E Pluribus Pluribus: The Hijacking of the Voting Rights Act and the Resegregation of America

Craig Haller

Follow this and additional works at: https://dsc.duq.edu/dlr

Part of the Law Commons

Recommended Citation
Available at: https://dsc.duq.edu/dlr/vol39/iss3/6

This Comment is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.
E Pluribus Pluribus:  
The Hijacking of the Voting Rights Act  
and the Resegregation of America

INTRODUCTION

The Prussian Prince, Otto Von Bismarck, once remarked that "[i]f you like laws and sausages, you should never watch either one being made."¹ The same can be said of voting districts.² Because of the need to keep pace with population shifts, states are forced to reapportion voting districts after each census.³ Consequently, the noisome process of accommodating the multifarious competing interests that squeal to be recognized by reapportionment committees descends upon the political landscape every ten years much like a blight of locusts raining down upon a fertile field of wheat.⁴ Each decision to recognize certain squeals while subordinating others casts doubt upon our representative democracy. The Department of Justice's baneful administration of the Voting Rights Act of 1965 ("Voting Rights Act" or "Act") is, a fortiori, disturbing when one considers that it has forced

---

¹ LAWYER'S WIT AND WISDOM 15 (Bruce Nash & Allan Zullo eds., 1995).
² The redistricting process has been described in many colorful ways. Perhaps the best description was delivered by Pamela Karlan - "Redistricting, like reproduction, combines lofty goals, deep passions about identity and instincts for self-preservation, increasing reliance on technology, and often a need to 'pull [and] haul' rather indelicately at the very end. And of course, it often involves somebody getting screwed." (alteration in original) (footnotes omitted). Pamela S. Karlan, The Fire Next Time: Reapportionment After the 2000 Census, 50 STAN. L. REV. 731, 733 (1998).
³ See id. at 735 (stating that "[p]opulation shifts now require reapportionment of virtually every legislative body after each decennial census. Self-preservation is a powerful motivation for legislators to reapportion seats before the courts take the process out of their hands.").
⁴ The clash of competing interest groups has placed the Democratic Party in a particularly unenviable position. The formation of compact majority-black districts removes many of the minority votes that liberal Democrats rely upon to get elected in mixed-race districts. Fully cognizant of this fact, Democrats have attempted to design districts with outrageous shapes to mitigate the effects of the creation of majority-black districts. See id. at 740-41 (remarking that "[b]y posing the choice to the Democratic Party so starkly - the majority non-white districts most likely to survive judicial scrutiny are configured in the way most 'costly' to the Democratic Party - the wrongful districting decisions are likely to pit black and white Democrats against each other, creating a three-way struggle for power in the redistricting process."). These efforts have given rise to many of the racially gerrymandered districts that will be discussed at length herein.
reapportionment committees to continually make concessions based upon race, even though neither the Voting Rights Act nor the cases decided under it permit such discrimination. Indeed, Alexander Hamilton's remark in *Federalist* 9 concerning the potential results of recognizing rigid distinctions between the interests of each state applies equally well to the potential results of recognizing rigid distinctions between the interests of each race—"[W]e shall be driven to . . . splitting ourselves into an infinity of little jealous, clashing, tumultuous commonwealths, the wretched nurseries of unceasing discord and the miserable objects of universal pity or contempt."6

Although one may find it difficult to believe in the current climate of incessant reapportionment litigation, there was a time when courts refused to participate in disputes concerning the characteristics of voting districts.7 This philosophy was drastically altered, however, by the Supreme Court's landmark decision in *Baker v. Carr*.8 In holding that a dispute arising from an imbalanced legislative apportionment scheme did not present a nonjusticiable political question by the mere fact that political rights were involved, the Court opened the Pandora's box of redistricting controversies to the judicial branch.9 Capitalizing on

---

5. *See* discussion *infra* Parts I and II.


7. *See* Colegrove v. Green, 328 U.S. 549, 552 (1946) (concluding that a petition to review the constitutionality of congressional districts was "beyond [the Court's] competence to grant").


9. *Baker*, 369 U.S. at 209. The Court held that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question." *Id.* Justice Felix Frankfurter, in his opinion in *Colegrove*, described a nonjusticiable political question as one "of a peculiarly political nature and therefore not meet (sic) for judicial determination" because of a "due regard for the effective working of our government." *Colegrove*, 328 U.S. at 552. Justice Frankfurter dissented from the majority opinion in *Baker* because he believed the Court's entry into the political thicket threatened to eviscerate the respect of the people for the judicial branch. *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting). He supported his position with the statement that:

The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements. *Id.*

One may argue in response, however, that even though prudence may dictate such abstention, the Constitution, in fact, injects the Court into such imbroglios by demanding that each citizen be provided with the equal protection of the law. *See* U.S. CONST. amend. XIV, § 1 (forbidding the denial of the "equal protection of the laws" to any citizen).
this new opportunity, the Court's decisions in *Wesberry v. Sanders*\(^\text{10}\) and *Reynolds v. Sims*\(^\text{11}\) were laudable attempts to ensure that each person's vote was of equal value. The abhorrent attempts of some officials, especially in the South, to limit the access of certain groups to the ballot box required more than the judiciary was able to give, however.\(^\text{12}\) Consequently, the Voting Rights Act of 1965\(^\text{13}\) was passed to ensure that each person's opportunity to cast a vote would not be denied.\(^\text{14}\)

This article will establish that the Supreme Court's initial efforts in presiding over legislative apportionment disputes and the language of the Voting Rights Act were constitutional attempts to guarantee that each citizen has the opportunity to exercise one of the rights most basic to being a free person—the right to vote. It will also be established, however, that these efforts have been hijacked by the Justice Department's recalcitrance in refusing to administer the Voting Rights Act as written and interpreted by the courts. Quite frankly, the Justice Department has transmogrified the Voting Rights Act into a document that demands the very thing that the Act was designed to destroy—racial discrimination in the voting process.\(^\text{15}\) Part One will describe the administration of the

---

10. 376 U.S. 1 (1964). The Supreme Court in *Wesberry* held that that the "one person, one vote" principle applies to congressional elections. *Wesberry*, 376 U.S. at 7. The "one person, one vote" principle requires that each person's vote be of the same value as any other person's; this principle is violated, for example, if one voting district contains 500,000 voters and another only contains 100,000 voters. *See id.*

11. 377 U.S. 533 (1964). The Supreme Court in *Reynolds* extended the "one person, one vote" principle to state legislative districts. *Reynolds*, 377 U.S. at 568. It is important to note, for reasons that will hereinafter become apparent, that the Court in *Reynolds* recognized the right to vote to be "individual and personal in nature." *Id.* at 561.

12. *See infra* notes 25-32 and accompanying text.


14. *See infra* notes 33-38 and accompanying text.

15. A quite interesting comparison can be drawn between the passage of the Voting Rights Act in 1965 and the Civil Rights Act in 1964 ("Civil Rights Act" or "Act"). The proponents of the Voting Rights Act assured those who remained skeptical about the Act's potential effects that it would, in no way, require race-conscious efforts to achieve proportional representation of minority groups. *See* Charles Stephen Ralston & Michael A. Carvin, *Voting Rights Debate*, 10 Touro Law Review 415, 434 (1994). Likewise, the proponents of the Civil Rights Act assuaged the concerns of many by explaining that no racial quotas would result from passage of the Civil Rights Act. *See id.* at 434. In fact, one of the chief promoters of the Civil Rights Act, Senator Hubert H. Humphrey, stated in response to a cautionary statement of a fellow senator that "if the senator can find . . . any language [in the bill] which provides that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating the pages one after another, because it is not in there." 110 Cong. Rec. 7420 (1964) (statement of Sen. Humphrey). The history of both Acts, however, belies such statements as such effects have
Voting Rights Act under the direction of the Justice Department. Part Two will explain the significance of the change of course mandated by the Supreme Court's decision in Shaw v. Reno and its progeny. Finally, Part Three will discuss why the holding in Shaw v. Reno is correct, and why its only shortcoming is that its language may not be explicit enough in establishing that race is no more of a relevant difference between people than hair or eye color.

I. OVERVIEW OF THE DEVELOPMENT AND ADMINISTRATION OF THE VOTING RIGHTS ACT

A. Voting Rights Before the Voting Rights Act

Soon after the Civil War, steps were taken by the federal government to ensure that blacks in the South would not only be free from bondage but would also be able to participate in the political process. Foremost among these steps was the passage of the Fifteenth Amendment in 1870 guaranteeing that the right to vote would not be denied on the basis of race or skin color. The Enforcement Act of 1870 was also passed, which made interference with the right to vote a criminal act. Such efforts had an immediate impact on voting rights as the number of blacks registered to vote in the South rose rapidly. Consequently, blacks were elected to political office in many southern states; for instance, more than half of the legislators in the lower house of the...
South Carolina legislature were black, and three blacks were elected to the position of lieutenant governor.\textsuperscript{23}

The history of voting rights prior to the passage of the Voting Rights Act, especially in the South, would be no success story, however. The political climate in the South changed after the disputed presidential election of 1876.\textsuperscript{24} As a result of a compromise, whereby the Democrats chose to support Rutherford B. Hayes over Samuel Tilden in return for the end of close federal supervision of the treatment of blacks in the South, the plight of black voters soon became replete with barriers, some more sophisticated than others, that blocked their exercise of the franchise for over eighty years.\textsuperscript{25} For example, between 1896 and 1900 the number of blacks registered to vote in Louisiana plummeted from 130,334 to 5320.\textsuperscript{26}

\textbf{B. The Passage of the Voting Rights Act}

Even though the federal government "rediscovered" the problem of voting rights in the South after World War II, the initial efforts designed to secure such rights were futile.\textsuperscript{27} The passage of the

\begin{enumerate}
\item Id.\textsuperscript{23}
\item Id. at 16. The dispute was over which candidate, Rutherford B. Hayes or Samuel Tilden, had received the most legitimate votes. Id. Due to the suspicion that supporters of both candidates had altered the voting returns from the South, an electoral commission was formed to investigate who had actually been elected. Id. Once the Democratic supporters of Samuel Tilden recognized that their candidate had lost, they agreed to back Rutherford B. Hayes if federal troops were removed from the South and Reconstruction effectively ended. Id.
\item See id. at 17-18. Among the most common devices implemented to curb black voting between the end of the Civil War and the passage of the Voting Rights Act were English literacy tests and poll taxes (used as prerequisites to registration), the requirement that one establish good character prior to voting (usually done by submitting references from other registered voters), and Constitutional understanding tests. Id. at 5. Many of these fin de siecle innovations were adopted in Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia. South Carolina v. Katzenbach, 383 U.S. 301, 310-11 (1966). Perhaps the most prevalent was the literacy test requiring the ability to read and write that was designed to exploit the difference in literacy rates between blacks and whites. Katzenbach, 383 U.S. at 310-11. To avoid isolating illiterate whites who were incapable of passing such tests, different standards were used or help was given to them to ensure that they would pass. Id. at 312. For example, a white applicant was given a passing evaluation in Louisiana even though his written interpretation of a provision of the state constitution was "FRDUM FOOF SPETGH." Id. at 313 (citing United States v. Louisiana, 225 F.Supp. 363, 384 (E.D. La. 1963)). Perhaps the applicant meant "freedom of speech."
\item HUDSON, supra note 22, at 17.
\item See Katzenbach, 383 U.S. at 313-14. This futility is reflected by the fact that the registration of blacks in Alabama rose from 14.2% to only 19.4% between 1958 and 1964, registration of blacks in Louisiana increased from 31.7% to only 31.8% between 1956 and 1965, and in Mississippi the registration of blacks rose from 4.4% to only 6.4% between 1954
\end{enumerate}
Civil Rights Acts of 1957, 1960, and 1964 kindled the hopes of those who wished to extirpate the incidents of racial discrimination in voting. Suits brought under those Acts, however, were rarely successful, certainly not on a state or region-wide basis, because the rigors mandated by the Acts made preparing and establishing a meritorious case an extremely laborious process; even if a state practice was found to be a violation, the offending state was free to, and often did, replace the offensive practice with different ones that would require more suits ad infinitum.

Dr. Martin Luther King, Jr., led the way for the passage of the Voting Rights Act as he did for so many other salutary measures. His leadership prompted President Lyndon Johnson to demand that Nicholas Katzenbach, the Attorney General, “write the god-damnest, toughest voting rights act you can devise.” The violence that surrounded the civil rights movement in the South ensured that the impetus for a voting rights act would not disappear. After President Johnson proposed the Voting Rights Act to a joint session of Congress by stating “we shall overcome,” the Act was passed by the House of Representatives by a 378 to 74 margin and by the Senate by a 79 to 18 margin.

The Voting Rights Act was designed to secure the right to vote to all citizens regardless of color and not to ensure any type of proportional representation. This is demonstrated by Attorney...
General Katzenbach's statement during the congressional hearings on the Act that its goal "is to increase the number of citizens who can vote."\textsuperscript{38} Even though the Act as passed in 1965 contained nineteen sections, an examination of the cases decided under it would suggest that section 2\textsuperscript{39} and section 5\textsuperscript{40} are the only ones because of the frequency that disputes under them have occurred in comparison to the other sections.

Section 2 prohibits the use of any voting practice or procedure by any State or political subdivision that denies or abridges the right of any citizen to vote on the basis of race or color or on the basis that the citizen belongs to a language minority group.\textsuperscript{41} Section 5, which applies only within certain covered jurisdictions, demands that no change to a voting practice or procedure be implemented without first "preclearing" it with either the Justice Department or the United States District Court for the District of Columbia.\textsuperscript{42} Preclearance will result only if the applying state convinces the Attorney General or the District Court through a declaratory judgment action that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on the basis of race or on the basis of membership in a language minority group.\textsuperscript{43}

---

\textsuperscript{38} THERNSTROM, supra note 37.

\textsuperscript{39} Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973(a) (1994). Section 2 now reads "no voting . . . procedure shall be . . . applied by any state or political subdivision . . . which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race . . . or in contravention of the guarantees set forth in section 1973b(f)(2) . . . ." Voting Rights Act § 2.


\textsuperscript{42} Voting Rights Act § 5. There is no de minimis exception whereby minor alterations need not be precleared. See 28 C.F.R. § 51.12 (requiring that "[a]ny change affecting voting, even though it appears to be minor or indirect, returns to a prior . . . procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the Section 5 preclearance requirement."). Jurisdictions become "covered" jurisdictions and, thus, subject to the preclearance requirement, by exhibiting very low voter turnout or registration. Katzenbach, 383 U.S. at 317. See 28 C.F.R. pt. 51 app. (setting forth the covered jurisdictions and the dates when they became covered by section 5).

\textsuperscript{43} Voting Rights Act § 5. States resort to preclearance through the Attorney General much more frequently than through the District Court because it is more convenient. See
C. The Administration of the Voting Rights Act

The constitutionality of the Voting Rights Act was challenged within a year of its passage. The State of South Carolina challenged various sections of the Act, including section 5, by averring that such legislation was not authorized by the Fifteenth Amendment. In *South Carolina v. Katzenbach*, the Supreme Court rejected South Carolina's claims and upheld the constitutionality of the Voting Rights Act. The Court found that even though Congress had been quite "inventive" when it drafted the Act, the Act was, nevertheless, authorized by the Fifteenth Amendment. According to Chief Justice Warren's majority opinion, the goal of the Voting Rights Act, which is to guarantee the right to vote for all citizens, is firmly rooted within the dictates of the Fifteenth Amendment. It is interesting to note that questions concerning a group's putative right to proportional representation were not considered, and were certainly not resolved in the affirmative, by the Court's opinion.

The Voting Rights Act had a nearly immediate impact in favor of increasing the access of black voters to the ballot box. As the

---

*Tiersten*by note 37, at 468 (stating that "in very few instances have jurisdictions actually chosen the option (built into the law) of going to the D.C. district court and then on to the Supreme Court. The simpler, faster, less expensive alternative of administrative preclearance (Justice Department review) has been the norm.").

44. *Katzenbach*, 383 U.S. at 316-17. Alabama, Georgia, Louisiana, Mississippi, and Virginia submitted amicus curiae briefs in support of South Carolina's claims; briefs in opposition to South Carolina's claims were submitted by California, Illinois, and Massachusetts (joined by Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Montana, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wisconsin). *Id.* at 307 & 308 n.2.

45. *Id.* at 327. South Carolina's most pointed charge was that Congress was not empowered to enact specific remedies to enforce the Fifteenth Amendment, but was, instead, limited to crafting general prohibitions only. *Id.* The Court found no such "artificial rule[]" within the Fifteenth Amendment. *Id.*

46. *Id.* at 327-28. Such inventiveness was justified according to Chief Justice Warren's majority opinion because the case-by-case litigation that had preceded the Voting Rights Act placed too great a burden upon those who wished to end discrimination in voting. *Id.* at 328. See *supra* text accompanying notes 27-32. The Court held that because litigation under existing statutes was extremely onerous "Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *Katzenbach*, 383 U.S. at 328.

47. *Katzenbach*, 383 U.S. at 337. Chief Justice Warren optimistically remarked that the Voting Rights Act may eventually lead to the point where "[w]e may finally look forward to the day when truly '(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.'" *Id.* (alteration in original) (quoting U.S. CONST. amend. XV, § 1). Significantly, Chief Justice Warren said nothing about the proportional representation of certain groups while pondering the possibilities of the Voting Rights Act.

48. See *Hudson*, *supra* note 22, at 70 (listing the percentage of blacks registered to vote
number of blacks registered to vote and voting increased, however, so did the appetites of those who wished to use the Voting Rights Act for purposes beyond those for which it was passed.\textsuperscript{49} More specifically, the Act became a vehicle for ensuring that certain groups not only had equal voting rights, but also for ensuring that representatives of certain ordained groups were actually elected.\textsuperscript{50} Quite frankly, those who saw the American landscape as a collection of groups rather than a nation of individuals were able to successfully commandeer the Voting Rights Act, with the vital aid of the Justice Department, for the objective of achieving the election of people who looked or spoke similarly to each such group.\textsuperscript{51} Regardless of the merits of proportional representation or other communitarian notions, the use of the Voting Rights Act for such purposes once its intended goal was met is a deplorable example of the prestidigitation that the modern administrative state makes possible.\textsuperscript{52} In short, those who favored the proportional

\textsuperscript{49} See Christopher M. Burke, The Appearance of Equality 65 (1999) (explaining that "the provisions of the VRA were transformed by voting rights litigants and activists, the Justice Department, and the federal courts into a policy of race sorting in political representation."); see also Hudson, supra note 22, at 69 (remarking that "the rapid and resounding success of the act led civil rights leaders to posture their movement for greater gains.").

\textsuperscript{50} See Thernstrom, supra note 37, at 464 (describing the expansion of the Act to cover certain groups and pointing out the method by which success was redefined as failure - "[p]rogress as initially conceived might be unmistakable, but redefined to ensure black officeholding, it disappeared.").

\textsuperscript{51} Burke, supra note 49, at 64. The Voting Rights Act, as administered and applied, is not in tune with the holding of Reynolds v. Sims, 377 U.S. 533 (1964), insofar as Reynolds established the "one person, one vote" principle which elevates the individual rather than the group to the position of prime importance. Id. In fact, it has been pointed out that:

It is astonishing how quickly and relatively uncontestedly the communal interpretation of the VRA became the orthodox version. Communitarian rhetoric favored a distribution of political power to racial and ethnic groups in proportion to their numbers. This prescription of proportional entitlements profoundly altered the fabric of American democracy. It refocused representation jurisprudence from the individual to the group. The focus of equality broadened to include not only equality of opportunity but also proportionality of result.

Id. (footnote omitted).

\textsuperscript{52} See supra note 15 (explaining how the administration of the Civil Rights Act of 1964 resulted in actions that were beyond the authority granted by the statute); see also Thernstrom, supra note 37, at 466 (describing the difference between the Act as written and as applied). The abominable application of the Voting Rights Act since its constitutionality as written was upheld in Katzenbach, 383 U.S. at 301, has not gone completely unnoticed as demonstrated by the following critique:

By 1975 those who enforced the Voting Rights Act had arrived at a point no one
representation of groups should have sought a group rights statute instead of attempting to implement their agenda under the guise of the Voting Rights Act.

The factual background of the Supreme Court's decision in *Beer v. United States*\(^5\) and its subsequent treatment by the Justice Department are illustrative of the deficiencies in the administration of the Voting Rights Act. *Beer* involved an attempt by the City of New Orleans to obtain preclearance of its city council voting districts under section 5 of the Voting Rights Act.\(^5\)\(^4\) The proposed changes would have increased the number of districts in which there was a majority of black inhabitants and black registered voters.\(^5\)\(^6\) Nevertheless, the Justice Department denied preclearance because the proposed changes "diluted" black voting strength from what was conceivable if different changes were made.\(^5\)\(^6\) The Supreme Court, in an opinion authored by Justice Stewart, set aside the refusal of preclearance by the Justice Department on the basis that Section 5 only requires that changes not be retrogressive.\(^5\)\(^7\)

Ultimately, the Court found in *Beer* that the Voting Rights Act requires preclearance as long as the proposed changes do not diminish the voting strength of a protected group.\(^5\)\(^8\) Even though this holding clearly elevated the non-retrogression standard to the envisioned in 1965. The right to vote no longer meant simply the right to enter a polling booth and pull the lever. Yet the issue retained a simple Fifteenth Amendment aura – one that was pure camouflage. An alleged voting rights violation had become a districting plan that contained nine majority-black districts when a tenth could be drawn.

*THERNSTROM, supra* note 37, at 466.


54. *Beer*, 425 U.S. at 133-34.

55. Id. at 135-36.

56. Id.

57. Id. at 141-42. Justice Stewart explained the conclusion of the Court by stating 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." Id. at 141. See also *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (stating that preclearance should be given to a redistricting plan even if it is constructed with a discriminatory purpose in mind if it is not retrogressive).

58. *Beer*, 425 U.S. at 141. The Court stated that "[i]t is ... apparent that a legislative reapportionment that enhances the position of racial minorities ... can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5." Id. As a related matter, the Court decided to include the remark that "[t]his Court has, of course, rejected the proposition that members of a minority group have a federal right to be represented in legislative bodies in proportion to their number in the general population." Id. at 137. In addition, the Court trumpeted the goal of the Voting Rights Act — "to rid the country of racial discrimination in voting." Id. at 140 (quoting *Katzenbach*, 383 U.S. at 315).
forefront of section 5 inquiries, the Justice Department has proceeded as if the case was never decided in clear violation of its obligations as the administrative arm of the Voting Rights Act. Consequently, states and political subdivisions must continue to defend their proposals against claims that preclearance should be denied because black voting power is not maximized.

The baneful administration of the Voting Rights Act is also reflected by the Supreme Court's decision in *United Jewish Organizations v. Carey*. The dispute giving rise to *United Jewish Organizations* began when the State of New York sought preclearance of its revised voting districts for the state senate and the state assembly. Because of the need to pacify the Justice Department by wringing out as many majority-minority districts as possible, the redistricting committee decided to split the Hasidic Jewish community in and around the Williamsburgh area into two different districts. Representatives of the Hasidic Jews filed suit based upon the claim that the decision to decrease their voting strength to augment the voting power of other minorities violated their rights under the Fourteenth and Fifteenth Amendments. Justice White, in his opinion announcing the judgment of the Court, rejected the claim of the Hasidic Jewish community as he explained that such discrimination in favor of certain minority groups and at the expense of others is authorized by the Voting

59. See Thernstrom, supra note 37, at 469-70 (describing the saga giving rise to the Supreme Court's decision in *Miller v. Johnson*, 515 U.S. 900 (1995), that was highlighted by the Justice Department's demand that black voting strength be maximized for preclearance to occur); see also Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.56 (1999) (stating that "the Attorney General will be guided by the relevant decisions of the Supreme Court of the United States and of other Federal courts."). This provision, which requires that the decisions of the federal courts be obeyed, would appear tautological in most circumstances but certainly not so as it relates to the defiance of the Justice Department.

60. See Thernstrom, supra note 37, at 471 (stating that "the contempt with which the Justice Department viewed the Court's interpretation of the law was startling . . . If three majority-black districts could be drawn, then only a plan that contained all three should be considered racially 'fair.'").

61. 430 U.S. 144 (1977) (plurality opinion).


63. Id. at 152. The Justice Department had objected to the first proposed changes that were submitted because they did not carve out sufficiently large nonwhite majorities. *Id.* One of the reapportionment committee members justified the decision to bifurcate the Jewish community by explaining that the Justice Department was essentially demanding that the population of the district in which the Jewish community was previously entirely contained be at least 65% nonwhite. *Id.*

64. *Id.* at 152-53.
United Jewish Organizations provides a clear yet grotesque description of how the Voting Rights Act has been used to favor certain groups while ignoring others. The desultory fashion in which groups like Asian Americans and Alaskan natives have become protected groups while certain religious groups and even women have been left out has besmirched the entire Act. Indeed, a group’s presence on the protected list reveals that group’s current political clout and calls into question that group’s justification for being on the list at all. In any event, the playing of favorites and the subsequent clash of minority groups are inevitable outgrowths of a policy aimed at ensuring the election of members of certain groups at the expense of others. Because the election process is, by its very nature, a zero-sum game while the voting process is not, the only way to apply the Voting Rights Act in a neutral and fair manner is to confine its administration to guaranteeing that everyone has access to the voting booth.

The United States Supreme Court further muddied the Voting Rights Act waters with its decision in Thornburg v. Gingles. Unlike Beer and United Jewish Organizations, Gingles dealt with a claim of vote dilution under section 2 of the Voting Rights Act. The section 2 claim was facilitated by the 1982 amendments to the Act that made it possible to establish a section 2 vote dilution violation even if the challenged voting practice or procedure was implemented without the intent of denying or abridging the right of

---

65. Id. at 165.
66. See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 402 (including Hispanics, Asian Americans, American Indians, and Alaskan natives as protected groups); see also Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.2 (1999) (listing the groups to be considered in determining whether a voting change should be precleared); see also note 41 and accompanying text.
67. See Burke, supra note 49, at 65-66 (explaining how the powerful lobbying presence of the Mexican American Legal Defense and Education Fund overcame the opposition of the National Association for the Advancement of Colored People to achieve protected status under the Voting Rights Act).
68. See Hudson, supra note 22, at 109 (identifying black opposition as one of the major obstacles to hispanics becoming a protected group and explaining that such opposition was a result of the fears of many blacks that expansion to cover other groups would limit black advantages gained from the administration of the Act).
69. This recommendation is bolstered by the fact that the Voting Rights Act was designed to secure the right to vote and was not written or intended to ensure the election of anyone.
70. 478 U.S. 30 (1986).
71. Gingles, 478 U.S. at 34. See supra notes 39-41 and accompanying text.
anyone to vote.\textsuperscript{72} The \textit{Gingles} Court held that various state legislative districts in North Carolina had the impermissible result of diluting the voting power of blacks living within those districts.\textsuperscript{73} In so doing, the Court listed the three \textit{Gingles} factors for establishing a section 2 vote dilution claim – (1) the objecting minority group must be sufficiently large and compact to constitute a majority in a single-member district, (2) the minority group must be politically cohesive, and (3) the white majority must vote as a bloc such that it is able to defeat the minority’s preferred candidate.\textsuperscript{74}

Even though section 2, as amended in 1982, expressly denies that it requires that certain minority groups be proportionally represented, the \textit{Gingles} decision is an accurate indication of the effect section 2 now has on the push for proportional representation.\textsuperscript{75} A fortiori, section 2 has a more widespread influence than section 5 because section 2 applies to all jurisdictions, not just covered ones, and an existing practice may constitute a violation whereas only changes to voting practices activate section 5.\textsuperscript{76} In short, section 2 allows disgruntled voters to “police” the election landscape anywhere, anytime, as long as the current voting system has failed to result in the proportional representation of certain groups.\textsuperscript{77}

\begin{footnotesize}
\textsuperscript{72} See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 134. Prior to the 1982 amendment to section 2, no violation of section 2 could be established even if the apparent result of a voting procedure was to dilute a particular group’s potential voting strength unless it was shown that such a result was intended. See \textit{Mobile v. Bolden}, 446 U.S. 55 (1980) (requiring a discriminatory purpose to accompany a discriminatory result for a section 2 violation to be found).

\textsuperscript{73} \textit{Gingles}, 478 U.S. at 80.

\textsuperscript{74} \textit{Id.} at 49-51.

\textsuperscript{75} Section 2 requires that claims of vote dilution be evaluated according to “the totality of circumstances,” but allows “[t]he extent to which members of a protected class have been elected to office in the State or political subdivision” to be one of the circumstances taken account of. Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973(b) (1994). Section 2 also contains the disclaimer “[t]hat nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” Voting Rights Act § 2. Despite this carefully worded language, achieving proportional representation of certain groups appears to be the only safe way to guard against section 2 problems.

\textsuperscript{76} See supra notes 39-43 and accompanying text; see also \textit{Burke}, supra note 49, at 76 (stating that the 1982 amendments “extended Section 5-type protections to all jurisdictions with significant minority populations”).

\textsuperscript{77} See \textit{Burke}, supra note 49, at 78 (remarking that “[t]he right not to have one’s racial voice submerged, found in Section 2 of the VRA, became the right to be represented separately, distinctly, and proportionately by race.”). Justice O’Connor realized the disparity between the words of section 2 and the manner in which it is administered:
\end{footnotesize}
II. CONSTITUTIONAL LIMITATIONS ON THE ADMINISTRATION OF THE
VOTING RIGHTS ACT

A. Shaw v. Reno: A Dramatic Change of Course

The administration of the Voting Rights Act was rarely challenged on constitutional grounds until the Supreme Court's decision in Shaw v. Reno.\(^7\) With few exceptions, such as in Katzenbach and United Jewish Organizations, disputes concerning the Voting Rights Act were based upon the interpretation of the Act, as opposed to direct constitutional challenges to the manner in which the Act was being applied.\(^7\) This lack of constitutional challenges can largely be explained by the uncertainty surrounding the question of whether members of the majority group, that is to say whites, could state a claim under the Equal Protection Clause of the Fourteenth Amendment as a result of racial gerrymandering designed to promote minority voting strength.\(^8\) In Shaw v. Reno, the Supreme Court found that a citizen of a racially gerrymandered district could state a cognizable claim under the Fourteenth Amendment if traditional districting principles, such as respect for political subdivisions, compactness, and contiguity, were sacrificed in favor of racial concerns.\(^8\)

Surely Congress did not intend to say on the one hand, that members of a protected class have no right to proportional representation, and on the other, that any consistent failure to achieve proportional representation, without more, violates § 2. A requirement that minority representation usually be proportional to the minority group's proportion in the population is not quite the same as a right to strict proportional representation, but it comes so close to such a right as to be inconsistent with § 2's disclaimer and with the results test that is codified in § 2.

Gingles, 478 U.S. at 96 (O'Connor, J., concurring).

78. 509 U.S. 630 (1993). The significance of the constitutional challenge found in Shaw v. Reno has been described as follows:

[T]he constitutionality of the VRA as amended in 1975 and 1982 was not seriously questioned until Shaw in 1993. Of course, South Carolina v. Katzenbach considered the constitutionality of the VRA of 1965 soon after its passage and answered in the affirmative, but the VRA that Katzenbach considered had changed radically by 1982. Prior to Shaw, the federal courts articulated an underlying communitarian purpose in the VRA, and acted only to clarify its limits when presented with novel fact situations

BURKE, supra note 49, at 88 (footnote omitted).

79. BURKE, supra note 49, at 88.

80. See Shaw, 509 U.S. at 677-78 (Stevens, J., dissenting) (finding no violation if the majority group is being disadvantaged for the benefit of a minority group). The Equal Protection Clause of the Fourteenth Amendment forbids any state to "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

81. Shaw, 509 U.S. at 649. Justice O'Connor, writing the opinion of the Court, stated the Court's decision this way:

[A] plaintiff challenging a reapportionment statute under the Equal Protection Clause
The factual background of the Shaw v. Reno decision was highlighted by North Carolina's attempt to obtain preclearance from the Justice Department of its congressional districts. The need for preclearance arose when it was determined that North Carolina's increased population entitled it to an additional seat in Congress. The initial districting proposal that was submitted contained only one majority-black district; consequently, the Justice Department denied preclearance because a second majority-black district was possible. In response to the objection of the Justice Department, North Carolina submitted a new plan that contained two majority-black districts with very unusual shapes. In fact, one of the districts resembled a "bug splattered on a windshield" while the other district was so narrow and followed the Interstate 85 corridor so closely that "if you drove down the interstate with both car doors open, you'd kill most of the people in the district." Nevertheless, the new proposal gained Justice Department approval. The plan was challenged by five citizens of Durham County, North Carolina, who, as a result of the narrow Interstate 85 district, were segregated into two different voting districts despite their close proximity to one another.

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.

82. Id. at 634-35.
83. Id. at 633.
84. Id. at 634-35. But cf. Beer v. United States, 425 U.S. 130 (1976) (finding that preclearance under section 5 should only be denied when the proposed change will have a retrogressive effect on the ability of minorities to vote regardless of the room available for the augmentation of minority voting power).
85. Shaw, 509 U.S. at 635-36.
86. Id. at 635 (quoting the WALL ST. J., Feb. 4, 1992, at A14). The "bug splat" district was District 1. Id. It was "hook shaped" and was "[c]entered in the northeast portion of the state, it move[d] southward until it taper[ed] to a narrow band; then, with finger-like extensions, it reach[ed] far into the southern-most part of the State near the South Carolina border." Id.
87. Id. at 635-36 (quoting the WASHINGTON POST, Apr. 20, 1993, at A4). The "Interstate 85" district was District 12. Id. at 635. District 12 was "approximately 160 miles long and, for much of its length, no wider than the I-85 corridor." Id. It was "snakelike" and included "tobacco country, financial centers, and manufacturing areas." Id. "At one point the district remain[ed] contiguous only because it intersect[ed] at a single point with two other districts before crossing over them." Id. at 636.
88. Id. at 636.
89. Id. at 636-37. Of the five North Carolina residents who challenged the revised plan, two were grouped into District 12 and three were grouped into District 2. Id. at 637. Their claim did not mention their skin color. Id. at 641. Rather, their challenge to the voting
In arriving at the conclusion that a member of a majority group could state a claim under the Fourteenth Amendment as a result of a racially gerrymandered districting plan, Justice O'Connor, in her opinion for the Court, compared the policy of requiring racial gerrymandering to achieve preclearance to "political apartheid" and refused to accept Justice Stevens's argument in dissent that no constitutional violation arises if only members of the majority group are disadvantaged because of their skin color. It must be pointed out that Justice O'Connor's majority opinion did not establish that racial motivations in districting decisions are always impermissible. The Court did hold, however, that traditional districting principles, including respect for political subdivisions, compactness, and contiguity, must never be subordinated to racial concerns unless the predominant use of race is narrowly tailored to a compelling government interest. In addition, the Court found that appearance does matter to the extent that the existence of grotesquely shaped districts can establish the predominance of districts was based upon the assertion that the racially gerrymandered districts denied to them their right to take part "in a 'color-blind' electoral process." Id. at 641-42.

90. *Shaw*, 509 U.S. at 647. The Court's opinion 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.

*Id.*

91. *Id.* at 642.

92. *Id.* at 647, 658. It is important to note that the Court did not espouse the idea that the Constitution requires that any traditional districting principles be followed. *Id.* at 647. Rather, the Court held that such principles are important factors because their non-existence within a districting plan is very strong evidence that race was the predominant factor in the districting process. *Id.*

The Court justified its requirement that racial gerrymanders be subjected to strict scrutiny while political gerrymanders often are not with the following passage:

Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering even for remedial purposes may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters — a goal that the Fourteenth and Fifteenth Amendments embody and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.

*Id.* at 657.
B. Miller v. Johnson and Bush v. Vera: Additional Constraints on a Runaway Justice Department

The ability of citizens of racially gerrymandered districts to bring a claim under the Equal Protection Clause of the Fourteenth Amendment was augmented by the Supreme Court's decision in Miller v. Johnson. Coming on the heels of Shaw v. Reno, the Court in Miller was asked to determine whether such a claim could be made based upon evidence other than the presence of bizarrely shaped districts. To be sure, the claim of racial gerrymandering in Miller was certainly buoyed by the nonsensical shapes of the congressional districts submitted for preclearance by the State of Georgia. Nevertheless, the incessant efforts of the Justice Department in coercing Georgia to discriminate on the basis of race for the purpose of squeezing out a third majority-black congressional district when two were initially proposed and only one had previously existed, in clear violation of the non-retrogression principle propounded in Beer, provided ample support for the claim that racial motivations predominated in the districting process.

The Court, in an opinion written by Justice Kennedy, ruled that the presence of a bizarre shape is not a sine qua non of a claim of unconstitutional racial gerrymandering in redistricting. While the Court affirmed the holding in Shaw v. Reno, insofar as that holding established that the predominance of racial concerns could be demonstrated by the circumstantial evidence of a district's shape, the Miller opinion enlarged the available pool of evidence by finding that other evidence, such as the demands made by the Justice Department, could support a charge of racial motivations.

93. Id. at 647. Justice O'Connor's majority opinion stated that "we believe that reapportionment is one area in which appearances do matter." Id.
95. Miller, 515 U.S. at 910-11.
96. Id. at 907-09 (explaining that the three majority-black districts arising from the "max-black" plan espoused by the Justice Department included "the narrowest of land bridges," ruptured counties, and long tracts wherein urban and rural neighborhoods were linked together in districts spanning over 260 miles in length).
97. See id. at 907-08 (quoting the lower court, 864 F. Supp. 1354, 1367 (S.D. Ga. 1994), that remarked that the districting plan "bore all the signs of [the Justice Department's] involvement") (alteration in original).
98. Id. at 912-13.
gerrymandering. Ultimately, the Miller Court reinforced the principle that districts constructed with racial concerns serving as the districting committee's lodestar may only be enacted if they are narrowly tailored to serve a compelling government interest. In addition, the Miller decision concluded that the maximization of majority-black districts is not a compelling government interest when the Voting Rights Act, as interpreted in Beer, only requires that there be no retrogression in the ability of blacks to vote.

The Supreme Court chased its decisions in Shaw v. Reno and Miller with its decision in Bush v. Vera. Under scrutiny in Bush were the congressional districts constructed by Texas and precleared by the Justice Department after the 1990 census. More

---

99. Id. at 913. Justice Kennedy's opinion stated that: 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, as courts applying Shaw have recognized, is that parties may rely on evidence other than bizarreness to establish race-based districting.

100. Id. at 904, 916.

101. Miller, 515 U.S. at 921-22. The Court stated its position in the following manner: [C]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws.

... The District Court found that the Justice Department had adopted a "black-maximization" plan under § 5, and that it was clear from its objection letters that the Department would not grant preclearance until the State... created a third majority-black district... It is, therefore, safe to say that the congressional plan enacted in the end was required in order to obtain preclearance. It does not follow, however, that the plan was required by the substantive provisions of the Act.

Id. at 921 (citations omitted). The Court articulated its final conclusion as follows: "It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids." Id. at 927-28.

One cannot overstate the degree of involvement of the Justice Department in the drawing of the congressional districts reviewed in Miller. In fact, the Justice Department teamed up with the American Civil Liberties Union ("ACLU") and adopted the ACLU's "max-black" plan to coerce Georgia into making as many majority-black districts as possible regardless of shape or shared interests. Thernstrom, supra note 37, at 470. In addition, the Justice Department's preoccupation with the racial makeup of proposed districts cannot be gainsaid. For instance, in drafting South Carolina's election districts, a Justice Department attorney actually labeled each district either "B" or "W," although he supposedly could not remember what the letters stood for at a subsequent trial. Id. at 480.


103. Bush, 517 U.S. at 956-57. The redistricting plan was precleared, in large part, because of the creation of three majority-minority districts — District 30 (majority-black population), District 29 (majority-hispanic population), and District 18 (majority-black population). Id.
significant for its bolstering of conclusions already reached than for any novel finding, the Bush decision served to highlight those redistricting principles that had been firmly established in prior cases. In addition, Justice O'Connor's plurality opinion announcing the judgment of the Court reveals those issues in redistricting controversies that remain unsettled and may very well become important in the next round of redistricting litigation after the results of the 2000 census are tallied.

Justice O'Connor's plurality opinion determined that three of the Texas congressional districts were unconstitutional because they were constructed with race predominating over other redistricting principles, and because the implementation of racial classifications was not narrowly tailored to a compelling government interest. Of particular importance was the fact that a computer software program called "REDAPPL" was utilized in the redistricting process that allowed racial data to be analyzed on a block-by-block basis as districts were drawn. Along with the unusual shapes of the majority-black and majority-hispanic districts, such evidence of the use of racial demographics was sufficient to support a conclusion of unconstitutional racial gerrymandering.

As stated above, however, the judgment of the Court highlighted not only the settled principles of redistricting litigation, but also those issues that are not settled. In particular, Justice O'Connor's

104. Id. at 958-59 (echoing the principles settled previously in Shaw v. Reno and Miller).
105. See id. at 958 (stating that districts created with the intent of aggregating a majority-minority population or with race in mind are not necessarily strictly scrutinized). But see id. at 1000 (Thomas, J., concurring) (demanding that all classifications using race as a guide be strictly scrutinized).
106. Id. at 957.
107. Id. at 961-62. The Court made note of the fact that:
The primary tool used in drawing district lines was a computer program called "REDAPPL." REDAPPL permitted redistricters to manipulate district lines on computer maps, on which racial and other socioeconomic data were superimposed. At each change in configuration of the district lines being drafted, REDAPPL displayed updated racial composition statistics for the district as drawn. REDAPPL contained racial data at the block-by-block level, whereas other data, such as party registration and past voting statistics, were only available at the level of voter tabulation districts (which approximate election precincts). The availability and use of block-by-block racial data was unprecedented; before the 1990 census, data were not broken down beyond the census tract level . . . . By providing uniquely detailed racial data, REDAPPL enabled districters to make more intricate refinements on the basis of race than on the basis of other demographic information.
108. Id. at 961-62 (citation omitted).
109. See supra note 105 and accompanying text.
conclusion in her plurality opinion that the intentional use of race in drawing districts and the intentional creation of majority-minority districts may not always trigger strict scrutiny if race is not the predominant consideration leaves unanswered the question of how far states may go in seeking to augment the voting power of certain groups before the Fourteenth Amendment is violated. Juxtaposed with Justice Thomas's concurring opinion in which he expressed his conclusion that all governmental classifications based upon race should be strictly scrutinized, the judgment of the Court in Bush fails to provide a definitive pronouncement that racial gerrymandering in redistricting cannot be countenanced under our constitutional regime. Unless Congress makes the unlikely choice to intervene, such a ruling may ultimately be necessary to compel the Justice Department to administer the Voting Rights Act as written and as the Constitution demands.

III. WHY SHAW v. RENO Was Right: A Defense of Color Blindness

A. The Constitutional Injury Caused by Racial Gerrymandering

Justice Stevens dissented in both Bush and Miller. At the heart of each of his dissenting opinions in those two cases is his

---

111. Id. at 999-1000 (Thomas, J., concurring). Justice Thomas's opinion stated that "application of strict scrutiny in this suit was never a close question. I cannot agree with Justice O'Connor's assertion that strict scrutiny is not invoked by the intentional creation of majority-minority districts." Id. at 999. Justice Thomas went on to explain that:

Strict scrutiny applies to all governmental classifications based on race, and we have expressly held that there is no exception for race-based redistricting . . . . While we have recognized the evidentiary difficulty of proving that a redistricting plan is, in fact, a racial gerrymander, . . . we have never suggested that a racial gerrymander is subject to anything less than strict scrutiny.

Id. at 1000 (Citations omitted).

112. Congress is unlikely to act for at least two reasons: (1) because of the politically explosive nature of race-conscious redistricting, and (2) because the language of the Voting Rights Act is not the source of the problem; rather, the problem arises from the interpretation and application of the Act. In any event, a definitive statement about the unconstitutionality of discriminating on the basis of race in the redistricting process is necessary because, as the cases discussed herein reveal, the Justice Department has shown a maddening ability "to be given an inch, but to take a foot."

113. See Bush, 517 U.S. at 1003 (Stevens, J., dissenting) (objecting to the judgment of the Court that found, in part, that political gerrymandering in favor of a minority group may cause constitutional harm to majority group members); see also Miller, 515 U.S. at 929 (Stevens, J., dissenting) (dissenting, inter alia, because the opinion of the Court recognized that a majority group member is injured by being included within a racially gerrymandered voting district).
assertion that members of the majority group, that is to say whites, suffer no injury when voting districts are politically gerrymandered to favor certain minority groups.\textsuperscript{114} If such a position is constitutionally viable, then no \textit{Shaw v. Reno} claim could be made because the lack of an injury would prevent any majority group member from challenging racial gerrymandering in redistricting. Justice Stevens's position, however, is unjustifiable.\textsuperscript{115}

The injury that Justice Stevens failed to identify is the injury that any American citizen suffers when treated differently from others because of race.\textsuperscript{116} The Equal Protection Clause demands that no one be discriminated against on account of race.\textsuperscript{117} This guarantee

\textsuperscript{114} See \textit{Bush}, 517 U.S. at 1008 (Stevens, J., dissenting) (stating that "[r]acial gerrymandering of the sort being addressed in these cases is 'discrimination' only in the sense that the lines are drawn based on race, not in the sense that harm is imposed on specific persons on account of their race."); see also \textit{Miller}, 515 U.S. at 932 (Stevens, J., dissenting) (remarking that "I do not see how a districting plan that favors a politically weak group can violate equal protection.").

\textsuperscript{115} See discussion \textit{infra} Part III-A-D.

\textsuperscript{116} See \textit{Adarand Constructors, Inc v. Pena}, 515 U.S. 200, 229-30 (1995) (stating that "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution["].). One may find Justice Stevens's inability to perceive a constitutional injury suffered by whites when they are racially gerrymandered into majority-minority districts peculiar after one considers his dissenting opinion in \textit{Fullilove v. Klutznick}, 448 U.S. 448 (1980) (plurality opinion). In \textit{Fullilove}, Justice Stevens objected to the Court's decision to uphold a set-aside program granting racial preferences to minority construction companies. The graveness of his dissent is the following passage:

[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception – especially when fostered by the Congress of the United States – can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor. \textit{Id.} at 545 (Stevens, J., dissenting) (footnote omitted). Of particular interest is Justice Stevens's remark that programs that create racial consciousness are objectionable because they hinder efforts aimed at making race irrelevant in American society. \textit{Id.} Certainly the segregation of whites and blacks into separate and distinct voting districts by the mandate of the Justice Department is an instance of official government action based upon race that Justice Stevens at one time found objectionable.

\textsuperscript{117} See \textit{Powers v. Ohio}, 499 U.S. 400, 415 (1991) (identifying the elimination of discrimination on the basis of race from all governmental actions as a goal of the Fourteenth Amendment). One of the most lucent descriptions of the meaning of the Fourteenth Amendment was articulated in \textit{University of California Regents v. Bakke}, 438 U.S. 265, 289-90 (1978) (plurality opinion). In \textit{Bakke}, the Court stated that:

The Guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." The guarantee of equal
extends to all citizens; the fact that an individual is white and, therefore, is considered to be a majority group member does not, ipso facto, mean that the right not to be discriminated against because of race is waived. Furthermore, the definition of "discrimination" does not encompass only those actions that harm the political, social, or economic interests of a particular person or group. To the contrary, to discriminate against someone one need only "distinguish" or "differentiate" one person from another. Consequently, the Equal Protection Clause provides an unfortunate twist for racial gerrymanderers in that they may not make distinctions among citizens on the basis of race regardless of the skin color of the group to be benefited or burdened.

We should be glad that the Constitution forbids racial discrimination even by those with benign yet myopic intentions. protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.


118. See Reynolds v. Sims, 377 U.S. 533, 563 (1964) (stating that "[o]ne must be ever aware that the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination.'") (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)). The enjoyment of the rights protected by the Constitution simply does not depend upon whether the group seeking to exercise such a right currently outnumbers another group. One can easily imagine the chaos that would result from such a philosophy.

119. See THE NEW MERRIAM-WEBSTER DICTIONARY 220 (1989) (defining "discriminate" as "distinguish, differentiate"). Even if "discrimination" in the context of racial gerrymandering requires that a particular person or group lose political power, there would still be a constitutional injury to support Shaw v. Reno claims. The Supreme Court's decision in Powers, 499 U.S. at 400 (1991), illustrates this point. In Powers, the Court held, inter alia, that a white person may object to the race-based use of peremptory challenges to remove black potential jurors from the venire. Id. at 402. The injury complained of in Powers was ostensibly one incurred by the black potential jurors yet the white defendant's claim was recognized. Id. See supra notes 172-75 and accompanying text.

When one directs the rationale supporting the Powers decision toward Shaw v. Reno claims, it appears that a white voter could assert a cognizable claim not only on behalf of himself if he resides in a racially gerrymandered district, but also on behalf of black voters. The white voter could make a cognizable claim, a fortiori, by identifying the black voters who were left behind by the racial gerrymanderers and now live in districts that are overwhelmingly majority white wherein they may have less influence according to those inclined to think in racial terms.

120. One such proponent of attempting to achieve proportional representation through racial gerrymandering is Lani Guinier. It is Guinier's belief that those who vote for the losing candidate in elections, in effect, "waste" their votes because the votes were not directed toward a candidate who gained political office. Lani Guinier, Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes, in AFFIRMATIVE ACTION AND REPRESENTATION 223, 227 (Anthony A. Peacock ed., 1997). According to Guinier, a voting system does not function properly if a voter "is represented by the person against whom he or she votes" because "the representation of the majority of the people becomes a
The segregation of voters according to race erects a nearly insuperable impediment to the glimmering goal of erasing racial discrimination from the American landscape. At the heart of attempts to racially gerrymander voting districts is the notion that members of certain minority groups cannot be represented by non-members because the interests of such non-members are hostile to the interests of these minority groups. At the very least, representation of the whole people.” Id. at 250. This critique misapprehends the nature of how a representative democracy works, and her solution to the “problem,” which is to give everyone an equal opportunity to vote for a winning candidate, calls to mind an advertising slogan – “Tastes great, less filling.” Id. at 228-29.

To be represented simply does not mean that one voted for the representative; all that is necessary is that one have had the opportunity to cast an equally-weighted vote in the election. Furthermore, groups that are not large enough to elect their preferred candidates on their own, and arguably none are, may still gain political success by aligning themselves with other groups. Because most elections are won by very narrow margins, no candidate can afford to ignore the demands of any group, even those with disparate political views from his own. Guinier's primary suggestion, which is that everyone be given an opportunity to vote for a winning candidate, is seriously weakened by the fact that there are an infinite number of groups in our society, not just racial ones, and by the fact that, in a democracy, math counts and some candidate has to lose. See Reynolds, 377 U.S. at 566 (stating that “the democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future.”); see also United Jewish Orgs. v. Carey, 430 U.S. 144, 166 (1977) (finding that an “individual voter . . . has no constitutional complaint merely because his candidate has lost out at the polls and his district is represented by a person for whom he did not vote. Some candidate, along with his supporters, always loses.”).

121. This assertion is supported by a string of cases decided by the United States Court of Appeals for the Eleventh Circuit dealing with the evidentiary value of minority electoral success in vote dilution controversies under the Voting Rights Act. For instance, in Meek v. Metropolitan Dade County, 908 F.2d 1540, 1548 (11th Cir. 1990), the election of a black candidate was discounted to make way for a section 2 vote dilution claim because, even though a black candidate was successful, it was not established that the particular black candidate was the true choice of black voters instead of merely being black voters’ preferred choice over white candidates. Meek, along with the other cases in the series referenced infra, suggest that not only must black candidates win elections to meet the requirements of the polluted version of the Voting Rights Act that is now often applied, but they must also be elected by other blacks.

See NAACP v. Gadsden County Sch. Bd., 691 F.2d 978, 983 (11th Cir. 1982) (refusing to allow the election of a black candidate to disprove the dilution of black voting strength because the candidate may have been elected merely “to thwart” a vote dilution challenge under section 2 of the Voting Rights Act); see also United States v. Marengo County Comm’n, 731 F.2d 1546, 1571-72 (11th Cir. 1984) (finding that minority electoral success may be ignored because it may have been motivated by the desire to avoid section 2 vote dilution liability and also deciding that the degree to which white representatives are responsive to minority needs has no influence in section 2 vote dilution litigation); see also Solomon v. Liberty County Comm’n, 166 F.3d 1135, 1145 (11th Cir. 1999) (finding that the mere fact that a black candidate was elected was not enough to prove that black voting strength was not diluted because the Voting Rights Act requires that a black candidate be shown to have been the candidate of choice of black voters), vacated, 206 F.3d 1054, 1055 (11th Cir. 2000); see also Thernstrom, supra note 37, at 490 (remarking that white support for black candidates,
such thinking threatens our nation’s prosperity because it paints a picture of American society as nothing more than a collection of hostile factions that are incapable of living together unless the government allocates to each caviling group a piece of political power.\textsuperscript{122}

Racial gerrymandering is a particularly subversive practice because it not only guarantees that race will always be a point of division among American citizens, but because it will ultimately prove futile in advancing the interests of the very minorities who are its putative beneficiaries.\textsuperscript{123} This futility is certainly guaranteed if the premise upon which racial gerrymandering is based is true.\textsuperscript{124} That is to say that if minorities need to be segregated into separate and distinct districts to ensure their representation because the antagonism of whites toward protected minorities precludes whites from genuinely representing such minorities, then such minority representation will ultimately prove vacuous because the underlying white antagonism will follow the minority representatives to the legislatures and prevent any salutary measures from being passed in favor of minority interests.\textsuperscript{125} In effect, the net result of racial gerrymandering would be an increased volume of comments of minority congressmen in the

\begin{itemize}
\item \textsuperscript{122} See Thernstrom, \textit{supra} note 37, at 490-92 (stating that racial classifications “imply that individuals are defined by blood – not by character, social class, religious sentiments, age, or education. But categories appropriate to a caste system are a poor basis on which to build that community of equal citizens upon which democratic government depends.”).
\item \textsuperscript{123} Officially assigning the representation of minority interests to a small number of minority representatives, which would be the result of achieving strict proportional representation through racial gerrymandering, would be dangerous to minorities. It would ensure that those representatives who are concerned with certain minority interests would be far outnumbered by the rest of the legislators who would represent much larger percentages of white voters as a result of the segregation through racial gerrymandering. This situation would be similar to the situation that would have resulted if the British would have reacted to the cries of “no taxation without representation” by granting the American colonies proportional representation in the British Parliament. That is to say that the colonists would then have been represented, but would still have been unable to effectively prevent or control their rate of taxation because their portion of representatives in Parliament would have been so meager. See John Philip Reid, \textit{The Concept of Representation in the Age of the American Revolution} 2-3 (1989) (remarking that “to give Americans representation in the British parliament ‘would [have] . . . tak[en] away from the colonists the grand bulwark of their liberties.’”) (citing an anonymous constitutional commentator).
\item \textsuperscript{124} See supra note 121 and accompanying text.
\item \textsuperscript{125} See Burke, \textit{supra} note 49, at 78-79 (stating that “white representatives from majority-white districts will have little incentive to discuss race issues with minority representatives from majority-minority districts if they do not need minority votes to remain in office. Majority-minority districting may resegregate the legislature.”).
\end{itemize}
Congressional Record but no increase in governmental efforts to cure the problems afflicting minority communities. In addition, congressional sessions would take on the appearance of summits between nations wherein the participants come to further their own interests with little or no concern for the interests of opposing parties. The interests of majority and minority group members are not, of course, so diametrically opposed; but the moment one begins to embrace this proposition, the justification for racial gerrymandering begins to disintegrate.¹²⁶

B. The Constitution Recognizes Individuals Not Interests

In Gray v. Sanders,¹²⁷ the Supreme Court declared that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters."¹²⁸ As this statement demonstrates, the Constitution only "sees" individuals; it does not seek to protect or exalt any particular group or groups.¹²⁹ Certainly attempts to officially recognize particular group interests by allocating power in proportionate amounts are as unavailing as they are unjust because of the sheer number of potentially recognizable interests and because of the fact that many interests can be possessed by the same person at the same time.¹³⁰ Yet the Voting Rights Act has been

¹²⁶ The ultimate extension of the philosophy behind racial gerrymandering forces its proponents to either espouse the position that white and minority interests are permanently at odds, in which case nothing is really gained by electing minority candidates because they would meet with failure in legislatures, or to accept that white and minority interests do not wholly oppose each other, in which case the necessity of segregating minorities into majority-minority districts disappears.
¹²⁸ Gray, 372 U.S. at 379-80 (quoting U.S. Const. preamble).
¹²⁹ See Reynolds, 377 U.S. at 562 (stating that "[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.").
¹³⁰ The arbitrary nature of the manner in which only five minorities have become protected under the Voting Rights Act becomes apparent when one realizes that two interests that have been among the most frequent sources of discrimination historically, that is to say gender and religion, are not on the protected list under the Voting Rights Act. See Hudson, supra note 22, at 13 (describing the plight of female voters in America until their right to vote was established by constitutional amendment); see also Plessy v. Ferguson, 163 U.S. 537, 558 (1896) (Harlan, J., dissenting) (inquiring why distinctions based upon race are acceptable while distinctions based upon religion are not attempted). Perhaps religious or gender gerrymandering would be considered were it not for the fact that any attempt to segregate voters according to religion or gender would create a logistical nightmare that no computer software could sort out. In addition, just as the Court in Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965), expressed its horror at the thought of police officers invading the marital bedroom searching for contraceptives, certainly the intrusion of the redistrictor's line-drawing pen between man and wife would be "repulsive to the notions of privacy surrounding the marriage relationship." Griswold, 381 U.S. at 485-86.
administered as if the Constitution allows discrimination on the basis of race as long as such discrimination is designed to achieve the proportional representation of the five selected minority interests.

The entrenchment of property interests was initially attempted in many states after independence from Britain was achieved.\textsuperscript{131} At the heart of these attempts were property ownership and tax payment requirements as prerequisites to voting.\textsuperscript{132} Such efforts were eventually abandoned, however, in favor of the belief that "politics . . . was not the reconciling but the transcending of the different interests of the society in the search for the single common good."\textsuperscript{133} The fact that the representation of certain vulnerable interests was pondered but ultimately jettisoned long before the passage of the Voting Rights Act by the same generation that drafted the Constitution is strong evidence of the individualized nature of representation in our constitutional democracy.\textsuperscript{134}

The abject futility of attempting to divide American society according to various arbitrary characteristics for the purpose of proportionally representing certain interests was actually perceived before the commencement of the Justice Department's race-sorting efforts under the Voting Rights Act. In fact, Alexander Hamilton, in \textit{Federalist 35}, severely castigated those who sought to obstruct the adoption of the Constitution by claiming that the legislative branch, as structured by the Constitution, was deficient because it would not allow for the representation of each interest that was present in American society at the time.\textsuperscript{135} Hamilton, in his typically perspicuous fashion, attacked such complaints by stating:

\textsuperscript{131} \textit{See} Gordon S. Wood, \textit{The Creation of the American Republic} 218-19 (1969) (stating that property "was becoming an interest in its own right, to be specially represented in the legislature").

\textsuperscript{132} \textit{See} Hudson, \textit{supra} note 22, at 10-11 (listing the requirements necessary to cast a ballot, including the payment of taxes and the ownership of property, in many of the newly-independent states).

\textsuperscript{133} Wood, \textit{supra} note 131, at 58. Consistent with this belief that an effective political system did not require the official and systematic representation of certain interests was the Founders' conviction that "[t]he process of voting was not incidental to representation but was at the heart of it.").

\textsuperscript{134} \textit{See id.} at 221-22 (declaring that the representation of specific interests, such as property, "violated the homogeneity of interests on which republicanism [is] based"); \textit{see also} Reid, \textit{supra} note 123, at 32-33 (remarking that "[t]here may have been no other point of law about which British and colonial constitutional and political values were so divergent than the theory that representatives who gave consent to legislation represented property rather than people.").

\textsuperscript{135} \textit{The Federalist No. 35}, at 218-19 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
[The] argument presents itself under a very specious and seducing form; and is well calculated to lay hold of the prejudices of those to whom it is addressed. But when we come to dissect it with attention it will appear to be made up of nothing but fair sounding words. The object it seems to aim at is in the first place impracticable, and in the sense in which it is contended for is unnecessary . . . .

The idea of an actual representation of all classes of the people by persons of each class is altogether visionary. Unless it were expressly provided in the Constitution . . . the thing would never take place in practice.\textsuperscript{136}

C. The Administration of the Voting Rights Act and Federalist 10

The Justice Department’s administration of the Voting Rights Act is breeding the very creatures that cause the ailment that James Madison identified in \textit{Federalist 10} as the “disease[] most incident to Republican Government” – factions.\textsuperscript{137} It is true that Madison identified majority faction as the main source of tumult in democracies, and that normally only minority factions are purposefully crafted under the current administration of the Voting Rights Act.\textsuperscript{138} These facts should provide no solace, however, because the official recognition of minority factions threatens to allow the majority to realize its strength because it fosters group consciousness.\textsuperscript{139} This recognition is precisely the event that Madison believed would be avoided by the creation of a large republic wherein the citizenry would be so widely dispersed that a majority faction would have extreme difficulty in forming.\textsuperscript{140} It is

\begin{enumerate}
\item[136.] \textit{Id.}
\item[137.] \textit{The Federalist No. 10}, at 65 (James Madison) (Jacob E. Cooke ed., 1961).
\item[138.] See \textit{id.} at 60 (stating that a minority faction “may clog the administration, it may convulse the society, but it will be unable to execute and mask its violence under the forms of the Constitution.”). \textit{But see} City of Richmond v. J.A. Croson Co., 488 U.S. 469, 523-24 (1989) (Scalia, J., concurring) (referring to \textit{Federalist 10} while describing how a discriminatory program favoring blacks was adopted in Richmond, Virginia, even though blacks were the majority political group in Richmond).
\item[139.] See \textit{Burke}, supra note 49, at 32-33 (asserting that the way that the Voting Rights Act has been administered promotes factions, and that “[r]acial polarization, notably absent in many districts not covered by the VRA, is routine in majority-minority districts.”).
\item[140.] \textit{Federalist} 10, supra note 137, at 64. Madison explained the way a large republic controls the growth of factions as follows:
\begin{quote}
Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with
\end{quote}
certainly ironic that the very government that was created, inter alia, to control factional conflict is now pursuing a policy that requires the deliberate creation of factions.

The classical liberal view of society espoused by Madison in *Federalist 10*, that has as its basis the understanding that the building blocks of our polity are individuals, is diametrically opposed to the modern liberal, communitarian view that we are who we associate with or look like. It is for this reason that *Shaw v. Reno* and its progeny are important because they signal, at least indirectly, a possible return to the philosophy behind *Federalist 10* in making redistricting decisions. That is to say that *Shaw v. Reno* holds that the government cannot and should not elevate group concerns, such as the election of minority candidates, to the predominant position in its ratiocination prior to taking action on a redistricting plan. Quite frankly, one who analyzes *Federalist 10* is likely to conclude that Madison would have agreed with the decision in *Shaw v. Reno*.

D. Race Is Not a Relevant Difference

The logic of the Equal Protection Clause, along with the cases decided in accordance with it, have firmly established that race is rarely, if ever, a relevant difference upon which governmental classifications may be made. This conclusion is clearly supported by the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*. In *Adarand*, the Court held that all governmental classifications based upon race should be strictly scrutinized to determine if the Equal Protection Clause has been violated because distinctions between citizens based upon race can only be justified by the most extreme circumstances. The fact that elected bodies are not mirror images of the population at large does not present each other.

Id.

141. See Burke, supra note 49, at 25-36 (describing Madison's theory of representation as "focused on the individual" while communitarian theories are not).

142. See supra Part II.A.

143. See infra note 151 and accompanying text.


145. *Adarand*, 515 U.S. at 227. Only these extreme circumstances make race relevant. See Benjamin E. Griffith, *Redistricting Litigation in the Next Millennium*, 49 CATH. U. L. REV. 31, 60-61 (1999) (stating "that any race-conscious remedial measure is subject to strict scrutiny under the Equal Protection Clause . . . . Under strict scrutiny, a racial classification is required to be justified by a compelling government interest and narrowly tailored to further that interest.").
such an extreme circumstance.

1. Race Is Not a Relevant Difference: Governmental Classifications

In University of California Regents v. Bakke, Justice Blackmun, writing on behalf of only himself, stated that “[i]n order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.” In contrast to this declaration, in Adarand, Justice Scalia remarked in his concurring opinion that “[t]o pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to . . . preserve for future mischief the way of thinking that produced race slavery . . . . In the eyes of government, we are just one race here. It is American.”

The antinomy created by the clash of these two statements reflects the question that lies at the heart of every dispute concerning government action and race – “Is racism the only cure for the malady of racial prejudice?” In contradistinction to government policies that discriminate on the basis of race, such as the policy motivating the current administration of the Voting Rights Act, the decisions of our nation’s highest judicial body do not reflect the myopic view that the only way to combat racial prejudice is to adopt racist tactics.

In Hirabayashi v. United States, the Supreme Court upheld government action at the time of the Second World War that discriminated against citizens of Japanese ancestry. While the specific result in the case suggests that the government is empowered to discriminate against its citizens according to certain arbitrary characteristics, the extremely limited nature of the Court’s holding clearly supports the proposition that race, and other such criteria, are almost always incapable of supporting governmental classifications. In fact, the Court circumscribed its approval of

146. 438 U.S. 265 (1978) (plurality opinion).
147. Bakke, 438 U.S. at 407 (Blackmun, J., separate opinion).
148. Adarand, 515 U.S. at 239 (Scalia, J., concurring).
149. 320 U.S. 81 (1943).
150. Hirabayashi, 320 U.S. at 102.
151. See id. (explaining that the war-time conditions necessitated that deference be given to military leaders exercising their war powers and declining to consider whether such classifications would have been constitutional under other circumstances); see also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (proclaiming that racial classifications would be appropriate only in circumstances resembling “social emergenc[i]es” that endanger “life and limb”).
the classifications by stating that "[b]ecause racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense."  

The proposition that racial prejudice can and should be remedied by means other than racist tactics is further supported by the Court's decision in Anderson v. Martin. In Anderson, Justice Clark, writing for the Court, struck down a Louisiana statute that mandated that a candidate's race accompany his or her name on the ballot for all primary, general, or special elections. In particular, the Court objected to the fact that the statute would "encourage . . . voters to discriminate upon the grounds of race," and would "plac[e] . . . the power of the State behind a racial classification that includes racial prejudice at the polls." Unlike those who support racial gerrymandering, the Supreme Court in Anderson found "no relevance in the State's pointing up the race of the candidate as bearing upon his qualifications for office."  

The irrelevance of race as a basis for drawing distinctions between American citizens was further illuminated when the

152. Hirabayashi, 320 U.S. at 100.
155. Id. at 402. Justice Douglas, in Wright v. Rockefeller, 376 U.S. 52, 59 (1964) (Douglas, J., dissenting), based his dissent upon a similar concern for the lessons that are taught to citizens through official government action. The dissent is particularly poignant because the case concerned the constitutionality of a districting plan to which minorities were not wholly opposed because various majority-minority districts were created. Wright, 376 U.S. at 53-54. After comparing racial gerrymandering to the electoral system constructed by the British in India to comply with the Indian caste system, Justice Douglas concluded that:

Racial electoral registers, like religious ones, have no place in a society that honors the Lincoln tradition - 'of the people, by the people, for the people.' Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic and so on . . . . Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines.

Id. at 66. Finally, in asserting that the plans violated the Constitution even though minority groups supported the districts, Justice Douglas stated that "[t]he fact that Negro political leaders find advantage in this nearly solid Negro and Puerto Rican district is irrelevant to our problem . . . . Racial boroughs are . . . at war with democratic standards." Id. at 62.
156. Anderson, 375 U.S. at 403.
Supreme Court, in *City of Richmond v. J.A. Croson Co.*,\(^{157}\) struck down a program adopted by the city council of Richmond, Virginia, wherein minority contractors were given preferential treatment in the award of city construction contracts at the expense of those who did not belong to the selected group of minorities chosen for protection by the city council.\(^{158}\) In her opinion announcing the judgment of the Court, Justice O'Connor echoed opinions from past cases by declaring that the Equal Protection Clause has the same meaning regardless of the skin color of the citizen who seeks its protection.\(^{159}\) Furthermore, Justice O'Connor excoriated the dissenting justices by remarking that blithe acceptance of "benign" governmental race discrimination will "assure[] that race will always be relevant in American life."\(^{160}\) Ultimately, Justice O'Connor's opinion held that all distinctions based upon race that are made by states or other political subdivisions must be strictly scrutinized and can only be justified by a compelling government interest.\(^{161}\)

Finally, in *Adarand*, the Supreme Court extended its holding in
Croson to federal racial discrimination. That is to say that the Court held that neither the federal government, nor the states, may discriminate on the basis of race unless the classifications withstand the strict scrutiny of the judicial branch. Justice O'Connor, in her opinion for the Court, equated the strict scrutiny test with relevance and concluded that only distinctions based upon relevant differences will pass under strict scrutiny. Ultimately, Adarand and Croson, as well as the other cases referred to in this section, produce a syllogism - because classifications based upon relevant differences satisfy the strict scrutiny test, and because very few racial classifications withstand strict scrutiny, the unavoidable conclusion is that race is rarely, if ever, a relevant difference upon which governmental distinctions may be made.

2. Race Is Not a Relevant Difference: Jury Selection

The legal history of the jury selection process in the United States further solidifies the proposition that the Constitution simply does not "see" a citizen's race unless patently extreme circumstances makes race relevant. Indeed, Strauder v. West Virginia, one of the most salient Supreme Court decisions dealing with the composition of juries and the right to serve thereon, established that a pool of prospective jurors may not be systematically limited according to race. Strauder is important,

162. Adarand, 515 U.S. at 227.
163. Id. The majority opinion identified three guiding principles that courts should follow in analyzing governmental racial classifications - (1) skepticism, (2) consistency, and (3) congruence. Id. at 223-24. By skepticism, the Court meant that all distinctions based upon race must be closely examined; by consistency, the Court meant that the Equal Protection Clause means the same thing regardless of the race of the complaining party; and by congruence, the Court meant that the Equal Protection Clause of the Fourteenth Amendment extends the same protection as does the equal protection component of the Due Process Clause of the Fifth Amendment. Id. See id. at 239 (Scalia, J., concurring) (stating that "there . . . [i]s no such thing as either a creditor or a debtor race" because "[t]hat concept is alien to the Constitution's focus upon the individual . . . ."); see also id. at 240 (Thomas, J., concurring) (finding no difference between paternalistic racial discrimination and that motivated by a desire to oppress a certain race).
164. Id. at 228. Justice O'Connor stated that "strict scrutiny does take 'relevant differences' into account - indeed, that is its fundamental purpose." Id.
166. Strauder, 100 U.S. at 308. The decision in Strauder arose from an attempt to enforce a West Virginia law in the trial of a black man that prohibited blacks from being considered for jury service. Id. at 305. The holding of the Court was not limited to discrimination only against black potential jurors as the following passage from the majority
however, not only for its finding that race is not a relevant
criterion for determining one's eligibility for jury service, but also
for its explicit declaration of what was not found. That is to say
that the Supreme Court in *Strauder* concluded that the Equal
Protection Clause of the Fourteenth Amendment is violated if
citizens are excluded from the venire because of their race while
expressly distancing itself from any suggestion that the actual
composition of juries must include members of a particular party's
racial group.\footnote{167}

What the Court did not decide in *Strauder* it clearly determined
in *Virginia v. Rives*.\footnote{168} In *Rives* the Court was faced with the
petition of two black men who were accused of murdering a white
man in Virginia.\footnote{169} The gravamen of the petition was that the black
defendants had a right to be tried by a jury composed, at least in
part, of members of their own racial group.\footnote{170} In rejecting the
claim, Justice Strong's opinion for the Court stated that:

> The privilege for which they moved . . . was not a right given
> or secured to them, or to any person, by the law of the State,
> or by any act of Congress, or by the Fourteenth Amendment
> of the Constitution. It is a right to which every colored man is
> entitled, that, in the selection of jurors to pass upon his life,
> liberty, or property, there shall be no exclusion of his race,
> and no discrimination against them because of their color. But
> this is a different thing from the right which it is asserted was
denied to the petitioners by the State court, viz. a right to
> have the jury composed in part of colored men. A mixed jury
> in a particular case is not essential to the equal protection of
> the laws . . . .\footnote{171}

\footnote{167} Id. at 305. The Court stated that:
It is to be observed that the . . . question[] is not whether a colored man, when an
indictment has been preferred against him, has a right to a grand or a petit jury
composed in whole or in part of persons of his own race or color, but it is whether,
in the composition or selection of jurors by whom he is to indicted or tried, all
persons of his race or color may be excluded by law, solely because of their race or
color, so that by no possibility can any colored man sit upon the jury.

\footnote{168} 100 U.S. 313 (1879).
\footnote{169} *Rives*, 100 U.S. at 314-15.
\footnote{170} Id. at 315.
\footnote{171} Id. at 322-23. See Martin v. Texas, 200 U.S. 316, 321 (1906) (stating that "a mixed
The jury selection process was further cleansed of racial discrimination by the Supreme Court's decision in *Batson v. Kentucky.* The *Batson* Court was faced with the question of whether a prosecutor's use of peremptory challenges to prevent certain people from becoming members of a jury violated the Equal Protection Clause when the peremptory challenges were exercised on the basis of the potential jurors' race. Because for most, if not all, trials, peremptory challenges are left to the caprice of trial lawyers, the Court's consideration of them in *Batson* was, ipso facto, significant. Of even more significance, however, was the Court's determination that premising peremptory challenges upon the race of the person excluded from jury service violates the Equal Protection Clause of the Constitution.

jury some of which shall be of the same race with the accused, cannot be demanded, as of right, in any case; nor is a jury of that character guaranteed by the Fourteenth Amendment."); see also Akins v. Texas, 325 U.S. 398, 403 (1945) (remarking that "[f]airness in selection has never been held to require proportional representation of races upon a jury."); see also Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (explaining that "we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.").


173. *Batson,* 476 U.S. at 82. The *Batson* case originated out of the trial of a black man for burglary wherein the entire jury was composed of whites. *Id.* at 82-83. The genesis of the dispute was the prosecutor's use of his peremptory challenges to exclude all four black potential jurors in the venire. *Id.* at 83.

174. See *id.* at 89 (explaining that prosecutors customarily have the authority to exercise their peremptory challenges for any reason imaginable or no reason at all as long as they believe that their challenges may help them win cases).

175. *Id.* The Court stated that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* See *Powers* v. Ohio, 499 U.S. 400, 409 (1991) (holding that the Equal Protection Clause is violated when a person is excluded from serving on a jury because of a peremptory challenge based upon race).

The Supreme Court's decision in *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614 (1991) extended the prohibition on exercising race-based peremptory challenges to civil trials. In *Edmonson,* the Court confronted the argument that litigants' ability to determine the composition of a jury should not be circumscribed because the freedom of litigants to select the jury generates a degree of acceptance of the jury's verdict. *Id.* at 630-31. The Court rejected that argument by stating that:

It may be true that the role of litigants in determining the jury's composition provides one reason for wide acceptance of the jury system and of its verdicts. But if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution . . . . If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury. By the dispassionate analysis which is its special distinction, the law dispels fears and preconceptions respecting racial attitudes.

*Id.*
After analyzing the Supreme Court's decisions concerning the jury selection process, it is difficult to imagine what other conclusion could have been reached in Shaw v. Reno. In fact, such an analysis leads one to ask the same question that Justice Douglas pondered in Wright v. Rockefeller—"If race is not a proper criterion for drawing a jury list, how can it be in designing an electoral district?" The answer, of course, is that race should not be utilized in either setting. Just as no one has a right to a jury with any particular racial composition, no one has a right to a legislature that reflects the racial makeup of society at large. And just as race is so irrelevant in jury selection that a lawyer may base a peremptory challenge on the smell of the cologne that a particular person is wearing but not upon his race, race is also irrelevant in the drawing of election districts.

3. Race Is Not a Relevant Difference: Racial Profiling

In addition to the cases discussed herein concerning governmental classifications based upon race and racial discrimination in the jury selection process, the controversy surrounding racial profiling by law enforcement officers supports the contention that Shaw v. Reno was correctly decided because race is almost always irrelevant in the "eyes" of the Constitution. The typical example of racial profiling occurs when a police officer decides to stop a young, black, male motorist by conjuring up a traffic violation for the purpose of searching the motorist for evidence of other crimes, usually drug possession. This practice, particularly the treatment of race as a relevant factor in identifying criminals, has been widely condemned.

178. See supra notes 165-71 and accompanying text.
179. See supra notes 172-75 and accompanying text.
180. See Wesley MacNeil Oliver, With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling, 74 Tul. L. Rev. 1409, 1410-11 (2000) (stating that "[t]he archetypal example of racial profiling . . . is an officer's decision to stop a racial minority, often driving a nice car, for a traffic violation where others committing similar or greater violations are ignored. Typically, the officer . . . requests consent from the motorist to search his car . . . .")
181. See K.G. Jan Pillai, Neutrality of the Equal Protection Clause, 27 Hastings Const. L.Q. 89, 127 (1999) (remarking that "[t]he practice, known as racial profiling, has been repeatedly condemned by minority communities, civil rights leaders and state and federal legislators . . . ."); see also Abraham Abramovsky & Jonathan I. Edelstein, Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared, 63 Alb. L. Rev. 725, 747 (2000) (declaring that racial profiling has been nearly
Racial profiling has been rightly identified as an attack on the dignity of those stopped based upon the color of their skin.\textsuperscript{182} It seems, however, that many of those who oppose racial profiling believe that skin color is an irrelevant aspect of one's identity while operating a vehicle, but not when pulling the lever in a voting booth. Quite frankly, one who espouses such a belief occupies an untenable position because the irrelevance of race to official decisionmaking, regardless of statistical support, is recognized in one instance while ignored in the other. Ultimately, the Equal Protection Clause demands that both racial profilers and racial gerrymanderers be universally condemned.

\textbf{CONCLUSION}

The intransigence of the Justice Department, combined with the requirements of the Constitution as pronounced in \textit{Shaw v. Reno}, have left state redistricting committees between Scylla and Charybdis.\textsuperscript{183} That is to say that if they attempt to comply with the Justice Department's majority-minority maximization standard they will find it nearly impossible to avoid violating the Equal Protection Clause and its prohibition on the predominant use of race in drawing voting districts.\textsuperscript{184} Likewise, compliance with the Constitution will almost always prevent the drawing of enough majority-minority districts to satisfy the Justice Department and

\begin{enumerate}[182. See Oliver, \textit{supra} note 180, at 1435 (explaining that "[i]t is the assault on the motorist's dignity rather than the invasion on his privacy, or even liberty, that is problematic when a motorist is singled out because of his race and asked to reveal the contents of his car.").

183. See \textit{Bush v. Vera}, 517 U.S. 952, 1037 (1996) (plurality opinion) (Stevens, J., dissenting) (pointing out that "[s]tates may find it extremely difficult to avoid litigation flowing from decennial redistricting. On one hand, States will risk violating the Voting Rights Act if they fail to create majority-minority districts. If they create those districts, however, they may open themselves to liability under Shaw and its progeny.").

184. See \textit{Bush}, 517 U.S. at 982-83 (refusing to find that the need to comply with section 5 of the Voting Rights Act is a compelling government interest because the Justice Department requires augmentation of minority voting strength rather than non-retrogression); \textit{see also} Miller v. Johnson, 515 U.S. 900, 921 (1995) (speculating that even if the requirement of complying with the Voting Rights Act is a compelling government interest, the Equal Protection Clause is still violated when preclearance is only granted if minority voting strength is increased as opposed to not being decreased); \textit{see also} Shaw v. Reno, 509 U.S. 630, 654 (1993) (stating that "[s]tates have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied.") (emphasis added); \textit{see also} Shaw v. Hunt, 517 U.S. 899, 915 (1996) (assuming that compliance with the Voting Rights Act is a compelling government interest, but holding that the Justice Department's requirements for preclearance prevent redistricting plans from being narrowly tailored to meet that interest).
other private litigants.

The Justice Department and the other litigants who wish to hijack the Voting Rights Act should stand down to avoid the vicious cycle that inevitably results from the clash of the opposing camps. Indeed, those that wish to entrench racial discrimination into the redistricting process should lobby for a statute that creates the right for members of some groups to be elected instead of merely securing the measly right to vote as the Voting Rights Act does. Unfortunately, even the passage of such a statute may not justify the actions of racial gerrymanderers, however, because of that pesky provision in the Constitution called the Equal Protection Clause.

In 1778, when our nation was a nascent representative democracy, there were many who wondered how the debate over the nature of representation could continue to be so unsettled "after so much ha[d] been well said, on the worth and importance of representation, and our blood and treasure lavishly spent to maintain and preserve it." As this article demonstrates, even now, as our nation sits on the pinnacle of world prestige, the debate rages on. While the causes of this dissonance are many, the emphasis on racial differences promulgated by racial gerrymanderers is irrefragably a prime source of this discord. It is, in fact, quite remarkable that the philosophy of color blindness was once espoused by the very ancestors of the racial gerrymanderers who now condemn it as harmful to certain "rights." Quite simply, we must abandon, completely and consistently, the belief that race is a relevant difference between people to ford the stream of racism that now divides us. As Chief Joseph of the Nez Perce said,

185. See Therienstrom, supra note 37, at 486 (identifying the Justice Department, as opposed to the Voting Rights Act, as the source of redistricting problems); see also Hudson, supra note 22, at 1 (explaining that the Voting Rights Act successfully secured the right to vote to many within the first five years of its existence and was then used for other unexpected purposes by those with more ambitious desires).

186. See supra note 11 (explaining that the right to vote was recognized in Reynolds v. Sims, 377 U.S. 533, 561 (1964), as an individual right).


188. See Burke, supra note 49, at 67 (remarking that those who opposed state-sponsored segregation, such as Thurgood Marshall, were opposed to distinctions based upon race);
we must "[t]reat all men alike. Give them all the same law. Give them all an even chance to live and grow . . . . The earth is the mother of all people, and all people should have equal rights upon it."189

*Craig Haller*