Miller v. Johnson:
Drawing the Line on Racial Gerrymandering

INTRODUCTION

Though often the object of a cartoonist's pen, political redistricting is a serious process by which group and individual interests are balanced. Intensely political and involving a complex accommodation of geographic, historic, economic and social interests, redistricting has long been

1. Following the redistricting of Essex County, Massachusetts, in 1812, the BOSTON WEEKLY MESSENGER, March 6, 1812, printed a map of the district. An artist, noting the dragon like shape of the district, sketched in a head, claws and wings. When a friend commented that it looked more like a salamander, the artist replied: "Better call it a Gerrymander" after Governor Elbridge Gerry who signed the districting bill into law. ROBERT R. DIXON JR., DEMOCRATIC REPRESENTATION, REAPPORTIONMENT IN LAW AND POLITICS 459 (1968); see Appendix A.

2. Every ten years, following the decennial census, the political map of the United States is redrawn. DAVID BUTLER & BRUCE CALM, CONGRESSIONAL REDISTRICTING 1 (1992). The process through which this political map is redrawn is referred to as redistricting and involves two components: apportionment (the process of deciding how many seats each state will have) and redistricting (the process whereby boundaries within each state are drawn). Id. at 17. Each state is initially allocated one seat. The remaining 385 seats are apportioned by a formula which ranks the state’s priority by population. Id. at 19. For detailed formulas of apportionment, see NATIONAL CONFERENCE OF STATE LEGISLATURES, REAPPORTIONMENT LAW AND TECHNOLOGY 6-9 (1980). When the number of seats within a particular state has been determined, the boundaries of any new and old districts must be redrawn so that they are equally populated. See Kirkpatrick v. Preisler, 394 U.S. 526 (1969) (holding that a state must show substantial evidence of unavoidability of variation in order to allow any deviations from the “one person, one vote” application of districting).

3. Redistricting laws involve two overlapping rights, “the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast votes effectively.” Williams v. Rhodes, 393 U.S. 23, 30 (1968).

4. While apportionment is accomplished through use of a neutral mathematical formula, as indicated in note 2, redistricting is accomplished via legislative negotiation and compromise. BUTLER & CALM, supra note 2, at 45. Redistricting committees utilize Census Bureau reports which reveal the socioeconomic characteristics of each census district or block level. Id. at 58. These detailed reports contain information about total population, gender, race, voting age, ethnicity, income, educational level and home ownership. Precinct level party registration records are also used in redistricting processes. Id; see also Miller v. Johnson, 115 S. Ct. 2475, 2499-500 (1995) (Ginsburg, J., dissenting) (“District lines are drawn to accommodate a myriad of factors — geographic, economic, historical and political
considered the legislature's responsibility. Though the Constitution grants state legislatures the authority to create political districts, judicial intervention is permitted when the delicate balance between individual liberty and group interests is upset. This imbalance is readily apparent when a legislature engages in political or racial gerrymandering.

5. Courts have traditionally given great deference to the legislature. See Wood v. Brown, 287 U.S. 1, 8 (1932) (holding that the Supreme Court does not have jurisdiction over redistricting); Colegrove v. Green, 328 U.S. 549 (1946) (holding that "Courts ought not enter [the] political thicket of redistricting and that Congress has exclusive authority to secure and ensure fair representation."); South v. Peters, 339 U.S. 276 (1950) (refusing to exercise equity powers to govern a state's redistricting process); Wise v. Lipscomb, 437 U.S. 535, 539 (1978) ("[R]edistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt"); see also Upham v. Seamon, 456 U.S. 37, 40 (1982) (stating that courts should not substitute their own reapportionment plans and policies for those chosen by the state). But see Baker v. Carr, 369 U.S. 186 (1962) (stating that the judiciary has the power to review state apportionment and redistricting procedures).

6. "Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the state may be entitled in the Congress: but no Senator or Representative, or Person holding and Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. CONST. art. I, § 2. "The times places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof: but Congress may at any time by law make or alter such regulations, except as to the places and choosing of senators." U.S. CONST. art. I, § 4.

The propriety of Article I, Section 8 was long debated by the Constitution's framers. NATIONAL CONFERENCE OF STATE LEGISLATURES, REAPPORTIONMENT LAW AND TECHNOLOGY 1 (1980). Alexander Hamilton argued that the provision was necessary to preserve the union and that a small group of ambitious men might dissolve the union by simply refusing to elect representatives. THE FEDERALIST NO. 59 (ALEXANDER HAMILTON).

7. Since Baker v. Carr, 369 U.S. 186 (1962), the courts have retained a supervisory role in redistricting. The Baker Court held that redistricting was a justiciable issue and thus courts are authorized to hear equal protection clause challenges to state apportionment decisions. BUTLER & CAIM, supra note 2, at 27. Many constitutional provisions influence political districting. For example, the courts have held that a legislature's political motives may be unconstitutional if its plan works to the long term disadvantage of an identifiable political group. Davis v. Bandemer, 478 U.S. 109, 128-32 (1986). Also, "[W]hen there is proof that a discriminatory purpose ... has been a motivating fact in the [legislature's] decisions ... judicial deference is no longer justified" and therefore, Fourteenth or Fifteenth Amendment violations may be found. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977). State legislatures must also comply with the requirements of Article I, Section 2, of the United States Constitution and the Voting Rights Act, 42 U.S.C. § 1973 (1994).

8. For purposes of this study, gerrymandering is defined as all "apportionment and districting arrangements which [intentionally] transmute one party's [or interest's] actual voter
In *Miller v. Johnson*, the Supreme Court rejected an attempt by the Georgia State Legislature to draw a political district in a manner substantially motivated by considerations of race. This article discusses the merits of that decision. Part I provides groundwork for analysis of *Miller* by offering a brief description of the evolution of voting rights with an emphasis on Supreme Court cases heard after the Voting Rights Act of 1965. Part II analyzes the *Miller* decision. Part III rebuts the propositions that *Miller* is an abuse of judicial power and inconsistent with precedent. Part III also asserts that the *Miller* ruling should have been extended to eliminate political as well as racial gerrymandering. Part IV briefly discusses *Miller*'s impact upon affirmative action. The article concludes by asserting that the *Miller* decision was necessary to ensure equal representation for all American citizens, both black and white.

I. THE EVOLUTION OF MINORITY VOTING RIGHTS

A. MINORITY VOTING RIGHTS: 1800 TO 1960

Prior to the Civil War, only six states granted voting rights to blacks. Immediately upon defeat of the Confederacy, Southern states were required to amend their constitutions to allow universal male suffrage. The adoption of the Fifteenth Amendment followed soon thereafter, granting the “right of citizens of the United States to vote” and promising that the franchise would not be “denied or abridged . . . by any state on account of race, color, or previous condition of servitude.”

strength into the maximum number of legislative seats” at the expense of the other party or interest. ROBERT R. DIXON JR., DEMOCRATIC REPRESENTATION, REAPPORTIONMENT IN LAW AND POLITICS 460 (1968). There are three principal methods of gerrymandering districts to obtain party advantage. First, the gerrymandering party may draw a district so that the opposing party has far more votes within a single district than it needs to win that district. The opposing party thereby loses the opportunity to use those favorable excess votes in other districts. Second, the gerrymandering party may increase the odds of electing its candidate by infusing the district with favorable voters. Third, the gerrymandering party may increase the number of his opponent’s voters when it has been determined that the opponent’s candidate is likely to lose. ANDREW HACKER, THE BROOKINGS INSTITUTE, CONGRESSIONAL REDISTRICTING 47 (1964).


10. BERNARD GROFFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 4 (1992). Black males could vote in Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, and New York. Black females, as well as white females, were denied the right to vote in all states. Id.

11. Id. The requirement of suffrage regardless of race was a condition of the Military Reconstruction Act of 1867. Id.

12. U.S. CONST. amnd. XIV. While the Fourteenth Amendment granted equal
Nonetheless, upon the withdrawal of Union troops, Southern states began gradually implementing a series of measures designed to prevent blacks from both registering and voting.\(^3\) Apparent acquiescence by the Supreme Court allowed these techniques to become pervasive.\(^4\) By the beginning of the Twentieth Century, almost all Southern blacks had been disenfranchised.\(^5\) Any efforts to mobilize black voters were hindered by inconsistent rulings by the Supreme Court.\(^6\) Over the next ninety years, little or no progress was made for minority voting rights. The Voting Rights Act of 1965 marked the first significant step towards securing access to the polls for Southern minorities.\(^7\)

**protection of the laws, it only indirectly affected voting rights. The Amendment states that denial of voting rights will result in proportional reduction of the denying state's representation in Congress. U.S. CONST. amend. XIV, § 2. This enforcement mechanism has never been used. GROFFMAN, supra note 10, at 4.**

13. GROFFMAN, supra note 10, at 5, 6. "State statutes passed in an effort to discourage black political participation included such legally sanctioned devices as long residency requirements and very short registration periods." *Id.* at 7. Poll taxes, property qualifications for registration and disenfranchising crimes (offenses believed to be most often committed by blacks) were instituted. While blacks were required to pass state literacy tests, "grandfather" clauses operated to exempt illiterate whites from similar tests. In the primarily Democratic South, Republican candidates were scratched off ballots, voting booths were closed in heavily Republican areas, Republican votes were stolen from ballot boxes and police intimidated voters. These numerous and varied techniques reduced the number of voters by one-half between the years 1877 and 1892. STEVEN R. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969, 6 (1976).

14. Soon after the adoption of the Enforcement Act of 1870 and the Force Act of 1871 (each intended to provide a means by which the newly adopted Fifteenth Amendment would be enforced), the Supreme Court declared that in order to secure convictions under these acts, the accused must have operated under the authority of the state with an intention to discriminate on racial grounds. *See* United States v. Reese, 92 U.S. 214 (1875); United States v. Cruikshank, 92 U.S. 542 (1875). By requiring proof of both agency and intent, the Court crippled the efforts of Congress to protect minority voting rights from private and official interference. Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VANDERBILT L. REV. 523-584 (1973).


16. *See, e.g.*, Guinn v. United States, 238 U.S. 347 (1915) (finding an Oklahoma grandfather clause to be unconstitutional); U.S. CONST. amend. IX (1920) (right to vote granted to females); Grovey v. Townsend, 295 U.S. 45 (1935) (Court declared that all white primaries are legal); Smith v. Allwright, 321 U.S. 449 (1944) (declaring all-white primaries are unconstitutional); Breedlove v. Suttles, 302 U.S. 277 (1937) (upholding the poll tax); Lassiter v. Northampton County Bd. of Electors, 360 U.S. 45 (1959) (declaring literacy tests constitutional).

17. GROFFMAN, supra note 10, at 16. The 1957, 1960 and 1964 Civil Rights Acts had little effect upon black voting rights in the South. *Id.* at 15. After adoption of the Civil Rights Acts, the registration of voting age blacks increased 5.2 percent in Alabama, .1 percent in Louisiana, and .2 percent in Mississippi. South Carolina v. Katzenbach, 383 U.S. 301, 313
B. SECURING ACCESS TO VOTING FACILITIES: THE VOTING RIGHTS ACT OF 1965

The Voting Rights Act of 1965 was drafted to be the “goddamnedest toughest” voting bill ever written.18 The Act and its later amendments targeted Southern states that had historically engaged in electoral discrimination and supplemented the protection of the Fifteenth Amendment19 by prohibiting all tests and devices employed as a voting prerequisite.20 Sections 2 and 5 of the Voting Rights Act had the greatest effect upon minority voting rights.

Section 2 of the 1965 Act prohibited all standards, practices or procedures by which a state or political subdivision could “deny or abridge the right of any citizen of the United States to vote on account of race or color.”21 Section 2 also provides enforcement mechanisms for existing Constitutional protection.22 The most significant provisions targeted Southern states with a history of discrimination against minorities.23 These “special” provisions, Sections 4 through 9, were designed to prevent states from reviving the subtle discriminatory techniques that had been used in

(1966).


19. Bernard Groffman & Chandler Davidson, The Brookings Institute, Controversies in Minority Voting 17 (1992). House Debate revealed that the Voting Rights Act would eliminate the “legal dodges and subterfuges” that had been created to skirt the Fifteenth Amendment. The act was to be “impervious to all legal trickery and evasion.” Id. at 18.

20. See supra note 13 and accompanying text. Section 4(b) of the 1965 Act determined that a jurisdiction is subject to the Act’s special provisions if: 1) the jurisdiction maintained a test or device as a precondition of registering or voting as of November 1, 1964 and 2) less than 50 percent of the voting age population was registered to vote on November 1, 1964, or less than 50 percent of the voting age population voted in the November 1964 presidential election. If a state as a whole did not meet these criteria, the standard was applied to individual counties within the state. Later amendments expanded this coverage. See infra note 27 and accompanying text. Groffman, supra note 10, at 16-17.


22. Section 2 was essentially a reiteration of the Fifteenth Amendment, significant in part because it provided a means of enforcement. See Groffman, supra note 10, at 16-20 (1992).

23. The Voting Rights Act of 1965 contained both temporary and permanent provisions. Sections 2 and 3 of the Act were considered permanent in nature and affected the entire nation. See 42 U.S.C. § 1973 (1965). Special provisions, Sections 4 through 9, were to be applied to only certain jurisdictions and were to expire in five years. See 42 U.S.C. § 1973 (1965).
Of these special provisions, Section 5 was the most influential.\(^\text{25}\) Section 5 of the 1965 Voting Rights Act\(^\text{26}\) was intended to prevent both the revival of old and the creation of new obstacles to minority voting.\(^\text{27}\) Section 5 requires that covered jurisdictions approve any change in voting standards, practices or procedures\(^\text{28}\) with either the Attorney General or the Federal District Court in the District of Columbia.\(^\text{29}\) To receive approval (also called preclearance), the proposed change in voting procedure cannot have the intention or effect of "denying or abridging the right to vote on account of race or color."\(^\text{30}\) If the Department of Justice or Attorney General denies preclearance, the state’s procedure cannot be implemented.\(^\text{31}\)

These provisions, though denounced as an "uncommon exercise of political power,"\(^\text{32}\) were extremely successful in securing and mobilizing

\(^{24}\) Section 4 of the Voting Rights Act set forth the means by which these historical offenders would be identified. Seven states fell under the scope of the original formula. The states initially subject to special provisions were Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and parts of North Carolina. Groffman, supra note 10, at 17. In 1970 and 1975, amendments to the Act expanded the coverage of Section 4. The 1970 amendments to the Voting Rights Act extended the coverage of special provisions over those jurisdictions that maintained a test or device as a precondition of registering or voting and in which less than 50 percent of the voting age population had registered or voted in the 1968 elections. 42 U.S.C. § 1973 (1970). In 1975, the scope of Section 4 was further expanded to encompass those states and counties which contained a substantial language-minority population and which utilized English-only election materials. The use of English-only election materials is considered to be "test or device" in districts where more than 5 percent of the residents are a language minority. 42 U.S.C. § 1973 (1975).


\(^{26}\) Id.


\(^{29}\) If the Attorney General denied preclearance, the change could not be implemented. However, the state legislatures could appeal the decision of the Attorney General by seeking declaratory judgment from a District Court in Washington, D.C., that the proposed change was not discriminatory.


\(^{31}\) Id. Though the Attorney General or District Court may recommend district designs, the states have no duty to follow these recommendations. While states may not draw district lines which violate Section 5 of the Voting Rights Act by diluting minority voting strength, they are free to follow "their own assessment of state policy." Richard H. Pildes and Richard G. Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno, 92 Mich. L. Rev. 483, 490 (1993).

\(^{32}\) South Carolina v. Katzenbach, 388 U.S. 301 (1966) (approving of the Act and reasoning that "exceptional conditions can justify legislative measures not otherwise
black political participation. Only two years after the 1965 Voting Rights Act was passed, more than 500,000 new black voters were registered in covered jurisdictions. Every Southern state and jurisdiction covered by the Act had registered at least 50 percent of its black voting age population.

C. THE COURT'S FIRST ENCOUNTER WITH VOTE DILUTION

While the Voting Rights Act was working to ensure minority access to voting facilities, the Supreme Court set out to redress another obstacle to voting equality: malapportionment. Prior to 1964, substantial population disparities existed between state political districts. When districts are unequally populated, the relative strength of its voters is also unequal. "Since the weight of an individual's vote varies inversely with the size of the electorate, a single vote in a large district has less value than a vote in a small one." Southern states deliberately placed minorities within large districts to diminish minority voting strength. The opportunity to level

appropriate . . . ".

33. See GROFFMAN supra note 10, at 21-23.
34. Id.
35. Id. at 22 (The significance of this number becomes apparent when recalling that in 1940, only 5 percent of blacks in Southern states were registered to vote).
36. Malapportionment is the creation of political districts with unequal population sizes.
37. Prior to the mid 1960s, the Supreme Court refused to hear apportionment cases. See Colegrove v. Green, 328 U.S. 549 (1946) (holding that apportionment is a political question and thus not justiciable). The result was gross disparities in population size of state districts. The Tennessee legislature had failed to redistrict for over sixty years; disparities among populations in large and small districts approached the ratio of twenty-three to one. Disparities in Alabama state districts approached sixteen to one. BUTLER & CAIM, supra note 2, at 29. After the 1960 census, forty-two states contained districts where the vote of a citizen in a small district was twice the power of the vote of a citizen in a large district. ANDREW HACKER, THE BROOKINGS INSTITUTE, CONGRESSIONAL DISTRICTING 3 (1964).
38. BUTLER & CAIM, supra note 37, at 2. For example, if the State of Utopia contains two districts with populations of ten and 100 respectively, the relative strength of voters in the second district is ten times less than that of voters in the first district. In other words, if each district elects a single representative, then 10 percent of Utopia's voters would be electing 50 percent of the state's total representatives.
39. Id.
40. Id. at 67. Democracy rests upon the principle of popular sovereignty. Those interests desired by the majority are favored over interests with less support. Id. Accurate calculation of the people's will is dependent upon each individual having an equal voice. But see Baker v. Carr, 369 U.S. 186, 301 (1964) (Frankfurter, J., dissenting) ("The notion that representation proportioned to the geographic spread of population is . . . 'the basic principle of representative government' is, to put it bluntly, not true.").
the representational playing field arose in the 1964 case Reynolds v. Sims. Utilizing the Fourteenth Amendment’s guarantee of equal protection, the Reynolds Court held that, “equally weighted votes were not necessarily equally effective ones” since individual voters must vote as a block to have political impact. Reynolds held that the potential for inflation or dilution of an individual’s vote requires that legislative districts be equally populated. By invalidating fourteen state districting plans over the next two years, the Supreme Court removed one form of minority
vote dilution and insured that intra-district population equality would forevermore be a primary districting goal.

D. MORE ELUSIVE FORMS OF VOTE DILUTION: THE RACIAL GERRYMANDER

Having secured access to voting facilities for minority citizens, courts focused their attention on redressing vote dilution caused by racial gerrymandering. Unlike malapportionment, racial gerrymandering can dilute voting strength even in equally populated districts.\(^4\) Dilution occurs when these districts are drawn in such a manner as to enhance the voting strength of some racial or political\(^4\) groups while diluting the strength of others.\(^5\) Like racial gerrymandering,\(^5\) at-large elections,\(^5\) anti-single-shot laws,\(^5\) increasing the size of legislative districts,\(^5\) and changing elected offices to appointed ones were subtle techniques by which the strength of minority votes were diminished without directly denying access to voting facilities.\(^5\)

The Voting Rights Act\(^5\) and \textit{Reynolds} decision were incapable of prevent-


\(^{48}\) HACKER, \textit{supra} note 37, at 59. Even if an individual has an equally weighted right to vote, gerrymandering can operate to dilute the value of that vote. See \textit{supra} note 8 and accompanying text. The \textit{Baker} decision dealt with the dilution of individual votes that resulted from the creation of districts with unequal population sizes.

\(^{49}\) The Supreme Court has suggested that large political organizations are not as vulnerable to the effects of gerrymandering as are minority groups. Since they are better able to cope with the consequences of vote dilution, less protection is offered to those groups claiming partisan gerrymandering. See \textit{Davis} v. \textit{Bandemer}, 478 U.S. 109 (1986) (stating that a successful partisan gerrymandering claim is predicated upon a showing by the complainant that members of the political group suffered discrimination similar to that of racial minorities); \textit{Badham} v. \textit{Eu}, 488 U.S. 1024 (1989) (rejecting the contention that disadvantages suffered by California Republicans were similar to those of Southern Blacks).

\(^{50}\) BUTLER AND CAIM, \textit{supra} note 2, at 34.

\(^{51}\) See \textit{supra} note 8 and accompanying text.

\(^{52}\) Districts which are at-large, or multi-member, do not utilize traditional district lines. Black communities which might have constituted a majority within small single-member districts are thereby overwhelmed by the white majority.

\(^{53}\) Anti-single-shot laws prohibit voting for a single candidate in situations where there are multiple candidates. \textit{Groffman}, \textit{supra} note 10, at 140. These laws prohibited blacks from withholding votes for all candidates on the ballot except those that they wished to elect. \textit{Groffman} & \textit{Davidson}, \textit{supra} note 19, at 25.

\(^{54}\) Decreasing the size of legislative bodies decreases overall minority control within the district. \textit{Groffman} & \textit{Davidson}, \textit{supra} note 19, at 25.

\(^{55}\) \textit{Groffman}, \textit{supra} note 10, at 140.

\(^{56}\) Though political redistricting is a "voting procedure" subject to Section 5 of the Voting Rights Act (\textit{see} Georgia v. \textit{United States}, 411 U.S. 526 (1973)), the 1965, 1970 and
ing these dilutive techniques since they did not directly deny access to the vote and could be employed even in equally populated districts. The Supreme Court, recognizing the need to protect minorities against more subtle forms of vote dilution, found a solution in the Constitution’s Fourteenth and Fifteenth Amendments.

The Court first began to address the dilutive effects of gerrymandering in *Gomillian v. Lightfoot*.\(^{57}\) In *Gomillian*, the City of Tuskegee intentionally drew its political district to exclude almost all Negro citizens from the city.\(^{58}\) The *Gomillian* Court invalidated the district on grounds that it violated the Fifteenth Amendment by denying Tuskegee’s Negro residents the right to participate in municipal elections.\(^{59}\) Though the City’s gerrymander was more akin to vote denial than vote dilution, Justice Frankfurter’s opinion shed light and public attention on the subtle and sophisticated means by which gerrymandering could affect voting strength.\(^{60}\) The Supreme Court finally invalidated vote dilution in *Fortson v. Dorsey*.\(^{61}\) In *Fortson*, the Court held that multi-member districts are inherently unconstitutional if they “designedly or otherwise ... operate to minimize or cancel out the voting strength of racial or political elements of the voting population.”\(^{62}\)

In *Whitcomb v. Chavis*,\(^{63}\) the Court suggested that vote dilution could be proven by showing that a cohesive and politically salient group had “less opportunity than did other . . . residents to participate in the political process and to elect legislators of their choice.”\(^{64}\) This lost opportunity was to be measured by the “totality of the circumstances” and included consideration of such factors as: 1) lack of access to the process of slating candidates, 2) unresponsiveness of legislators to particularized interests, 3) past discrimination which precludes effective participation, 4) existence of large districts,

---

1975 Amendments were limited in coverage and focused upon lifting barriers to minority voting access, not the protection of voting strength.

58. The effect of the redistricting was to remove from the city all but four or five of Tuskegee’s 400 Negro voters. Not a single white voter was displaced by the redistricting. *Id.* at 341. See Appendix B.
59. *Id.* at 345.
62. *Id.* at 439.
63. 403 U.S. 124 (1971).
64. *Id.* at 149.
5) majority vote requirements, 6) anti-single-shot laws, and 7) prohibiting at-large candidates from running in geographic subunits. The 1986 case *Thornburg v. Gingles* added the requirement that minority complainants demonstrate: 1) group voting behavior, and 2) racially polarized voting by the majority which, over time, defeats the preferred candidate of the minority community. Though initially concerned with preventing the dilution of minority voting strength, the Court soon recognized that the racial gerrymander could strike both blacks and whites alike.

In *United Jewish Organizations v. United States* ("UJO"), members of a Jewish community alleged that a New York redistricting plan, formulated to meet the requirements of the Voting Rights Act, had divided their community in half and thus violated the Fourteenth and Fifteenth Amendment’s prohibition against vote dilution. The UJO Court denied the plaintiff’s claim, holding that considerations of race are permissible and often necessary to comply with Sections 4 and 5 of the Voting Rights Act. Significantly, however, the Court held that racial considerations

65. It was actually the Fifth Circuit case of *Zimmerman v. McKeithern*, 485 F.2d 1297 (1973), that proposed analysis of the previous seven factors. Though not a Supreme Court case, the factors in *Zimmerman* were universally used by courts. *GROFFMAN & DAVIDSON, supra* note 19, at 34.


67. *Id.* at 50, 56. The individuals which comprise voting blocks do not always faithfully adhere to the group’s voting patterns, deviating from the group by voting for the opposite coalition or interest. *DIXON, supra* note 8, at 437-38. The *Whitcomb* and *Zimmer* tests were insufficient because even if a voting group was numerous, compact and cohesive, there was still no guarantee that all individual members of the group would act in unison. By requiring minority plaintiffs to show group voting behavior, the Thornburg Court supplied a means by which the cohesiveness of group behavior could be proven.


69. Having been once denied preclearance by the Department of Justice, the N.Y. legislature, in order to attain a nonwhite majority of 65 percent, which it felt necessary to meet Department of Justice preclearance standards, split the petitioner’s community between two separate districts. *Id.* at 152.

70. The Court classified the Jewish residents as whites and concluded that the New York plan did not violate the Fourteenth and Fifteenth Amendments, since “whites would not be under-represented relative to their share of the population.” *Id.* at 166. The Court further held that the use of racial criterion was justified to the extent that “[t]he percentage of districts with a nonwhite majority roughly approximates the percentage of nonwhites in the county.” *Id.* at 165.

71. The *UJO* plurality appeared to allow ameliorative uses of redistricting. The Court held that the Fourteenth and Fifteenth Amendments are not violated by the use of specific numerical quotas establishing majority-minority districts. *Id.* at 162. Further, the Court held that the deliberate use of race to increase under represented minorities caused “no racial slur or stigma with respect to whites or any other race . . . .” *Id.* at 165.

72. *Id.* at 159. See also Beer v. United States, 425 U.S. 130 (1976) (implying that the
which result in unfair representation, fence out white populations, or unfairly cancel out white voting strength, would violate the Equal Protection Clause.\textsuperscript{73}

In 1982, Congress provided its own remedy for vote dilution\textsuperscript{74} by amending the Voting Rights Act.\textsuperscript{75} The 1982 amendments required that legislators be race conscious when drawing district lines by prohibiting any redistricting plan which diminished the voting strength of an individual based upon his race or color.\textsuperscript{76} Since the 1982 amendments, individuals claiming dilution have had two alternatives: a claim under the Voting Rights Act or a claim under the Fourteenth Amendment. The Voting Rights Constitution does not prevent a state subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with Sec. 5; City of Richmond v. United States, 422 U.S. 358 (1995).

\textsuperscript{73} Here, the Equal Protection Clause was used to ensure equal representation. But see Miller v. Johnson, 115 S. Ct. 2475 (1995).

\textsuperscript{74} In the eyes of civil rights activists, progress towards voting equality took a major step backwards in City of Mobile v. Bolden, 446 U.S. 55 (1980). The Bolden plurality held that racial discrimination was a prerequisite to a vote dilution claim. Id. at 66. The Court's opinion in Bolden is completely inconsistent with its precedent concerning the Fourteenth Amendment claims. In Washington v. Davis, 426 U.S. 229 (1979), the Court established that a showing of intent to discriminate was a prerequisite to a Fourteenth Amendment claim. The Court held that discriminatory impact was insufficient to state a cause of action. Id. at 239-40. Though the decision had little effect upon suits brought under the Voting Rights Act, since those Acts did not prevent vote dilution, it made Fourteenth Amendment vote dilution claims much more difficult to prove. Fearing that the Bolden standards were too strict, civil rights activists heavily lobbied Congress to amend the Voting Rights Act so that a showing of intent, as required by Bolden, would no longer be required. The activists advocated the "results tests" that was later incorporated into section 2. Groffman, supra note 10, at 39.

\textsuperscript{75} Remember that the 1965, 1970 and 1975 Voting Rights Acts only protected minority access to the vote. Any claims of dilution of voting strength came under the Court's Fourteenth Amendment formula which required a showing of intent.

\textsuperscript{76} Section 2 was changed to read in part:

(A) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state of 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 . . . .

(B) A violation of subsection (a) occurs if, based upon the totality of the circumstances, it is shown that the political process leading to the 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) in that its members have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice . . . .
RACIAL GERRYMANDERING

Act is less burdensome upon plaintiffs since a showing of discriminatory intent is not necessary.\footnote{77. S. Rep. No. 97-417, 97th Cong., 2nd Sess. (1982). A Senate Judiciary Report accompanying the Amendment stated that “this amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restores the legal standards based upon the controlling Supreme Court precedents ... prior to Mobile v. Bolden.” Id. at 2.}

E. ILLEGAL CLASSIFICATIONS

In its landmark decision \textit{Shaw v. Reno},\footnote{78. 509 U.S. 630 (1993).} the Supreme Court forged a completely new weapon to ensure voting equality: a prohibition against racial classifications.\footnote{79. While the Supreme Court had never utilized the Equal Protection Clause's prohibition against racial classification, the idea was certainly not new. As early as 1960, it had been suggested that the Equal Protection Clause should be utilized in cases of racial gerrymander. \textit{See Gomillian v. Lightfoot}, 364 U.S. 339 (1960) (Whitaker, J., concurring).} In an attempt to comply with the new vote dilution provisions of the 1982 Voting Rights Act, the North Carolina legislature redrew its political map to include two majority-black districts.\footnote{80. The impetus for the change was the 1990 census which entitled North Carolina to an additional legislative seat. \textit{Shaw}, 509 U.S. at 630. At the time, forty counties with the state were covered by the Voting Rights Act which required that redistricting plans be approved by either the Attorney General or by a district court in the District of Columbia. After its first redistricting plan, which included one majority-black district, was rejected by the Attorney General, the North Carolina legislature submitted a plan containing two majority black districts. One of those districts was extremely irregular in shape. Its length was approximately 160 miles long and, in some places, no wider than an interstate highway. \textit{Id.} at 635. The district split towns and counties and appeared to have no respect for traditional districting principles. \textit{Id.} In remarking on its peculiar shape, one legislator noted, “if you drove down the interstate with both car doors open, you’d kill most of the people in the district.” \textit{Id.} at 636. The Attorney General precleared the plan. \textit{Id.}} Residents in one of the majority-black districts filed suit contending that the state had created an unconstitutional racial gerrymander.\footnote{81. The appellants contended that the majority black district had been created without regard for traditional districting considerations such as compactness, contiguity, geographical boundaries, or political subdivisions. \textit{Id.} at 630. Appellants also contend that the shape of the district was so irregular that it “rationally [could] only be viewed as an effort to segregate voters on the basis of race for purposes of voting.” \textit{Id; see Appendix C} (map reprinted from Supreme Court Reporter with permission of West Publishing Company).} The Supreme Court agreed and held that the North Carolina districting scheme unjustifiably segregated voters into different districts based solely upon their race.\footnote{82. \textit{Shaw}, 509 U.S. at 630.} The Supreme Court began its analysis by distinguishing equal protection claims from vote dilution claims.
UJO was a vote dilution case; Shaw was not. Unlike UJO, the districting scheme in Shaw was "so irrational on its face that it immediately offended principles of racial equality."83 The Shaw appellants claimed that the district plan "on its face was so highly irregular that it rationally could be understood only as an effort to segregate voters by race."84 The Shaw Court held that racial classifications are odious in their very nature to institutions founded upon equality85 and thus threaten harms distinct from those of vote dilution.86 Among these distinct harms are the potential to "stigmatize individuals by reason of their membership in a racial group"87 and racial hostility.88 Shaw reasoned that these, along with other "special harms,"89 necessitate an exacting judicial examination of districts whose shape is so bizarre that they could only have been based upon racial considerations. In absence of legitimate considerations90 which might explain the district's bizarre shape,91 the Court held that North Carolina's two-district scheme should be subjected to strict scrutiny. This exacting standard is only satisfied if the State legislature can show that its plan is narrowly tailored to further a compelling government interest.92

By invalidating redistricting schemes based solely upon race, Shaw established a new cause of action entirely independent of dilutive effect.93 The Shaw Court did not, however, appear to bar all intentional, race

83. Id. at 652.
84. Id. at 651.
85. See Hirabayashi v. United States, 320 U.S. 81, 100 (1948).
86. Id.
87. Classifications based solely upon race threaten to "stigmatize individuals by reason of their membership in a racial group" and are likely to invite racial hostility. See Shaw, 509 U.S. at 643; City of Richmond v. J.A. Croson, 448 U.S. 469, 493 (1989).
88. Shaw, 509 U.S. at 643.
89. The Court held that racial voting classifications create and reinforce the idea that members of the same racial group think alike and share identical political interests. Such classifications disregard age, education, economic status or community factors. Id. at 647. Further, the Court held that when districts are created to effectuate a "perceived common interest . . . elected officials are more likely to believe that their primary obligation is to represent only the members of that group" rather than the entire constituency. Id.
90. The Court cites compactness, contiguous and respect for political subdivisions. Shaw, 509 U.S. at 630.
91. The Court repeatedly notes that though these factors are sufficient to rebut a claim that a district is drawn solely upon the race of its occupants, the legislature does not mandate consideration of these factors. Id. at 630, 652, 656, and 676.
92. Id. at 630.
93. The Court's opinion in Shaw is both muddled and confused. Seeming inconsistencies created more questions than the decision answered. See infra notes 183, 184 and accompanying text.
conscious districting. The Court explicitly declined to rule on whether or how "mixed motive" districts could be challenged and also left undecided whether "the intentional creation of minority-majority districts, without more, always gives rise to an Equal Protection violation." Thus, Shaw appears to have created two distinct gerrymanders: constitutionally impermissible gerrymanders which cannot be explained on grounds other than race, and legitimate gerrymanders in which race was a factor but not the sole motivating factor. While wounding the racial gerrymander, Shaw did not destroy it. The coup de grace was to come one year later in Miller v. Johnson.

II. MILLER V. JOHNSON

A. FACTS

As a result of the 1980 Decennial Census, the state of Georgia occupied ten seats in the United States House of Representatives; one of those seats was majority-black. Due to population increases reported by the 1990 Decennial Census, Georgia was allowed an eleventh legislative seat and in 1991 began the task of redistricting. Among the factors considered by the General Assembly while redrawing district lines were equality of population among districts, contiguous geography, fidelity

94. The Court suggested several times that race-conscious redistricting is not necessarily a trigger for strict scrutiny, and may often be necessary for compliance with the Voting Rights Act. "Appellants appear to concede that race-conscious redistricting is not always unconstitutional. That concession is wise. This Court has never held that race-conscious state decision making is impermissible in all circumstances." Shaw, 509 U.S. at 642. But see Shaw, 509 U.S. at 649 ("Thus we express no view as to whether the intentional creation of majority-minority districts, without more, always gives rise to an Equal Protection claim").

95. "Mixed motive" is the author's own term of art used to mean districts drawn intentionally upon race but that also include non-racial districting factors.

96. Shaw, 509 U.S. at 643.


99. Id. at 2483.

100. Id.

101. Id.

102. See notes 36-48 and accompanying text.

103. Courts have held contiguous to mean that "all parts of the district are joined together." GROFFMAN, supra note 10, at 64 (1992). Also known as geographic compactness (see Thornburg v. Gingles, 478 U.S. 30 (1986)), the question of contiguity addresses a
to precinct lines where possible\textsuperscript{104} and maintenance of minority voting strength via compliance with Sections 2 and 5 of the Voting Rights Act.\textsuperscript{105} In addition to plans proposed by its legislators, the Georgia General Assembly welcomed the submission of plans authored by its citizens.\textsuperscript{106} One such plan was submitted by the American Civil Liberties Union.\textsuperscript{107} The ACLU's plan, referred to as the Max-Black plan,\textsuperscript{108} was intended to maximize black voting strength\textsuperscript{109} by combining and condensing statewide black populations into three of Georgia's eleven available districts.\textsuperscript{110} While the Georgia General Assembly began formulating its districting plan, the ACLU relentlessly lobbied the Department of Justice to require adoption of the Max-Black plan.\textsuperscript{111}

Pursuant to the requirements of Section 5, the Georgia General Assembly submitted its redistricting plan to the Department of Justice for preclearance.\textsuperscript{112} The General Assembly's plan doubled the number of majority-black districts and created a third district in which blacks comprised an influential but sub-majority percentage of the voting age
district's shape. "A proposed district is sufficiently compact if it retains a natural sense of community . . . a district should not be so convoluted that its representatives could not easily tell who lives within the district . . . ." East Jefferson Coalition for Leadership and Dev. v. Parish of Jefferson, 691 F. Supp. 991, 1007 (1988).

104. Consideration of these and other factors were part of a voluntary effort by the Georgia General Assembly to clarify its districting process. Johnson v. Miller, 864 F. Supp. 1354, 1360 (1994), aff'd, 115 S. Ct. 2475 (1995). Consideration of these factors was not required by law or statute.

105. The State of Georgia is covered by the special provisions of the Voting Rights Act. Thus, all changes in voting procedure or practice require Department of Justice approval. See supra notes 18-35 and accompanying text.


107. The plan, nicknamed the Max-Black plan, was submitted by Kathleen Wilde, an attorney for the American Civil Liberties Union in her capacity as the advocate for the Black Caucus of the Georgia General Assembly. Id. at 1360.

108. Id. at 1360, 1361, 1363.

109. Floor debate and depositions leave no doubt that traditional districting factors were abandoned in the ACLU's attempt to maximize black voting strength. Representative Tyrone Brooks, a member of the Georgia Black Caucus, stated that in formulating the Max-Black plan its drafters were "not concerned about anything other than maximizing our voting strength." Id. at 1361.

110. Id. See Appendix D (map reprinted from Supreme Court Reporter with permission from West Publishing Company).

111. The Department of Justice is the agency responsible for preclearing the General Assembly's redistricting plan under 42 U.S.C. § 1973 (1995). See infra notes 120, 121 and accompanying text.

112. See notes 18-35 and accompanying text.
Submitting to pressure from the ACLU, the Department of Justice denied preclearance, noting concern that the Georgia Legislature had not yet completely maximized black voting potential. Undaunted by the rejection of its first redistricting plan, the Georgia General Assembly began anew.

The Legislature’s second plan more closely conformed to the suggestions of the Department of Justice and not coincidentally, the Max-Black plan advocated by the ACLU. Splitting counties to recognize additional black populations, the revised plan increased minority voter strength in Georgia’s Second District by ten percent. While extending black voting power far beyond that of its first districting plan, the Legislature refused to hyper-extend particular districts, as suggested by the Max-Black plan, reasoning that the extensions would dissect media markets and "violate all reasonable standards of compactness and contiguity."

Puppet to the ACLU, the Department of Justice rejected the Legislature’s second redistricting plan.

In its third attempt at preclearance, the Georgia legislature used the ACLU’s Max-Black plan as its benchmark. Drafters of the third plan


114. Id. After the first redistricting plan was submitted, the ACLU accused the Georgia legislature of ignoring the Max-Black plan and pressured the Department of Justice to refuse preclearance. Id. See infra notes 120, 121 and accompanying text.

115. Recall that before redistricting, Georgia only had one majority-black district. Thus, even after more than doubling the number of majority-black districts, the Department of Justice—or perhaps more appropriately the ACLU—was still unsatisfied.


117. See infra notes 120, 121 and accompanying text.

118. Black voting strength in the Second District was increased to 45.01 percent. Id. In the Fifth and Eleventh Districts, blacks comprised almost 60 percent of the voting age population. Id. at 1364-66.


120. The ACLU had a profound influence upon the Department of Justice. The District Court revealed that the ACLU and Department of Justice were in close cooperation with one another during the General Assembly’s districting debates. Id. at 1361. The District Court was abhorred by the use of “informants,” “whistleblowers” and “secret agents” by the Department of Justice and ACLU throughout the General Assembly’s districting debates and labeled the collusion between the two groups “an embarrassment.” Id. at 1367.

121. Miller v. Johnson, 115 S. Ct. 2475, 2484 (1995). Commenting upon the collusion between the ACLU and the Department of Justice, the Miller Court stated, “[t]hough the Department of Justice denied that the Max-Black plan was the ‘benchmark’ against which Georgia’s efforts were compared, its role as such soon became obvious to the General
openly confessed that "[getting] the numbers" was their primary concern.\textsuperscript{122} The result was the creation of three majority-black districts.\textsuperscript{123} Having finally bent under the relentless pressure of the ACLU, the Georgia General Assembly submitted its distorted districts\textsuperscript{124} to the Department of Justice. Preclearance was granted.\textsuperscript{125} Elections in the new districts were held in November of 1992.\textsuperscript{126} Black candidates were elected from all three majority-minority districts.\textsuperscript{127} Five white voters filed suit alleging that the Eleventh District was a racial gerrymander.\textsuperscript{128}

B. PROCEDURAL HISTORY

The cornerstone of the district court's\textsuperscript{129} analysis was the premise that racial classifications are presumptively invalid and only acceptable upon extraordinary justification.\textsuperscript{130} Relying heavily upon \textit{Shaw v. Reno}, the court ruled that extraordinary justification constitutes: a showing that the law is narrowly tailored to further a compelling state interest.\textsuperscript{131} Noting that discriminatory intent is an "indispensable element" of successful discrimination claim,\textsuperscript{132} the district court sided with those interpretations Assembly, and is [equally] obvious to this Court." \textit{Id.} at 1364.

\begin{itemize}
  \item \textsuperscript{123} The Second District, with 52.33 percent black voting age, the Fifth District, with 57.47 percent, and the Eleventh District, with 60.36 percent. \textit{Id.} at 1366.
  \item \textsuperscript{124} "The populations of the Eleventh District are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties and narrow swamp corridors." Johnson v. Miller, 864 F. Supp. 1354, 1366 (S.D. Ga. 1994), \textit{aff'd}, 115 S. Ct. 2475 (1995). Extending from Atlanta to the Atlantic Ocean, the Eleventh District split eight counties and five municipalities. \textit{Id.}
  \item \textsuperscript{125} \textit{Id.}
  \item \textsuperscript{127} \textit{Id.}
  \item \textsuperscript{128} \textit{Id.} Before reaching the District Court for the Southern District of Georgia, plaintiffs faced a challenge that they lacked standing to sue. These claims were addressed in United States v. Hays, 115 S. Ct. 2431 (1995), where it was ultimately determined that all plaintiffs had standing. \textit{Id.}
  \item \textsuperscript{130} \textit{See} Brown v. Board of Education, 347 U.S. 483 (1954).
  \item \textsuperscript{131} \textit{See} Shaw v. Reno, 113 S. Ct. 2816, 2832 (1992); Palmore v. Sidoti, 466 U.S. 429, 432 (1984); Fullilove v. Klutznick, 448 U.S. 448, 491 (1980) (racial classification is subject to "the most searching examination").
  \item \textsuperscript{132} Washington v. Davis, 426 U.S. 229, 240 (1976). The \textit{Washington} Court held that the essential purpose of the Fourteenth Amendment was the prevention of official acts
of *Shaw* which held that the bizarre shape of a political district, while constituting circumstantial evidence of legislative intent, is not a threshold inquiry. The court reasoned that while an oddly shaped political district may be a "smoking gun" which reveals racially discriminatory intent, requiring bizarre shape as a prerequisite to an Equal Protection claim would be contrary to *Shaw*’s intent. The district court concluded that when race is "the substantial or motivating consideration in the creation of the district" regardless of district shape, invocation of strict scrutiny is appropriate.

The *Shaw* court had explicitly refused to rule on the issue of whether, when considered with other districting goals, consideration of race might violate Equal Protection. The district court justified its interpretation of *Shaw* by reviewing other district court decisions and Fourteenth
Amendment Supreme Court rulings. The Department of Justice appealed, claiming that Shaw required a showing of bizarre shape as a prerequisite to an Equal Protection claim.

C. THE SUPREME COURT’S DECISION

The Miller decision represented the Court’s second attempt to cut a clear path through the “political thicket” of redistricting. Due to the variety of interpretations which had arisen from the Shaw decision, Miller was necessary to clarify and review the parameters of the Fourteenth Amendment’s prohibition against racial classifications. The Court began its opinion by clearly announcing the prima facie elements of a racial gerrymandering claim and later focused on distinguishing the permissible from impermissible uses of racial data in legislative redistricting decisions. Justice Kennedy led the Miller majority.

Ruling 5-4, the Supreme Court affirmed the district court’s interpretation of Shaw. Laying the foundation for its opinion, the Court reaffirmed the long held proposition that the Fourteenth Amendment requires complete racial neutrality in government decision making. The Court noted that racial classifications prevalent in the 1950s and 1960s violated this principle of neutrality, causing feelings of inferiority among minorities and perpetuating racial stereotypes. Since, racial classifications are dangerously antithetic to the Fourteenth Amendment, they one, before it is constitutionally suspect. See Hays v. Louisiana, 839 F. Supp. 1188, 1202, 1214 (W.D. La. 1993).


141. Id.
144. Miller, 115 S. Ct. at 2482.
146. Miller, 115 S. Ct. at 2486.
“call for the most exacting judicial examination.” Reasoning that racial classifications in the voting context were no less harmful, Kennedy noted that racial gerrymanders “balkanize [citizens] into competing racial factions” and perpetuate the stereotypical assumption that “because of their race, [minorities] ‘think alike, share the same political interests, and will prefer the same candidate at the polls.” The Court reasoned that the harms inherent in race-based redistricting justify judicial intervention and application of traditional Fourteenth Amendment scrutiny. To initiate this scrutiny, the Court required that complainants prove “that race was the predominant factor motivating the legislature’s decision to place a significant number of voters [inside] or [outside] a particular district.”

Kennedy justified this heavy burden for plaintiffs by noting that legislative redistricting decisions are accompanied by a presumption of good faith and further admonished courts to use “extraordinary caution” when analyzing a state’s “intensely political” redistricting schemes.

The Court noted that proving a substantial motivation to racially gerrymander is significantly complicated by the many permissible uses of racial demographic data. When redrawing district lines, a state is free to recognize communities comprised predominantly of one race, as long as those communities share “some common thread of relevant interests.”

Shared political, social and economic interests are legitimate considerations and thus may justify the concentration of a minority group inside or outside a political district. The Court also noted that awareness of race is entirely distinct from reliance upon race. With a wealth of demographic information at their fingertips, legislators are always aware of a community’s racial composition. Thus, Kennedy ruled that a successful racial gerrymander claim requires proof that the legislature acted “because of” a community’s racial composition, and not just “in spite of” that racial

147. Id. at 2482 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978)).
148. Id. at 2486 (citing Shaw v. Reno, 113 S. Ct. 2816 (1993)).
149. Id. at 2487.
150. Id. at 2488.
151. Id.
152. Miller, 115 S. Ct. at 2488.
153. See supra notes 4-5 and accompanying text. Miller, 115 S. Ct. at 2486.
154. Id. at 2488-90.
155. Id. at 2490.
156. Id.
157. Id. at 2487.
composition.\textsuperscript{158} The Court revealed several means by which plaintiffs might make this distinction.

Relying upon principles first promulgated in Shaw, Kennedy reaffirmed that a district’s bizarre shape may be convincing circumstantial evidence of racial gerrymandering since “in some exceptional cases, a reapportionment plan may be so highly irregular, that on its face\textsuperscript{159} it cannot be understood as anything other than a racial classification.”\textsuperscript{160} While a district’s shape may be sufficient proof that traditional districting principles were subordinated to considerations of race, the Court stressed that bizarre shape is not a prima facie requirement.\textsuperscript{161}

Kennedy also indicated that legislative statements which indicate an intent to gerrymander or the subordination of traditional race-neutral districting factors constitutes “powerful evidence” of discriminatory intent.\textsuperscript{162} Utilizing this second approach, the Miller Court ruled that the statements and admissions of Georgia’s legislators were overwhelming evidence of an intent to gerrymander.\textsuperscript{163} Thus, Miller held that in addition to circumstantial evidence of a district’s bizarre shape, any direct evidence illustrating an overriding motive or desire to assign citizens to a legislative district based upon their race is sufficient to invoke strict scrutiny.\textsuperscript{164}

The Miller Court did not eliminate all racial gerrymandering, noting that substantial reliance upon racial data may be permissible when used as a remedial measure.\textsuperscript{165} Citing traditional affirmative action precedent, and noting the state’s strong interest in eradicating discrimination, the Court sanctioned the limited use of racial gerrymanders\textsuperscript{166} to ameliorate the effects of past discrimination. Paradoxically, however, Kennedy held that even remedial gerrymanders would immediately be subject to strict scrutiny.\textsuperscript{167} Reminding legislators that compelling evidence is required to justify remedial districts,\textsuperscript{168} the Court ruled that Georgia’s redistricting

\begin{footnotesize}
\begin{itemize}
\item[158.] Miller v. Johnson, 115 S. Ct. 2475, 2488 (1995) (citing Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (proof of discriminatory purpose requires a showing that the decision maker chose a “particular course of action at least in part ‘because of,’ and not merely ‘in spite of,’ its adverse effects. . . . ”)).
\item[159.] Miller, 115 S. Ct. at 2485.
\item[160.] Id.
\item[161.] Id. at 2486.
\item[162.] Id. at 2490.
\item[163.] Id.
\item[164.] Id. at 2485.
\item[165.] Id. at 2490.
\item[166.] Id.
\item[167.] Miller, 113 S. Ct. at 2490.
\end{itemize}
\end{footnotesize}
could not be classified as remedial since it was not reasonably necessary to prevent dilution of minority voting strength. The Court did not address whether compliance with the Voting Rights Act, without more, could constitute a compelling interest.  

III. ANALYSIS

Critics denounce the Miller decision as an unprecedented trespass into legislative territory. 170 Quite to the contrary, Miller is a logical extension of Equal Protection principles set forth in Shaw v. Reno. 171 Part A of this section rebuts the claim that the Miller decision will lead to repeated intrusions into redistricting processes and illustrates the absurdity of the appellant's argument that the Court's prior decision in Shaw required a showing of bizarre shape. Part B of this section asserts that Miller should have been extended to prohibit political as well as racial gerrymandering. The final section of the Article discusses potential impacts stemming from the Miller decision with particular emphasis on how minority representation will be affected.

A. ANALYSIS OF THE COURT'S DECISION

To defend Miller it is first necessary to rebut the argument that the Court trespassed into what has traditionally been legislative territory. 172 Undeniably, federal courts must exercise extreme caution when evaluating racial gerrymandering claims. 173 Redistricting is a legislative function — and for good reason. First, it is the legislature, not the judiciary, that is armed with a fantastic array of socioeconomic census information, 174 courts lack both the experience and training necessary to assimilate and utilize this data. Second, state legislators, not court justices, are most closely

2637, 2642 (1993)).

169. Id.
170. Justices Stevens and Ginsburg note, as do principal critics, that the majority in Miller expanded the judicial role by allowing review of any district predominantly motivated by race, while the Court's decision in Shaw allowed judicial review only for apportionments resulting in extremely irregular shapes. Miller, 115 S. Ct. at 2499-2501 (Stevens, J., dissenting).
172. See supra notes 5-8 and accompanying text.
174. See supra note 5 and accompanying text.
related to the general electorate and are thus best able to recognize and convey the needs of voters and local communities of interest. Third, and most importantly, the Constitution grants the legislature exclusive power to regulate “the times, places and manner of holding elections for senators and representatives.” These arguments would seem to weigh against judicial review and, consequently the Miller decision. However, by imposing heavy prima facie burdens and maintaining the presumption that legislative districts are drawn in good faith, the Miller Court minimized the threat of excessive judicial interference.

To survive summary judgment, plaintiffs must overcome the presumption of good faith which accompanies all legislative actions. This requires that plaintiffs first ascertain whether the legislature considered race when drawing district lines, and then offer direct or circumstantial evidence that race was the predominant and motivating factor. Since the legislature may rebut this claim by offering evidence that other districting factors were more important than race, plaintiffs must be intimately familiar with all redistricting factors, as well as the extent to which each factor influenced the overall redistricting process. This burden is monumental. The intricacy and esoteric nature of political districting will undoubtedly deter all but the most experienced attorneys and well funded plaintiffs.

Politicians who have tediously drawn district lines to preserve incumbency advantage are not likely to offer assistance to plaintiffs trying to invalidate those districts. In absence of bizarre shape or legislative confessions of discriminatory intent, plaintiffs’ attorneys will be hard-pressed to satisfy the threshold requirements established by the Miller Court. The high prima facie burden imposed upon plaintiffs, the legislature’s interest in preserving district lines, and the Court’s cautious nature and

177. Miller, 115 S. Ct. at 2488.
178. Id.
179. Remember that a district’s shape, in and of itself, may be sufficient to state a claim of racial gerrymandering if the district’s shape cannot “rationally be understood as anything other than an effort to ‘segregate . . . voters’ on the basis of race.” Miller v. Johnson, 115 S. Ct. 2475, 2485 (citing Shaw v. Reno, 113 S. Ct. 2816 (1993)). Even so, the legislature may contradict this showing by proving that use of traditional districting procedures, and not race, was the predominant and motivating reason for the district’s shape. See supra notes 83-98 and accompanying text.
distaste for judicial review of political questions\textsuperscript{181} make regular court intrusions into the districting process highly unlikely. Critics also allege that Miller is a needless deviation from Shaw v. Reno which had clearly established bizarre shape as a prerequisite to a gerrymandering claim. While Shaw's "muddled language"\textsuperscript{182} might support such an argument, simple logic does not. The ACLU openly admitted that its goal was to "maximize [black] voting strength"\textsuperscript{183} by pushing the percentage of black voters within the district "as high as possible."\textsuperscript{184} Even state officials admitted that the Max-Black plan "violate[d] all reasonable standards of compactness and contiguity."\textsuperscript{185} As the the Miller Court noted, these statements were veritable "stipulation[s]" of discriminatory intent.\textsuperscript{186} Requiring that plaintiffs look for evidence of bizarre shape in the face of such admissions is tantamount to searching for an elephant with a magnifying glass. Further, interpreting Shaw to require a showing of bizarre shape would, in effect, carve out a distinct Fourteenth Amendment standard for voting classifications.\textsuperscript{187} No evidence in Shaw supports such an exception; in fact, Shaw's reliance upon traditional equal protection analysis clearly precludes such a conclusion.\textsuperscript{188} Thus, the Appellant's argument

\textsuperscript{181} See supra note 183 and accompanying text.
\textsuperscript{184} Id.
\textsuperscript{186} Id. at 2485.
\textsuperscript{187} See generally Yick Wo v. Hopkins, 118 U.S. 356 (1886); Gomillan v. Lightfoot, 364 U.S. 339 (1960)(discriminatory intent of city redistricting plan is illustrated by the plan's dramatic effect upon population areas); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. at 266 (1977) (where the redistricting pattern is "unexplainable on grounds other than race . . . the evidentiary inquiry is . . . relatively easy."); Personnel Adm'l of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (discriminatory purpose can be found when the legislator acts "because of" and not merely "in spite of" race).
\textsuperscript{188} In particular, the Court relied heavily upon Washington v. Davis, 426 U.S. 229, 239 (1976); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979); Yick Wo v.
that bizarre shape is a prerequisite to an equal protection claim is illogical, inconsistent with Fourteenth Amendment precedent, and unsupported by careful consideration of Shaw v. Reno.189

B. THE ONE THAT GOT AWAY: THE POLITICAL GERRYMANDER, ALIVE AND WELL AFTER MILLER

The Miller decision eliminated a significant threat to voting equality: legislative districts drawn with substantial reliance on racial considerations.190 In future years, however, Miller may be best known for what it did not do: eliminate political gerrymandering. While the Supreme Court has ruled that political gerrymandering claims are justiciable,191 it has done little to prohibit political gerrymandering.192 Instead of tackling the problem, the Miller Court skirted and even appeared to sanction political gerrymanders. Analysis of the Constitution and early writers reveals that the Miller Court should have broadened its application of strict scrutiny to all gerrymanders, both racial and political.

1. Equal Protection

Over time, Supreme Court justices have made strong Equal Protection arguments for the unconstitutionality of racial gerrymandering.193 These arguments include:

Hopkins, 118 U.S. 356 (1886).
189. Indeed, the Miller Court notes that “[t]he logical import of our reasoning [in Shaw] is that evidence other than a district’s bizarre shape can be used to support the claim.” Miller, 115 S. Ct. at 2487.

190. Miller v. Johnson, 115 S. Ct. 2475 (1995). By definition, a racial gerrymander subordinates traditional districting factors for considerations of race. To the extent that substantial considerations of race are no longer justifiable, the Miller decision effectively eliminated the racial gerrymander.


192. In Davis, Indiana Democrats claimed that Republican drawn district lines had diluted their voting strength. Though ruling that political gerrymandering was a justiciable issue, the Court denied the Democrats’ claims. The Court’s rationale is vague and has been subject to several interpretations. First, it is hypothesized that the Democrats’ claim was simply lacking evidentiary support. Second, some scholars believe that the Court required political gerrymandering plaintiffs to offer proof that they suffered discrimination comparable to that of ethnic minorities. Butler & Caim, supra note 2, at 34-35 (1992). The second interpretation most likely stems from the Court’s later decision in Badham v. Eu, 488 U.S. 1024 (1989). In Badham, the Court rejected a political gerrymandering claim brought by California Republicans. The Court reasoned that the Republicans were not “in the same position of political exclusions” as were blacks in the South. Id.

arguments evolved, incorporating ideas of equal access,\textsuperscript{194} equal representation,\textsuperscript{195} the prevention of vote dilution,\textsuperscript{196} and, most recently, the prevention of race-based classifications.\textsuperscript{197} All of these holdings were founded upon the premise that the Equal Protection Clause encompasses a guarantee of equal representation\textsuperscript{198} regardless of race,\textsuperscript{199} and requires every state to govern impartially.\textsuperscript{200} The Equal Protection guarantees of the Constitution apply no less stringently to citizens who entertain different political ideologies.\textsuperscript{201}

The opportunity to affect the political process is adversely affected, and in some cases completely eliminated, by districts gerrymandered to serve the interests of their creators. Politicians in the Georgia General Assembly openly admitted to having drawn their districts to avoid contests between incumbents.\textsuperscript{202} Gerrymandering to preserve incumbent advantage results in the “representatives selecting the people that they wish to represent, rather than the people choosing whom they wish to represent them.”\textsuperscript{203} Often

\begin{itemize}
\item \textsuperscript{194} See supra notes 18-34 and accompanying text.
\item \textsuperscript{195} See supra notes 36-47 and accompanying text.
\item \textsuperscript{196} See supra notes 48-77 and accompanying text.
\item \textsuperscript{197} See supra notes 78-98 and accompanying text.
\item \textsuperscript{198} In Reynolds v. Sims, 377 U.S. 533 (1964), the Supreme Court recognized that Equal Protection encompasses a guarantee of equal representation. The concept of equal representation requires a state to seek to achieve fair and effective representation of all citizens when drawing district lines. The Reynolds Court also held that an apportionment of political seats which “contracts the value of some votes and expands that of others” is unconstitutional, since the “Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote.” Reynolds v. Sims, 377 U.S. 533, 559 (1964) (citing Wesberry v. Sanders, 376 U.S. 1 (1964)). The Court stated that it would defeat the constitutional principle of equal representation to allow state legislatures to draw lines in such a way as to give some voters a greater voice in choosing a Congressman than others. The Court also recognized that redistricting should be based upon a number of neutral criteria. Id. See also Karcher v. Daggett, 462 U.S. 725, 745-65 (1983) (holding that the guarantee of equal representation is firmly grounded in the Equal Protection Clause of the Fourteenth Amendment).
\item \textsuperscript{199} Equal protection applies with equal force regardless of “the race of those burdened or benefitted by a particular classification.” Miller v. Johnson, 115 S. Ct. 2475, 2485 (1995) (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989), and Adarand Constr’rs Inc. v. Pen a, 115 S. Ct. 2097, 2102 (1995)).
\item \textsuperscript{200} Karcher v. Daggett, 462 U.S. 725, 745-65 (1983).
\item \textsuperscript{202} Miller v. Johnson, 115 S. Ct. 2475, 2485, 2489 (1995).
\item \textsuperscript{203} See Brief for Amicus Curiae William C. Owens, Jr., in Support of Appellees at 8,
politicians have less political but equally selfish districting goals in mind. One Georgia Senator admitted to having redrawn the 11th District to include the precinct where his son lived. The Miller decision appears to sanction the consideration of such "political" factors, elevating them to the status of "legitimate state interests." It is obvious that the Miller Court naively confused the interest of the State, with the interests of the State's politicians. "[F]air and effective representation for all citizens" is inconsistent with the ruthlessly ambitious, self-preserving interests of career politicians. If the Miller Court truly believed that the Equal Protection Clause encompasses the right of all citizens to affect the political process, then the constitutionality of political gerrymandering should also have been called into question.

2. The Guarantee Clause

Arguments against political gerrymandering can also be supported by the Constitution's Guarantee Clause, found in Article IV, Section 4 of the Constitution. "[T]he right to vote is inherent in the Republican form of government envisaged by Article IV, section 4." Since legislative redistricting plans affect voting procedures, they are subject to the limitations imposed by the Guarantee Clause. Article IV, section 4, however, encompasses more than just the right to vote. In Number 39 of The Federalist, James Madison vehemently argued that a republican form of government must "be derived from the great body of society, not from an

---

206. As the Court has long held. See Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964).
207. While political ideology is not an immutable characteristic, as is race, participation in political parties has long been recognized by the history and traditions of our country. Effective political participation is, at the very least, fundamental to our form of government.
208. "The United States shall guarantee to every state in this Union a Republican form of Government, and shall protect each of them against invasion; and on application of the legislature, or of the Executive (when the legislature cannot be convened) against domestic violence." U.S. Const. art. IV., § 4.
210. Reynolds v. Sims, 377 U.S. 533, 591 (1964)("legislative apportionments...are wholly free from constitutional limitations save as such may be imposed by the Republican Form of Government."). But see id. at 582 ("[S]ome questions raised under the Guarantee Clause are not justiciable, where political in nature and where there is a clear absence of judicially manageable standards."). James Madison argues that the existing government has an obligation to defend itself against aristocratic innovations which may threaten the republican form. THE FEDERALIST NO. 43 (James Madison).
inconsiderable portion, or a favored class of it." Implicit in Madison's argument is the concept of equal opportunity for representation regardless of either race or ideology. Ironically, early Constitutionalists prophesied the development of political factions and feared that these special interests would come to interfere with accurate calculation of the electorate's will. With the power to redraw district lines in a manner furthering incumbency advantage, politicians need not heed the voice of their constituents. Once drawn to preserve the power of its creator, district lines may be slightly altered to accommodate the needs of the highest bidder. One need only review the ACLU's gross manipulation of the Department of Justice and Georgia Legislature to see that the fears of the early theorists were well founded.

3. Freedom of Speech and Association

In addition to being antithetical to Equal Protection principles and our republican form of government, political gerrymandering offends basic First Amendment guarantees. Partisan gerrymanders manipulate legislative district lines to advantage or disadvantage certain political groups. This manipulation amplifies some political speech and mutes others. Without an effective political voice, the potential for minority interests to affect government is effectively nullified. Political gerrymandering can infringe upon First Amendment associational rights in a similar manner. When a community of interest is split by district lines, the community is deprived of its potential to exert force in numbers. As noted by Justice Douglas, "cumbersome election machinery can effectively suffocate the right

211. THE FEDERALIST NO. 39 (James Madison).
212. Justice Frankfurter recognized this in Baker when he held that the case was "in effect a Guarantee Clause claim masquerading under a different label." Baker v. Carr, 369 U.S. 186, 297 (1962) (Frankfurter, J., dissenting).
214. Entrenched incumbency is a direct result of political gerrymandering and was a great fear of Constitutional writers. Acknowledging that "those who have power in their hands will not give it up while they can retain it," entrenched incumbency was considered undesirable in colonial times. James Madison, Notes of Debates in the Federal Convention of 1787, at 266. Term limits were often suggested, but were not incorporated into the final copy of the Constitution. Id.
215. See supra notes 121-122 and accompanying text.
216. See supra note 9 and accompanying text.
218. Splitting communities of interest is not the only way to diminish the relative voting power. See supra note 9 and accompanying text.
of association, the promotion of political ideas, [the] progress of political action, . . . and the right to vote."²¹⁹ When a community of interest is split to serve the selfish needs of politicians and special factions, that community's speech and associational rights become, at best, illusory.²²⁰

IV. PRACTICAL IMPACT: MILLER'S EFFECT UPON AFFIRMATIVE ACTION

Affirmative action proponents are outraged with the Miller decision and allege that it represents a setback to minority representation.²²¹ A close and thoughtful review of the Court's decision reveals otherwise. The Miller decision will have no effect upon government affirmative action programs since the decision did not add or detract from existing policies which regulate the use of remedial efforts.²²² Instead, the Court's decision simply reaffirmed the now long established premise that "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial scrutiny."²²³ Affirmative remedies narrowly tailored to eliminate the residual effects of discrimination are still permissible, even under the strictest interpretations of the Court's opinion.²²⁴ Miller's greatest impact stems from its prohibition of majority-minority districts drawn with substantial reliance upon race. However, this prohibition does not arise from new rules promulgated in Miller, but rather from restoration of the original intent of the Voting Rights Act.

The Miller decision did not eliminate the availability of affirmative action as a remedy for past discrimination. To the contrary, Miller clearly recognized that the State has a significant interest in "eradicating the effects of past discrimination."²²⁵ The belief that Miller eliminated affirmative action stems from confusion about the Court's rejection of Georgia's 'black

²²⁰. Id.
²²¹. Richard Lacayo, The Soul of a New Majority, TIME, July 10, 1995, at 46. Soon after the Miller decision, a member of the Congressional Black Caucus was quoted as saying, "[w]e're not going to stand back and let five people who are out of touch with reality determine our future . . . we're going to initiate massive voter registration drives and voter education sessions." Id.
²²⁴. Id. at 2490.
²²⁵. Id.
maximization’ policy. Georgia’s legislative redistricting plan was not rejected because it was an affirmative action measure, but rather because it was not. Georgia’s plan was completely unrelated to remedial or ameliorative goals. To justify the use of race-based measures to remedy past discrimination, the state must have “convincing evidence that remedial action is necessary . . . [and a] strong basis in evidence of the harm to be remedied.” Miller did not create a heightened standard for affirmative action remedies, but rather sent a clear signal that racial remedies are inappropriate in the absence of racial discrimination.

The greatest repercussions from the Miller decision emanate from its prohibition of majority-black districts created under the guise of “compliance” with the Voting Rights Act. The Voting Rights Act was never intended to justify the creation of majority-minority districts absent evidence of discrimination. As Miller correctly noted, the Voting Rights Act was intended to prevent retrogression of minority voting strength. Majority-minority districts are maximization tools and are not narrowly tailored to prevent retrogression. Restored to the colorblind status that Congress originally intended, the Voting Rights Act can no longer be used to justify indiscriminate creation of majority-minority districts.

Miller, 115 S. Ct. at 2484 (citing Johnson v. Miller, 864 F. Supp. 1354, 1368 (1994) (“It became obvious that [the Justice Department] would accept nothing less than abject surrender to its maximization policy.”))

Id. at 2490-91. The State of Georgia, even in its written briefs to the Supreme Court, never alleged that their districting plan was intended to remedy the effects of past racial discrimination. Id. The Court notes, “[i]nstead of grounding its objections on evidence of discriminatory purpose, it would appear that the government was driven by its policy of maximizing majority-black districts.” Id. at 2492.

Id. at 2491.


The Court notes that the Voting Rights Act was never intended to permit “the far reaching application of section 5 utilized by the Department of Justice in creating Georgia’s three majority-black districts. Miller, 115 S. Ct. at 2490-93. Kennedy concludes, “[i]t takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute . . . to demand the very racial stereotyping the Fourteenth Amendment forbids.” Id. at 2494.

Id. at 2490-94.

Miller, 115 S. Ct. at 2493. “Section 5 was directed at preventing a particular set of invidious practices which had the effect of ‘undoing or defeating the rights recently won by nonwhite voters.’” Miller v. Johnson, 115 S. Ct. 2475, 2493 (citing H.R. REP. NO. 91-397 at 8 (1969)). See supra text accompanying notes 19-35.

Thus, while Miller did not determine whether compliance with the Voting Rights Act can justify majority-black districts, it is likely that it cannot. Miller, 115 S. Ct. at 2490-91.
the greatest impacts from the decision will not be seen until after the next decennial census.

Contrary to the view of Justice O'Connor,\(^\text{234}\) *Miller* does cast doubt upon the legitimacy of existing majority-black districts.\(^\text{235}\) In the past decade, the number of minority representatives in Congress has nearly doubled.\(^\text{236}\) Most of these representatives were elected by majority-minority districts.\(^\text{237}\) The Court has already agreed to hear race-based districting cases in both Texas and North Carolina. There will certainly be more suits, though it is impossible to determine how many. One thing is certain; those plaintiffs who prove that race was the predominant motivating factor in the creation of district lines will be victorious—but after 200 years of race-based stereotypes, that is a victory we all can celebrate.

### CONCLUSION

While reviewing the Georgia State Legislature's attempt to draw a political district in a manner substantially motivated by race, *Miller v. Johnson* exposed a fallacy which served as the foundation for eighteenth-, nineteenth-, and twentieth-century barriers to minority franchise rights: the idea that minority groups act and vote similarly. By perpetuating this stereotype, majority-minority districts threaten the very right which they seek to protect. Treading lightly through the political thicket of redistricting, the *Miller* Court managed to disarm this threat by prohibiting political districts drawn with substantial reliance upon race. When combined with the Reconstruction Amendments and the Voting Rights Act, *Miller’s* rejection of racial voting classifications has finally answered the cry of civil rights activists for total equality.

DARIN R. DOAK

\(^{234}\) Miller v. Johnson, 115 S. Ct. at 2497 (O'Connor, J., concurring). Justice O'Connor stated that the Court's decision "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." *Id.*

\(^{235}\) Justice O'Connor's statement presumes that current majority-minority districts are 'coincidentally' majority-minority and were drawn primarily through consideration of traditional districting principles. However, the vast majority of minority districts were drawn with the sole intention of complying with Section 5 of the Voting Rights Act. Most majority-minority districts are thus susceptible to court review.

\(^{236}\) Lacayo, *supra* note 221, at 46.

\(^{237}\) After the 1990 redistricting and subsequent 1992 elections, the number of African-American members of the Congress rose from 26 to 40. Almost all of these representatives were elected from majority-black districts.
APPENDIX A
The Original Gerrymander
The entire square comprised the city prior to redistricting. The black figure within the square represents the city after redistricting.
APPENDIX D
Proposed 11th District under Max-Black plan