiction may not enforce any change in a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting,"[194] before it seeks and receives federal judicial or administrative "preclearance." The Act defines voting to "include all action necessary to make a vote effective in any primary, special, or general election."[195] Under the Act, a covered jurisdiction can seek judicial preclearance of a change by bringing a declaratory judgment action in the United States District Court for the District of Columbia. In such a suit, the submitting jurisdiction bears the burden of showing that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or, under a 1975 amendment, membership in a language minority group.[196]

If a covered jurisdiction does not want to go to court, it can submit a proposed change to the Attorney General of the United States for administrative preclearance. Because of its speed, this is ordinarily the procedure chosen by jurisdictions subject to section 5 of the Act.

The statute does not establish standards to govern the administrative preclearance determination, but the Attorney General has promulgated regulations governing the procedure by which it is made. These require her to make the same determination as the District Court would make in an action brought under the Act, and (as the Act does with respect to judicial preclearance) place the burden of proving the absence of a discriminatory purpose or effect upon the submitting jurisdiction.[197] If the Attorney General does not interpose

---

[193] *See id.* §§ 6(b), 7, 9, 13(a), 79 Stat. at 439-42, 444-45.

[194] 42 U.S.C. § 1973c (1994).

[195] Voting Rights Act § 14(c)(1) (codified at 42 U.S.C. § 1973*l* (1994)). This subsection of the Act reads in full:

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

[196] 42 U.S.C. § 1973c (1994). The provision relating to language minority groups was added by Pub. L. No. 94-73, 89 Stat. 400, 401 (1975).

[197] Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51.52(a) (1999).

an objection to a submitted change within sixty days, that change may take effect. When the Attorney General decides to interpose an objection to a change, the regulations require her to state the reasons for her decision,[198] and an objection letter accompanies a denial of administrative preclearance. However, neither section 5 of the Act nor any regulation promulgated by the Attorney General purport to provide any mechanism for the Attorney General to require a state to adopt any particular alternative to a scheme to which she interposes an objection. The Attorney General's power amounts only to a veto over any adopted change. If the Attorney General does deny administrative preclearance to a change in state or local law, the aggrieved state or political subdivision may, nonetheless, commence an action for judicial preclearance in the District Court for the District of Columbia, and the court must give the change de novo consideration.[199]

Section 5, like the other portions of the Act applicable only to certain jurisdictions, has always been temporary, but the preclearance provisions of section 5 have repeatedly been renewed—most recently as they were about to expire in 1982, when they were extended for twenty-five years.[200] The coverage formula has also twice been revised and section 5 now applies not only to those jurisdictions that exhibited indicia of racial discrimination in voting in 1964, but also to those exhibiting such indicia in 1968 or 1972.[201]

Section 5 was the first provision of the V.R.A. to be held to play a role in combating vote dilution. The V.R.A. "was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race."[202] Consequently, as long ago as 1969, in its decision in *Allen v. State Board of Elections*, the Supreme Court, relying on the statutory definition of "voting" to include "'all action necessary to make a vote effective,'" construed laws that submerged black votes or replaced elective with appointive offices

---

[198] *Id.* at § 51.44(a).

[199] Morris v. Gressette, 432 U.S. 491, 505 n.21 (1977).

[200] *See* 42 U.S.C. § 1973b(a)(8) (1994).

[201] The coverage formula was amended in 1970 to permit extension of coverage to additional jurisdictions on the basis of findings with respect to voting procedures in effect on November 1, 1968, and voter registration and participation that month, and again in 1975 to permit a similar extension based on findings regarding voting in November 1972. 42 U.S.C. § 1973b(b) (1994). The statute has also always contained so-called "bailout" provisions that permit covered states or their subdivisions to be freed in certain circumstances from the requirements of compliance with those portions of the Act that apply only to covered jurisdictions. 42 U.S.C. § 1973b(a)(1) (1994).

[202] Allen v. State Bd. of Elections, 393 U.S. 544, 565 (1969).

as "voting qualification[s] or prerequisite[s] to voting, or standard[s], practice[s] or procedure[s] with respect to voting," subject to review under section 5 of the Act by the district court (or the Attorney General) in order to determine whether they had the purpose or effect of denying or abridging the right to vote on account of race or color.[203] Section 5 of the V.R.A., then, reached not only government actions that had the purpose or effect of discriminating on the basis of race in voter registration and the casting of ballots, but also, as the *Allen* Court made clear, electoral mechanisms that had the purpose or effect of "diluti[ng] voting power" on the basis of race.[204] For many years after the Court's decision in *Allen*, however, the precise nature of undiluted minority voting strength remained unarticulated by the courts, making it impossible to determine precisely the nature of what might be protected by a prohibition of vote dilution.[205]

In *Beer v. United States*, in 1976, the Court construed the "effect" prong of the judicial preclearance provisions of section 5 to require the submitting jurisdiction to demonstrate only that a change in voting practices or procedures will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[206] In requiring the district court to determine whether a new plan gives greater or lesser effect to minority voting strength, *Beer*—like *Allen*—implicitly acknowledged that it would be possible to ascertain when a group had undiluted voting strength—or in *Beer*'s terms, the fully "effective exercise of the electoral fran-

---

[203] *See id.* at 566 (quoting 79 Stat. 445, 42 U.S.C. § 1973*l*(c)(1) (Supp. I 1964)). In terms of rendering black votes ineffective, *Allen* itself addressed the replacement of single-member districts in Mississippi with an at-large election. 393 U.S. at 550, 569. The holding of *Allen* was first applied by the Supreme Court to address the shapes of electoral districts in 1973—after Congress's post-*Allen* re-enactment of section 5 of the V.R.A.—in *Georgia v. United States*, 411 U.S. 526 (1973).

[204] *Allen*, 393 U.S. at 569.

[205] Although the Court at first analogized the protection afforded under the V.R.A.'s command of nondilution to the protection against "dilution" of a vote's value imposed by the one person-one vote rule of *Reynolds v. Sims*, in fact they are not the same. *See Allen*, 393 U.S. at 569 (citing Reynolds v. Sims, 377 U.S. 533, 555 (1964)). Racial vote dilution takes place in a context in which, because districts are equipopulous, the weight of each vote, in the sense in which it is guaranteed by the one person-one vote rule, is the same.

[206] 425 U.S. 130, 141 (1976). Again, the district court and the Attorney General are empowered to deny preclearance if a change has the purpose or will have the effect of denying or abridging the right to vote on the basis of race, color, or membership in a language minority group. *See* 42 U.S.C. § 1973c (1994) (outlining the statutory standard applicable to the district court); Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51.52(a) (1999) (codifying adoption of the same standard for preclearance by the Attorney General).

chise."[207]

But *Beer* also blunted the need to explicate the nature of this undiluted voting strength, and limited the power of the Attorney General to weed out vote dilution through the "effect" prong of her preclearance power by holding, in essence, that even some dilutive plans will pass muster under the section 5 preclearance provisions because they are no more dilutive than what came before. Under *Beer*, the only discriminatory effect that can form the basis for a denial of preclearance is "retrogression."[208] And, despite the continuing use of the "retrogression" test, the Court has never in its section 5 jurisprudence come to grips with what might be meant by fully effective voting power.[209]

Section 5 of the V.R.A., however, is not the only federal statutory prohibition on diluting voting strength on the basis of race. The second provision of federal law to address voting mechanisms that have a dilutive effect is section 2 of the V.R.A., which was amended to do so in 1982.

The test contained in the amended section 2 actually grew out of the Court's Equal Protection jurisprudence. In 1966, a month after the V.R.A. was upheld in *South Carolina v. Katzenbach*,[210] the Supreme Court in *Burns v. Richardson* first said (albeit in dictum) that one could state a vote dilution claim—which it described as a claim that "the voting strength of racial or political elements of the population" had been "minimize[d] or cancel[ed] out"—directly under the Equal Protection Clause.[211] Seven years later, the Court in *White v. Regester* struck

---

[207] 425 U.S. at 141.

[208] *Id.*

[209] *See, e.g.*, Reno v. Bossier Parish Sch. Dist. (*Bossier Parish II*), 120 S. Ct. 866, 873 (2000) (holding that the "purpose" prong of section 5 of the V.R.A. prohibited only acts undertaken with a purpose to "retrogress"); Reno v. Bossier Parish Sch. Bd. (*Bossier Parish I*), 520 U.S. 471, 478, 480 (1997) (distinguishing the section 5 retrogression test, which the Court claimed requires only a comparison of a "new voting plan with [the] existing plan," from the test for "dilution" under section 2, which "implies . . . the existence of an 'undiluted' practice against which the fact of dilution may be measured").

[210] 383 U.S. 301 (1966).

[211] 384 U.S. 73, 88 (1966). The Court said that where the requirements of *Reynolds v. Sims* are met, apportionment schemes including multimember districts would constitute an invidious discrimination only if it could be shown that "designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Id.* (quoting Fortson v. Dropsy, 379 U.S. 433, 439 (1965)) (footnote omitted). Thus, the Court said that legislative judgments reflected in the apportionment scheme before it "were subject to constitutional challenge only upon a demonstration that the . . . apportionment, although made on a proper population basis, was designed to or would operate to minimize or cancel out

down for the first time a state's districting scheme under the Constitution on the basis that it had just such a dilutive effect.[212]

In *White* the Court held that unconstitutional vote dilution could be found only on the basis of an in-depth examination of the "totality of the circumstances."[213] It held that not every racial or political group had a right to representation in the state legislature, but that members of racial groups have a right not to be "invidiously excluded . . . from effective participation in political life."[214] Although the unanimous opinion for the Court in *White* did not purport to describe any rigid test for dilution, it upheld the district court's "intensely local"[215] appraisal of a number of factors: the history of racial discrimination and discrimination in voting in the jurisdiction at issue, the cultural and economic situation of the group within the jurisdiction, the previous success of members of racial minority groups in gaining election, the presence or absence of support for candidates for office across racial lines, the responsiveness of elected and other political officials to the shared needs and interests of the minority community, and the racial campaign tactics of candidates for office.[216]

---

the voting strength of racial or political elements of the voting population." *Id.* at 89. The possible viability of such a claim had been raised, but left open, two years earlier in *Fortson.*

[212] 412 U.S. 755 (1973) (invalidating multimember districts in two Texas counties as having unconstitutionally diluted the votes of blacks and Mexican Americans). The Court previously rejected such a challenge in *Whitcomb v. Chavis,* 403 U.S. 124 (1971). These lawsuits were both aimed at multimember districts, districts populous enough to support the number of representatives who were to represent them without running afoul of the one person-one vote requirements set out in *Baker v. Carr* and *Reynolds v. Sims.*

[213] *White,* 412 U.S. at 769.

[214] *Id.* The court also stated:

> [W]e have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups. To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Id. at 766 (citing Whitcomb v. Chavis, 403 U.S. 124, 149-150 (1971)).

[215] *Id.* at 769.

[216] *Id.* at 766-69. In *White,* the Court invalidated the multimember district in Texas's Dallas and Bexar Counties because of their impact on black and Mexican-American voters, respectively. The Court described the district court's findings with respect to the latter as "a blend of history and an intensely local appraisal of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise." *Id.* at 769-70.

While *White* opened the door to redress for unlawfully discriminatory minority vote dilution, this multifactor test did little to clarify the nature of undiluted voting strength, or, consequently, the nature of the legal entitlement against vote dilution on the basis of race.[217]

The evolution of the constitutional law of vote dilution came to an abrupt halt in 1980. In that year, the Supreme Court held in *City of Mobile v. Bolden* that the Constitution prohibited only those electoral mechanisms adopted with an intention to discriminate on the basis of race.[218] This imposed a virtually insurmountable burden on minority voters pressing a claim of unconstitutional vote dilution.

Congress, however, responded almost immediately and in 1982 amended section 2 of the V.R.A. to make clear that any electoral

---

The framework set out in *White* was refined by the lower courts. Particularly influential was the Fifth Circuit's opinion in *Zimmer v. McKeithen*, which stated:

> The Supreme Court has identified a panoply of factors, any number of which may contribute to the existence of dilution. Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives. Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that the use of a multi-member districting scheme is rooted in a strong state policy divorced from the maintenance of racial discrimination, *Whitcomb v. Chavis* would require a holding of no dilution. *Whitcomb* would not be controlling, however, where the state policy favoring multi-member or at-large districting schemes is rooted in racial discrimination. Conversely, where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in *White v. Regester* demonstrates, however, that all these factors need not be proved in order to obtain relief.

485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff'd sub nom.* East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 639 (1976) (per curiam) (footnotes and citations omitted).

[217] *See, e.g.*, Issacharoff, *supra* note 44, at 1841-45 (describing the way in which *White* failed to articulate the nature of the "minority vote dilution" the Court sought to remedy).

[218] 446 U.S. 55, 66-70 (1980) (plurality opinion). Justice White's separate opinion in *City of Mobile* essentially argues only that purposeful discrimination could be inferred from the effect of the districting scheme at issue in the case before the Court. *See* 446 U.S. at 101-03 (White, J., dissenting). In *Rogers v. Lodge*, 458 U.S. 613, 619 (1982), however, the Court described Justice White's opinion in *City of Mobile* as having provided a fifth vote for the proposition that purposeful discrimination is a prerequisite to a finding of vote dilution under the Equal Protection Clause.

mechanism with a dilutive effect is unlawful.

Section 2(a) of the V.R.A., as amended in 1982, now provides that:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [membership in a language minority group], as provided in subsection (b) of this section.[219]

Section 2(b) explains the statutory standard for vote dilution:

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[220]

These amendments were approved by an 85-8 vote in a Republican-controlled Senate, and were signed into law by President Reagan.[221]

In outlawing a discriminatory effect, section 2 is similar in operation to section 4 of the original V.R.A., which suspended use in covered jurisdictions of literacy and other tests which had had a racially disparate impact, and to section 5 of the V.R.A., which prohibits changes to voting laws in covered jurisdictions unless the adopting state or its political subdivision can prove that the changes have no discriminatory effect. Congress's power to outlaw voting practices on the basis of their discriminatory effect alone was upheld in *City of Rome v. United States*[222] and *South Carolina v. Katzenbach.*[223]

The 1982 amendments led finally to a judicial decision from which one can deduce the nature of undiluted minority voting strength and the corollary nature of a vote dilution claim. This came in the Supreme Court's first opinion construing the prohibition on

---

[219] 42 U.S.C. § 1973(a) (1994) (emphasis added).
[220] 42 U.S.C. § 1973(b) (1994).
[221] 128 CONG. REC. 14,304-37 (1982).
[222] 446 U.S. 156, 173-78 (1980).
[223] 383 U.S. 301, 334, 337 (1966).

vote dilution contained in the amended section 2, *Thornburg v. Gingles*.[224]

Gingles articulates a clear, relatively straightforward measure for the essential elements of a minority vote dilution claim. In that case, a group of black voters alleged that their placement in multimember districts rather than single-member districts denied them the ability to elect the candidates of their choice. While not abandoning the examination of the "totality of the circumstances" prescribed by the statute,[225] the Court held that there are three preconditions to showing that a multimember district dilutes votes in that way.

First, the minority group must be "politically cohesive."[226] Otherwise, there are no "distinctive minority group interests" that can be thwarted by a particular plan of electoral districting.[227]

Second, the white majority must "[vote] sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate."[228] Although the point appears to have been lost in some subsequent decisions, the Court made clear that varying degrees of white bloc voting could result in varying degrees of vote dilution: "[A] white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting."[229]

Finally, as a measure of the possibility of minority success absent such "racially polarized bloc voting," the Court required a showing that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district."[230]

Although subsequent cases have given great weight to this last factor,[231] the requirement of compactness has not been satisfactorily explained. Section 2, of course, does not speak of compactness. And the Constitution has long been held not to require that electoral dis-

---

[224] 478 U.S. 30 (1986).

[225] 42 U.S.C. § 1973(b) (1994); *see* Johnson v. DeGrandy, 512 U.S. 997, 1018 (1994) (citing 42 U.S.C. § 1973(b)) (reaffirming that a violation of section 2 must be determined "based on the totality of the circumstances").

[226] *Gingles*, 478 U.S. at 51.

[227] *Id.*

[228] *Id.* (citation omitted).

[229] *Id.* at 56.

[230] *Id.* at 50.

[231] *See, e.g.*, Bush v. Vera, 517 U.S. 952, 978 (1996) (plurality opinion), discussed *infra* notes 355-72 and accompanying text.

tricts be drawn compactly.[232]

This *Gingles* precondition therefore appears to mean only that the minority group cannot be so dispersed throughout the population as to make it impossible to draw a district in which they form a majority.[233] As some of the Court's more recent cases demonstrate, advances in computer technology since *Gingles* have reduced the practical difficulty of drawing such districts. The Court also explained that the requirement that the minority group be able to form a "majority" was based on the fact that the plaintiffs in *Gingles* had alleged impairment of their "ability *to elect* the representatives of their choice."[234] It expressly stated that the test it articulated was not meant to govern a case in which a claim was made that a minority group's "ability *to influence* elections" was impaired.[235]

Gingles made clear that the touchstone for finding the dilution of minority voting strength is a showing of racially polarized bloc voting, and that the degree of that dilution depends on the degree of racial polarization. The measurement of such racial polarization will not always be easy. The results of any single election will be insufficient to determine whether such polarization exists, and election data may have to be analyzed in light of other circumstances, such as racial appeals in political campaigns and the responsiveness of elected officials to the needs of the minority community, in order to determine its meaning. Nonetheless, meeting the *Gingles* preconditions is "essential" in order to establish a vote dilution claim under section 2.[236]

In circumstances where vote dilution is possible, then, it is prohibited by section 2 of the V.R.A. In the presence of racial polarization among voters—a cohesion of interests among the members of a racial minority group in electing particular candidates and a persistent unwillingness among a substantial part of the majority group to vote for

---

[232] *See, e.g.*, Gaffney v. Cummings, 412 U.S. 735, 752 n.18 (1973) ("But compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts.").

[233] For example, in his influential piece on the meaning of amended section 2, Howard Shapiro spoke of "the minimal level of geographic compactness necessary for the effective operation of political districts." Howard Shapiro, Note, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 YALE L.J. 189, 202 (1984).

[234] 478 U.S. at 46 n.12.

[235] *Id.*

[236] *See id.* at 48-49 n.15 (noting that "[u]nder [the] 'functional' view of the political process mandated by § 2," other factors "are supportive of, but *not essential to*, a minority voter's claim." (emphasis in original)); Growe v. Emison, 507 U.S. 25, 39-40 (1993) ("[T]o establish a vote-dilution claim . . . a plaintiff must prove [the] three [*Gingles*] threshold conditions.").

those candidates—section 2 of the V.R.A. requires state and local governments to adopt mechanisms for holding elections that will not have a dilutive effect on minority votes.

5. Drawing Race-Conscious Districts to Comply with the Act

In order to prevent the dilution of minority votes, compliance with the V.R.A., as construed in *Gingles* (and subsequent cases following it[237]), requires jurisdictions that use geographically based electoral districts and in which there is racially polarized bloc voting to draw district lines in a race-conscious fashion.[238] As the Court recognized in *Johnson v. DeGrandy*, "the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity."[239] In limited circumstances, then, compliance with the V.R.A. *requires* the use of race in the drawing of electoral district lines.

The precise way in which race must be used to comply with section 2 of the Act, however, has been widely misunderstood. To begin with, section 2 of the V.R.A., as construed in *Gingles*, does not require the creation of a proportional number of majority-minority districts. Nor does section 2 require the creation of the *maximum* number of majority-minority districts.[240] It is usually mathematically possible to draw even *more* than a proportional number of majority-minority districts.[241] For example, in a ten-district polity, members of a racial minority group comprising 21% of the population could, at least in theory, be divided so as to make up a 50.5% majority in 40% of the districts (four of the ten). This would never be required by section 2, and would probably unlawfully dilute *white* voting strength.

In any event, the statute is not designed to require proportional

---

[237] See *Voinovich v. Quilter*, 507 U.S. 146 (1993), and *Johnson v. DeGrandy*, 512 U.S. 997 (1994), both discussed *infra* notes 252-55 and accompanying text.

[238] Indeed, there is a strong argument that the Constitution itself demands such race-conscious action where the alternative is to give effect to discrimination in voting. *See* Palmore v. Sidoti, 466 U.S. 429 (1984) (holding that the federal Constitution prohibits state actors from giving effect to private discrimination); *see also* David A. Strauss, *The Myth of Colorblindness*, 1986 S. CT. REV. 99, 105 (concluding that *Palmore* stands for the proposition that race-conscious government action is sometimes constitutionally required).

[239] 512 U.S. at 1020.

[240] *See Gingles*, 478 U.S. at 89 (O'Connor, J., concurring) (noting that section 2 does not require the "maximiz[ation of] feasible minority electoral success").

[241] *See Johnson*, 512 U.S. at 1015-16 (explaining the mathematical possibility of disproportionate minority control of electoral districts).

representation of ethnic groups. Rather, it is designed to require that racial minority groups are afforded "undiluted" or fully effective voting strength.[242] This point has led to a great deal of confusion.

Under *Gingles*, polarization of voting is a necessary precondition for unlawful vote dilution. As the Court's focus on "the combined strength of minority support plus white 'crossover' votes" makes clear, the extent of unlawful vote dilution may vary with the *degree* of racial polarization.[243] Consequently, the extent to which race would have to be used in drawing district lines to prevent dilution will also vary with the degree of racial polarization.

Concrete examples may be helpful. At one extreme, given a high degree of cohesion among black voters, if racially polarized voting is absolute—if no white voters will cross over and vote for a candidate supported by black voters—only a districting plan that creates black-majority districts in proportion to the percentage of blacks in the population will give full effect to black voting strength.[244] This is not because creation of a proportional number of black-majority electoral districts is required by the statute, but because drawing such districts is in those circumstances the only way to prevent the dilution of black

---

[242] Because legally cognizable voter polarization can only be found where the majority group "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate," *Gingles*, 478 U.S. at 51, section 2 addresses only the structural inability to build coalitions across racial lines. The fully effective voting strength guaranteed by the statute thus should not necessarily translate into continual success at the polls. In the absence of a refusal of white voters to cross over, even cohesive minority voters who are unable in one or another election to succeed in electing a like-minded individual do not necessarily suffer vote dilution as a racial group. The relevant question—both in determining whether there is sufficient racial polarization to warrant race-conscious districting and in determining whether any districting plan is dilutive—is not success or failure in any single election, but refusal of voters to form coalitions across racial lines.

[243] *Gingles*, 478 U.S. at 56.

[244] The precise percentage of minority voters necessary to create an effective majority-minority district will depend on the circumstances. If the degree of cohesion among black voters is less than complete, as it usually will be in reality, effective minority voting strength would require a more substantial black majority. Some courts imposing remedial districting plans after finding a violation of section 2 have ordered the creation of districts with minority populations over sixty percent in order to compensate for lower turnout among minority group members. *See, e.g.*, Prosser v. Elections Bd., 743 F. Supp. 859, 869 (W.D. Wisc. 1992) (per curiam). This presents some difficult issues. As a general matter, such supermajorities would seem to be unjustifiable unless the low turnout is itself traceable (as it often will be) to past discrimination in voting. In this regard, examination of the greatest minority voter turnout in any previous election may be a helpful benchmark in assessing the potential minority voter turnout that may be assumed by the districting authority.

voting strength.[245]

An intermediate example might be a jurisdiction in which there is a highly cohesive community of black voters and in which there is substantial, but less than absolute, bloc voting by white voters. Minority voters in such a circumstance could achieve fully effective voting strength under a districting plan which creates a number of districts in which members of that group form some substantial minority. More precisely, any district in which as an empirical matter enough white voters might be willing to cross over and vote for a candidate supported by most of the black voters that, together, black and white crossover voters would make up a majority, would provide those black voters an opportunity, equal with that of other members of the electorate, to elect representatives of their choice. For example, if in such a circumstance the potential white crossover vote amounted to 15% of the electorate, a districting plan which created approximately 35%-minority districts would give full effect to black voting strength.[246] In such an intermediate case, drawing black-majority districts in proportion to black population, instead of the black "influence districts" just described, would actually "pack" black voters, giving black voters a small number of "safer" seats, but diluting overall black voting strength. In the face of a white population willing to cross over and form coalitions with black voters, the placement of larger numbers of black voters in a district than are necessary to offset any white voting bloc that is unwilling to form coalitions with black voters could in fact amount to "a 'contrivance to segregate' the group, thereby frustrating its potentially successful efforts at coalition building across racial lines."[247]

Finally, if there is enough potential crossover voting by whites that the candidate supported by a cohesive black minority will *not* usually be defeated by the votes of the white-majority bloc, compliance with section 2 will not ordinarily require electoral districts to be drawn to concentrate black voters to any degree. Indeed, it will prohibit the concentration of too many minority voters in a single district as "pack-

---

[245] Again, a *proportional* number of black-majority districts will not amount to *maximizing* the number of black-majority districts. *See supra* text accompanying notes 240-41. A disproportionately large number of black-majority districts would itself dilute white voting strength.

[246] This example is based roughly on the allegations in *Voinovich v. Quilter*, discussed *infra* notes 252-54 and accompanying text. Again, this assumes a completely cohesive black community.

[247] *See* United Jewish Org. of Williamsburgh, Inc. v. Cary, 430 U.S. 144, 172-73 (1977) (Brennan, J., concurring in part) (citation omitted).

ing."

Similarly, in a situation in which the black community shares no community of interests, compliance with section 2 will neither require nor prohibit race-conscious districting because in the absence of a cohesion of minority interests, no districting plan can dilute minority voting strength.[248] Lack of minority political cohesion necessarily defeats a claim of minority vote dilution.

Another widespread misconception about section 2 is that it guarantees the right to elect candidates of a particular race, and that its purpose is to "integrate legislatures."[249] But the V.R.A. is not concerned with the race of the candidates per se. The V.R.A. guarantees minority-group voters the right to participate equally in the election of the candidates of their choice, regardless of those candidates' race. The purpose of the V.R.A. is to ensure that the voices of citizens of all races are heard in the nation's legislatures.

Clearly the *effect* of the creation of nondilutive districts in jurisdictions in which voting is polarized along racial lines has in fact been to integrate many legislative bodies to a previously unknown degree. At times, it appears that the single interest that minority-group voters may share most fervently is the desire to elect someone of their own race.[250] Certainly Congress was aware in 1982 of the sad fact that race is still so salient in American life that people of both races continue to feel that only one of their own can properly represent them. The amended statute thus makes clear that the race of candidates can be considered in measuring the presence of unlawful voting discrimination under the Act.[251] But discrimination in voting under the Act is not measured solely by the success of candidates of a particular race.

Two section 2 cases decided in the 1990s have reaffirmed the definition of vote dilution first articulated in *Gingles* with its focus on the presence and degree of racial polarization. In *Voinovich v. Quilter*, the Court heard a claim by black voters that the creation of a number of black-majority districts proportionate to the percentage of blacks in the population actually diluted black voting strength because of the

---

[248] Race-conscious districting in such a situation, however, because completely unjustified, would properly be held to violate the Constitution.

[249] *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY 41-42 (1994).

[250] *See* Issacharoff, *supra* note 44, at 1855-56.

[251] *See* 42 U.S.C. § 1973(b) (1994) ("The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

possibility of crossover votes from white voters.[252] The plaintiffs argued that in Ohio, white voters who made up fifteen percent of the electorate were willing to cross over and vote in coalitional fashion with black voters, even when those voters supported a black candidate. Thus, the plaintiffs argued, the creation of black-majority districts, rather than districts in which black voters made up approximately thirty-five percent of the population, denied blacks the opportunity to form coalitions with this "crossover" segment of the white population. The plan at issue, they argued, had the effect of "packing" black voters into black-majority districts when a districting plan could have been drawn that contained a larger number of districts whose populations were thirty-five percent black, and in which black voters could effectively influence the outcome of the election.

The Bush Administration's Department of Justice suggested that an "influence district" claim of vote dilution could not be brought under section 2 by members of a minority group who had the potential, in combination with a substantial number of crossover voters, to elect a candidate of their choice.[253] As part of its argument that section 2 protected only those members of racial minority groups who could not elect a candidate without the creation of a majority-minority district, the government urged that each of the three factors described in *Gingles*, including the requirement of sufficient minority population to make up a majority in a single-member district, was necessary to make out a section 2 claim in all circumstances. This would have rendered claims of vote dilution such as the plaintiffs' outside the protection of section 2 of the Act.

The Court rejected this. Although the Court only assumed that an "influence" claim could be brought under the Act, it stated:

> Of course, the *Gingles* factors cannot be applied mechanically and without regard for the nature of the claim. For example, the first *Gingles* precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume *arguendo* to be actionable today. The complaint in such a case is not that black voters have been deprived of the ability to constitute a *majority*, but of the possibility of being a sufficiently large *minority* to elect their candi-

---

[252] 507 U.S. 146 (1993).

[253] *See* Brief for the United States as Amicus Curiae Supporting Appellants at 16 & n.9, Voinovich v. Quilter, 507 U.S. 146 (1993) (No. 91-1618) (arguing that the majority-minority districts could not violate section 2 because section 2 did not require the creation of influence districts).

date of choice with the assistance of cross-over votes from the white majority.[254]

Also, in *Johnson v. DeGrandy*, although the Court purported again not to decide whether black voters could bring a claim under section 2 that they had been denied an influence district, it made clear that creation of a number of majority-minority districts in proportion to the minority percentage of the overall population might nonetheless dilute minority voting strength because "there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice."[255] The Court there rejected an argument that creation of a proportional number of majority-minority districts should provide states' districting plans a conclusively safe harbor from section 2 challenges.

6. The Limits of the Law: Race-Conscious Districting as a Second-Best Solution

So the law may require race-conscious districting to prevent vote dilution. As we have seen in Part I, this use of race will carry some substantial costs, but before turning to the question of the proper approach to assessing the constitutionality of race-conscious districting, it is worth focussing briefly on some of the costs of the failure (really the inability) of the law to address directly the discriminatory action of voters in voting along racial lines.

The persistence of racial polarization makes districting itself a no-win proposition from the standpoint of racial equality. Indeed, there is no method for aggregating votes that will not have some deleterious consequence for members of the minority group. If race is not taken into account, the votes of members of the minority group will be, by definition, submerged. Yet if race *is* used to create black-majority districts, there will inevitably be some costs to black voters in terms of reduced influence in the surrounding black-minority districts.

To begin with, the essential fact that must be understood when evaluating race-conscious district lines drawn to prevent vote dilution caused by racially polarized voting is that a refusal to draw race-conscious district lines will not do anything to alter the existence of white-preferred and black-preferred candidates or of white-majority or black-majority districts. In the face of racial polarization, a refusal to

---

[254] *Voinovich*, 507 U.S. at 158.

[255] 512 U.S. 997, 1020 (1994).

draw race-conscious district lines is not "neutral": it will simply result in the creation of majority-majority districts and the election of all or almost all the candidates preferred by the majority group. This would be so even if district lines were drawn at random—the average district would have a racial composition roughly reflecting that of the polity, that is, a white majority.

Thus, in the face of a racially polarized electorate, neither the drawing of electoral district lines without reference to race nor the drawing of them in race-conscious fashion leads to a "neutral" outcome. In the face of the most extreme example of racial polarization, lines drawn without reference to race will submerge black votes and lead to the election of virtually all the white-preferred candidates; lines drawn on racial grounds to comply with the V.R.A. would lead to a proportionate number of successful white-preferred and black-preferred candidates. The view that drawing lines without reference to race is neutral, and that drawing electoral district lines on racial grounds provides minority voters with something they are not entitled to, is probably based on nothing more than the fact that we are accustomed, in the face of racial polarization, to the election of the white-preferred candidate.

Further, even if race is taken into account, minority voters will pay for their increased voting strength in a smaller number of districts with the loss of some lesser influence in a larger number of districts.[256] Even in a racially polarized jurisdiction whose districts are drawn intentionally to dilute black voting strength, black voters, whose candidate is never elected and to whom elected officials (relying on the predictable racial patterns in voting) may be extremely unresponsive, may make some difference in determining precisely who is elected simply by turning out and voting.

To take the extreme example, imagine a jurisdiction in which voting is completely racially polarized, and in which the African American population is overwhelmingly Democratic. Imagine further that every district has a white majority and that in virtually every election,

---

[256] This fact has led Justice Thomas to argue that "*any* reapportionment plan" can be invalidated under the Court's vote dilution jurisprudence, "either because it did not include enough majority-minority districts or because it did (and thereby diluted the minority vote in the remaining districts)." Reno v. Bossier Parish Sch. Bd. (*Bossier Parish I*), 520 U.S. 471, 491 (1997) (Thomas, J., concurring). Because the Court in *Gingles* provided a definition of "dilution" under section 2 and a roadmap for assessing the minority group's "undiluted" voting strength, this argument is not correct. It is, however, true that in the face of racially polarized voting no districting plan will be ideal for the representation of members of the minority group.

the black-supported candidate (say someone who is black) loses to a white-supported candidate (say someone who is white) in the Democratic primary. The general election is then between two white-supported candidates. Depending on numbers, the Democrat *may* only be capable of election with black support.

If he needs black support for election, the Democrat must at a minimum not act in a way that completely discourages all black voter turnout. This may require him to do nothing: simply preventing the Republican's election may encourage sufficient black turnout to ensure the Democrat's election. Or it may prevent the Democrat from acting in some ways that are antithetical to the black community's core interests. This effect will be limited, perhaps by the candidate's own views, and certainly by the risk of losing the support of white voters who voted for him in the primary.

Black voting strength in such a circumstance will still be diluted—intentionally in the example I have given. The price of nondilutive districting (with dilution defined as it is in *Gingles*) would be the loss of this limited—but often in the real world significant—black influence over a larger number of seats. The increase of black population in one or two districts will require the decrease of that population in the surrounding districts.

The power of law to address social problems is limited, and because, in this case, law does not address the discriminatory act in the voting booth, the result of antidiscrimination law here is not a replication of a world without voting discrimination, but a second-best solution. Given racial polarization in voting, section 2's prohibition on vote dilution means that no group is denied its voice in electoral politics. But it does not eliminate the costs imposed by discriminatory behavior in the voting booth. The law does not, at least in an immediate way, prevent ballots from being cast on racial lines. It only blunts the effects of the individual voters' impulse to discriminate.[257] But so long as racial polarization persists, some deleterious racial effects are inevitable.

In the context of electoral districting, as long as votes are still cast in a racially polarized way, and as long as one racial group forms a minority, the most the law can do is make a choice for what it determines is the least among evils. As long as discrimination persists, the possibility of a tradeoff between fully effective votes in a smaller number of

[257] *See* Rubin, *supra* note 52, at 590-91 (making this same argument about the operation of laws against discrimination generally).

districts and some influence, however slight, in a larger number of districts will be inescapable. In terms of drawing electoral district lines, the only options are to alter the lines to prevent dilution or to leave the members of the racial minority group to be persistently defeated.

The second-best nature of nondilutive districting suggests, of course, that society's ultimate goal must be the eradication of racial polarization in voting, and that race-conscious districting must at most be a temporary way-station along that road. The problem of racial group representation will only disappear when race no longer correlates with patterns of voting. This correlation, however, reflects broader racial attitudes in society, attitudes that law alone cannot eradicate.

As an empirical matter, as with other antidiscrimination laws, the V.R.A. may, through its choice that a prohibition on minority vote dilution as defined in *Gingles* is the lesser of the two evils, help to break down patterns of discrimination. In the initial elections from districts that have been drawn to take race into account in order to comply with the command of section 2 of the V.R.A., blacks tend to be chosen in votes that, unsurprisingly in light of the racial polarization that justifies the district lines in the first place, go along racial lines. In at least some subsequent elections, however, black incumbents have been able to attract white voters who previously had not voted for a black candidate. For example, Mike Espy was elected from a black-majority district in 1986 as the first black congressman from Mississippi since Reconstruction, with only twelve percent of the white vote.[258] Two years later, he was re-elected with forty percent of the white vote.[259] This can presumably be attributed in large part to the effect on white voters of having seen that a black representative can be as effective as a white one.[260] This pattern has been repeated in the re-election of black incumbents even when their districts have been redrawn in light of *Shaw* to eliminate the black majorities that originally elected them.[261]

---

[258] *See* Issacharoff, *supra* note 44, at 1854-55 & n.105.

[259] Tom Kenworthy, *Pathfinder Turns Up a Landslide*, WASH. POST, Nov. 11, 1988, at A9.

[260] *See id.* (quoting Espy as saying, "You have to get in to serve so they recognize that with a black congressman the sun will come up tomorrow just like it did yesterday. . . . I've always said there was a Catch-22. You have to get in there to produce and in order to produce you have to get in.").

[261] *See, e.g.*, Catalina Camia, *Re-elected Blacks Defy the Pundits*, DALLAS MORNING NEWS, Nov. 17, 1996, at 1A, 20A (describing, inter alia, the 1996 re-election of African American Congresswoman Cynthia McKinney from a sixty-five percent white district in

Indeed, Abigail Thernstrom, a commentator who has criticized much of the race-conscious districting undertaken pursuant to the 1982 amendments to section 2 of the V.R.A., has observed that "where whites—and often blacks—regard skin color as a qualification for office (in part because no experience suggests otherwise), the election of blacks helps to break both white and black patterns of behavior."[262] Similarly, if the trajectory of politics among African Americans follows the pattern of other ethnic groups for whom obstacles to participation in electoral politics have been removed, the initial election of black candidates in racially polarized areas may be a step along the way to a time when the African Americans who live there no longer feel they must elect one of their own to be truly represented.

If racial polarization is broken down by the use of nondilutive districts, the percentage of minority voters needed in each district to ensure fully effective voting strength will diminish over time. In situations where the initial election and service of a black representative alters the willingness of white voters to cross over and vote for a black-supported candidate, there has been a reduction in the degree of racial polarization. Consequently, the number of black voters necessary in each district to combat the remaining racial polarization will be reduced.

In such a circumstance the previously drawn district line will no longer be necessary to prevent vote dilution, because vote dilution can be prevented by a district with a smaller percentage of black voters. A new district line that reflects the reduction in polarization will have to be drawn. Indeed, the effect of retaining so large a black population in a district in which polarization has begun to break down would be the same as if black voters had been "packed" into the district in the first place. This phenomenon may have been reflected, for example, in some of the results in the 1994 congressional mid-term elections, the second elections under the districts drawn after the 1990 census, in which black-majority districts sent black (Democratic) incumbents back to Congress, usually with well over sixty percent of the vote.[263]

Georgia).

[262] ABIGAIL THERNSTROM, WHOSE VOTES COUNT? 239 (1987).

[263] *See, e.g.*, BARONE & UJIFASA, *supra* note 179, at 25-26 (noting that in Alabama's Seventh Congressional District, the incumbent, African American Democratic Congressman Earl Hilliard, won in 1994 with seventy-seven percent of the vote, up from the seventy percent he obtained when he was initially elected in 1992). Of course, a court analyzing the outcome of an election in a district whose racial composition had been intentionally fixed in order to comply with the V.R.A. would have to take account of the quality of the opposing candidate. Part of the reason black incumbents in black-majority districts received supermajorities in the 1994 election may have been that the

The V.R.A. requires that states prevent dilution of minority votes. Under *Gingles*, this means that the state must utilize a system in which minority voters have an opportunity to elect the candidate of their choice despite polarized opposition from some or most of the white majority. It does not mean that minority voters must be given or maintained in "safe" districts if that opposition softens. The creation of such safe seats may unjustifiably drain black voters from surrounding districts, diminishing their influence on a statewide level.

Unlike the mechanisms used in some countries to protect ethnic minorities' rights to representation, the type of districting that may be required by section 2 of the V.R.A. does not treat racial interest groups as permanent.[264] In determining what is required by section 2 of the V.R.A., a jurisdiction or a reviewing court thus must pay careful attention to the actual degree of potential crossover voting revealed by previous election results. Failure to do so may result in a small number of districts that have unnecessarily large black populations, unjustifiably reducing the influence of black voters in surrounding districts.

Of course, whether racial polarization is broken down by districting that complies with section 2 of the Act is an empirical question that will be answered over time. Nothing in the drawing of nondilutive districts ensures this result. There is the possibility in a racially polarized jurisdiction that a person elected from a black-majority district will be as unresponsive to the needs of his white constituents as the persons elected from white-majority districts have sometimes been to their African American ones. But every district must have either a black or a white majority. In a racially polarized jurisdiction, the result of either choice may be to provide some voters in each district with an unresponsive elected official. In the face of racial polarization, it is not inherently better to have all or virtually all white-majority districts, rather than some percentage of black-majority ones. And, since the traditional system of dilutive majority-majority districts has done little to break down patterns of racial polarization in voting, there is little reason to think that drawing nondilutive districts will somehow be less effective at doing so.

---

most viable potential Republican candidates concluded that their chances of success were small enough that they chose not to run.

[264] The opposite can be seen, for example, in systems like Lebanon's, where the top government offices are permanently divided among the nation's religious factions, with the Presidency belonging to a Mennonite Christian, the office of Prime Minister to a Sunni Muslim, and the Speakership of the Parliament to a Shiite Muslim. *See* Wadie Said, *The Palestinians in Lebanon: The Rights of the Victims of the Palestinian-Israeli Peace Process*, 30 COLUM. HUM. RTS. L. REV. 315, 320 (1999) (describing this power-sharing agreement).

B. *The Supreme Court's Evaluation of Race-Conscious Districting*

With a clear understanding of the way in which race-conscious districting may be employed to combat vote dilution, we can turn now to the approach to race-conscious districting described by the Supreme Court in its *Shaw* line of decisions and the contesting approach offered by the dissenters in *Shaw I* and its progeny.

In *Shaw v. Reno* the Supreme Court held that, in at least some circumstances, electoral districts drawn on the basis of race must be subjected to strict scrutiny.[265] In a series of follow-on cases, the *Shaw* majority has struggled to explain what triggers strict scrutiny of race-conscious electoral districts and whether those districts can ever survive that strict scrutiny.[266]

At best, the *Shaw* majority has articulated a scheme that operates in a binary fashion, one that evaluates attempts to address discrimination in voting too harshly in most circumstances by imposing a form of strict scrutiny that amounts to a rule of automatic invalidation, and that may (it at least suggests) evaluate such attempts too leniently in others, by using an utterly deferential rational basis test despite the costs associated with the use of race in this context.

At worst, the Court majority has laid, perhaps without even realizing it, the groundwork for the imposition of a uniform policy that will lead to the invalidation of *all* race-conscious districts, regardless of the circumstances leading to their adoption, and regardless of whether they present the risks and costs that appear to animate the Court's concern about race-conscious districts in the first place. In order to prevent the collision of this new requirement of equal protection with that of the civil rights statute that addresses discrmination in this area, the Court has begun to weaken the requirements of the V.R.A., so that it will not be construed to require what *Shaw*, so far implicitly, seems to prohibit.

By contrast, the approach put forward by the dissenting opinions in *Shaw I* and its progeny fails to recognize some of the harms that may be wrought by the use of race in districting, even where it is employed to combat discrimination. At least as articulated thus far, the approach advocates a deferential rational basis scrutiny in the absence of a showing of racial vote dilution.[267] This approach ignores some of the real risks that accompany any governmental use of race. It is not

---

[265] 509 U.S. 630 (1993).

[266] *See infra* text accompanying notes 268-372.

[267] *See infra* text accompanying notes 377-89.

appropriately tailored to ensure that race-conscious districts do, indeed, serve purposes that transcend the harm they may cause.

As I will describe, however, *Shaw I* and the decisions that have followed it, particularly *Miller v. Johnson* and *Bush v. Vera*, have left the doctrine in this area confused and incoherent. In particular, the Court has been unable adequately to articulate the significance to its analysis of the bizarre shapes of the majority-minority electoral districts it has evaluated in these cases. As a consequence, the cause of action articulated in *Shaw* and its progeny is ripe for reconceptualization in a way that would render it both consistent with principles of equality, and responsive to the concerns that seem to animate the Court's decisions in this area.

1. The *Shaw* Approach

The drawing of electoral districts, like the drawing of school attendance zones, has the characteristics of geographical districting described in Part I. However it is achieved, it places each person (or, more precisely, each address at which a person may live) within one or another district. However a district is drawn, each person will find himself or herself assigned to a district. Each eligible voter will be able to cast a ballot for a representative. After the election, every resident of the district will be represented by the winning candidate.

The nature of assignment to districts does not require that the districts be constructed on the basis of any substantive criteria. There is no natural or neutral pattern of drawing district lines. Because of the one person-one vote requirement that districts be equipopulous,[268]

---

[268] *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964) (holding that under the Equal Protection Clause seats in both houses of a bicameral state legislature must be apportioned on a population basis); Wesberry v. Sanders, 376 U.S. 1, 18 (1964) (holding the same for congressional districts in order for each individual's vote to have equal worth under Article I, section 2 of the Constitution). With respect to congressional districts, even de minimis population deviations are not permissible without justification if they are avoidable. *See, e.g.*, Karcher v. Daggett, 462 U.S. 725, 730, 734 (1983) ("[The] 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the state must justify each variance, no matter how small." (citations omitted)). By contrast, state legislative districts with small population deviations "in the vicinity of 10 percent" have been held presumptively valid. SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 145 (1998); *see also* Gaffney v. Cummings, 412 U.S. 735, 748-49 (1973) (discussing "insignificant population variations"); Mahan v. Howell, 410 U.S. 315, 320-25 (1973) (acknowledging that the "more stringent standards" applicable to congressional districting are not applicable to state legislative districting). The Court in *Mahan* upheld a 16.4% population deviation, noting, however,

when one superimposes a districting plan upon a political jurisdiction, it is generally impossible to avoid splitting some communities or political subdivisions. There are also a multiplicity of different ways to combine subdivisions and communities even when they are not split.

No person has an entitlement to placement within any particular district. Nor does any person have an entitlement to be placed in a district with other like-minded individuals or in a districting plan that aggregates like-minded individuals overall in any particular way.

Consequently, the harm wrought by adoption of a plan of electoral districting that takes race into account will be less than the harm that may be caused by government uses of race that may determine, for example, who is given a particular job or a place in a college or graduate school class. Although the precise mechanisms by which electoral districts operate differ somewhat from the mechanisms by which school attendance zones operate, and while, as a consequence, districting plans may impose unique harms on persons placed in one or another district, race-conscious electoral districting thus falls roughly into Category Three, the third category of race-conscious action described in Part I.[269]

Nonetheless, in the series of decisions that began with *Shaw I* and continued through *Miller v. Johnson*,[270] *Bush v. Vera*,[271] and *Shaw v. Hunt* (*Shaw II*),[272] the Supreme Court has subjected to strict scrutiny and invalidated every districting plan to come before it in a fully briefed and argued case in which race was used in drawing district lines, and its controlling opinions indicate that it will continue to do so—at least when the resulting districts are bizarrely shaped and fail to employ what the court has called "traditional districting principles."[273] The Court has failed to examine the particular harms caused by the government's use of race in each of the cases before it to determine what "strict" scrutiny should allow. Nor has its approach been able adequately to account for the possible need for race-conscious government action to address voting discrimination in the form of racially polarized bloc voting.

Invalidation of these race-conscious districts has put states in a bind. They are required by the principles of equal opportunity con-

---

that it "may well approach tolerable limits." *Id.* at 329.

[269] *See supra* text accompanying notes 96-113.

[270] 515 U.S. 900 (1995).

[271] 517 U.S. 952 (1996).

[272] 517 U.S. 899 (1996).

[273] Bush v. Vera, 517 U.S. at 994 (O'Connor, J., concurring).

tained in the V.R.A. to draw such districts, yet they may be prohibited by the Equal Protection Clause as construed in *Shaw I* from doing just that. Confronted with this result of the interplay between *Shaw I* and the antidiscrimination command of the V.R.A., the Court has begun to relax the antidiscrimination requirement of the Act. Indeed, in its latest decision on voting rights, the Court held in *Reno v. Bossier Parish School Board* (*Bossier Parish II*) that neither the Attorney General nor the District Court for the District of Columbia may deny preclearance under section 5 of the Act to a change adopted with an intent to discriminate, but no intent to "retrogress."[274] That is, the Court has issued the remarkable holding that preclearance under the Voting Rights Act must be granted to laws that are adopted with discriminatory intent, so long as the intent behind them was to leave the members of the racial minority group against whom they are aimed in no worse a position than they were under the previous law! The result will be that such districting plans will be permitted to stand—so no race-conscious alternative plans will have to be drawn to replace them.

The animating force behind the Court's trend toward weakening the V.R.A. seems to be rigid opposition to race-conscious districts. But the Equal Protection Clause fails to serve its fundamental purpose when what is required under the principle of equality is prohibited by the Constitution. The very nature of the strict scrutiny inquiry under *Shaw I* must be tailored to meet the Court's legitimate concerns if an undifferentiated constitutional approach to the use of race by government is not to hobble both the state and federal governments as they attempt to redress problems of persistent discrimination.

a. Shaw I, Miller, *and* Bush

The most important cases in the *Shaw* line—*Shaw I*, which arose in North Carolina, *Miller*, which arose in Georgia, and *Bush*, which arose in Texas—all grew out of the 1990 decennial congressional reapportionment. The results of the 1990 census revealed that, as a result of population increases, North Carolina and Georgia were each entitled to one additional congressional seat, and Texas was entitled to three.

Statewide, 20% of North Carolina's voting age population and 22% of its total population are black.[275] Nonetheless, at the time the

[274] 120 S. Ct. 866, 878 (2000).

[275] *See* Shaw v. Reno (*Shaw I*), 509 U.S. 630, 634 (1993) (describing the voting age population); BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1990 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS OF THE UNITED STATES 522 (1990) (breaking down population by race).

districting plan at issue in *Shaw* was drawn, no North Carolina congressional district had sent an African American to Congress since the end of Reconstruction.[276]

Georgia's population is 27% black.[277] The State sent to Washington its first black congressman in 101 years in 1972 when Andrew Young was elected from a 40% black district in Atlanta, the Fifth Congressional District. After Young's retirement, a white Democrat, Wyche Fowler, was elected from the Fifth District in a racially polarized election.[278] The district was redrawn to include a black majority following the 1981 reapportionment after the United States District Court for the District of Columbia refused to preclear, under section 5 of the V.R.A., an initial plan that did not create such a district, finding that that plan served a discriminatory purpose.[279] Fowler was reelected in 1982 and 1984 when he faced no opposition from "the first rank of black politicians in Atlanta."[280] When Fowler retired in 1986, John Lewis, a black politician, replaced him. At the time the districting plan at issue in *Miller* was drawn, Lewis represented the only black-majority district in Georgia and was the state's only black representative.

In both *Shaw* and *Miller*, the State adopted a redistricting plan that created one more black-majority district than had previously existed. North Carolina—now entitled to twelve congressional districts—created its first black-majority district, and Georgia—now entitled to eleven districts—added a second. Under the original North Carolina plan, black voters thus formed a majority of the voting age population in only 8.33% of the congressional districts. Under the original Georgia plan, black voters formed a majority of the voting age population in 18.18% of the congressional districts.

Both plans were submitted to the Attorney General of the United States for preclearance under section 5 of the Act.[281] As described

---

[276] *See Shaw I*, 509 U.S. at 659 (White, J., dissenting).

[277] *See* BUREAU OF THE CENSUS, *supra* note 275, at 519 (breaking down population by race).

[278] *See* POLITICS IN AMERICA 375 (Alan Ehrenhalt ed., 1985).

[279] *See* Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982) (noting that the state was unable to demonstrate that the proposal was not discriminatory in either purpose or effect).

[280] POLITICS IN AMERICA, *supra* note 278, at 375.

[281] The entire state of Georgia is covered by section 5 of the V.R.A., *see* Abrams v. Johnson, 521 U.S. 74, 79-80 (1997), as are forty of North Carolina's one hundred counties, *see* Shaw v. Reno, 509 U.S. 630, 634 (1993). Although only forty of North Carolina's one hundred counties are thus subject to the statute's preclearance requirements, none of the parties to the lawsuit in *Shaw* contended that the statewide

above, each state had the burden of demonstrating before the Attorney General that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color" or membership in a language minority group.[282] Under *Beer*'s non-retrogression standard, given the degree of racial polarization in the two states, the Attorney General could not have concluded that these plans had the "effect" of discriminating on the basis of race within the meaning of section 5. They did not have a retrogressive effect, even though, in the presence of racial polarization, they would have had a discriminatory, "dilutive" effect under section 2 of the V.R.A.

Nonetheless, since the case arose before the Court's decision in *Bossier Parish II*,[283] the Attorney General remained free to conclude that the *purpose* behind their adoption was discriminatory even if it was not a purpose to *worsen* the position of African Americans, but only to leave a pre-existing discriminatory effect in place. And, in each case, exercising his power under section 5 of the V.R.A., the Attorney General interposed an objection to the plan on the ground that it had the purpose of discriminating against black voters by minimizing black voting strength.

In the letter conveying the denial of preclearance to North Carolina's plan, John Dunne, the Assistant Attorney General for Civil Rights in the Bush Administration's Justice Department, wrote that a second majority-black district could have been drawn "in the south-central to southeastern part of the state."[284] In his letter concerning

---

plan was not subject to those requirements. *See* 509 U.S. at 634.

[282] 42 U.S.C. § 1973c (1994); *see supra* text accompanying notes 196-97; *see also* Beer v. United States, 425 U.S. 130 (1976).

[283] As described above, in *Reno v. Bossier Parish School District* (*Bossier Parish II*), 120 S. Ct. 866 (2000), a closely divided Court concluded that a discriminatory purpose could not give rise to a violation of section 5 of the V.R.A. unless it was a purpose actually to retrogress—that is, to worsen the position of minority voters.

[284] In his objection letter Dunne wrote that:

> [T]he proposed . . . district boundary lines in the south-central to southeastern part of the state appear to minimize minority voting strength given the significant minority population in this area of the state. In general, it appears that the state chose not to give effect to black and Native American voting strength in this area. . . .
>
> We also note that the state was well aware of the significant interest on the part of the minority community in creating a second majority-minority congressional district. . . . For the south-central to southeast area, there were several plans drawn providing for a second majority-minority congressional district, including at least one alternative presented to the legislature. . . . These alternatives, and other variations identified in our analysis, appear to provide the minority community with an opportunity to elect a second member of

the Georgia reapportionment, he wrote that the proposed plan did not recognize concentrations of minority voters in the southwest area of the state.[285]

Under the statute, a state aggrieved by a failure of the Attorney General to preclear a submitted change still may bring an action in the district court for judicial preclearance. Neither state took this course. Rather, the legislature in each state responded by adopting a new plan. North Carolina created a second black-majority district. Georgia adopted a second plan that included two black-majority districts, but again, the Attorney General denied preclearance on the ground that the state had not proven the absence of a discriminatory effect. Georgia then adopted a third districting plan, the one at issue in *Miller*, which contained a third black-majority district.

In the second majority-minority district created by the new North Carolina plan (the Twelfth District), African Americans made up 53.34% of the voting age population and 54.71% of the population overall.[286] The Twelfth District was not in the southeastern part of the state to which the Assistant Attorney General had referred in his objection letter. Rather, it described "a thin band, sometimes no wider than Interstate Highway 85, some 160 miles long, snaking diagonally across piedmont North Carolina from Durham to Gastonia."[287] This configuration lacked compactness and split other pre-existing political units—precincts, counties, and towns—among two, or even three,

---

> congress of their choice to office, but, despite this fact, such configuration for a second majority-minority congressional district was dismissed for what appear[] to be pretextual reasons. Indeed, some commentators have alleged that the state's decision to place the concentrations of minority voters in the southern part of the state into white majority districts attempts to ensure the election of white incumbents while minimizing minority electoral strength. Such submergence will have the expected result of "minimiz[ing] or cancel[ing] out the voting strength of [black and Native American minority voters]." Although invited to do so, the state has yet to provide convincing evidence to the contrary.

Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, to Tiare B. Smiley, Special Deputy Attorney General (Dec. 18, 1991), *reprinted in* State Appellees' Brief at 16a-17a, Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. 1992) (No. 92-357) [hereinafter State Appellees' Brief] (citation omitted).

[285] *See* Johnson v. Miller, 864 F. Supp. 1354, 1364 (S.D. Ga. 1994) ("Mr. Dunne also observed that, while the submitted plan properly utilized black voting potential in Atlanta and east-central Georgia, it did not 'recognize' concentrations of minorities in the south-west region of the state.").

[286] *See Shaw*, 509 U.S. at 671 n.7 (White, J., dissenting) (describing the total population); State Appellees' Brief, *supra* note 284, at 24a (describing the voting age population).

[287] Shaw v. Barr, 808 F. Supp. 461, 464 (E.D.N.C. 1992).

congressional districts. Nonetheless, when the North Carolina General Assembly submitted the new plan to Attorney General Barr, he interposed no objection to it, but, rather, chose to preclear it. Under the new plan, North Carolina in 1992 sent its first two black representatives to Congress since the election of 1898.

The third black-majority district contained in Georgia's new plan was the Second District. This new plan altered the second Georgia plan by adding a black population center in Macon, originally included in the planned black-majority Eleventh District, to the Second District, giving it a black majority. The Eleventh District was then extended eastward to Savannah to include an African American population center there. Consequently, it retained its majority-black character. The shape of the resulting Eleventh District was not especially bizarre by mathematical standards,[288] although it included some bizarre tentacle-like appendages (obviously created with the aid of a computer) to include certain black populations in the District. Under this third plan, Georgia's Second, Fifth, and Eleventh Districts had voting age populations that were 52.33% black, 57.47% black, and 60.36% black, respectively.[289] This plan, too, was precleared by the Attorney General. Under it, two additional black representatives from Georgia were elected to Congress in 1992.

The districts at issue in *Bush* had a less tortured genesis:

> In response [to the 1990 census], and with a view to complying with the Voting Rights Act of 1965 as amended, the Texas Legislature promulgated a redistricting plan that, among other things, created District 30, a new majority-African-American district in Dallas County; created District 29, a new majority-Hispanic district in and around Houston in Harris County; and reconfigured District 18, which is adjacent to District 29, to make it a majority-African-American district. The Department of Justice precleared that plan under VRA §5 in 1991, and it was used in the 1992 congressional elections.[290]

A study by Professors Pildes and Niemi concluded that the three districts at issue in *Bush* were among the twenty-eight least compact and regular congressional districts in the nation.[291]

---

[288] *See* 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, 565-66 & tbl. 3 (1993) (identifying the most bizarrely shaped congressional districts employed in the 1992 election).

[289] *See* Johnson v. Miller, 864 F. Supp. at 1366 n.12. The total populations of these districts were 56.63% black, 62.27% black, and 64.07% black, respectively. *See id.*

[290] Bush v. Vera, 517 U.S. 952, 957 (1996) (plurality opinion) (citations omitted).

[291] *See* Pildes & Niemi, *supra* note 288, at 565-66 & tbl. 3.

i. *Shaw I*

The first of these cases to come before the Court was of course *Shaw I*. The V.R.A. specifies that the Attorney General's decision to preclear a change shall not "bar a subsequent action to enjoin [its] enforcement."[292] No minority voter in North Carolina, however, sought to challenge the State's plan. Suit was brought, rather, by five white voters from Durham County, which was divided between the white-majority Second District and the newly created black-majority Twelfth District. Under the plan, two of the plaintiffs were to vote in the Twelfth District and three in the Second.[293]

The complaint named among the defendants various North Carolina state officials and the State Board of Elections,[294] and alleged a laundry list of constitutional infirmities in the adoption of the new plan. The complaint alleged that the creation of two districts, "each of which was designed and intended to contain a majority of black persons and black voters[,] . . . violated important rights possessed by the plaintiffs as citizens, residents and registered voters in the State of North Carolina."[295] With respect to their claim under the Equal Protection Clause, the plaintiffs alleged that "[a]ny action by officers of the State of North Carolina which discriminates on the basis of race or color . . . denies the Plaintiffs and all other voters equal protection of the laws."[296] The complaint alleged that the plan created a "racially discriminatory voting process,"[297] and that the creation of two congressional districts in which "a majority of black voters was concentrated arbitrarily . . . was a decision made with the purpose . . . to create Congressional Districts along racial lines and to assure that black members of Congress would be elected from two Congressional Dis-

---

[292] 42 U.S.C. § 1973c (1994).

[293] *See* Shaw v. Reno, 509 U.S. 630, 637 (1993).

[294] Despite the fact that § 14(b) of the V.R.A. provides that the District Court for the District of Columbia has exclusive jurisdiction to enjoin actions of federal officials taken pursuant to the Act, *see* 42 U.S.C. § 1973*l*(b), the plaintiffs named as primary defendants the Attorney General and the Assistant Attorney General for the Civil Rights Division (the federal appellees). The Supreme Court ultimately held, however, that the District Court's dismissal of the claims against these federal appellees was proper. *Shaw*, 509 U.S. at 641 (1993).

[295] Complaint and Motion for Preliminary Injunction and for Temporary Restraining Order at ¶ 17, Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. 1992) (No. 92-202-CIV-5-BR) [hereinafter Complaint], *reprinted in* Jurisdictional Statement of Plaintiffs-Appellants, Shaw v. Reno, 509 U.S. 630, app. C at 81a (1993) (No. 92-357) [hereinafter Jurisdictional Statement].

[296] *Id.* at ¶ 36, *reprinted in* Jurisdictional Statement, *supra* note 295, app. C at 93a.

[297] *Id.*

tricts in which a majority of black voters were intentionally and purposefully concentrated."[298] Read liberally, the complaint, which did not mention the plaintiffs' race, appears to incorporate, with respect to the state defendants, an allegation that they "abridged the rights of the plaintiffs and all other citizens and registered voters of North Carolina whether black, white, native American, or others—to participate in a process for electing members of the House of Representatives which is color-blind."[299]

A divided three-judge district court dismissed for failure to state a claim.[300] The Supreme Court, however, noted probable jurisdiction, and then, by a vote of 5-4, reversed.

After describing the facts, the Court, in an opinion written by Justice O'Connor, recounted a brief history of discrimination against African Americans with respect to voting in the United States. The Court acknowledged that the interests of a cohesive bloc of minority voters could be thwarted in ways more complex than simple denial of equal access to the polls:

> [T]his Court [has] recognized that "the right to vote can be affected by a *dilution* of voting power as well as by an absolute prohibition on casting a ballot." *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) (emphasis added). Where members of a racial minority group vote as a cohesive unit, practices such as multimember or at-large electoral systems can reduce or nullify minority voters' ability, as a group, "to elect the candidate of their choice." *Ibid.* Accordingly, the Court [has] held that such schemes violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength. *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 616-617 (1982); *White v. Regester*, 412 U.S. 755, 765-766 (1973). Congress, too, responded to the problem of vote dilution. In 1982, it amended § 2 of the Voting Rights Act to prohibit legislation that *results* in the dilution of a minority group's voting strength, regardless of the legislature's intent. 42 U.S.C. § 1973.[301]

Rather than focussing on whether the districting plan at issue was responsive to precisely such a situation, however, the Court observed, in apparent reference to the shape of the proposed districts, that "[i]t

---

[298] Amendment to Complaint at ¶ 36a, Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. 1992) (No. 92-202-CIV-5-BR), *reprinted in* Jurisdictional Statement, *supra* note 295, app. D at 102a.

[299] Complaint, *supra* note 295, at ¶ 29, *reprinted in* Jurisdictional Statement, *supra* note 295, app. C at 89a-90a.

[300] *See* Shaw v. Barr, 808 F. Supp. 461 (1992) (E.D.N.C. 1992), *rev'd sub nom.* Shaw v. Reno, 509 U.S. 630 (1993).

[301] 509 U.S. at 640-41.

is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past,"[302] and permitted the plaintiffs to go forward on their claim that the plan at issue itself amounted to an "unconstitutional racial gerrymande[r]."[303]

The Court held that the plaintiffs had stated a claim upon which relief could be granted under the Equal Protection Clause, a claim that the electoral districting plan was "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."[304] The Court ruled that the districting plan could therefore be upheld only if it could survive strict scrutiny.[305] The Court reversed the judgment of the district court and remanded for a determination whether the districting plan was "narrowly tailored to further a compelling governmental interest."[306] Among the interests the lower court was instructed to consider on remand was whether the districting scheme was justified by a compelling state interest in compliance with the federal voting rights statute.[307]

The Court made clear that the claim it recognized was not a claim that white voting strength was diminished on the basis of race. Rather, the Court purported to recognize "the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification."[308] This was the language the Court used, despite the fact that the North Carolina districts were "among the most integrated districts in the country."[309]

The Court—after describing North Carolina's redistricting legislation as "race-neutral on its face"[310]—did suggest (despite the state's inescapable concession that it had used race to draw the district lines)

---

[302] *Id.* at 641.

[303] *Id.*

[304] *Id.* at 642.

[305] *Id.* at 643-44.

[306] *Id.* at 658.

[307] *Id.* at 653-57.

[308] *Id.* at 652.

[309] Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 94.

[310] 509 U.S. at 643. The Court observed at one point "[a] reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses." *Id.* at 646.

that the trigger for strict scrutiny in the case before it was not merely the conscious use of race by government, but the presence of a district whose appearance was "so bizarre on its face that it is 'unexplainable on grounds other than race.'"[311] Although the Court stated—without distinguishing among them—that "[l]aws that explicitly distinguish between individuals on racial grounds fall within the core"[312] of the prohibition of the Equal Protection Clause, and that "[a]ccordingly, we have held that the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling state interest,"[313] the Court purported to limit its holding to districting plans it described as "bizarre," "highly irregular," or "irrational on [their] face," those drawn without regard for "traditional districting principles such as compactness, contiguity, and respect for political subdivisions."[314] It thereby reserved the question "whether 'the intentional creation of majority-minority districts, without more' always gives rise to an equal protection claim."[315]

After its initial observation about the shape of the districts created by the plan at issue, the Court concluded that "we believe that reapportionment is one area in which appearances do matter."[316] Without exploring the possibility that black voters in North Carolina *in fact* had cohesive interests which, without race-conscious districting, would find no representation in light of antithetical bloc voting by white voters, the Court stated that:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception 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. We have rejected such perceptions elsewhere as impermissible racial stereotypes.[317]

---

[311] *Id.* at 644 (quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

[312] *Id.* at 642.

[313] *Id.* at 643.

[314] *Id.* at 647.

[315] *Id.* at 649 (quoting *id.* at 668 (White, J., dissenting)).

[316] *Id.* at 647.

[317] *Id.*

The Court also concluded, without recognizing that in a racially polarized jurisdiction *every* district will further the interests of one or another group, that:

> The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.[318]

ii. *Miller v. Johnson*

The *Shaw* opinion raised more questions about this new "analytically distinct" cause of action than it answered. In the *Miller* decision, a divided Court attempted to explain further what it meant. That opinion purported to deal with both the relevance of district shape to a *Shaw* claim, as well as one of the binds in which districting authorities might find themselves after *Shaw*—specifically, when they might be required to use race in order to avoid retrogression under section 5 of the V.R.A., but could be prohibited from doing so under a reading of *Shaw* that applied to all acts of race-conscious districting. The results, however, were far from satisfactory.

In *Miller*, as in *Shaw*, following the adoption and preclearance of the Georgia plan, no black voter brought a vote dilution claim. Instead five white voters who lived in the new black-majority Eleventh District brought suit under *Shaw*. A divided three-judge district court struck the districting plan down.[319] The Supreme Court, in an opinion by Justice Kennedy, affirmed.[320]

The Court purported to hold that a district need not, in fact, have a bizarre shape in order to violate the Fourteenth Amendment under *Shaw*:

> 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. The logical implication . . . is that parties may rely on evidence other than bizarreness to es-

---

[318] *Id.* at 648.

[319] Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994) (per curiam).

[320] Miller v. Johnson, 515 U.S. 900 (1995).

tablish race-based districting.[321]

The gravamen of a *Shaw* claim, the *Miller* Court explained:

> is that the State has used race as a basis for separating voters into districts. Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches and schools, so did we recognize in *Shaw* that it may not separate its citizens into different voting districts on the basis of race.[322]

The Court purported to hold that the *assignment* of voters to electoral districts on the basis of race—apparently regardless of the racial composition of the resulting districts—was always to be subjected to strict scrutiny.[323] And the case of *United States v. Hays*, decided the same day as *Miller*, makes clear that, wherever it is available, the gravamen of the *Shaw* cause of action is the very classification by race, regardless of the *particular* race of the putative plaintiff.[324] In *Hays*, the Court held that an individual does not have standing to challenge a districting plan simply because he or she lives in a state with districts that have been drawn on racial grounds. It further held, however, that "[a]ny citizen able to demonstrate that he or she, personally" has been classified according to race, that is, that he or she "resides in a racially gerrymandered district," does have standing to challenge the districting plan under *Shaw*.[325]

Despite saying that district shape is not an essential part of a *Shaw* claim, in language that clouded its holding on the significance of bizarre shape, the Court in *Miller* went on to say that, because the inevitable awareness of race on the part of districting authorities would render proof of racial "motivat[ion]" difficult,[326] to succeed in a *Shaw* claim a plaintiff would have to show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff *must* prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations."[327]

Again without addressing the possibility that districts might be

---

[321] *Id.* at 913.

[322] *Id.* at 911 (citations omitted).

[323] *See id.* at 915 (stating that "assignment of voters on the basis of race" must be subjected to "our strictest scrutiny").

[324] 515 U.S. 737, 744 (1995).

[325] *Id.* at 744-45.

[326] *Miller*, 515 U.S. at 916.

[327] *Id.* (emphasis added).

drawn on racial grounds in a legitimate effort to prevent minority vote dilution, that is, that taking race into account for this reason might be necessary because otherwise the voices of members of the minority racial group would *in fact* be submerged in light of the racial polarization of voters within a particular jurisdiction, the Court justified its position that all race-conscious districting was subject to strict scrutiny by saying that:

> When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, "think alike, share the same political interests, and will prefer the same candidates at the polls." 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."[328]

The Court did state that "[a] State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests," but it ignored the possibility that members of one racial group might share political interests in the way they do in jurisdictions where there is racially polarized bloc voting.[329] Quoting the district court, the Court stated that "[t]he evidence was compelling 'that there are no tangible "communities of interest" spanning the hundreds of miles of the Eleventh District.'"[330] But the passage in the district court opinion cited by the Court spoke only of "compelling evidence of economic conditions, educational backgrounds, media concentrations, commuting habits, and other aspects of life in central and southeast Georgia," that supported the conclusion that there were no communities of interest of those kinds shared by the residents of the district.[331] The district court also found, as it had to, that "some degree of vote polarization exists,"[332] a finding the Supreme Court majority simply ignored.

The Court had little difficulty in concluding that race was the predominant factor leading to the adoption of the Eleventh Congres-

---

[328] *Id.* at 911-12 (citations omitted).

[329] *Id.* at 919; *cf.* Abrams v. Johnson, 521 U.S. 74, 111-12 (Breyer, J., dissenting) (discussing the possibility of common interests being shared by rural and urban African American voters).

[330] *Miller*, 515 U.S. at 919.

[331] Johnson v. Miller, 864 F. Supp. 1354, 1389-90 (S.D. Ga. 1994) (three-judge court), *aff'd*, 515 U.S. 900 (1995).

[332] *Id.* at 1390.

sional District.[333] The state had conceded, as the history of the adoption of the final Georgia Plan in response to the Attorney General's denial of preclearance in any event made clear, that "Georgia's eleventh is the product of a desire by the General Assembly to create a majority black district."[334] Whatever hesitation the *Shaw* Court had had about relying on this fact—present in almost every similar case—was evidently overcome.

Having found race the "predominant factor" in Georgia's districting plan, the Court applied strict scrutiny. Without acknowledging that race must sometimes be used in order to avoid the discriminatory purpose or effect prohibited by section 5 of the V.R.A., which is precisely why a districting authority would use race in order to obtain preclearance, the Court concluded that the district at issue did not serve the purpose of "remedy[ing] past discrimination," since "the State's true interest . . . was creating a third majority-black district to satisfy the Justice Department's preclearance demands."[335] The Court did not explore the fact that the Justice Department's preclearance demands, if employed properly, might have been imposed *only* to prevent adoption of a dilutive plan drawn with a discriminatory purpose.

The Court left open the question "[w]hether or not in some cases compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination."[336] It concluded, however, that compliance with the Act could not justify the districting plan at issue, because the districting plan was not required under section 5 of the Act.[337]

Pulling out the heavy guns—*United States v. Nixon*,[338] *Marbury v. Madison*,[339] *Cooper v. Aaron*[340]—the Court explained that it retained an independent obligation to evaluate the propriety of a state's use of race even when the Justice Department exercising its section 5 power has concluded that that use of race is compelled by the V.R.A.[341] The Court's reasoning here was correct as far as it went. The statute gives the state exclusive standing to challenge an administrative denial of

---

[333] *See Miller*, 515 U.S. at 921.

[334] Brief of Appellants Miller, et al. at 30, *Miller* (No. 94-631).

[335] *Miller*, 515 U.S. at 920-21.

[336] *Id.* at 921.

[337] *See id.*

[338] 418 U.S. 683, 704 (1974).

[339] 5 U.S. (1 Cranch) 137, 177 (1803).

[340] 358 U.S. 1, 18 (1958).

[341] *Miller*, 515 U.S. at 923.

preclearance by seeking de novo review in an action in the District Court for the District of Columbia. Furthermore, a decision by the Attorney General not to interpose an objection is not subject to judicial review.[342] Nonetheless, if the Attorney General refuses to preclear a plan, and the state fails to challenge that action but adopts a new plan that then is precleared, a citizen aggrieved by the new plan must have standing directly under the Constitution (and, for that matter, under section 2 of the Act) to challenge it.

The basis, however, for the Court's conclusion that section 5 did not require the denial of preclearance in this case to any districting plan that failed to create a third black-majority district was incomprehensible. First the Court concluded—again, correctly—that preclearance could not have been denied to any and all such plans merely on the basis that the state had failed to prove an absence of any discriminatory *effect.* The Court concluded that Georgia's original, dilutive plans that contained two black-majority districts met the *Beer* nonretrogression standard, "increas[ing] the number of majority-black districts from 1 out of 10 (10%) to 2 out of 11 (18.18%)."[343] In a racially polarized jurisdiction that, like Georgia, is 27% black, this would have been enough to prevent the only discriminatory effect with which section 5 is concerned after *Beer*, "retrogression."[344]

The Court then held that the Justice Department incorrectly concluded that the state had not borne its burden of proving an absence of discriminatory *intent* in its initial plans even though those plans would have had a discriminatory effect. The Court observed that the district court had found no discriminatory intent in the initial plans and concluded that "[t]he State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible . . . cannot provide any basis under § 5 for the Justice Department's objection."[345] The basis for this statement appears to have been a conclusion that the Justice Department was engaged in a "policy of maximizing majority-black districts," and that failure to "create majority-minority districts wherever possible" could not provide evidence of an intent to discriminate.[346]

If the Justice Department had, indeed, required maximization of

---

[342] *See* Morris v. Gressette, 432 U.S. 491, 499-507 (1977) (explaining that "judicial review of the Attorney General's actions . . . is necessarily precluded").

[343] *Miller*, 515 U.S. at 923.

[344] *Id.*

[345] *Id.* at 924.

[346] *Id.* at 924-25.

majority-black districts, this would make sense. As the Court suggested in its V.R.A. decision in *Johnson v. DeGrandy*, failure to maximize is not evidence of vote dilution.[347] But the Georgia Plan that was precleared did not *maximize* the number of black-majority districts, it created a roughly *proportional* number of them: three of eleven (27.27%) in a state whose population is approximately 27% black. (In fact, by distributing almost all of Georgia's African Americans into black-majority districts, the state could have created as many as five black-majority districts.)

The failure even to notice the difference suggests a fundamental problem in the Court's approach. Whether the state's failure to create a roughly proportional number of majority-minority districts could have justified a decision not to preclear at a time when any intent to discriminate was thought a proper basis for denial of preclearance under section 5 depended on the circumstances in Georgia: Was a plan with only two such districts chosen with an intent to discriminate? The Supreme Court failed even to reach that question.

Through its failure to distinguish "maximization" from "proportionality," the Court in *Miller* held (at least for purposes of *that* case) that section 5 could not require the creation of a proportional number of black-majority districts. It is not clear what construction of section 5 the Court rejected in *Miller*. Although it described the two-black-majority-district plan as "ameliorative"[348]—which implies that failure to draw a second black-majority district would have been retrogressive, and that preclearance could, in *those* circumstances, have been denied until the state adopted a plan with two intentionally drawn black-majority districts—the Court also said that the Justice Department had misread section 5 by construing it to contain an "implicit command that States engage in presumptively unconstitutional race-based districting."[349] It said that the Justice Department's construction of the Act raised sufficiently troubling constitutional questions under the Fourteenth Amendment that it had to be rejected.[350]

Whether the Court would really object to any reading of section 5 that would in any circumstances require the use of race to address voting discrimination is not clear. Yet whether the objection put forward

---

[347] *See* 512 U.S. 997, 1016-17 (1994) (describing the way in which "failure to maximize," that is, to give a minority group "power . . . above its numerical strength," does not indicate the presence of vote dilution).

[348] *Miller*, 515 U.S. at 923.

[349] *Id.* at 927.

[350] *Id.*

in *Miller* is read broadly or narrowly its articulation suggests one way in which a one-size-fits-all approach, in the end, could require abandonment of some of the most important tools that have been used to address discrimination in voting.

Miller holds that section 5 did not require the use of "presumptively unconstitutional" race-based districting in that case. This could be read narrowly. The context of this statement suggests that "presumptively unconstitutional race-based districting" refers only to race-based districting for purposes of *maximization* of black-majority districts. Indeed, the Court said:

> [W]e recognized in *Beer* that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." The Justice Department's maximization policy seems quite far removed from this purpose.[351]

But a broader reading of the limiting construction put on section 5 is possible. *Miller* could be read to suggest that preclearance may not be denied if the denial would require subsequent race-based action by the districting authority. Of course, this would be at variance with the Court's implicit recognition that race-based districting to avoid retrogression may well be required to satisfy the effect prong of section 5 preclearance scrutiny. Perhaps more significant even than the Court's failure to explain its holding was its apparent failure to see that it cannot both praise "ameliorative" adoption of non-retrogressive districting plans and condemn all those districting plans that intentionally use race.

In any event, the Court in *Miller* clearly chose to resolve the tension between the V.R.A. and the cause of action recognized in *Shaw* not by permitting race-conscious action to combat discrimination but by weakening the requirements of section 5 of the V.R.A., at least as they were being applied in the case before it. And, as described above, with the recent decision in *Bossier Parish II*,[352] the Court has taken another step toward dismantling the section 5 tools for preventing discrimination that may require the creation of majority-minority electoral districts.

The strictness of the approach to race-conscious districting described in *Miller* and its uniform applicability to all race-conscious districting was undermined to some extent by a concurring opinion filed

---

[351] *Id.* at 926 (citation omitted).

[352] *See supra* text accompanying note 274.

by Justice O'Connor. As the weakest of the five votes in the majority in *Shaw I* and all the cases to follow it so far, Justice O'Connor's voice on this matter—as on so many matters in American constitutional law at the present moment—is the controlling one. Despite joining the Court's *Miller* opinion, she seemed to disagree with the scope of the *Shaw* cause of action suggested by the majority. She wrote that "[t]o invoke strict scrutiny, a plaintiff must show that the State has relied on race *in substantial disregard of customary and traditional districting practices.* Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind."[353]

This is closer to what the Court seemed to be saying in Justice O'Connor's own majority opinion in *Shaw I,* that strict scrutiny was triggered by the use of race in a particularly unusual manner. It suggests that strict scrutiny might not be triggered simply by the use of race as the predominant motivating factor in districting, but only by its use to the exclusion of traditional districting practices. This sense is further reinforced by Justice O'Connor's statement in *Miller* that:

> Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so *even though race may well have been considered in the redistricting process.* But application of the Court's standard helps achieve *Shaw*'s basic objective of making extreme instances of gerrymandering subject to meaningful judicial review. I therefore join the Court's opinion.[354]

iii. *Bush v. Vera*

What *Miller* gave in terms of an apparent expansion of *Shaw I* scrutiny to all race-conscious districting was—again, a least apparently—taken away the following Term in a decision written by Justice O'Connor in *Bush v. Vera.*[355] That case addressed not only the significance of bizarre shape, but also the potential conflict between the command of *Shaw* and section 2 of the V.R.A. The results, however, were again less than satisfactory.

In *Bush,* the Court pulled back from the broad reading of *Shaw I* given in Justice Kennedy's opinion for the Court in *Miller.* In Justice O'Connor's opinion, in which Chief Justice Rehnquist and Justice

---

[353] *Miller,* 515 U.S. at 928 (O'Connor, J., concurring) (emphasis added).

[354] *Id.* at 928-29 (citations omitted) (emphasis added).

[355] 517 U.S. 952 (1996).

Kennedy joined, a plurality of the Court made clear that strict scrutiny only applies where "traditional race-neutral districting principles" are "subordinated . . . to racial considerations."[356] The plurality concluded that

> Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts. . . . For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were "subordinated" to race. By that we mean that race must be "*the predominant* factor motivating the legislature's [redistricting] decision."
> . . .
>
> . . . .
>
> . . . The Constitution does not mandate regularity of district shape, and the neglect of traditional districting criteria is merely necessary [to the application of strict scrutiny], not sufficient. For strict scrutiny to apply, traditional districting criteria must be *subordinated to race.*[357]

Although the plurality elsewhere did insist "that bizarreness is not necessary to trigger strict scrutiny,"[358] as a practical matter, the subordination of "traditional" districting criteria appears to mean only the creation of bizarrely shaped districts.

The Court did acknowledge that race and voting preference may correlate,[359] and it said that a political gerrymander that happens to coincide with race is not constitutionally suspect.[360] But it held that a classification that uses race "as a proxy for political characteristics" is "a racial stereotype requiring strict scrutiny."[361]

Having concluded that race did predominate in the drawing of the district lines before it, the plurality turned to the question whether the districts at issue could be justified by either "the interest in avoiding liability under the 'results' test of VRA § 2(b), the interest in remedying past and present racial discrimination, [or] the 'nonretrogression' principle of VRA § 5."[362] Its discussion focused primarily

---

[356] *Id.* at 958 (quoting Miller, 515 U.S. at 928 (O'Connor, J., concurring)).

[357] *Id.* at 958-59, 962 (quoting *Miller*, 515 U.S. at 916) (citations omitted).

[358] *Id.* at 980.

[359] *Id.* at 967 ("There was evidence that 97% of African-American voters in and around the city of Dallas vote Democrat.").

[360] *Id.* at 968 ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify . . . regardless of [the State's] awareness of [the districting plan's] racial implications . . . .").

[361] *Id.*

[362] *Id.* at 976.

upon the first of these interests.

The plurality "assume[d]"—but, more importantly, in an unusual (and, again, ultimately controlling) opinion concurring in her own plurality opinion, Justice O'Connor *concluded*—that "compliance with the results test [of section 2], as interpreted by our precedents, can be a compelling state interest."[363] The plurality purported to hold that districts drawn to comply with section 2 could be sustained under the strict scrutiny standard articulated in *Shaw I*:

> [T]he "narrow tailoring" requirement of strict scrutiny allows the States a limited degree of leeway in furthering such interests. If the State has a "strong basis in evidence," *Shaw I*, 509 U.S. at 656 (internal quotation marks omitted), for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2, and the districting that is based on race "substantially addresses the § 2 violation," *Shaw II*, *ante* at 918, it satisfies strict scrutiny.[364]

The plurality, however, limited the significance of this ruling in two ways. First, it narrowed the scope of the protection against minority vote dilution provided by section 2, thus limiting the class of cases in which a state will actually be required to draw districts to prevent minority vote dilution. It did this by emphasizing the first *Gingles* factor necessary for finding a section 2 violation, "'that [the minority group be] sufficiently large and *geographically compact* to constitute a majority in a single member district.'"[365] As described above,[366] this *Gingles* factor was, from the start, the least intelligible. It appeared, in the original opinion, to mean to limit claims of vote dilution to circumstances where there was a practical alternative that would not result in the submergence of minority voting strength. Understood in this way, the possibility of "compactness" meant that vote dilution was prohibited whenever an alternative district could be drawn. In *Bush*, however, the plurality held that "[i]f . . . a *reasonably compact* majority-minority district cannot be created, § 2 does not require a majority-minority district."[367]

Second, the plurality held that the "narrow tailoring" prong dealt not only with the racial composition of the nondilutive district, but,

---

[363] *Id.* at 977 (citations omitted); *id.* at 990 (O'Connor, J., concurring).

[364] *Id.* at 977.

[365] *Id.* at 978 (quoting Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986)) (emphasis added by the *Bush* Court).

[366] *See supra* text accompanying notes 231-33.

[367] *Id.* at 979 (emphasis added). The Court reached the same conclusion in *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 916 (1996), decided the same day.

again, with its shape. After observing that "nothing in § 2 requires the race-based creation of a district that is far from compact," the plurality held that "[d]istrict shape is not irrelevant to the narrow tailoring inquiry."[368] The plurality held that, where bizarre shape is "predominantly attributable to racial, not political, manipulation," the resulting districts cannot be justified by the need to comply with section 2.[369]

These principles were spelled out in Justice O'Connor's concurring opinion, which, because it represents the controlling voice on this matter, is worth quoting at length.

> First, so long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny. Only if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply.
>
> Second, . . . [V.R.A. section 2] may require a State to create a majority-minority district where the three *Gingles* factors are present . . . .
>
> Third, the state interest in avoiding liability under V.R.A. § 2 is compelling. . . .
>
> Fourth, if a State pursues that compelling interest by creating a district that "substantially addresses" the potential liability, and does not deviate substantially from a hypothetical court-drawn § 2 district for predominantly racial reasons, its districting plan will be deemed narrowly tailored.
>
> Finally, however, districts that are bizarrely shaped and noncompact, and that otherwise neglect traditional districting principles and deviate substantially from the hypothetical court-drawn district, *for predominantly racial reasons*, are unconstitutional.[370]

Justice O'Connor's concurrence purports to leave open the possibility that a districting plan drawn to comply with section 2 and subject to strict scrutiny may be upheld. Under the principles she articulates, however, at least as spelled out in *Bush*, the invalidation of any

---

[368] *Id.* at 979-80.

[369] *Id.* at 981. The plurality went on to hold that its conclusion that the district lines at issue were not narrowly tailored to comply with section 2 of the Act "foreclose[d]" any argument that they were justified by the need to remedy discrimination in the form of vote dilution. *Id.* at 982. It also held that the one district that was defended on the ground that it was justified by an interest in compliance with section 5 of the Act was not narrowly tailored to that interest because it "'went beyond what was reasonably necessary to avoid retrogression.'" *Id.* at 983 (quoting *Shaw I*, 509 U.S. at 655).

[370] *Id.* at 993-94 (O'Connor, J. concurring) (citations omitted).

such district would appear to be tautological: Strict scrutiny only applies "if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race."[371] Yet these appear to be precisely the cases in which districting plans will be found not to be narrowly tailored to serve the compelling interest in avoiding liability under section 2. Where districts are drawn with a black majority in order to comply with section 2, but "are bizarrely shaped and noncompact, and . . . otherwise neglect traditional districting principles and deviate substantially from [a] hypothetical court-drawn district, for predominantly racial reasons"[372]—that is, in all the cases where they are subject to strict scrutiny—they will never be "narrowly tailored" to serve the interest in compliance with section 2 of the V.R.A.! The tension between the antidiscrimination command of section 2 and the *Shaw* cause of action is thus relaxed not by an understanding that prevention of vote dilution may justify a bizarrely shaped district, but, again, by releasing districting authorities from the requirement that they prevent vote dilution if the only way to achieve that goal is to draw such a district.

b. *Assessing the "Strict Scrutiny" of* Shaw *and Its Progeny*

The approach that has begun to take solid form in *Shaw*, *Miller*, and *Bush* threatens a rigid formalism unable to take account of the particular circumstances in which race is being used to draw district

---

[371] *Id.* at 993. Justice O'Connor also joined the Court's opinion in *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899 (1996), handed down the same day as *Bush*. *Shaw II* was the *Shaw v. Reno* litigation back before the Court for a second time after a remand to the district court. On remand, the district court had concluded that the districts at issue in *Shaw I* survived strict scrutiny. The Court, in a decision written by Chief Justice Rehnquist, reversed. The decision, somewhat intriguingly, described *Shaw I* as holding "that the plaintiffs whose complaint alleged the deliberate segregation of voters into separate and bizarre-looking districts on the bases of race stated a claim for relief under the Equal Protection Clause," *id.* at 901, a statement that acknowledges that the *Shaw* cause of action has not been held to extend to districts whose shapes are not "bizarre." The Court also construed the *Miller* standard—subordination of race-neutral districting principles to racial considerations—to mean that a race-conscious district is subject to strict scrutiny even where the State has effectuated traditional districting criteria if "race was the criterion that . . . could not be compromised," that is, if traditional districting principles "came into play only after the race-based decision had been made." *Id.* at 907. Read literally, this could mean that all intentionally created majority-minority districts are subject to strict scrutiny. Because *Shaw II* involved the quintessential bizarrely shaped districts, the Court's statement is in any event only dictum, and Justice O'Connor's specific statement to the contrary in her concurring opinion in *Bush* is undoubtedly a better indicator of her understanding of the requirements of the *Shaw* cause of action.

[372] *Bush*, 517 U.S. at 994.

lines. Coming as these decisions do contemporaneously with *Adarand*, a case notable for its insistence upon "consistency" in the evaluation of race-conscious government action, they threaten a cookie-cutter vision of equal protection concerned more about prohibiting the use of race than about the prevention of discrimination. Indeed, in relaxing the requirements of the V.R.A., as it did in *Miller*, in *Bush*, and in the *Bossier Parish* cases, the Court appears to suggest that it believes the harm of using race in districting is greater than the harm of unredressed discrimination against the members of racial minority groups.

These decisions suggest a new and troubling conception of equal protection, one that appears to be unable to take account of the different ways and contexts in which government may seek to use race, particularly in order to combat discrimination. Indeed, at least as a rhetorical matter, the Court equates race-conscious districting with the constitutional anathema of segregation, eliding all distinctions essentially with a play on the verb "to separate." The Court equates "separating voters into districts" on the basis of race, that is, separating in the intermediate sense of sorting, with "segregating citizens on the basis of race," that is, separating people in the ultimate sense of keeping the races apart. The Court thus suggests that all such uses of race are equally harmful and therefore equally suspect. This impression is reinforced by the fact that the plaintiffs' only cognizable complaint in the *Shaw* line of cases appears to be their very assignment to a particular (integrated) district on the basis of race.

This suggests a completely undifferentiated approach to the government's various uses of race. And it goes beyond rhetoric. In applying *Shaw* strict scrutiny, the Court has so far refused to give constitutional credence to the possibility of electoral cohesion among members of a racial minority group. In *Shaw I*, the Court said that race-conscious districting "reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls."[373] In *Miller*, the Court went further, stating that race-conscious districts, regardless of their genesis, are based on the "assumption that voters of a particular race, because of their race" will vote in a similar fashion.[374] It said that the assignment of voters to districts in a race-conscious manner embodies impermissible "'stereotypes.'"[375]

---

[373] Shaw v. Reno, 509 U.S. 630, 647 (1993).

[374] Miller v. Johnson, 515 U.S. 900, 912 (1995).

[375] *Id.* (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting)).

In the absence of demonstrable political cohesion among members of a racial minority group, these statements would be correct. However, it should be no surprise that the members of a community that has long suffered both private and official discrimination, and whose members are on average disadvantaged in a wide range of material ways as a result of it, would share common concerns and might, as a general matter, support the same candidates, ones they believe will address their concerns and represent their interests. One must turn a blind eye to common knowledge about voting patterns to deny that this happens.

Where voting is adequately demonstrated to be polarized along racial lines, race-based districting assignments that address polarization are based on fact, not assumptions. Nor do these assignments reflect invidious "stereotypes" about inherent differences between members of different racial groups. It is unremarkable that members of a group subjected to a common history of discrimination would largely share a similar political outlook. And to prohibit the conscious use of race in drawing electoral district lines in the face of racial polarization is simply to advantage the majority racial group, permitting them to control the outcome of elections in most or all electoral districts.

The Court in *Shaw* and *Miller* refused to examine the factual situations in which North Carolina and Georgia decided to draw race-conscious districts. If the Attorney General was correct in his initial denial of preclearance in each case, North Carolina and Georgia were both faced with racially polarized bloc voting, and the additional black-majority congressional district in each case served to combat vote dilution. Certainly the complete absence of blacks from either state's congressional delegation over a ninety-year period suggests that the Attorney General's determination was not without support.

Without some shift in emphasis, the Court thus seems poised to codify an approach that can only be explained by a counterfactual belief that racial differences in America have vanished and that, therefore, race-conscious districting *must* be based on impermissible stereotypes. Denying the reality of racial inequality might make the imposition of a requirement of colorblindness seem more morally palatable. In light of even the plainly observable reality of elections in many parts of America, however, the view suggested by this line of decisions is simply unjustified.

And, although, as I will explore below, the imposition of *Shaw* strict scrutiny need not spell the end of attempts to prevent minority

vote dilution, such scrutiny as has been applied in the *Shaw* line of cases also raises a number of practical concerns.

Even if the Court ultimately upholds the creation of race-based districts in some circumstances because it is necessary for compliance with the V.R.A., the impact on voting rights wrought by the *Shaw* line of cases will be significant. The imposition of strict scrutiny on districts in which race is taken into account in order to comply with the Act shifts the burden to prove the existence of racially polarized voting onto the state or its political subdivision. While states may ultimately be permitted to engage in race-conscious districting where needed to address racially polarized voting, unless the Court makes clear that in such circumstances the State's burden can easily be met, the result will be an enormous amount of litigation over plans voluntarily adopted to obtain preclearance under section 5 or to avoid liability under section 2 of the V.R.A.

Indeed, although placement of the burden of proof may seem like a mere formality, as the Court has observed in another context, "[w]here the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation."[376]

This may be especially true in cases like *Shaw* and *Miller*. One must not forget that the state's first choice in each case was a plan with fewer black-majority districts. Each state defended its first plan before the Attorney General in an attempt to show that it was not discriminatory. The states only adopted the plans that were challenged in the Supreme Court after the Attorney General denied preclearance of their original plans on the basis of their discriminatory purpose.

Any state that has adopted a nondilutive plan only after an initial plan was denied preclearance by the Attorney General or struck down by a court as a violation of section 2 of the V.R.A. will now be called upon to defend a new plan that it may feel it was forced to adopt in the first place by what it considers an intrusive and hostile federal government. It may now have to prove that the plan it originally adopted was discriminatory. And it may not want to. This is one place where the approach taken by the Court in *Shaw* may work real mischief.

Ironically, the failure to obtain preclearance of an original plan and the subsequent need to adopt a plan that could meet the preclearance requirements of section 5 of the V.R.A. were the dispositive

[376] Lavine v. Milne, 424 U.S. 577, 585 (1976).

pieces of evidence supporting the Court's conclusions in both *Miller* and *Shaw II* that the new plans at issue were drawn predominantly on the basis of race. This means that every time a state has redrawn its districting plan in response to a finding that its original plan had a discriminatory purpose or effect it will now have to defend the new grudgingly adopted plan that increases minority voting strength. These cases thus may put the fox squarely in the chicken coop. Unless the Court creates procedures to deal with the perverse incentives not to defend such new plans that traditional strict scrutiny would create, the procedural aspects of *Shaw* could have quite sweeping substantive consequences.

A court charged with guaranteeing equality must distinguish those uses of race that impose inequality from those that attempt to rectify inequality. In treating a use of race that responds to present discriminatory conditions in the same harsh manner as if it were one needlessly perpetuating notions of racial difference, the Court condemns the presently disadvantaged group to remain in its unequal position, without hope of redress from the political branches. In employing its apparently undifferentiated approach to race-conscious government action—and regardless of whether it ultimately finds some small class of cases in which strict scrutiny does not apply—the Court in *Shaw*, *Miller*, and *Bush* failed to discharge this special responsibility.

2. The Dissenters' Argument for Rational Basis Review

The only alternative for addressing race-conscious districting put forward by any member of the Court has been to reject any type of heightened scrutiny absent a showing of minority vote dilution. Because it would be extremely deferential to a governmental use of race, however, this approach is flawed in principle. Perhaps even more important, it is unlikely to be adopted in practice (at least without some change in composition of the Court) because it would require some member of the *Shaw I* majority to repudiate the *Shaw* cause of action. As that majority has made clear, that is a step none of its members is prepared to take.[377]

---

[377] *See, e.g.*, Bush v. Vera, 517 U.S. 952, 985-86 (1996) (plurality opinion of O'Connor, J.). As Justice O'Connor wrote for the plurality in *Bush*:

> This Court has now rendered decisions after plenary consideration in five cases applying the *Shaw I* doctrine (*Shaw I*, *Miller*, *Hays*, *Shaw II*, and this suit). The dissenters would have us abandon those precedents, suggesting that fundamental concerns relating to the judicial role are at stake. While we agree that those concerns are implicated here, we believe they point the other way.

The position against employing any form of heightened scrutiny of race-conscious districting absent an allegation of vote dilution has at its core the view that, unless votes are diluted, the use of race in districting causes no cognizable harm. As Justice White wrote in his dissent in the first of this line of cases, *Shaw I*, in which he was joined by Justices Blackmun and Stevens: "The grounds for my disagreement with the majority are simply stated: Appellants have not presented a cognizable claim, because they have not alleged a cognizable injury."[378] Justice White concluded that in the absence of a discriminatory effect in the form of denial to members of one or another racial group of the ability to participate meaningfully in the political process, there could be no challenge to race-conscious districting under the Fourteenth Amendment.[379] In his dissent, Justice Souter agreed that in the absence of such a cognizable injury, there was no call for searching judicial scrutiny.[380]

Dissenting in *Miller*, Justice Ginsburg, joined by Justices Stevens and Breyer, similarly complained that the Court wrongly employed strict scrutiny regardless of whether the race-conscious districts "dilute[d] or enhance[d] minority voting strength,"[381] and in *Bush*, Justice Stevens, in a dissent joined by Justices Ginsburg and Breyer, stated that he would "return to the well-traveled path that we left in *Shaw I*."[382]

Justice Souter's dissent in *Bush* can be read as more contingent, implicitly suggesting the possibility of applying to race-conscious districts some type of closer-than-rational-basis examination. Justice Souter, who was joined by Justices Ginsburg and Breyer, did essentially reject the *Shaw* cause of action because he found no injury sounding in equal protection. He wrote:

> Far from addressing any injury to members of a class subjected to *differential treatment*, the standard presupposition of an equal protection violation, *Shaw I* addressed a putative harm subject to complaint by any

---

> Our legitimacy requires, above all, that we adhere to *stare decisis*, especially in such sensitive political contexts as the present, where partisan controversy abounds.... Our Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes. We decline to retreat from that commitment today.

Id. (plurality opinion of O'Connor, J.) (citations omitted).

[378] Shaw v. Reno, 506 U.S. 630, 659 (1993) (White, J., dissenting).

[379] *See id.* at 663-70.

[380] *Id.* at 683-84 (Souter, J., dissenting).

[381] Miller v. Johnson, 515 U.S. 900, 947 (1995) (Ginsburg, J., dissenting).

[382] *Bush*, 517 U.S. at 1005 (Stevens, J., dissenting).

> voter objecting to an untoward consideration of race in the political process.
>
> ....
>
> ... [B]efore *Shaw I*, the Court required evidence of substantial harm to an identifiable group of voters to justify any judicial displacement of ... traditional districting principles.[383]

One of the "basic deficiencies" of *Shaw I*, he wrote, is its "failure to provide a coherent concept of equal protection injury, there being no separably injured class and no concept of harm that would not condemn a constitutionally required remedy for past dilution as well as many of the districting practices that the Court is seeking to preserve."[384]

But while questioning the notion that there is any cognizable equal protection harm wrought by the districts at issue in the *Shaw* line of cases—and further, rightly rejecting the implication of some of the Court's rhetoric that these race-conscious districts were tantamount to segregation[385]—Justice Souter's opinion actually does ac-

---

[383] *Id.* at 1045, 1050 (Souter, J., dissenting) (emphasis added).

[384] *Id.* at 1062. Justice Souter also noted that:

> [W]hat *Shaw I* spoke of as harm is not confined to any identifiable class singled out for disadvantage. If, indeed, what *Shaw I* calls harm is identifiable at all in a practical sense, it would seem to play no favorites, but to fall on every citizen and every representative alike.... [The injury recognized in *Shaw I*] is probably best understood as an 'expressive harm,' that is, one that 'results from the idea or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about.' Pildes & Niemi, [*supra* note 288, at 506-07]. To the extent that racial considerations do express such notions, their shadows fall on majorities as well as minorities, whites as well as blacks, the politically dominant as well as the politically impotent. Thus, as an injury supposed to be barred by the Equal Protection Clause, this subject of the 'analytically distinct' cause of action created by *Shaw I* bears virtually no resemblance to the only types of claims for gerrymandering we had deemed actionable following *Davis v. Bandemer*, 478 U.S. 109 (1986), those involving districting decisions that removed an identifiable class of disfavored voters from effective political participation.

Id. at 1053-54 (some citations omitted).

[385] As Justice Souter explained in his opinion:

> Although the Court used the metaphor of "political apartheid" as if to refer to the segregation of a minority group to eliminate its association with a majority that opposed integration, *Shaw I*, *supra*, at 647, talk of this sort of racial separation is not on point here. The *de jure* segregation that the term "political apartheid" brings to mind is unconstitutional because it emphatically implies the inferiority of one race. See Brown v. Board of Education, 347 U.S. 483, 494 (1954) ("To separate [minority children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community"). *Shaw I*, in contrast, vindicated the com-

knowledge the possibility that race-conscious districting *simpliciter* might impose some *other* constitutionally significant harm upon the individuals subject to it.

He noted that the racial composition of the districts before the Court did not

> reflect any purpose of racial subjugation, the district in question having been created in an effort to give a racial minority the same opportunity to achieve a measure of political power that voters in general, and white voters and members of ethnic minorities in particular, have enjoyed as a matter of course.[386]

He went on to say that:

> In light of a majority-minority district's purpose to allow previously submerged members of racial minorities into the active political process, this use of race cannot plausibly be said to affect any individual or group in any sense comparable to the injury inflicted by *de jure* segregation. It obviously conveys no message about the inferiority or outsider status of members of the white majority excluded from a district. And because the condition addressed by creating such a district is a function of numbers, the plan implies nothing about the capacity or value of the minority to which it gives the chance of electoral success.[387]

In actually examining the government's use of race to see if any of the harms he mentioned were present, Justice Souter's dissent undertook a closer look at the government's action than an opinion applying traditional, deferential rational basis scrutiny would have done. Nonetheless, Justice Souter's *Bush* dissent does conclude at least as a formal matter not that the challenged districts thus survive close examination, but that in the absence of any of these "equal protection injur[ies] in the usual sense," only rational basis scrutiny should apply.[388]

All the dissenters in *Shaw* and its follow-on cases have repeatedly reached the conclusion that *Shaw* is untenable. They have been un-

---

> plaint of a white voter who objected not to segregation but to the particular racial proportions of the district. See Karlan, [*supra* note 309, at] 94 (noting the irony of using the term "apartheid" to describe what are "among the most integrated districts in the country"). Whatever this district may have symbolized, it was not "apartheid."

Id. at 1054-55.

[386] *Id.* at 1055.

[387] *Id.*

[388] *Id.* at 1056 (noting that the Court's conclusion that "not every intentional creation of a majority-minority district requires strict scrutiny" is a "sound one," but that even this conclusion does not address the problem with the continued vitality of the *Shaw* cause of action: that "there is no equal protection injury in the usual sense").

able to rationalize or to apply the decision. Even in cases in which the parties have not sought to overrule *Shaw*, the dissenting Justices have reached the conclusion that it is fundamentally flawed, and that its flaws are fatal.[389]

In light of the potential harms involved in any governmental use of race, however, the dissenters' alternative approach of applying traditional rational basis scrutiny may well not provide sufficient oversight of state and local governments' use of race in electoral districting. There are costs to race-conscious districting that, like all other race-conscious government action, require justification. To the extent that they conclude that only vote dilution is a cognizable harm, the dissents written in the *Shaw* line of cases actually understate the universe of legitimate concerns that race-conscious districting raises. Furthermore, from a practical standpoint, an unwillingness to grapple with what animated the *Shaw* Court's move to strict scrutiny will leave the Court's minority with no role in the formulation of rules for that scrutiny's application.

III. PUTTING RACE-CONSCIOUS DISTRICTING IN ITS PROPER PLACE

With this as preparation, we can turn to the question this background presents: How should race-conscious districts drawn to prevent minority vote dilution be evaluated under the Fourteenth Amendment, and can they pass constitutional muster?

In Part III.A I propose a way to undertake the "strict scrutiny" called for by *Shaw* that is consistent with the framework for analysis I set out in Part I. My purpose is to demonstrate what equal protection scrutiny of race-conscious districts might look like under a method that is consistent with the purposes that strict scrutiny should properly serve.

This approach, which is sensitive to the harms that may be wrought by race-conscious districting and in particular to the legitimate concerns that seem to have given rise to the *Shaw* cause of action in the first instance, is also consistent with the rhetoric of the controlling opinions in the *Shaw* line of cases—the opinions of Justice O'Connor in this area—rhetoric that is itself in some tension with the

---

[389] *See, e.g., id.* at 1005 (Stevens, J., dissenting, joined by Ginsburg & Breyer, JJ.) (arguing that the Court should "return to the well-traveled path that we left in *Shaw I*"); *id.* at 1046 (Souter, J., dissenting, joined by Ginsburg & Breyer, JJ.) (stating that "no amount of case-by-case tinkering can eliminate" the "basic misconception about the relation between race and districting principles" that is the cause of "*Shaw*'s problems").

"strictest" version of *Shaw*'s strict scrutiny. It is proposed as an alternative not only to the Procrustean bed that *Shaw* and its progeny threaten to become, but also to the rational basis standard suggested by the dissenters in *Shaw* and the cases applying it. In addition, this approach would have the advantage of bringing more reason out of the *Shaw* line of cases without overruling it, a step that has been repeatedly suggested by the *Shaw* dissenters, but that is unlikely without some change in the composition of the Supreme Court.[390]

In Part III.B I will address the Court's concern in the *Shaw* line of cases with the shapes of the electoral districts before it, and I will consider the rhetoric of the Court, which has likened districts with small African American majorities to "segregation" and "apartheid." These have presented perhaps the deepest puzzles about the meaning of the *Shaw* line of cases. But, as I will describe, they may actually provide the key to a new understanding of the *Shaw* cause of action, an understanding that would place it firmly within the long line of race-discrimination cases decided by the Court, including *Brown* and *Bakke*. This understanding would permit *Shaw* to be more readily harmonized both with the Court's other equal protection decisions, and with the rational approach to strict scrutiny that I have proposed. Finally, then, in Part III.C, I will return to the question of narrow tailoring in light of the availability of race-neutral alternatives for combating discrimination in voting.

A. *Evaluating Race-Conscious Districting Under a Strict Scrutiny Attached to Its Moorings*

1. The State of the Law

How then might one properly assess—scrutinize—the use of race in the drawing of electoral district lines? The approaches suggested by the two factions on the current Court, the *Shaw* majority and the four dissenters, each leave something to be desired. The line of cases since *Shaw I*, the confusion suggested by *Miller* and *Bush*, the ongoing erosion of the V.R.A. in response to the *Shaw* line of cases, and the likelihood of more of the same, all demonstrate both the urgent need for, and the possibility of, a reexamination of the appropriate nature

[390] Although there have been two changes of personnel on the Court in the seven years since *Shaw I* was decided, no member of the five-member *Shaw* majority has left the Court. The same five justices who formed the majority in *Shaw I*—Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas—have also formed a five-member majority in *Miller*, *Bush*, and *Shaw II*.

of *Shaw* scrutiny.

Contradictions in the cases also suggest that the doctrine in this area is unstable. The tenor of Justice O'Connor's two opinions in *Bush* suggests that she believes race-conscious districts that are subject to strict scrutiny and that were drawn in part to comply with section 2 of the V.R.A. may sometimes be upheld.[391] Yet the complex legal test she has articulated seems to preclude that result. If applied literally, that test would actually divide the world of intentionally drawn race-conscious districts into two formal categories, neither one of which would be assessed in terms of the actual and potential harms it entails.[392] First would be those that respect traditional districting principles. Even though they are intentionally drawn on the basis of race, these would, apparently, pass muster if they were merely rational. The second category of intentionally race-drawn districts would be those that are bizarrely shaped (and perhaps those that in some other way deviate from traditional districting principles). These would be subjected to strict scrutiny, and would invariably be struck down, again without the inquiry into circumstance that would be appropriate.

Not only is this approach too rigidly formalistic to address the genuine concerns that are raised by the government's use of race in electoral districting, but in light of the dictum in *Adarand* that *all* race-conscious government action is subject to strict scrutiny, an approach in which some lines drawn on the basis of race are subject only to rational basis review may be unsustainable. The *Shaw/Miller/Bush* majority is composed of the same Justices who were in the majority in *Adarand*. When Justice Kennedy writes for that majority—as he did in *Miller*—strict scrutiny even of race-conscious districting seems to expand to include all districting plans in which race was intentionally used. Indeed, in *Bush*, Justice Kennedy, who joined Justice O'Connor's plurality opinion, also wrote separately to say:

> [T]he statements in . . . the [plurality] opinion that strict scrutiny would not apply to all cases of intentional creation of majority-minority districts . . . are unnecessary to our decision, for strict scrutiny applies here. I do not consider these dicta to commit me to any position on the question whether race is predominant whenever a State, in redistricting, foreordains that one race be the majority in a certain number of districts

---

[391] *See, e.g.*, Bush v. Vera, 517 U.S. 952, 977 (1996) (plurality opinion of O'Connor, J.); *id.* at 990 (O'Connor, J., concurring).

[392] *See supra* notes 355-72 and accompanying text (reviewing the *Bush* decision in detail).

or in a certain part of the State.[393]

Justice Thomas, with whom Justice Scalia joined in concurrence, more definitely expressed his opinion that, as the Court had said one year previously in *Adarand*, all race-conscious government action is subject to strict scrutiny.[394]

Although Justice O'Connor's controlling view is that mere "predominan[ce]" of race in electoral districting is not sufficient to trigger strict scrutiny and that "traditional districting criteria" must also be "neglected" in order for it to apply,[395] her apparently contradictory statement that "bizarreness is not necessary to trigger strict scrutiny" suggests that the last chapter on the formal approach to race-conscious districts is far from being written.[396] The need to rationalize *Shaw* scrutiny, suggesting ways to make sense of it, therefore is particularly great.

2. Applying the Approach Described in Part I

A properly tailored examination of the use of race in the drawing of electoral districts—an examination that could appropriately be denominated "strict"—would begin by identifying which of the possible risks and harms associated with the government's use of race are present in the context of race-conscious districting, and, more specifically, which of these risks and harms are present in the particular districting plan at issue. A reviewing court—or, indeed, a legislature or other districting authority contemplating such a use of race—would then have to assess whether the costs that in fact attend the use of race before it are justified by any sufficiently strong legislative purposes. It would also have to determine whether there were race-neutral alternatives available to the districting authority that would serve these purposes. Finally, it would have to consider whether, in this context, the use of race is sufficiently harmful that a polity seeking to achieve these particular purposes should be required to bear whatever costs are attendant upon using any such alternatives. Such scrutiny would address the question which close examination of race-conscious gov-

---

[393] *Bush*, 517 U.S. at 996 (Kennedy, J., concurring).

[394] *See id.* at 999-1000 (Thomas, J., concurring).

[395] *Id.* at 959, 962 (plurality opinion of O'Connor, J.). Justice O'Connor's view, as the narrowest one in support of the outcomes in *Miller* and *Bush*, states the law. *See* Marks v. United States, 430 U.S. 188, 193 (1977) (explaining that when there is no majority opinion, the narrowest reasoning of any concurring justice states the Court's holding).

[396] *Bush*, 517 U.S. at 980 (plurality opinion of O'Connor, J.).

ernment action must be designed to help answer: Is there a genuine difference between these groups that renders the difference in treatment rational, and does the disparate treatment serve a sufficiently important goal that it transcends whatever harm is done by the use of the line drawn by the particular law?[397]

Such an approach, based on the principles described in Part I, would acknowledge the harms that may be caused by any use of race by government, but would take care to define them more precisely than the Court has in the *Shaw* line thus far. The use of race in districting would still require justification, but a more careful description of the harm caused by race-conscious districting, and a recognition of the harms that some other types of race-conscious government action entail but that are absent in the districting context, would permit the Court to assess more precisely the adequacy of the justifications put forward by districting authorities for the race-conscious plans they have adopted. In addition, once one articulates the costs associated with the use of race in districting, one may better assess any race-neutral alternatives that could be used to achieve the government's goals to determine whether the government should be required to turn to them. Thus far, no Court majority applying *Shaw* has seen fit even to discuss the alternatives to race-conscious districting that might be used to combat discrimination in voting.

The approach I suggest here—an approach that could take account, for example, of the particular harms that may be wrought by race-conscious districts that are bizarrely shaped—might well address the concerns expressed by Justice O'Connor, both as the voice of the Court in *Shaw* and in her separate opinions since then, better than any version of *Shaw* strict scrutiny yet articulated. Its results would likely coincide with Justice O'Connor's understanding of the bottom line of the *Shaw I* cause of action: that race-conscious districting is not per se invalid, but that it must be carefully cabined. It would be preferable to the line she otherwise appears headed toward drawing: a formal line distinguishing the permissible from the impermissible based on "predominance" of race. Instead, scrutiny that is actually tailored to the particular harms at issue is more likely to result in the invalidation of those districting plans that are actually most harmful or for which the justification is the weakest. And, as I will describe in Part III.B, it could both take account of Justice O'Connor's repeated

[397] *See supra* pp. 12-15 (articulating this question and describing how strict scrutiny can help to answer it).

but inchoate concern about bizarrely shaped districts, and explain the results in all the race-conscious districting cases that have come before the Court since *Shaw I* was decided.

a. *Identifying the Risks and Harms Attendant upon the Use of Race*

A reviewing court, or a districting authority in the first instance, confronted with a districting plan that has been intentionally drawn in a race-conscious fashion must first evaluate the use of race in the context before it to identify what harms the districting plan will actually cause.[398]

To begin with, one would have to consider whether race was being used in this context in order to segregate voters on the basis of race. The intentional separation of people into all-black and all-white electoral districts would place the districting plan firmly in Category One,[399] as a virtually unjustifiable use of race by government.

This was what happened, for example, in *Gomillion v. Lightfoot*.[400] *Gomillion* involved manipulation of a municipal boundary that resulted in the actual segregation of black voters. In that case—which rested upon the Fifteenth Amendment and not the Fourteenth—a municipality, Tuskegee, Alabama, had redrawn its city boundaries allegedly to exclude black voters on the basis of their race. As the Court described:

> The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia*, the right to vote in municipal elections.... If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible ... that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.[401]

Although the ordinance at issue there not only separated voters on the basis of race, but excluded them from the polity altogether,

---

[398] The list of harms I describe here is taken from my discussion *supra* text accompanying notes 49-60 (cataloguing the possible risks and harms associated with governmental uses of race).

[399] *See supra* Part I.B.1 (setting out my taxonomy of four categories of race-conscious government action).

[400] 364 U.S. 339 (1960).

[401] *Id.* at 341.

segregation of voters by race into separate electoral districts would also fall squarely within the first category of race-based government actions, those that are in essence flatly prohibited. A court reviewing a race-conscious districting plan thus would have to examine the racial mix of its component districts to ensure that they are not segregationary, that they do not convey the message of inferiority and unfitness the practice of segregation connotes.

Next, one would have to assure oneself that race was not being used to deny any group an equal opportunity to participate in the electoral process, that is, that race was not being used to dilute the votes of one or another racial group. Again, this would require an examination of the racial composition of each district, but it would also require inquiry into the extent of racial polarization in the polity at issue. Because a districting plan that dilutes votes would deny the members of one or another group the opportunity to participate in the election of candidates of their choice, a dilutive plan of electoral districting would have to be situated in Category One (in the case of dilution of African American voting strength) or in Category Two (in the case of dilution of white voting strength).[402] In either case, I can think of no interest that could be said to justify such racial vote dilution.

Under a proper approach to strict scrutiny, a conclusion that a race-conscious districting plan was neither segregative nor dilutive would not automatically lead to its validation. Such an electoral districting plan, however, would be much like the archetypal Category Three use of race, a districting plan that draws school attendance zones. Indeed, once a court has satisfied itself that race is not being used to work the harm of dilution—a harm that can never be presented in the case of school attendance zones—a race-conscious districting plan would fall squarely within Category Three.

Of course this is not to say that there are no costs involved in the use of race in this context, or that such a plan will not require justification. Just as an integrative plan of school attendance zones denies no one any good or benefit, however, such an electoral districting plan will not deny anyone the power to vote in an election, or to be represented in the legislature. And, so long as the district lines are not dilutive of minority voting strength and do not give members of the minority group political strength beyond their numbers, there is

[402] *Cf.* Johnson v. DeGrandy, 512 U.S. 997, 1017 (1994) (describing the possibility of providing a minority group with "political power . . . above its numerical strength").

no risk that the districting plan reflects mere racial politics. In such a circumstance neither group is being given a "reward," nor should the plan cause members of either group to feel that they are not full members of the polity. Indeed, the opposite should be true.

Risks and costs, however, do remain. There is some risk that race has been used for no reason other than erroneous stereotype. In a jurisdiction in which there were no racial polarization, in which voting did not correlate at all to race, the creation of integrated districts would not dilute voting strength—the very concept of one or another racial group's "voting strength" would, indeed, be meaningless—but it would be unnecessary, and would rest, presumably, upon nothing more than an erroneous belief in the relevance of race.

There is also the risk that the use of race in this context will perpetuate a negative racial stereotype. Although this is ultimately an empirical question in this context, there may be some risk that the creation of black-majority districts may be perceived as an exemption for African Americans from the normal requirement of coalition-building in American politics. Of course, this is not an inference of incapacity in the same sense as the inference some people draw from race-conscious affirmative action plans that supplant substantive, arguably "merit-based" criteria for the distribution of some good. The stereotype is now likely to be that members of the minority group are not required to play by the same rules as everyone else.[403]

It is possible to view the significance of electoral districting lines in this way precisely because, through the ability to aggregate their votes, members of the racial minority group may be provided by race-conscious districting plans with what they might otherwise be denied: the ability to elect candidates of their choice. This feature of electoral districts—their impact on the ability to aggregate votes—is what renders them different from the paradigmatic Category Three example. Among other things, it means that there may be this additional cost, a cost not present in all examples of integrative districting.

Now, indeed, whenever any group—say Democrats—is made a majority in an electoral district, they could be said to have been "exempted" from the need to build coalitions in the same sense. That such groups are not ordinarily said to have been so exempted suggests that any such inference of special, lenient treatment in this context may be based at least to some degree on a pre-existing attitude toward

[403] Thus, for example, Abigail Thernstrom, a critic of the use of race in electoral districting, writes that "the question is: how much special protection from white competition are black candidates entitled to?" THERNSTROM, *supra* note 262, at 5.

the racial minority group that happens to have been made the majority in one or more of the districts at issue in the particular districting plan under evaluation. At bottom, it would of course be unjust to forbid such districts on the ground that they reinforce stereotypes if they are, in fact, responses to the unwillingness of other groups to form coalitions across racial lines. But if this is a divisive and harmful negative racial stereotype that is reinforced by the use of race in this context—a negative racial stereotype that is probably not reinforced by integrative plans of school attendance zones—this may suggest that race-conscious plans of electoral districting may be upheld only on a somewhat stronger justification and a somewhat stronger showing of necessity than integrative school attendance zone plans like those I described in Part I.[404]

Lastly, there are the two harms previously described that will always be present when government uses race to classify individuals.[405] At the margin there will be a divisiveness harm, as the use of race will to at least some degree reinforce people's belief in racial difference. Since the outcome of elections is so public, and since it involves political power, in the context of electoral districts, this divisiveness harm can include some exacerbation of a highly corrosive us-against-them mentality. Of course, in the presence of racial polarization, it will not be the districting plan that *creates* this mentality. But at the margin, there will inevitably be some divisiveness harm, even if the use of race is responsive to a genuine difference in the way in which the races are currently situated. Finally, there is the dignitary harm inherent in classifying people on the basis of race. Indeed, this harm may have played some role in the decision by the white *Shaw* plaintiffs to bring suit in the first instance.

b. *Examination of the Relevant Interests*

After articulating which harms are actually presented by the districting plan before it, a reviewing court engaged in appropriately searching scrutiny of the use of race in this context would have to look next to see if those harms might be justified by a sufficiently important governmental interest. There are at least three relevant interests.

First, there is the interest in preventing minority vote dilution, the discriminatory effect of racially polarized bloc voting. Drawing nondilutive districts in order to avoid a violation of section 2 of the V.R.A. as

---

[404] *See* discussion *supra* text accompanying notes 96-113.

[405] *See* discussion *supra* p. 23.

construed in *Gingles* serves this purpose precisely. This interest, an interest in avoiding a discriminatory effect, is extremely strong. Even the *Shaw* majority said, in an opinion by Chief Justice Rehnquist in *Shaw II*, that:

> A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions. For that interest to rise to the level of a compelling state interest, it must satisfy two conditions. First, the discrimination must be 'identified discrimination.' 'While the States and their subdivisions may take remedial action when they possess evidence' of past or present discrimination, 'they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.' . . . Second, the institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary. . . .[406]

Once the vote dilution that would occur in the absence of race-conscious districting is understood as the consequence of using an apparently neutral method of vote aggregation in the presence of private acts of voter discrimination in the voting booth, the interest in preventing such dilution through the use of race-conscious districts would seem to meet even the current Court's stringent test for determining when an interest is "compelling."

Second, the interest in preventing minority vote dilution itself subsumes an interest in integration or diversity. That interest was held in *Bakke* to justify Category Two affirmative action plans that present more risks and costs than do nondilutive electoral districts drawn on the basis of race.[407] It was also held in *McDaniel* to justify the archetypal Category Three use of race, race-conscious school attendance zone lines.[408] The purpose of preventing vote dilution is to permit representation of members of all politically cohesive racial groups. The interest in providing an equal opportunity to participate in the political process can be understood as an interest in ensuring diversity in who is represented. When race is used to avoid minority vote dilution, it is being used—much as it was in *McDaniel*—to *integrate*.[409] In *McDaniel*, the integration was the physical integration of individual

---

[406] Shaw v. Hunt, 517 U.S. 899, 909-10 (1996) (citations omitted).

[407] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315-20 (1978), discussed *supra* note 87 and accompanying text.

[408] *See* McDaniel v. Barresi, 402 U.S. 38 (1971), discussed *supra* text accompanying notes 103-13.

[409] *See id.*

schools.[410] In the context of race-conscious districting, the integration is more abstract yet perhaps even more fundamental, the "integration" of the political process not by racial integration of the legislative delegation, but by providing meaningful ballots to the racial minority previously denied them. If the interest in diversity was strong enough to uphold the uses of race in *Bakke* and *McDaniel*, it should also be sufficiently strong to support a jurisdiction's voluntary decision to adopt district lines that take race into account in order to avoid minority vote dilution. The costs associated with race-conscious districting cannot justify hobbling a government body that, faced with polarized voting, voluntarily decides to prevent minority vote dilution, and that therefore takes race into account in drawing its district lines.

Indeed, the interest in diversity is even stronger in this context because the alternative to using race will deny members of the minority group political representation. As described above, in a racially polarized jurisdiction, a decision not to permit race-conscious districting, while formally even-handed, will result in the creation of a disproportionate number of white-majority districts. "Colorblind" districting will result in having only one of the politically cohesive racial groups—the majority group—represented. By contrast, even when race is not used in the school-districting context, every child will still get to go to school. In a world in which racial polarization exists, a prohibition on race-conscious districting thus would amount to imposition by constitutional edict of something very similar to separate-but-equal discrimination. The races would be provided formal equality in a way that would be detrimental only to the racial minority. A reading of the Equal Protection Clause that requires states to discriminate against racial minority groups in this way would be very difficult to defend.

Finally, there is a third and related interest that could justify the use of race to draw non-dilutive districts. Even if the interest in preventing the discriminatory effect of a dilutive plan of electoral districting were not considered sufficiently strong to justify these uses of race, the interest in complying with section 2 of the V.R.A. could be sufficient, because of the deference due to congressional legislation enacted to enforce the command of the Fifteenth Amendment.[411]

---

[410] *See id.* at 40 (upholding a plan which integrated schools by establishing geographic attendance zones drawn to allow for increased racial balance).

[411] A similar interest would be present in the event that a state or local government had to redraw a districting plan following a denial of preclearance under section 5 of the V.R.A. on the ground that a submitted plan had the purpose or effect of causing a

For whatever reason, the Court has focused primarily on this interest, rather than the interest in combating discrimination regardless of the requirements of federal statutory law, and in *Bush v. Vera*, a majority of the Court—Justice O'Connor and the four dissenters—concluded that the interest in compliance with section 2 of the V.R.A. was, indeed, a compelling state interest.[412]

Ultimate acceptance of this interest, however, may face an objection not present in the case of the other two interests I have discussed. The V.R.A. was enacted pursuant to Congress's power under section 2 of the Fifteenth Amendment.[413] That provision grants Congress the power to "enforce . . . by appropriate legislation" the substantive guarantee of section 1 of that Amendment that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[414]

In a series of cases over the last three years, beginning with *City of Boerne v. Flores*, the Supreme Court has narrowly interpreted Congress's enforcement power under the parallel provision of the Fourteenth Amendment.[415] The Court has held that the power to "enforce" a constitutional provision is only "remedial and preventive"[416] and that, although Congress may in the exercise of its enforcement power "prohibit[] conduct which is not itself unconstitutional," there must be "a congruence and proportionality between the injury to be

---

"retrogression" in the electoral power of a racial or language minority group. However, because the Court has now eliminated the power of the Attorney General to deny preclearance under section 5 on the basis of an intent to discriminate unless that intent amounts to an intent to cause retrogression, *see Reno v. Bossier Parish Sch. Bd.* (*Bossier Parish II*), 120 S. Ct. 866, 878 (2000), such denials of preclearance, which were common after the 1990 census, are far less likely to be interposed against the districting plans that will soon be adopted following the 2000 census.

[412] 517 U.S. 952, 990 (1996) (O'Connor, J., concurring); *id.* at 1033 (Stevens, J., joined by Ginsburg & Breyer, JJ., dissenting); *id.* at 1046 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting).

[413] *See* Lopez v. Monterey County, 525 U.S. 266, 269 (1999).

[414] *See* U.S. CONST. amend. XV.

[415] *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (concluding that the Religious Freedom Restoration Act was not within Congress's power under section 5 of the Fourteenth Amendment); College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (concluding that the Patent Remedy Act was not within Congress's power under section 5 of the Fourteenth Amendment); Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) (concluding that the Age Discrimination in Employment Act was not within Congress's power under section 5 of the Fourteenth Amendment).

[416] *City of Boerne*, 521 U.S. at 524.

prevented or remedied and the means adopted to that end."[417]

Any argument based on an interest in compliance with the V.R.A. will therefore eventually have to contend with *City of Boerne* because failure to draw districts in compliance with section 2 of the V.R.A. as amended in 1982 would not necessarily violate the Constitution. *City of Mobile v. Bolden* held that the Constitution did not forbid dilutive districting plans unless the districting authority acted with an intent to discriminate.[418] Section 2 prohibits such plans regardless of the intent with which they are adopted.

Nonetheless, the amended section 2 of the V.R.A. is a valid exercise of Congress's power under section 2 of the Fifteenth Amendment. *City of Boerne* itself makes clear that the V.R.A. is a response "to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination," and the Court there "acknowledge[d] the necessity of using strong remedial and preventive measures to respond" to this deprivation.[419]

Undoubtedly there is at least some moral difference between minority vote dilution that is the incidental effect of a districting plan that serves some non-racial purpose and minority vote dilution that is the intentional result of a plan discriminatorily designed to have that effect. Although discrimination in the voting booth is a necessary element of each, in the former the districting authority lacks invidious intent. Yet there are many reasons that justify Congress's conclusion that enforcement of the Fifteenth Amendment's guarantee required a prohibition on all districting plans that have a dilutive effect.

First, it may have been Congress's judgment that a dilutive effect is almost always intentional. The traditional concept that one intends the natural consequences of one's actions has particular truth in the area of electoral districting. As a rule, districting plans are drawn up by or with the aid of state legislators who have an intimate familiarity with the demographics in their own districts. Districting authorities also rely on census figures that themselves are broken down by race. Where race correlates with political preferences—which is always the case where voters are polarized along racial lines—the choice of how to draw a district line will almost always be an intentional choice about which group to favor.[420]

---

[417] *Id.* at 518, 520.

[418] 446 U.S. 55, 66-70 (1980) (plurality opinion).

[419] *City of Boerne*, 521 U.S. at 526.

[420] Indeed, if "intentional discrimination" is not limited to that discrimination based on racial favoritism, every district line drawn in a racially polarized jurisdiction

Additionally, unlike other actors, state legislators may well have the sophistication to hide their true intentions. Certainly this is the history of voting discrimination.[421] As politicians themselves, of course, the members of Congress who adopted section 2 were intimately aware of this reality.

Congress may also have wanted to avoid the divisiveness that would have been created by requiring an inquiry into intent. If that inquiry were expanded beyond the scope of the individuals drawing up the districting plan, it would probably be relatively easy to find discriminatory intent in virtually every case in which districts will have a dilutive effect. Electoral districts are rarely cut from whole cloth. They tend, rather, to reflect slight modifications of pre-existing plans of electoral districting. Ordinarily districts are redrawn to maintain the position of incumbents. Where no African American person has ever been elected in a multiracial jurisdiction, to take the most extreme example, it is likely that a historical inquiry will reveal that the

---

could be described as "intentionally" racially discriminatory. Electoral districts are drawn by politicians precisely in order to have particular electoral effects. The infinite number of ways of drawing district lines to create constitutionally compelled equipopulous districts means that, unless those lines are generated randomly, politicians will always have to make choices about who to include in each district, even as they also seek to achieve other goals such as compactness or maintaining pre-existing political subdivisions, such as counties or cities. The only substantive criteria upon which one district line will be thought preferable to another will be its political consequence. This political consequence will be among the reasons the district line is chosen. In the presence of racially polarized voting, racial groups form the very political groups that will be affected by any districting plan. Where in a racially polarized jurisdiction a districting plan is adopted that underrepresents the strength of minority voters, districting authorities who have made a deliberate choice thus inevitably will have adopted it "'because of' . . . its adverse effects upon" the minority group. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

This is not to say that the subjective motivation for such plans will necessarily include negative views about the members of one or another racial group as such. It may be the fact that the black voters would not support the incumbents who seek reelection, and whose re-election the legislators doing the districting want to ensure (perhaps because of personal friendship, party loyalty, even a mutual agreement among legislators that protecting each other is the only way to ensure one's own protection). "Discriminatory intent," however, as that term has been used in the equal protection context, is the intent to "discriminate," to provide different treatment along impermissible (in this case, racial) lines. It does not require antipathy toward the group against whom one is discriminating. Because the intent of districting authorities will always be to create political consequences, and because, in the presence of racially polarized voting, those political consequences will necessarily be racial, the discriminatory submergence of minority votes will always be an intentional effect of a dilutive plan of electoral districting.

[421] *See* South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966) (stating that the V.R.A. was a response to "unremitting and ingenious defiance of the Constitution" in some parts of the country).

original plan on which the district lines were based was adopted for a discriminatory purpose. For example, on remand from *City of Mobile v. Bolden*, the district court undertook a lengthy examination of the history of the adoption of various voting mechanisms in Mobile, Alabama, and found that the city's electoral system had been adopted prior to 1911 with a racially discriminatory purpose and had subsequently "been maintained . . . for racial motives."[422] The city was over one-third black, yet no African American had ever been elected to the City of Mobile's governing Commission between 1874 and 1982.[423]

Whenever a districting plan has a dilutive effect, itself an artifact of racial discrimination in voting, an historical inquiry is likely to show that that effect of a districting plan is in part a vestige of some invidiously discriminatory decision made in the past. There is also the likelihood that the very patterns of residential segregation that render certain districting plans dilutive are themselves traceable to acts, whether public or private, of intentional discrimination.[424]

Finally, of course, the dilutive effect of any districting plans does reflect "discriminatory intent" on the part of the voters. Indeed, persistent racial polarization in voting itself suggests that relations between the races in that jurisdiction are fundamentally poor. Professor Issacharoff's research suggests that racial polarization in voting reflects not mere coincidence of race with other views, but is itself in fact about race: "The persistence and extremity of the polarized voting practices in community after community, despite substantial numbers of middle-class blacks and poor whites indicates that, beyond the divergent socioeconomic interests, there must also be a more fundamental racial antipathy at work as well."[425]

As the above discussion indicates, inquiry into motive may have been thought by Congress not merely difficult, but particularly inappropriate when it comes to a racially discriminatory effect of a plan of electoral districting. On the one hand, as *City of Mobile v. Bolden* demonstrates, it may require courts to attempt to piece together the motivation of state legislators acting over one hundred years ago. As Professor Issacharoff's work suggests, because the effect of a plan of districting is in part the result of private choices, the inquiry could involve scrutiny of the racial attitudes of an entire community.[426] This

---

[422] Bolden v. City of Mobile, 542 F. Supp. 1050, 1054-68 (S.D. Ala. 1982).

[423] *Id.* at 1076.

[424] *See supra* note 102 and accompanying text.

[425] Issacharoff, *supra* note 44, at 1879.

[426] The *Gingles* Court unanimously agreed that a showing of legally sufficient ra-

could be extraordinarily divisive. It would also itself raise constitutional concerns of the highest order because it involves inquiry into the reasons ballots were cast.[427]

One way in which the Court has determined the propriety of enforcement legislation under *City of Boerne* has been "by examining the legislative record containing the reasons for Congress' action."[428] In this case, Congress was presented with evidence at the time it amended section 2 that the burden of proving discriminatory intent would be virtually insurmountable, that the inquiry into intent would be destructive, and that prohibiting only intentionally discriminatory districting plans would leave a great deal of intentional discrimination untouched.[429] The legislative history reveals that by adopting the results test in section 2 of the V.R.A., Congress was indeed attempting to address these difficulties.[430]

Congress's judgment in the exercise of its power under the Fifteenth Amendment is due great deference. And indeed, its authority to prohibit discriminatory effects in the exercise of its power under section 2 of the Fifteenth Amendment has been consistently upheld.[431] Whatever the limits of congressional power to address discrimination under the Civil War Amendments,[432] where the exercise of that power raises only the relatively few concerns presented in the districting context, Congress's judgment of what is appropriate should be given effect.[433]

---

cially polarized bloc voting does not depend on the motivation of white voters. *See* Thornburg v. Gingles, 478 U.S. 30, 48-51, 56-58 (1986) (describing the test for racially polarized bloc voting); *id.* at 100 (O'Connor, J., joined by Burger, C.J., and Rehnquist & Powell, JJ., concurring) ("Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters.").

[427] *See supra* notes 186-87 and accompanying text.

[428] Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 648 (2000).

[429] *See* S. REP. NO. 97-417, at 36-37 (1982) (discussing the V.R.A. Extension).

[430] *See id.* at 36 (describing principal reasons for rejection of the intent test: it is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities," it places an "inordinately difficult burden" of proof on plaintiffs, and it "asks the wrong question").

[431] *See* City of Rome v. United States, 446 U.S. 156, 173-78 (1980); South Carolina v. Katzenbach, 383 U.S. 301, 323-28 (1966).

[432] *See, e.g.*, LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-14 (2d ed. 1988) (discussing Congress's enforcement power under the Fourteenth and Fifteenth Amendments).

[433] And, indeed, in United Jewish Organizations of Williamsburgh, Inc. v. Carey

c. *Narrow Tailoring*

It is important to note here that the existence of the three governmental interests I have outlined—the interests in preventing vote dilution, in "integrating" the political process, and in complying with section 2 of the V.R.A.—does not mean that *all* uses of race in electoral districting will be found to serve them. This is the first place the narrow-tailoring requirement comes in. One of its roles is to ensure that the use of race is actually designed to *serve* the sufficiently strong state interest. This requires an examination of the composition of the electoral districts under review.

In this regard, there is some evidence that attempts to increase the proportion of black voters in certain electoral districts have sometimes gone too far. The Department of Justice in the late 1980s and early 1990s—and particularly during the reapportionment occasioned by the 1990 census—began vigorously to insist upon the creation of black-majority districts by jurisdictions subject to the preclearance requirements of section 5 of the V.R.A. As in *Shaw* and *Miller*, it would do so by refusing to preclear the plan initially adopted by a covered jurisdiction on the ground that that jurisdiction had not borne its burden to prove the absence of discriminatory intent. As a consequence, the electoral landscape was quite substantially altered: many new black-majority districts were formed at all levels of government. At the federal level, nonwhite faces began to appear in Congress in record numbers as well: in 1992, the number of black and Hispanic Representatives jumped from thirty-six to fifty-five.[434]

Some critics argued, however, that black majorities were unnecessary in some of these cases to give full effect to minority votes—unnecessary to prevent vote dilution or for compliance with section 2 of

---

(*UJO*), 430 U.S. 144 (1977), a four-member plurality of the Court voted to uphold a race-conscious plan of electoral districting on the ground that the state was acceding to a reasonable position of the Attorney General that creation of these districts was necessary to achieve the nonretrogression in black voting strength required under section 5 of the V.R.A., and that the use of race to comply with the Act was constitutional. *See id.* at 162-65 (plurality opinion); *see also id.* at 168-79 (Brennan, J., concurring in part). With the plurality in *UJO*, Justices Stewart and Powell made up a six-person majority for the proposition that the V.R.A. and the use of race in order to comply with the V.R.A. are constitutional. *See id.* at 180 n.* (Stewart, J., joined by Powell, J., concurring). Chief Justice Burger later characterized his dissenting opinion in *UJO* as standing for that same proposition. *See* Fullilove v. Klutznick, 448 U.S. 448, 483 (Burger, C.J., joined by White & Powell, JJ.) (citing *UJO*, 430 U.S. at 180-87 (Burger, C.J., dissenting), and describing Chief Justice Burger's opinion as "dissenting on other grounds").

[434] *See* Bob Benenson, *GOP's Dreams of a Comeback Via the New Map Dissolve*, 50 CONG. Q. WKLY. REP. 3580 (1992).

the V.R.A. They argued that the Justice Department's insistence on their creation was part of a strategy by Republicans, supported by black leaders, to pack black Democratic voters into safe districts. Some African Americans would be assured of election from these districts, while surrounding districts would be drained of black voters, leaving those districts more white—and more Republican.[435] (That view was lent credence by the Bush Justice Department's argument in *Voinovich*—later rejected in *DeGrandy*—that creation of a proportional number of black-majority districts should not be subject to a "packing" challenge under section 2 of the V.R.A. on the ground that a larger number of minority "influence districts" with a non-minority majority could have been created.[436]) If, indeed, the black-majority districts that were created in order to obtain preclearance from the Attorney General contained a greater percentage of black voters than was necessary for compliance with the Act, such districting plans—which would amount to packing black voters into districts—could not be found to be narrowly tailored to serve the purpose of preventing vote dilution.

Finally, the last step of a proper analysis would be to examine as part of the narrow-tailoring inquiry any race-neutral alternatives that might have been used to serve the government's purposes. The costs inherent in any such alternatives would have to be weighed against the costs of the use of race in the particular circumstances presented. In the context of race-conscious districting, this is a topic whose importance warrants separate consideration, and about which I will defer detailed examination until Part III.C.

Unlike either a virtually fatal "strict scrutiny," or an ineffectually deferential rational basis test, a judicial examination that followed the steps I have outlined would be tightly moored to the purposes for which it was undertaken in the first place. While acknowledging the harms that are always caused by the classification of individuals according to race, this type of examination would be far preferable to any one-size-fits-all analysis. And in permitting the governmental use of race in some circumstances where it is used to address or prevent discrimination and inequality, this approach would be most faithful to

---

[435] *See, e.g.*, Karlan, *supra* note 173, at 1733-34 & nn.128 & 130 (1993) (describing these allegations).

[436] *See* Brief for the United States as Amicus Curiae Supporting Appellants at 12-16, Voinovich v. Quilter, 507 U.S. 146 (1992) (No. 91-1618) (arguing that section 2 of the V.R.A. cannot require creation of districts in which minorities are not a majority of the voting age population, and urging therefore that Ohio's plan with a proportionate number of black-majority districts should be upheld).

the underlying command of equal protection.

B. *Can Bizarrely Shaped Districts Free Us from Misshapen Doctrines? Making Sense of the Rhetoric That Animates* Shaw

So is there any way to get there from here? Can the *Shaw* line of cases be reconciled with the approach I have suggested? As described above, the cases are confused and incoherent. At best they suggest a scrutiny that is too rigid in most cases and too deferential in others. At worst, they portend an effectively undifferentiated approach to the use of race for districting purposes, an approach under which all such uses of race are unconstitutional.

There is language in the opinions, and particularly in the opinions of Justice O'Connor, whose vote has been controlling in these cases, that strict scrutiny will not necessarily mean the invalidation of all districts drawn with race in mind in order to combat the effects of racial polarization in voting. In order to reconcile this rhetoric with the approach I have described, however, one would need to glean from the Court's *Shaw* line of decisions some principle that appropriately distinguishes the more harmful uses of race in electoral districting from the less harmful ones.

The key to reconciling the *Shaw* line of decisions with the Court's pre-*Shaw* cases—and with the approach advocated here—may lie in one of the most perplexing aspects of the *Shaw* series of cases: the on-again, off-again focus on the shapes of electoral districts. This focus, of course, began in *Shaw I* itself, where Justice O'Connor wrote for the Court that strict scrutiny was to be applied to "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race.'"[437] This is a strange formulation to use, given that all parties conceded that race had been used to draw the district lines in *Shaw.* It suggests that injury inheres not in the use of race, but in the fact that one could draw no other conclusion but that race had been used. This was reinforced by the Court's statement that "we believe that reapportionment is one area in which appearances do matter."[438]

As described above, the focus on bizarre shape seemed to fade in *Miller v. Johnson.*[439] In *Miller* the Court, this time with Justice Kennedy writing, said that bizarre shape was not "a threshold showing" for seek-

---

[437] Shaw v. Reno, 509 U.S. 630, 644 (1993) (quoting Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

[438] *Id.* at 647.

[439] *See supra* text accompanying notes 321-25.

ing relief under *Shaw*.[440] It held that, to make out a claim under the Equal Protection Clause, a plaintiff would have to show that race was "the predominant factor motivating" the legislative decision to place voters in particular districts.[441] Although it said that this could only be proved by demonstrating that "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations,"[442] it also said:

> 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.[443]

Of course the *Shaw* Court's emphasis on bizarre shape would have been totally unnecessary had that shape only been relevant as proof that race was used in districting, since the state admitted that the districts had been drawn purposely on racial grounds in order to obtain preclearance under section 5 of the V.R.A. And, despite Justice Kennedy's efforts in *Miller* to eliminate bizarre shape as the touchstone of a *Shaw* cause of action, in *Bush v. Vera*, Justice O'Connor's plurality opinion seemed to revive it.[444] There she wrote:

> Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts . . . .
>
> . . . .
>
> . . . For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were "subordinated" to race. By that we mean that race must be "*the predominant* factor motivating the legislature's [redistricting] decision." . . .
>
> . . . .
>
> . . . The Constitution does not mandate regularity of district shape, and the neglect of traditional districting criteria is merely necessary [to the application of strict scrutiny], not sufficient. For strict scrutiny to apply, traditional districting criteria must be *subordinated to race*.[445]

---

[440] Miller v. Johnson, 515 U.S. 900, 912 (1995).

[441] *Id.* at 916.

[442] *Id.*

[443] *Id.* at 913.

[444] *See* Bush v. Vera, 517 U.S. 952 (1996).

[445] *Id.* at 958, 959, 962 (plurality opinion) (first alteration in original) (citations omitted) (quoting *Miller*, 515 U.S. at 916).

In *Bush* at least, this focus on "traditional districting principles" turned out to mean in practice that bizarrely shaped districts that were unexplainable on grounds other than race had to be subjected to strict scrutiny.[446] Indeed, the plurality engaged in detailed descriptions of the "narrow and bizarrely shaped tentacles," and the resemblance to "a sacred Mayan bird" with "spindly legs" and an "open beak," of the districts before it.[447]

More significantly, the plurality concluded that bizarre shape was relevant to the narrow tailoring inquiry, saying:

> Our discussion in *Miller* served only to emphasize that the ultimate constitutional values at stake involve the harms caused by the use of unjustified racial classifications, and that bizarreness is not necessary to trigger strict scrutiny. Significant deviations from traditional districting principles, such as the bizarre shape and noncompactness demonstrated by the districts here, cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial. For example, the bizarre shaping of Districts 18 and 29, cutting across preexisting precinct lines and other natural or traditional divisions, is not merely evidentially significant; *it is part of the constitutional problem insofar as it disrupts nonracial bases of political identity and thus intensifies the emphasis on race.*[448]

The view that bizarreness might be a critical factor in the invalidation of the districts in *Shaw* and its follow-on cases is consistent with the Court's summary affirmance, on the very day *Miller* was decided, of the decision of a three-judge court in *DeWitt v. Wilson*, a case that upheld against *Shaw* challenge the use of race in California's 1992 redistricting plan.[449] Typically, that plan was adopted in part to gain preclearance under section 5 of the V.R.A.—some California counties are covered by its provisions—and to avoid challenge under the nondilution provisions of section 2 of the Act.[450]

The districting authority—three special masters appointed by the California Supreme Court—refused to create either bizarrely shaped majority-minority districts or majority-minority districts that grouped together geographically dispersed minority populations by including large stretches of sparsely populated land in between them.[451] On the

---

[446] *Id.* at 965-73.

[447] *Id.* at 965, 974 (internal quotation marks and citation omitted).

[448] *Id.* at 980-81 (citation omitted) (emphasis added).

[449] DeWitt v. Wilson, 515 U.S. 1170 (1995).

[450] *See* DeWitt v. Wilson, 856 F. Supp. 1409, 1410-11 (E.D. Cal. 1994) (three-judge court).

[451] *See id.* at 1413-15.

other hand, "the Masters attempted to reasonably accommodate the interests of every 'functionally, geographically compact' minority group of sufficient voting strength to constitute a majority in a single-member district."[452] The district court explained that "the functional aspect of geographical compactness takes into account the presence or absence of a sense of community made possible by open lines of access and communication."[453]

Because the resulting majority-minority districts were responsive to communities of interest, even though those communities coincided with race, the district court concluded that they were not drawn "based . . . solely on race."[454] The district court held that the districting authority had "properly looked at race, not as the sole criteria in drawing lines but as one of the many factors to be considered."[455] It concluded that "the Masters' Report evidences a judicious and proper balancing of the many factors appropriate to redistricting, one of which was the consideration of the application of the Voting Rights Act's objective of assuring that minority voters are not denied the chance to effectively influence the political process."[456]

The district court concluded that the plan was "a thoughtful and fair example of applying traditional districting principles, while being conscious of race."[457] The court held that "where race is considered only in applying traditional redistricting principles along with the requirements of the Voting Rights Act, . . . strict scrutiny is not required. However, if it were required, we conclude that this California redistricting plan has been narrowly tailored to meet a compelling state interest."[458] The district court upheld the race-conscious districting plan.

The significance of the Supreme Court's summary affirmance in *DeWitt* was a point of controversy in *Bush.* In her plurality opinion in *Bush,* Justice O'Connor wrote:

> Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts. See *DeWitt v. Wilson,* 856 F. Supp.

---

[452] *Id.* at 1411 (citations omitted) (quoting Wilson v. Eu, 823 P.2d 545, 549-50 (1992)).

[453] *Id.*

[454] *Id.* at 1413.

[455] *Id.* at 1413.

[456] *Id.* at 1413-14.

[457] *Id.* at 1415.

[458] *Id.*

> 1409 (E.D. Cal. 1994) (strict scrutiny did not apply to an intentionally created compact majority-minority district), summarily aff'd, 515 U.S. 1170 (1995).[459]

Justice Kennedy, who joined the plurality opinion, wrote separately to explain that:

> [the] question [whether strict scrutiny would apply to all cases of intentional creation of majority-minority districts] was not at issue in *DeWitt v. Wilson*.... [O]ur summary affirmance in *DeWitt* stands for no proposition other than that the districts reviewed there were constitutional. We do not endorse the reasoning of the district court while we order summary affirmance of the judgment.[460]

But whatever the meaning of *DeWitt* regarding the district court's decision not to apply strict scrutiny, its significance surely lies in the Supreme Court's decision to uphold the constitutionality of a plan in which race was considered in drawing electoral district lines, but in which the resulting plan did not contain any bizarrely shaped districts. Justice O'Connor's opinions for the Court in *Shaw* and for the plurality in *Bush* undeniably state that bizarreness of district shape is constitutionally harmful. An absence of bizarrely shaped districts is at least one basis upon which *DeWitt* can be distinguished from all the cases in which the Court has invalidated districting plans under the *Shaw* cause of action.

Why, all things being equal, including an identical community of interests among minority group voters, a majority-minority district that is bizarrely shaped should raise more constitutional concern than an identically composed one that is more compact, remains largely unarticulated by the Court. Yet, if we seek a "strict scrutiny" tailored to the harms wrought by particular governmental uses of race—and, perhaps more importantly from a practical point of view, if we seek a way to explain the *Shaw* line of cases that is consistent with such an approach—it would certainly behoove us to examine closely a statement like that of the *Bush* plurality that "bizarre shape[s] . . . cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial."[461]

Several commentators have sought to address the significance of bizarre district shape. In an article written shortly after *Shaw* was decided and before *Miller* and *Bush* were handed down, Professors Pildes

---

[459] Bush v. Vera, 517 U.S. 952, 958 (1996) (plurality opinion) (some citations omitted).

[460] *Id.* at 996 (Kennedy, J., concurring) (citations omitted).

[461] *Id.* at 980 (plurality opinion).

and Niemi concluded that *Shaw*'s emphasis on bizarre district shape could best be understood to reflect a concern with race becoming "the dominant value [that] . . . subordinates all others."[462] They argued that the bizarreness of the district's shape sends out a "signal . . . that, to government officials, race has become paramount and dwarfed all other, traditionally relevant criteria."[463]

On this view, bizarrely shaped districts were problematic because they sent a message of "inappropriate respect for relevant public values."[464] Professors Pildes and Niemi argued that Justice O'Connor's opinion in *Shaw* resonates with Justice Powell's landmark opinion in *Bakke*. They suggested that *Shaw* could be viewed as an attempt to ensure that race does not become, or appear to become, the dominant consideration in governmental decisionmaking. In the context of race-conscious districting, they contended bizarre shape sends the message that race was the only factor considered, even though it (a) may not have been or, more significantly, (b) may equally well have been in other cases in which it was possible to achieve the districting authority's "racial" ends with more compact districts. Professors Pildes and Niemi argued, therefore, that the harm the *Shaw* Court believed was wrought by bizarrely shaped districts must come either from some intrinsic wrong in sending out a message that race is dominant in a governmental decision or from the impact of that message on social perceptions.[465]

Similarly, Professors Aleinikoff and Issacharoff have argued that the noncompactness of the district may send a message that "underscores the deep racial divisions" in American society.[466] They, too, compared *Shaw* to *Bakke*, writing—again before *Miller* and *Bush*—that *Shaw*'s emphasis on shape could best be understood to express a concern with the "excessive reliance" on race, and a view that race could permissibly be used as a "factor," but only as one of many factors in the districting decision.[467] In their view, *Shaw*'s emphasis on bizarreness reflects a concern that bizarrely shaped districts will "call[] attention" to race.[468] In compact districts, by contrast, one can at least

---

[462] Pildes & Niemi, *supra* note 288, at 501.

[463] *Id.*

[464] *Id.* at 507.

[465] *See id.* at 509.

[466] T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 614 (1992).

[467] *Id.* at 614, 618.

[468] *Id.* at 613.

claim that the black majority was the result of residential housing patterns and the like.[469]

The concern about bizarre shape certainly must reflect some concern about the dominance of the use of race in governmental decisionmaking, but as the *Bush* plurality opinion now makes clear, Justice O'Connor's concern about district shape goes beyond its significance as an indication of the excessive use of race. And, undoubtedly, to some degree, the concern about shape must include a concern about obviousness, just as the concern expressed by Justice Powell in *Bakke* must include such a concern.

But perhaps the significance of bizarre shape to the *Shaw* Court, and to the *Bush* plurality (or at least to Justice O'Connor, who authored the opinions filed on their behalf), lies, at least in part, elsewhere. There are at least two possibilities.

The first, and perhaps most compelling, is actually suggested by the district court opinion in *DeWitt*. Where an electoral district is drawn to include as a majority members of a racial minority group, but it does not adhere to traditional districting principles, it may be more likely that the members of the racial minority group do not, in fact, share a community of interests that could justify the district at issue. In such circumstances, there is an increased probability that any district reflects a stereotypical racial presumption of common interests, rather than the reality of common interests that could, in the presence of racial polarization in voting, justify the use of race in districting. In such a circumstance, one might want both districting authorities and reviewing courts to operate with heightened sensitivity because of this increased risk to ensure that communities placed together in a district, but widely disparate socially, economically, or geographically, in fact have the cohesion that would justify creating that particular majority-minority district. If not, the government's use of race will have been made on the basis of "race alone," not in the *Bakke*an sense of race being used *simpliciter* rather than as one among several factors—district shape will always be the result of consideration of many factors—but in the sense of race divorced from any justification.[470]

Reading *Shaw*, *Miller*, and *Bush* to reflect this concern would be consistent with the Court's past practice and with the traditional un-

---

[469] *See id.* at 614.

[470] *Cf.* Pildes & Niemi, *supra* note 288, at 500-06 (suggesting that the principle animating *Shaw*'s focus on bizarrely shaped districts is that race not be permitted to appear to be paramount to all other traditionally relevant criteria for districting).

derstanding of the concerns addressed by strict scrutiny under the Equal Protection Clause. It would also make sense of much of the harsh language about communities of interest contained in the opinion of the *Miller* majority:

> A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests. "[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes." But where the State assumes from a group of voters' race that they "think alike, share the same political interests, and will prefer the same candidates at the polls," it engages in racial stereotyping at odds with equal protection mandates.[471]

Similarly, in *Shaw I*, Justice O'Connor wrote:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception 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. We have rejected such perceptions elsewhere as impermissible racial stereotypes.[472]

These statements could be read simply as a condemnation of the use of race as a proxy for a community of interest. But these words do not apply to *all* uses of race in drawing electoral district lines, but only those where race is used in derogation of traditional districting principles. That the Court is talking about district shapes is further suggested by the verbs it uses: the districts about which the Court is concerned "resemble" political apartheid; they "reinforce[] the perception" that members of different racial groups vote in different ways. The court also says that such "perceptions" have been condemned elsewhere as stereotypes, even though, in fact, what have been rejected in the past have not been "perceptions," but actions based upon stereotypes.

This suggests that, in some confused way, the Court may have been trying to articulate the idea that when a districting body begins to draw lines on the basis of race that gobble up voters from here and

---

[471] Miller v. Johnson, 515 U.S. 900, 920 (1995) (alteration in original) (citations omitted) (quoting Shaw v. Reno, 509 U.S. 630, 646 (1993)).

[472] Shaw v. Reno, 509 U.S. 630, 647 (1993).

there, the original purpose of the district, to give adequate voting strength to voters who actually share a community of interest and not merely skin color, may more readily get lost. This would justify a more skeptical examination of the resulting districting plan.

There is also a second, more intriguing possible explanation for the significance of district shape to the *Shaw* majority. The emphasis on district shape may, indeed, reflect the same intuition expressed in Justice Powell's opinion in *Bakke*, but that intuition may be about more than just "obviousness."

In *Bakke*, Justice Powell wrote that race can constitutionally be taken account of in admissions to a state medical school even to the point that it is the determinative factor in a decision whether or not to admit an individual. He concluded, however, that the state may not set aside a particular number of seats for which only members of racial minorities may compete: each applicant has to be considered as part of a pool of all the applicants, so that even where race is ultimately determinative, every candidate has been considered for every place in the class.[473] "So long as the university proceeds on an individualized, case-by-case basis," he wrote, "there is no warrant for judicial interference in the academic process."[474]

The significance of the line Justice Powell drew in his *Bakke* opinion has of course been the subject of a great deal of comment, and it remains controversial. On the one hand, the opinion can be understood to draw a line between rigid quotas and targets that ultimately may not be met in a given year after individualized consideration of each applicant for all the spaces in, for example, a medical school class, even if race is given weight as a plus factor. On the other hand, some have argued that Justice Powell's opinion holds in essence that race may be taken account of in university admissions, but only so long as it is not done in too obvious a way. Although Justice Powell's opinion in *Bakke* distinguishes between fixed "quotas" and the consideration of race in admissions where it "is simply one element—to be weighed fairly against other elements—in the selection process," each of these elements, including race, may be given a different weight by school authorities ex ante, so that the race-as-an-element process approved by Justice Powell will serve simply as a different means toward achieving precisely the same desired quantum of "educational diver-

---

[473] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315-20 (1978) (Powell, J.).

[474] *Id.* at 319 n.53.

sity."[475] That is, in practice, the weight given to race in an admissions plan deemed permissible under Justice Powell's opinion in *Bakke* will not be determined behind a veil of ignorance concerning its practical impact: university officials will determine how much "weight" to give race in order to achieve the level of diversity they desire.

Justice Powell's opinion actually suggests that this is not constitutionally problematic: the Harvard College Admissions Program, which Justice Powell cited as an example of a permissible plan, candidly stated that the diversity it sought to create "cannot be provided without some attention to numbers."[476] Indeed, under the Harvard Plan, as described in the appendix to Justice Powell's opinion, although the admissions committee could not know before examining the applicants in a given year whether the last few places in the class would go to white or minority students, there was nonetheless a floor in terms of minority percentage below which the admissions committee would not go.[477]

On this reading, nothing in *Bakke* appears to prevent a state university from giving racial diversity precisely enough weight that it will necessarily be dispositive in the same number of cases in which it would have been dispositive under a system like that invalidated in *Bakke* in which members of minority groups were considered separately for admission to a fixed minimum number of places in the class. Under this view of Justice Powell's *Bakke* opinion, therefore, the state is permitted to achieve in substance the same result as if it adopted a program that provides a certain number of seats to members of a particular racial group. It is on this reading that Justices Brennan, White, Marshall, and Blackmun concluded in *Bakke* that, in substance, Justice Powell's opinion struck down the U.C. Davis affirmative action plan because it did not "proceed[] in a manner that is not immediately apparent to the public."[478]

---

[475] *Id.* at 316-18.

[476] *Id.* at 323 (app. to opinion of Powell, J.).

[477] *Compare id.* at 324 (describing the competition in the Harvard College Admissions Program when there are "only a few places left to fill"), *with id.* at 323 (claiming that Harvard has not set "target-quotas," or "a minimum number of blacks . . . who are to be admitted," but stating that "some attention" must be paid to "numbers" because in terms of diversity it "would not make sense" to admit only "10 or 20 black students"). At one point Justice Powell's opinion does suggest that it would be impermissible to operate a "plus" factor affirmative action plan "as a cover for the functional equivalent of a quota system." *Id.* at 318. He also states, however, that the "presumption of legality" of a "plus" factor system "might be overcome" only by a showing of a "systematic exclusion of certain groups." *Id.* at 319 n.53.

[478] *Id.* at 379 (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and

This view of Justice Powell's opinion has of course led to criticism of that opinion.[479] The gravamen of this criticism is in essence that the only *constitutional* question at issue in *Bakke* was whether race can ever be dispositive in medical school admissions; all Justice Powell's controlling *Bakke* opinion accomplished was to require that the use of race be less obvious.[480]

The position that obviousness may do a constitutionally relevant harm, even an equal protection harm, however, is not without some strength.[481] Professors Aleinikoff and Issacharoff have suggested that knowledge that government has used race in a dispositive way may well be racially divisive.[482] Professors Pildes and Niemi have suggested, arguably less persuasively, that people may be disturbed by the obvious use of race because it will be perceived to reflect a breakdown of the deliberative process.[483]

On the other hand, that obfuscation would be the constitutional command in a democratic society certainly is counterintuitive. It means that if the politically accountable branches of government do choose to use race in drawing district lines, they are constitutionally required to act in the way for which they are least likely to be held accountable.

Justice O'Connor's opinion for the Court in *Shaw* does appear to suggest that what is required by the Constitution in matters of race is a maintenance solely of appearances: "[W]e believe that reapportionment is one area in which appearances do matter."[484] Under *Shaw*, at least, strict scrutiny was reserved for those uses of race that can "not be

---

dissenting in part); *cf. id.* at 319 (Powell, J.) ("It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class.").

[479] *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 309-10 (1985); Vincent Blasi, Bakke *as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CAL. L. REV. 21 (1979).

[480] *See* DWORKIN, *supra* note 479, at 309-11 ("[T]here is no difference, from the standpoint of individual rights, between the two systems at all."); Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1875 (1995) (book review) ("The Harvard program was a more genteel way of accomplishing the same results as the plan in *Bakke*, and . . . on the margins a plus factor has precisely the same effect as that plan; Powell's position was . . . 'pure sophistry.'").

[481] *Cf.* LAURENCE TRIBE, CONSTITUTIONAL CHOICES 223-28 (1985) (suggesting that Justice Powell's distinction addressed a concern about procedural fairness, a concern that might not be found "in the realm of equal protection").

[482] *See* Aleinikoff & Issacharoff, *supra* note 466, at 613 ("[S]uch [racial] lines are inherently divisive, calling attention to differences that have poisoned American society in the past.").

[483] *See* Pildes & Niemi, *supra* note 288, at 500.

[484] Shaw v. Reno, 509 U.S. 630, 647 (1993).

explained on grounds other than race."[485] In other words, if it is at least plausible to an outside observer that the district was drawn for non-race-conscious reasons, it may not be subject to invalidation.

Shaw thus could be read to suggest that the Equal Protection Clause is concerned, at least in this context, not with the substance of government decisionmaking, but with the message sent by it, the way it may be understood by the public. The closest analogy elsewhere in constitutional jurisprudence is the view, first taken, again, by Justice O'Connor, in *Lynch v. Donnelly* and subsequently adopted in practice by a majority of the Court, that the Establishment Clause prohibits government action that has the effect of "convey[ing] a message of endorsement" of religion.[486]

In the Establishment Clause context, however, the message that is impermissible, at least on Justice O'Connor's explanation of the endorsement test, is "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored by members of the political community."[487] Certainly the Equal Protection Clause, like the Establishment Clause, is motivated in part by concern with the integrity of the political community. But, at least at first blush, *Shaw* and its progeny suggest no real scrutiny of the social facts to determine whether the use of race is intended to ensure the inclusion of a group that has been discriminated against, or the exclusion of individuals as not full members of the political community on the basis of race. The message that appears to be forbidden, rather, is that there is a difference in the situation of the races that might make race a relevant consideration in a governmental decision.

The formulation in *Shaw* and in Justice O'Connor's subsequent opinions also suggests that, unlike in the Establishment Clause area, the Constitution is concerned here *only* with message and not with the concrete effect of the government's action. Under the Establishment Clause, the endorsement test is not the exclusive test for unconstitutionality. A finding of endorsement is sufficient, but not necessary, for

---

[485] *Id.* at 644.

[486] Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring); *see also* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (upholding a state law under the Establishment Clause because it neither benefits nor endorses religion). In their discussion of "expressive harms," Professors Pildes and Niemi have also observed a connection between the opinion in *Shaw* and Justice O'Connor's Establishment Clause jurisprudence. *See* Pildes & Niemi, *supra* note 288, at 512.

[487] *Lynch*, 465 U.S. at 688.

constitutional invalidation: aid to religion is impermissible even if it is disguised in such a way as to prevent the message of endorsement from being conveyed.[488] By contrast, if *Shaw* scrutiny is limited to those cases where districting principles are transgressed, because such districts "rationally cannot be understood as anything other than an effort to segregate voters into different districts in the basis of race," any district line will be permissible, whatever its *actual* origin, as long as it *could* be explained in nonracial terms.[489] The Constitution under this reading would appear to be concerned literally only with form and not with substance.

Appearances, however, can be deceiving. Perhaps the choice of form has some substantive implications. Justice Powell argued that the distinction he drew was not about appearance so much as it was about the "right to individualized consideration."[490] And he described the unconstitutional University of California plan as operating "a *separate* admissions system . . . in coordination with the regular admissions process."[491]

This resonates precisely with language in *Shaw I* expressing a concern that the districts at issue would be "understood" or "viewed" as an "effort to 'segregate.'" The Court repeatedly described the cause of action it recognized as one alleging that voters had been "segregated" on the basis of race. Indeed, the idea of segregation and separation of the races recurs like an incantation throughout the opinion in *Shaw*,[492]

---

[488] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 627 (1992) (Souter, J., concurring) (stating that the Establishment Clause prohibits government action that "favor[s] or endorse[s]" religion); Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 591 (1989) (Blackmun, J., joined by Brennan, Marshall, Stevens and O'Connor, JJ.) ("'Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.'" (quoting Everson v. Board of Educ. of Ewing, 330 U.S. 1, 16 (1947))).

[489] Shaw v. Reno, 509 U.S. 630, 649 (1993). Indeed, the *Shaw* Court said that "[i]t is unnecessary for us to decide whether or how a reapportionment plan that, on its face, can be explained in nonracial terms successfully could be challenged." *Id.*

[490] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318 & n.52 (1978).

[491] *Id.* at 273.

[492] *See, e.g.*, *Shaw*, 509 U.S. at 658 ("Today we hold only that appellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification."); *id.* at 649 ("[W]e conclude that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."); *id.* at 642 ("What appellants object to is redistricting legislation

which, as described above, at one point actually says that the North Carolina district at issue in the case "bears an uncomfortable resemblance to political apartheid."[493]

Similarly, the Court in *Miller* likened the creation of the black-majority district there to officially enforced racial segregation: "Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools, so did we recognize in *Shaw* that it may not separate its citizens into different voting districts on the basis of race."[494] The plurality in *Bush* also reiterated the *Shaw I* formulation.[495]

The language from *Shaw*—which actually purports to explain why bizarrely shaped districts are problematic—is extraordinarily perplexing, because the districts of which the plaintiffs' complained were, in fact, *not* segregated. As described above, in North Carolina's Twelfth Congressional District, the district whose shape was at issue in *Shaw*,

---

that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."); *id.* at 645 ("*Gomillion* thus supports appellants' 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."); *id.* at 646-47 ("In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race." (alteration in original) (citation omitted)); *id.* at 651 ("The plaintiffs in *UJO*—members of a Hasidic community split between two districts under New York's revised redistricting plan—did not allege that the plan, on its face, was so highly irregular that it rationally could be understood only as an effort to segregate voters by race. Indeed, the facts of the case would not have supported such a claim."); *id.* at 652 ("Nothing in the decision [*UJO*] precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification. Because appellants here stated such a claim, the District Court erred in dismissing their complaint.").

[493] *Id.* at 647.

[494] Miller v. Johnson, 515 U.S. 900, 911 (1995) (citations omitted).

[495] The Court stated:

> Strict scrutiny applies where "redistricting legislation . . . is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles," *Shaw I*, [509 U.S.] at 642, or where "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines," *Miller*, 515 U.S., at 913, and "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations," *id.*, at 916. See also *id.*, at 928 (O'Connor, J., concurring) (strict scrutiny only applies where "the State has relied on race in substantial disregard of customary and traditional districting practices").

Bush v. Vera, 517 U.S. 952, 958 (1996).

blacks made up 53.34% of the voting age population and 54.71% of the population overall.[496] The use of the highly charged rhetoric of segregation thus has frustrated dissenters and concerned commentators since *Shaw* was decided.[497] In their analyses of *Shaw*, though, perhaps because the districts at issue were integrated, commentators have in general ultimately either ignored the language of segregation,[498] or have treated it as inflammatory exaggeration.[499]

But the concept of segregation—segregation evident in the bizarre shape of a district—appears to have been central in the Court's thinking when it decided to uphold the challenge to the districting plan at issue in *Shaw*. If one could find an explanation for the Court's apparent intuition that bizarrely shaped districts "segregate" voters, one might perhaps be better able to determine whether there is any way to harmonize the *Shaw* line of cases with those decided outside the context of voting rights.

Every act of integration requires an intermediate act of segregation. To take the most obvious example, to integrate school classrooms through student assignments, one must first draw up separate lists of black and white students, lists in which the names of the students are segregated by race. In most cases of integration—most cases in the third category of race-conscious government action I have described—such lists would go no further than some administrators' offices. But one can imagine a system in which the intermediate segregatory step was done in such a public way that it independently offended the command of *Brown*.

For example, imagine a city that had maintained by law a system of "separate but equal" public transportation, not by segregating the seats on each bus, but by providing different buses for the members of

---

[496] *See Shaw*, 509 U.S. at 671 n.7 (White, J., dissenting); State Appellees' Brief, *supra* note 284, at 24a. Two of the plaintiffs in *Shaw* lived in the Twelfth District. The district in which the other plaintiffs' lived, the Second District, was also integrated. It had a total population that was 21.94% African American, approximately the same as the state population overall. Under the districting plan at issue in *Shaw*, five of the State's congressional districts had populations that were less than ten percent black. *See* Aleinikoff & Issacharoff, *supra* note 466, at 611-12 & n.100 (1993) ("If these data described residential communities, we would consider them remarkably integrated by usual American standards.").

[497] *See, e.g.*, *Shaw*, 509 U.S. at 671 n.7 (White, J., dissenting) (noting that the districts at issue were *not* segregated); Karlan, *supra* note 309, at 94 (same).

[498] *See* Pildes & Niemi, *supra* note 288.

[499] *See* Aleinikoff & Issacharoff, *supra* note 466, at 611-12 (calling the Court's use of the phrase "political apartheid" a "disturbing exaggeration").

each race.[500] Now imagine that, following *Brown*, that city wanted to desegregate this system of public transportation. The city might stop the legal segregation. But members of each race might continue to use their own racially identifiable buses. (Undoubtedly, the "black" buses would have been, among other things, older and in poorer condition than those reserved for white people.) One can imagine the city deciding that, in order to ensure that the previously segregated system of public transportation were now integrated, it would set up separate "black" and "white" bus stops, from which each bus would pick up a specified percentage of its passengers.

This would ensure a certain racial mix on each bus. Nonetheless, this "integrative" action would be impermissible under *Brown*, because, in integrating the buses, the city would have used the means of setting up segregated bus stops.

The same type of fact pattern can be conceived of with respect to most race-conscious acts of integration. For example, the Supreme Court held in its one-line per curiam opinion in *Tancil v. Woolls* that there is no constitutional obstacle to the collection by government on the basis of race of statistical information concerning divorce, presumably because such information can be valuable in measuring the lingering effects of discrimination.[501] But government presumably could not collect that data by setting up separate counters in county offices for black and white people seeking a divorce.[502] At some point, otherwise permissible race-conscious government action may transgress the command of equal protection under *Brown* in part because of its public nature, precisely because of the message that an intermediate segregative act may convey. The public bus case would no longer belong in Category Three, but in Category One. Unless the obviousness was absolutely necessary to achieve some overriding purpose, it would be invalid.

---

[500] The Montgomery, Alabama ordinance invalidated in *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam), required bus companies to segregate the seating on their buses, but also provided that "[n]othing in this section shall be construed as prohibiting [persons who operate bus lines in the city] from separating the races by means of separate vehicles if they see fit." *See* Browder v. Gayle, 142 F. Supp. 707, 711 n.2 (1956) (quoting MONTGOMERY, ALA., CODE § 10, Ch. 6 (1952)).

[501] *See* Tancil v. Woolls, 379 U.S. 19 (1964) (per curiam), *aff'g* Hamm v. Virginia State Bd. of Elections, 230 F. Supp. 156 (E.D. Va. 1964), discussed *supra* notes 122-27 and accompanying text.

[502] Indeed, while upholding the collection of statistical data, *Tancil* also invalidated Virginia's system of maintaining separate voting and property tax records for black and white citizens. *See Hamm*, 230 F. Supp. at 156, *aff'd sub nom.* Tancil v. Woolls, 379 U.S. 10 (1964).

This could help explain what Justice O'Connor was struggling to get at in her opinion for the Court in *Shaw*, when she distinguished district lines so bizarre that they could only be understood as an attempt to "segregate" from other district lines drawn on the basis of race. She may have been trying to say that the use of race to draw bizarrely shaped districts itself causes harm to African Americans despite the fact that the ultimate goal of the districting plan is to overcome discrimination against African Americans in voting.

In this conception the harmful message that the district's bizarre shape will send is not that race was used (or used excessively) in its creation. The link between bizarre shape and that kind of knowledge in any event seems speculative at best: someone living in a majority-minority district may well be as likely to realize it in a compact district as in a bizarrely shaped one.

Rather, the bizarrely shaped district may be constitutionally problematic because of what happens on the ground when, aided by computers, bizarre electoral district lines are drawn through neighborhoods in an attempt to obtain a district with a particular racial composition. One can at least imagine a neighborhood in which the voters all leave their houses on election day, the black voters turning right to go to their polling place, the white ones left to go to theirs. It may be even easier to imagine that the result of such districting might well include polling places in mixed-race areas that are populated on election day exclusively by members of one or another race. And one can readily see why this would present a grave constitutional problem.

Of course whether this effect occurs is an empirical question and the *Shaw* line of cases is notable for its failure to engage in any empirical analysis of the circumstances surrounding the districting plans struck down. The only mention of the practical consequences of the bizarre districts the Court has considered is contained in Justice O'Connor's plurality opinion in *Bush* where she described a challenged districting plan as causing:

> a severe disruption of traditional forms of political activity. Campaigners seeking to visit their constituents "had to carry a map to identify the district lines, because so often the borders would move from block to block"; voters "did not know the candidates running for office" because they did not know which district they lived in. In light of Texas' requirement that voting be arranged by precinct, with each precinct representing a community that shares local, state, and federal representatives, it also created administrative headaches for local election officials: ". . . Harris County estimated that it must increase its number of precincts from 672 to 1,225 to accommodate the new Congressional boundaries. Polling places, ballot forms, and the number of election employees are

> correspondingly multiplied. Voters were thrust into new and unfamiliar precinct alignments, a few with populations as low as 20 voters."[503]

Nonetheless, a concern about the practical consequences of drawing bizarrely shaped but ultimately integrated districts is one way to make sense of the rhetoric of segregation and apartheid repeatedly utilized by the members of the *Shaw* majority. *Brown* itself held that the harm caused by segregation is in part a harm caused by the message segregation sends.[504] In this light, the *Shaw* Court's focus on the appearance of the districts at issue may be understood less as an attempt to elevate form over substance, and more as an attempt to recognize a very real type of harm.

This may also help explain the distinction drawn by Justice Powell in his opinion in *Bakke*—a distinction with which commentators have struggled mightily—between affirmative action plans for school admissions that select students from separate lists drawn up on the basis of race and plans that obtain a functionally equivalent result through the less-obvious weighting of racial criteria by admissions officers sorting through applications that have not been separated on that basis.[505]

Perhaps Justice Powell understood that there was an affront to the dignity of the minority applicants in separating their applications out from those of the other applicants seeking admission to U.C. Davis, an affront that was not justified by the need for diversity even though the use of race was.[506] Under this view, Justice O'Connor's opinion in *Shaw* can be seen as an adoption of an approach similar to that taken by Justice Powell in *Bakke*. The invalidation of the bizarrely shaped electoral districts in *Shaw*, *Miller*, and *Bush*, under this reading, would be a reflection of the additional harm wrought by what the Court viewed as their intermediate segregative effect. The Court's rigid approach might then be limited, by its own logic as well as its own terms, to those districts that actually have this effect.

While this reading of *Shaw*'s concern with bizarrely shaped dis-

---

[503] Bush v. Vera, 517 U.S. 952, 974 (1996) (quoting the opinion of the district court, Vera v. Richards, 861 F. Supp. 1304, 1340, 1325 (S.D. Tex. 1994)).

[504] *Cf.* Lawrence, *supra* note 118, at 351.

[505] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 319 (1978).

[506] *Cf.* TRIBE, *supra* note 481, at 223-28 (focusing on Justice Powell's concern that affirmative action plans in University admissions include individualized consideration of applicants for all available seats). Of course, Justice Powell spoke of the right of the white applicant to individualized consideration. A white person, however, probably can make no claim to having been stigmatized by segregation. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (describing the stigmatic harm imposed by segregation on African American children).

tricts does suggest a way to harmonize the *Shaw* cases with a more rational approach to judicial scrutiny of racial classifications, it is not completely satisfactory. To begin with, there is little evidence that the districts at issue in any of the *Shaw* line of cases actually caused the segregative effect just described. Certainly none of the challenges to come before the Court have been brought by African American voters concerned about this unintended consequence of the creation of majority-minority districts.[507] Thus, although this reading of *Shaw* and its progeny might be able to locate the cases within the Court's traditional paradigm for addressing race-conscious government action, the casual placement of the cases in the most harmful category of race-conscious action on this basis would suggest a less-than-rigorous application of appropriate equal protection principles.[508] Where communities of interest can only be recognized by drawing noncompact districts, a per se rule that bizarrely shaped districts are "unexplainable" other than as a contrivance to segregate voters will restrict without warrant the ability of the government to address discrimination in voting. A holding that race-conscious action to comply with the V.R.A. actually includes an element of "segregation" without any factual support for that conclusion (or indeed, any complaint from a black voter) would suggest again an approach that would prefer not to countenance the use of race, regardless of the reality of the circumstances of its adoption.

In addition, a rule under which constitutionality turns on district shape or inclusion of geographically distant minority communities within a single district will have at least two perverse results worthy of mention in terms of government's attempt to address voting discrimination. First, in the presence of racially polarized bloc voting, the need to draw a bizarrely shaped district to offset voter discrimination may arise, at least in part, because of black success in ending patterns of residential segregation. Where residential areas are segregated, of course, a black-majority district can more easily be drawn in a way that adheres to traditional districting principles. Only where residential segregation has broken down, resulting in the dispersal of minority group members within integrated communities, will black-majority districts be more likely to violate those principles. A traditional-

[507] This theory of an intermediate segregative effect would also be difficult to square with the conclusion that the plaintiffs in *Shaw*, who were white, had standing.

[508] As, similarly, the casual use of the rhetoric of segregation and apartheid in such circumstances suggests a less-than-rigorous recognition of the uniquely pervasive and degrading regimes those words describe.

districting-principles limitation then will place a judge-made obstacle in the path of giving effective electoral strength to those members of minority groups who have been fortunate enough to break out of patterns of residential segregation but who still suffer from discrimination in voting.

At least in the case of North Carolina in 1992, however, a reasonably contiguous and compact second black-majority congressional district could have been drawn to give effect to black voting strength. Indeed, this was the suggestion put forward by the Attorney General. The bizarreness of the Twelfth District was caused not merely by the desire to draw a second such district, but by the desire to do so while protecting the incumbency of sitting representatives.[509]

A second irony of any approach that turns on district shape is that, in a racially polarized jurisdiction, only race-conscious districts that respond to discrimination against minorities will in practice be subject to invalidation. Districting plans with compact districts that have the effect of discriminating against minority groups will normally be easy to construct. The reality is that, with or without a limitation on the scope of *Shaw* scrutiny, there is no reason that the strict scrutiny provided by *Shaw* will ever be available in a challenge to a district that in fact submerges the votes of a racial minority group.[510]

Nonetheless, the possibility of at least rationalizing the *Shaw* line of cases with the proper concerns of equal protection could have a great deal of practical value. Despite the dissenters' repeated conclusion that *Shaw* and its progeny are not coherent, the five-member *Shaw* majority has repeatedly declared its intent to adhere to that decision. With no realistic possibility of overruling *Shaw*, the best that can be hoped for may be that *Shaw* may, at least in theory, and in the long run in practice, be situated within a rational framework for the examination of race-conscious government action.

The approach outlined in Part III.A above is capable of taking account of the particular harms that may be wrought by race-conscious districts that are bizarrely shaped or that have an intermediate segregative effect. The Court could acknowledge that the unique harms attendant upon a race-conscious districting plan that includes bizarrely shaped districts (in the form of a higher risk either (a) that there is no community of interest among the minority voters placed in

---

[509] *See* Pildes & Niemi, *supra* note 288, at 489-91, 516-26.

[510] *Cf.* Shaw v. Reno, 509 U.S. 630, 650-51 (1993) (arguing that the Court's equal protection analysis is the same regardless of whether a government's use of race favors the majority or the minority).

the district or (b) that there is an intermediate segregative effect) mean that any such plan requires a greater degree of justification and a stronger demonstration of necessity than would a districting plan that adhered to traditional districting principles. The inquiry could be calibrated to the circumstances in which race is used.

This might well address the concerns voiced by Justice O'Connor, both in her opinion for the Court in *Shaw* and in her separate opinions since then, better than any version of *Shaw* strict scrutiny yet articulated. It might permit race-conscious districts drawn to comply with the V.R.A. to be upheld, but it would not require repudiation of *Shaw*'s call for "strict scrutiny." Nor would it permit any governmental use of race to be approved without close examination. The results of such an approach would likely coincide with Justice O'Connor's understanding of the bottom line of the *Shaw I* cause of action: that race-conscious districting is not per se invalid, but that it must be carefully cabined. This would be preferable to the line she otherwise appears headed toward drawing. Indeed, scrutiny that is actually tailored to the particular harms at issue is far more likely to result in the invalidation only of those districting plans that actually do more harm or for which the justification is the weakest.

C. *Narrow Tailoring Again: Examining the Costs of Race-Neutral Alternatives*

This leads finally to the question of necessity. As described above, race-conscious districting can be used to help combat the effects of racially polarized voting. If the Court adheres to the rigid approach suggested by *Shaw*, *Miller*, and *Bush*—whether those decisions are limited to cases in which the districting authority has drawn bizarrely shaped districts or not—the results consequently will be significant. One possibility is that the state and federal governments will be limited in their ability to address discrimination in voting. Current patterns of discrimination will be locked in place, untouchable, frozen in constitutional amber.

There is also a second possibility, however, which is in its own way even more radical, a possible unintended consequence of superimposing a rigid command of colorblindness under the Equal Protection Clause upon the command of nondilution and nonretrogression already contained in the V.R.A.

There are colorblind alternatives to race-conscious districting that could be used to meet the statutory commands of nondilution and nonretrogression. In particular, systems of cumulative or preference

voting have recently gained support in some academic circles, precisely because they combat vote dilution without requiring race-conscious government action. The availability of these race-neutral alternatives presents the very question of necessity described above in Part I.[511] In *Bush*, a majority of the Court concluded that compliance with section 2 of the V.R.A. was a "compelling" state interest. To what extent then will the "narrow tailoring" requirement of strict scrutiny nonetheless act to prevent the use of race in drawing districts designed to comply with this interest, given the availability of the "less restrictive" alternative of some nongeographical system for aggregating voter preferences? Under an appropriately designed system even of formally strict scrutiny, the answer should depend upon the costs inherent in abandoning the widely-but-not-universally-used system of geographical districting.

An examination of those costs suggests the importance of adopting the kind of flexible system I have described rather than a uniformly rigid strict scrutiny that would condemn all race-conscious action in the face of colorblind alternatives. Nongeographical systems for aggregating votes are not precisely tailored to address racial discrimination in voting. Rather, they work by giving representation to any electoral minority whose candidates have previously been unable to attract sufficient support for election. Rigid restrictions on race-conscious districting could leave such electoral systems as the only mechanisms available for addressing discriminatory voting patterns. The consequence of a movement toward constitutionally prohibiting race-conscious districting could thus be a radical transformation in the very nature of American electoral democracy, one that might well leave our polity more divided and polarized than before.

The Supreme Court in *Hunt v. Cromartie* will soon revisit the meaning of *Shaw* for states seeking to comply with the V.R.A. The next decennial census, with its accompanying redistricting, is also almost upon us. Whatever the precise scope of the antidiscrimination command of the Act, the Court eventually will be faced with a case in which the need to respond to racial polarization under the statute will collide with one or another version of *Shaw*. When that occurs, the Court will need a framework for analysis capable of appropriately addressing, as part of the narrow-tailoring inquiry, the question whether, rather than being permitted to draw district lines on the basis of race,

---

[511] *See supra* pp. 36, 44-46, 46-49 (describing the way in which the requirement that the use of race be "necessary" varies from Category to Category among race-conscious actions).

the districting authority should be required to use one of these race-neutral alternatives.

In examining any use of race by government, one must assess the costs of any race-neutral alternatives. As demonstrated above,[512] race-conscious action in Category One can be justified only if the costs of any available race-neutral alternative are prohibitively high. In Category Two, race-conscious action can be justified if the costs of a race-neutral alternative are substantial, but perhaps slightly less prohibitive. In Category Three, race-conscious districting has been permitted—for example in *McDaniel v. Barresi*—despite the availability of race-neutral alternatives when use of those alternatives would have imposed significant, but again, even less substantial, costs.

In the case of preventing vote dilution, the cost for our democracy of using race-neutral alternatives to drawing electoral districts that take race into account could, at least arguably, be extremely high. This alone should suffice to support a decision to permit race-conscious districting to be used to prevent vote dilution even in the face of these colorblind alternatives.

1. The Availability of Systems of Semiproportional Representation

The conventional wisdom is that *Shaw* and its progeny ultimately are about the constitutionality of the non-dilution command contained in section 2 of the V.R.A. This appears to have been one of the reasons, for example, that Justice O'Connor went out of her way in *Bush* to concur separately in her own opinion: she wanted to make clear that, at least in theory, a race-conscious district drawn in compliance with section 2 of the V.R.A. could survive strict scrutiny under *Shaw*.

What seems generally to have escaped notice is that invalidation of the use of race to draw electoral district lines would not completely invalidate the V.R.A. There are non-race-conscious means of combating vote dilution, means that could be used to comply with the Act even were the use of race for that purpose held completely invalid. These include mechanisms that require the abandonment of geographically based districting altogether, such as limited and cumulative voting, described by political scientists as systems of "semiproportional representation."

These alternatives rely upon the abandonment of winner-take-all

[512] *See supra* pp. 30, 36, 44-46.

elections to represent geographical areas. In cumulative voting, instead of dividing a jurisdiction into districts corresponding to the representative seats to be filled, an at-large election is held to fill all the seats and each voter is given a number of votes equal to the number of offices to be filled. Each voter may cast as many of those votes for any candidate or candidates he or she chooses.

In limited voting, the elections are again held at large, but each voter is given a number of votes less than the total number of seats to be filled. Each voter may cast a single vote for the candidates he or she prefers, until all his or her votes are cast.

These systems work to ensure minority representation by lowering what political scientists refer to as the "threshold of exclusion," the minimum number of like-minded votes needed to guarantee an electoral success.[513] Imagine a jurisdiction which is entitled to four representatives, in which the population is 75% white and 25% black, and in which the black voters are politically cohesive and most of the white voters are unwilling to vote for any black-supported candidate.[514] If the jurisdiction is treated simply as a multimember at-large district from which all four representatives will be elected, electing a representative can only be assured by a vote of 50% of the electorate plus one. This is the threshold of exclusion. Although it comprises 25% of the population, the minority group will be submerged within the white majority. Representation for the cohesive minority group even by a single representative will be out of reach.[515]

If the jurisdiction is divided at random into four single member districts, each of which has the same racial breakdown as the jurisdiction as a whole, again it will require a group to have 50% plus one within any district to elect a representative. Although it will only take a total of 12.5% of the total number of voters in the jurisdiction plus one to guarantee any candidate victory, because of geographical districting, a candidate must have a majority among the 25% of the population in a particular district for him or her to succeed. In our example, unless a black-majority district is intentionally created, the minority will most likely lose the election in each single-member dis-

---

[513] *See, e.g.*, Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1138 n.296 (1991).

[514] This example is taken from *id.* at 1138.

[515] Smaller groups may succeed in electing candidates, but only when their opposition is divided in supporting more than one alternative candidate. Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 32-33 n.117 (1991).

trict.

A cumulative voting system compensates for this effect by lowering the threshold of exclusion. The threshold of exclusion under a system of cumulative voting can be expressed as $1/(1+n)$ where n is the number of seats up for election.[516] Thus, if our hypothetical jurisdiction were to adopt an at-large cumulative voting mechanism to choose its four representatives with each voter having four votes, it would require only 20% of the voters (1/(1+4) or 1/5) to elect a representative, if they all cast all four votes for a single candidate.

In a limited voting system, the threshold of exclusion would also be lowered, but by an amount that can be calibrated by providing various numbers of votes to each voter. The threshold of exclusion in a limited voting system can be expressed as $v/(v+n)$, where v is the number of votes that may be cast by each voter, and n is again the number of seats up for election.[517] In our hypothetical jurisdiction, giving each voter one vote under a system of limited voting would mean that the threshold of exclusion was again 20%. Giving each voter two votes would raise the threshold to 33 1/3%.

Under these non-geographical methods of vote aggregation minority vote dilution could be prevented without the race-conscious government action that *Shaw* and its progeny have held to be (at least in some circumstances) presumptively unconstitutional. Members of a politically cohesive racial group that was geographically dispersed could achieve representation by voting together for the candidate of their choice without a need for drawing tortured electoral district boundaries.[518] Indeed, they could do so even if they were so evenly distributed throughout the population that drawing a district in which they formed a majority would be not just difficult, but impossible.

The availability of such mechanisms might appear to put race-conscious districting at some risk after *Shaw*, *Miller*, and *Bush*. Because it might be possible to comply with the Act without race-conscious government action, whatever the strength of the state interest in compliance with the Act in various circumstances, the availability of nongeographical systems of election could be argued to render the use of race less than narrowly tailored to its achievement.

Unsurprisingly, some litigants have suggested the adoption by courts of mechanisms of cumulative voting as a remedy for violations

---

[516] Karlan, *supra* note 171, at 225.

[517] *Id.* at 224.

[518] Success under a system of cumulative voting also requires that the members of a particular group not split their votes between or among two or more candidates.

of section 2 of the V.R.A.,[519] and at least one court has ordered such a remedy.[520] Such systems have also been adopted voluntarily in response to litigation brought under section 2 of the V.R.A., and are now in place in a number of southern jurisdictions in which the votes of a black minority were previously submerged in multimember districts with anti-single-shot provisions.[521]

Indeed, the three-judge district court in *Miller*, in striking down Georgia's districting plan, said:

> Single-member majority-black districts are not a constitutional or statutory requirement. The assumption that the sole means of enhancing blacks' political influence is to pack them into such districts is unimaginative.
>
> The time has come to contemplate more innovative means of ensuring minority representation in democratic institutions.[522]

The idea of adopting these race-neutral alternatives to race-conscious electoral districting has appeal beyond those commentators unwilling to countenance almost any use of race by government. Some recent scholarship emphasizing the inadequacy of race-conscious districting in achieving the enactment of laws responsive to black interests suggests adoption of such systems as a third way of organizing elections, one that neither requires the use of race by government nor relegates minorities in communities in which there is bloc voting to a persistent position in which their interests are unrepresented.[523] Professor Guinier has argued that adoption of electoral

---

[519] *See, e.g.*, Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994); League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 873 (5th Cir. 1993) (en banc); *see also id.* at 920 (King, J., dissenting) (criticizing the majority's refusal to consider cumulative voting as a less intrusive means by which the state could achieve its goals).

[520] Cane v. Worcester County, 847 F. Supp. 369, 373-74 (D. Md. 1994) (ordering that the county impose a cumulative voting system and discussing the benefits of such a system). This ruling was reversed on appeal on the ground that imposition of such an election method did not "to the greatest extent possible give effect to the legislative policy judgments underlying" the plan that had been held to violate section 2, or any unacceptable remedy offered by the relevant legislative body. Cane v. Worcester County, 35 F.3d 921, 928 (4th Cir. 1994). Justice Thomas noted in his concurrence in *Holder v. Hall*, 512 U.S. 874, 910 (1994) (Thomas, J., concurring), that cumulative voting might properly be ordered as a remedy for a violation of section 2 as it has been construed in previous Supreme Court decisions.

[521] *See, e.g.*, ISSACHAROFF ET AL., *supra* note 268, at 745-47 (describing jurisdictions in which cumulative voting has been adopted).

[522] Johnson v. Miller, 864 F. Supp. 1354, 1393 (S.D. Ga. 1994) (three-judge court), *aff'd*, 515 U.S. 900 (1995).

[523] *See, e.g.*, Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA.

systems that "do not rely on territorial or residential location" "may work better than [race-conscious] districting as a remedy for vote dilution."[524]

An unreconstructed version of *Shaw* scrutiny would, at least with respect to state and local elections, leave mechanisms like cumulative and limited voting as perhaps the only methods legally available in racially polarized jurisdictions for compliance with the V.R.A. For example, were a state to adopt a legislative districting plan without taking race into account, it might have a dilutive effect and be held to violate section 2 of the V.R.A. A jurisdiction forbidden to use a race-conscious districting plan by *Shaw* might then have no choice but to adopt a system of semi-proportional representation in order to prevent dilution.

Congressional elections present a slightly more complicated case because a 1967 federal statute mandates that congressional seats be filled by election from single-member districts.[525] If, however, the nondilution command of the subsequently enacted 1982 amendments to the V.R.A. can only constitutionally be met by non-geographically-based mechanisms for vote aggregation, those amendments may be deemed to have repealed by implication the single-member district command to the extent that constitutionally acceptable single-member districts would have a dilutive effect. In such a circumstance, again, cumulative or limited voting could be used to fulfill the nondilution command of the V.R.A.

2. The Costs of This Race-Neutral Alternative

These mechanisms have great intuitive appeal and commentators have found them attractive. The adoption of such systems, however, could be far more fundamentally disruptive than the continued, narrowly cabined use of race-conscious districting to prevent dilution of minority votes.

Minority vote dilution is a breakdown in the operation of the American political process. Because, as a general matter, American democracy operates on the basis of a series of winner-take-all elec-

---

L. REV. 1413, 1461-66 (1991); *see also* Richard H. Pildes, *Gimme Five: Non-gerrymandering Racial Justice*, THE NEW REPUBLIC, Mar. 1, 1993, at 16.

[524] Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1135 (1993).

[525] *See* 2 U.S.C. § 2c (1994) ("[T]here shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established . . . .").

tions, the election of representatives tends to require the formation of coalitions. When those who feel most strongly about an issue within a particular district do not amount to a majority, they cannot elect a representative. They may attempt to persuade others to support their candidate. They may attempt to build coalitions by trading their support on an issue that matters more to another group of voters. And they may have to support someone sympathetic but more moderate than they, in order to elect a representative who will be at least somewhat responsive to their concerns. This is an inherent characteristic of an electoral system based on geographical districts.

The effect of the use of such a system should be in part to moderate the stridency of those who are elected. This is part of what was intended by those who developed our federal electoral system. Thus James Madison, who was deeply concerned with faction, wrote that, as compared to pure democracy, the election of representatives would have the effect of "refin[ing] and enlarg[ing] the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial consideration."[526] Although in some circumstances one or another point of view on an issue will dominate within a geographic region, the likelihood of electing representatives who are not merely responsive to the views of one or another faction should, in general, be increased by a system of election that gives victory only to those who can appeal to a majority of the population in a given geographic region.[527]

Racially polarized voting, with its attendant risk of vote dilution, represents a breakdown in the ideal operation of this political process. When, within a given district, coalitions persistently fail to form across a *racial* divide, the ideal operation of the political process has broken down.

The adoption of systems of semiproportional representation, however, would do far more than correct the process failure that occurs when voting is polarized along racial lines. Unlike the manipulation of district lines to ensure equal electoral opportunity to members of a particular racial minority group, systems that avoid vote dilution

---

[526] THE FEDERALIST NO. 10, at 62 (James Madison) (Jacob E. Cooke ed., 1961).

[527] Of course, even where candidates represent geographically defined districts, well-organized interest groups may be able to obtain a disproportionate share of power within the legislative chamber because of their ability to deliver votes. *See generally Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

by lowering the threshold of exclusion could, at least in theory, grant representation to *every* group which has historically been unable to garner sufficient support within any geographical district to elect a representative. Some commentators see this as an additional benefit to schemes of semiproportional representation: traditionally unrepresented groups will gain representation.[528]

But it can at least be argued that, within the context of our political system, the inability of a political group to succeed in obtaining the votes necessary to gain representation—an inability that could be overcome by mechanisms that provide semiproportional representation—is not ordinarily a political process *failure*, but a mark of its *success*.

One of the premises of the American system of representative democracy as it has been understood until now is that only those interests whose adherents are able to attract others to support them will succeed. The only justification for drawing districts on racial lines, whether under section 2 of the V.R.A. or otherwise, is that a racial minority group has been unable to build the coalitions necessary to give effect to their votes because of the racially polarized voting behavior in the jurisdiction. Drawing a district to permit black voters to influence the outcome of elections is a narrowly targeted response to that problem that does not fundamentally alter the nature of our system of representation.

By contrast, systems of semiproportional representation that would solve the problem of racially polarized bloc voting by lowering the threshold of exclusion could (at least in theory) reduce or eliminate across the board the need for minority political groups of sufficient size to build coalitions. Any group that meets the threshold should be able to elect a representative without appealing to any other voters. Under systems of election that permit the representation of minority interests but do not depend on geographic districting, extreme ideologues of various stripes, who have in general been unable to gain representation in winner-take-all district elections, might well be able to win elections.[529] Indeed, the election of at least somewhat

---

[528] *See, e.g.*, Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1633 (1993) ("Under a modified at-large system . . . politically cohesive minority groups are assured representation if they vote strategically.").

[529] Even under systems of geographical districting, of course, the most extreme views will generally be able to obtain representation where their adherents are residentially co-located. *See, e.g.*, Jim Yardley, *Around the South: Sheriff Rules Louisiana Parish With an Iron Fist, but Chinese Lawman Denies Racism*, ATLANTA J. & CONST., May 1, 1994,

more politically extreme candidates appears to have been one of the effects of the adoption by Chilton County, Alabama, in a consent decree, of a system of cumulative voting for elections to its County Commission and Board of Education.[530] Thus a constitutional command that vote dilution can be addressed only in such a race-neutral fashion would carry at least a risk of damage to the political fabric and stability of the nation that is not posed by the creation of majority-minority districts.[531]

Of course, to some degree any objection to semiproportional systems of representation can be seen as an objection to "more" democracy. Cumulative or limited voting would permit interests to be represented that are abroad in the land and that are now excluded from local and state governments as well as the federal legislature.

But representative democracy is designed in part (like the provisions of the Bill of Rights) to limit the influence of popular sentiment on the decisions of legislative bodies. To deny factions unable to muster enough votes the ability to be represented in legislative bodies is consistent with the ideas behind representative democracy.

In addition, despite the primacy of the interest group pluralist theory of American politics,[532] and the widespread appeal of public choice theory among commentators,[533] representation in our democracy is far more complex than mere preference aggregation. Interest group representatives do voice the preferences of their constituents, but they play other roles as well that may well argue against lowering the threshold of exclusion. They legitimate, by their presence, the

---

at A3 (describing the parish from which David Duke was elected in 1988 to the Louisiana state legislature).

[530] See Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 274 (describing a "sudden transformation" in which not only African Americans, but also Republicans were elected to seats on the County Commission, but noting also that, despite their theoretically enhanced chances, "fringe" candidates have not been elected).

[531] Professor Karlan has advocated the use of both limited and cumulative voting in circumstances where, because of dispersion of black voters throughout a racially polarized jurisdiction, it is not feasible to draw single-member district lines that will give black voters effective voting strength. Karlan, *supra* note 171, at 221-36. My argument, of course, is not that cumulative or limited voting is constitutionally infirm; in such circumstances, the need to prevent vote dilution could well outweigh the generally applicable considerations I am suggesting here.

[532] *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1542-43 & n.9 (1988) (describing interest group pluralism).

[533] Public choice theory involves the study of mechanisms for preference aggregation. *See generally* Pildes & Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990) (applying the "social choice theory" branch of public choice theory).

views of those they represent. They also play a role in their constituents' preference formation by the stands they choose to take. For example, when a leader of a group signals his or her willingness to accept compromise, that is frequently a basis for his or her constituents to accept it.

Indeed, the representative's role of exercising judgment independent of his or her constituency seems like one most in need of reinforcement.[534] One of the great complaints about modern political life in the United States is that politicians, driven by modern polling techniques and their own desire for re-election, tend to reduce their role to that of preference aggregator, to the exclusion of their obligation to exercise independent judgment. The resulting lack of judgment and courage on the part of politicians—characteristics whose exercise by politicians was doubtless intended to be encouraged by a system of government that deliberately placed legislative power in representatives rather than in the people as a whole—is an important part of the reason for widespread cynicism about politics.[535] It would be ironic if, rather than taking an approach that permits representatives to be less responsive to the views of narrow constituencies, the Court, in the name of a rigid and in any event unrealistic rule of colorblindness, imposed on the country an electoral regime that might have just the opposite effect.[536]

---

[534] The idea that legislators should exercise independent judgment has been described as "Republican," *see* Karlan, *supra* note 171, at 216, but my understanding is that it is part of the Republican conception of government only when it is coupled with legislative deliberation, the *sine qua non* of civic Republicanism. Whether the legislator's judgment derives from deliberation with others, or from reflection in solitude, it is clear that its exercise was essential to the founders' vision of representative democracy. *See* THE FEDERALIST NO. 10, at 62 (James Madison) (Jacob E. Cooke ed., 1961) ("[I]t may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves.").

[535] For example, between 1964 and 1982, the percentage of Americans who believed that government was "run by a few big interests looking out for themselves" rather than "for the benefit of all the people" increased from less than a third to over sixty percent. Daniel A. Farber & Phillip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 873 (1987).

[536] Public choice theory demonstrates that well-organized interest groups made up of single-issue voters will have a disproportionate impact on legislative outcomes. *See generally* Issacharoff, *supra* note 44, at 1885-86 (describing the problem and collecting sources). One of the reasons for this is that, within the legislature, representatives dependent for re-election on voters with a high intensity preference on an issue (say, a preference against gun control, to use Professor Issacharoff's example) will be able, in exchange for votes on other issues, to persuade representatives to vote with them who are dependent for re-election on voters with a low intensity preference in the opposite

Put in terms of the approach to strict scrutiny that I have articulated, a requirement that government use race-neutral alternatives to serve its interest in combating racial polarization in voting (or to comply with the V.R.A.'s provisions addressing it) could well impose substantial costs on society. But because the use of race at issue does not have all the risks and costs attendant upon the most harmful forms of racial discrimination by government, districting authorities should not be required to use such costly race-neutral alternatives to race-conscious districting. Society should not be required to abandon important values it concludes are served by geographically based districting simply because the only way to address the problem of racially polarized voting while maintaining those values is to use race in the creation of electoral district lines.

CONCLUSION

Strict scrutiny must be calibrated to the goals it has inarticulately but inescapably been designed to serve. It must be tailored to the very harms that require close inquiry in the first place. In the equal protection area, because of the unique risks and harms wrought by the government's use of race, close examination of such governmental action is always warranted. But where a particular use of race involves fewer risks and harms than the paradigmatic case of discrimination against members of an historically disadvantaged racial group in the provision of some good or benefit, the tools of strict scrutiny must be tailored to meet those concerns that are actually present. In particular, the narrow list of accepted justifications for the government's use of race and the requirements of narrow tailoring (particularly the requirement that government seek to use any available race-neutral alternative), should, depending on the precise circumstance in which government seeks to use race, properly be calibrated to take account of values that would otherwise have to be compromised.

If the Court were to adopt an approach that took sensitive account of the context in which government sought to use race, the result would be a better conception of equal protection. Without such an approach, strict scrutiny is unmoored from its foundations. At best it becomes a shorthand, trotted out episodically when the conclusion has already been reached that a particular classification will be invali-

---

direction (that is, who oppose gun control but do not vote exclusively on that issue). *See id.* Mechanisms of proportional representation should enhance the power of interest groups of single-issue voters by increasing their chances of electing representatives responsive only to them.

dated. At worst it becomes an engine for the virtually automatic invalidation of race-conscious government action—always employed and always fatal.

But the close judicial examination of racial classifications was not meant as the end of equal protection analysis. Rather, it should be used as it was designed to be: as a tool for evaluating a law's consistency with the constitutional command of "equal protection of the laws."

The Court's pre-*Shaw* decisions can best be understood to reflect a rational approach like the one I have described. The *Shaw* line of cases itself contains the basis for being harmonized with such an approach. It is thus still open to the Court in its application of *Shaw*, and indeed in the far more broadly significant application of *Croson* and *Adarand*, to exercise its special responsibility to examine the context in which the races are situated and to permit the use of race by government where it is necessary to rectify inequality. The alternative is likely the condemnation of any presently disadvantaged racial minority group to remain in its unequal position, without hope of redress from the political branches.