Where Race and Political Behavior Highly Correlate within a Congressional District, It Is Unlikely That the District Will Be Held to Be an Unconstitutional Racial Gerrymander: *Easley v. Cromartie*

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Where Race and Political Behavior Highly Correlate Within a Congressional District, it is Unlikely that the District Will be Held to be an Unconstitutional Racial Gerrymander: *Easley v. Cromartie*

**Constitutional Law — Fourteenth Amendment — Strict Scrutiny — Racial Gerrymandering** — The United States Supreme Court held that a North Carolina congressional districting plan did not violate the Equal Protection Clause of the Fourteenth Amendment because race was not the predominant factor motivating the state legislature’s districting decision.

*Easley v. Cromartie*, 532 U.S. 234 (2001)*

North Carolina’s serpentine-shaped Twelfth Congressional District meanders down Interstate 85 through six counties, picking up urban and heavily African-American concentrated areas in parts of Charlotte, Winston-Salem and Greensboro.¹ North Carolina residents sued state officials alleging that the legislature violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by drawing the Twelfth District with race as the “predominant factor.”² *Easley v. Cromartie* marked the fourth time that the Court heard arguments relating to District 12.³

Due to population growth measured in 1990 Census figures, North Carolina gained an additional congressional district: District 12.⁴ The first two cases to come before the Court, *Shaw I* and *Shaw II*, revolved around the North Carolina legislature’s initial attempt at redistricting.⁵ Before the redistricting, the former District 12 contained a majority of African-American voters.⁶ White voters

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* Governor Michael F. Easley was substituted for former Governor James B. Hunt, Jr. (listed in the initial caption), pursuant to Supreme Court Rule 35.3.
6. Id. North Carolina is comprised of 100 counties, 40 of which fall under Section 5 of the Voting Rights Act of 1965. See Shaw I, 509 U.S. at 633. Any jurisdiction subject to Section 5 is prohibited from making changes in a “standard practice or procedure with respect to
residing in District 12 sued, claiming that the district was an unconstitutional racial gerrymander that violated the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court held that the plaintiffs had a valid claim, stating that the legislature drew the former district's boundaries for race-based reasons if the proponents could allege that legislation, though "race neutral on its face," rationally could not be understood as anything other than "an effort to separate voters into different districts on the basis of race." In Shaw II, the Court determined that North Carolina's districting plan violated the Equal Protection Clause of the Fourteenth Amendment because the reapportionment scheme was not "narrowly tailored to serve a compelling state interest." In 1997 the legislature started over and devised the current redistricting plan for District 12. This plan was also challenged, and a three-judge panel in the District Court for the Eastern District of North Carolina granted summary judgment for the plaintiffs, enjoining any elections from occurring under the new plan. In Cromartie I, the decision of the district court was reversed. The Supreme Court declared that a genuine issue of material fact existed as to whether race was the predominant factor motivating the North Carolina legislature in drafting District
Reversing, the Court instructed the district court to determine whether the evidence was consistent with the constitutional political objective of creating a safe Democratic seat, or whether the legislature's motive was predominantly racial. On remand, the district court concluded that the North Carolina General Assembly used race as the "predominant factor" in drawing District 12. The court's conclusion was based on: (1) statistical evidence used to measure the compactness of a district, (2) a state senator's statement made in a committee hearing that declared that the 1997 plan should be enacted because, among other things, it ensured "racial balance;" and (3) a disparaging email sent by a state employee to the state senator in which the employee indicated he had moved the Greensboro black community into District 12, necessitating further changes to the plan. The district court determined that the legislature drew the boundaries of District 12 "to collect precincts with high racial identification rather than political identification." Determining that the district was not narrowly tailored to serve a compelling

13. *Cromartie II*, 532 U.S. at 239.
14. *Id.* at 241.
15. *Id.* at 237. Because the district court determined that the district was drawn with race as the "predominant factor," strict scrutiny was applied.
16. *Id.* at 240. The Court relied considerably on two statistical methods used to measure the compactness of a Congressional district: dispersion and perimeter compactness indicators. See *Cromartie v. Hunt*, 133 F.Supp.2d 407, 415-19. (E.D.N.C. 2000). Dispersion compactness measures the geographic dispersion of a district by drawing a circle around the district and producing a coefficient, which is the proportion of the area of the circumscribed circle that is also included in the district. *Cromartie*, 133 F.Supp.2d at 415-19. The coefficient ranges from 1.0 (most compact) to 0.0 (least compact); a low dispersion compactness measure is less than or equal to 0.15. *Id.* District 12 had a dispersion compactness indicator of 0.109, lower than all districts in North Carolina and other challenged and reconstituted districts in Florida, Texas, Georgia, and Illinois. *Id.* The second statistical indicator is perimeter compactness. *Id.* This indicator yields a coefficient that is the proportion of the area in the district relative to a circle with the same perimeter. *Id.* Again, the coefficient ranges from 1.0 to 0.0, with a low perimeter compactness measuring less than or equal to 0.05. *Cromartie*, 133 F.Supp.2d at 415-19. District 12's perimeter compactness indicator was 0.041, making it the most "geographically scattered" of all North Carolina's congressional districts and among the least compact in the nation. *Id.*
17. *Cromartie II*, 532 U.S. at 241. State Senator Roy Cooper led North Carolina Democrats in the redistricting process. *Cromartie*, 133 F.Supp.2d at 412. At a 1997 meeting of the Legislature's House Congressional Redistricting Committee, Cooper argued that the plan should be adopted because it "provides for a fair geographical, racial and partisan balance throughout the State of North Carolina." *Id.* at 419.
18. *Cromartie II*, 532 U.S. at 241. Gerry Cohen was the state employee charged with the technical aspects of drawing the districts. *Cromartie*, 133 F.Supp.2d at 420. He sent an email to Senator Cooper describing how he added the "Greensboro Black community" into the Twelfth District, which meant he needed to take 60,000 other citizens out of that district. *Id.*
state interest, the district court ordered the North Carolina legislature to redistrict the 1997 plan or face a forced redistricting by the court.\textsuperscript{20} The state defendants filed a direct appeal under 28 U.S.C. § 1253, and the Supreme Court noted probable jurisdiction.\textsuperscript{21}

The majority opinion, authored by Justice Breyer, stated that the issue in \textit{Cromartie II} was evidentiary — whether, based on the evidence presented, the district court \textit{clearly erred} in determining that District 12 was an unconstitutional racial gerrymander with race as the "predominant factor" motivating the legislature's districting decision.\textsuperscript{22} Justice Breyer declared that the burden of proof on the party attacking the motivation of a districting decision is "demanding," requiring the proponent to establish, at a minimum, that traditional race-neutral districting principles were subordinated to racial considerations.\textsuperscript{23}

Under this analysis, the plaintiffs must either prove that race was the "predominant factor" that motivated the legislature's districting decision, or, that an otherwise facially neutral law is "unexplainable on grounds other than race."\textsuperscript{24} The burden is justified because legislatures "must have discretion to exercise the political judgment necessary to balance competing interests."\textsuperscript{25} Legislative discretion is especially necessary when a high correlation exists between race and party preference.\textsuperscript{26} After establishing the standard of review, the Court began a systematic attack on the evidence to show that the district court's findings were clearly erroneous.\textsuperscript{27}

Justice Breyer detailed four major reasons why the district court's findings, based on the evidence, were in clear error.\textsuperscript{28} First, the district court's determination of "race, not politics" was

\textsuperscript{20} \textit{Cromartie}, 133 F. Supp.2d. at 423. District Judge Thornburg dissented, arguing primarily that strict scrutiny should not be applied merely because the North Carolina General Assembly drafted a race-conscious redistricting plan. \textit{Id.} at 427. In his view, the plaintiffs, having the burden of proof, failed to prove by a preponderance of the evidence that race was the "predominant factor" in the redistricting of District 12. \textit{Id.}


\textsuperscript{22} \textit{Cromartie II}, 532 U.S. at 241. "As a basis for appellate review, a finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on entire evidence is left with definite and firm conviction that a mistake has been made." \textit{BLACK'S LAW DICTIONARY} 143 (6th ed. 1991).

\textsuperscript{23} \textit{Cromartie II}, 532 U.S. at 241.

\textsuperscript{24} \textit{Id.}

\textsuperscript{25} \textit{Id.} at 241-242. For example, the majority cited \textit{Cromartie I} to illustrate that a black super-majority in one congressional district adjacent to black voters comprising less than a plurality in neighboring district is insufficient, standing alone, to prove that race was the motivating factor in drawing district lines. \textit{Id.}

\textsuperscript{26} \textit{Id.} at 242.

\textsuperscript{27} \textit{Cromartie II}, 532 U.S. at 243.

\textsuperscript{28} \textit{Id.} at 244.
founded on evidence of voter registration, not voter behavior. Second, the factual determinations underlying the district court's holding did not provide significant additional support for the district court's conclusion. Third, the district court dismissed the testimony of Dr. Peterson, the appellant-defendants' expert witness, without rejecting any of the significant factual supporting information that he provided at trial. Finally, at trial, the plaintiffs presented charts summarizing evidence of voting behavior that tended to refute the court's "race, not politics" conclusion.

The Court recognized that evidence of voting registration is problematic because in North Carolina, party registration and party preference do not always correspond. White registered Democrats cross party lines to vote for Republicans more often (in 60-70% of elections) than did black Democrats, who consistently vote along the party line (in 90-95% of elections). The majority noted that this voting pattern demonstrates that a district heavily composed of African-American precincts may be organized for political rather than racial reasons.

The Court next outlined the five factual determinations that the district court relied upon to conclude that race was the predominant factor in drafting District 12: (1) legislators excluded many heavily-Democratic precincts from District 12, even when those precincts immediately bordered the Twelfth; (2) the testimony of expert witness Dr. Weber, stating that race predominated over party affiliation in the composition of District 12; (3) the testimony of the plaintiffs' witness, Dr. Peterson, was unreliable and irrelevant; (4) the testimony of Senator Cooper, stating that there was a need for "racial and partisan balance;" and (5) the Cooper-Cohen email reported that the Greensboro black community had been moved into the Twelfth District, necessitating removing 60,000 people from that district.

The Court determined that the conclusions of Dr. Weber, an expert in redistricting, contradicted his own evidence, and offered "little insight into the legislature's true motive." For example, Weber testified that a reliably Democratic voting population of 60%

29. Id.
30. Id.
31. Id.
32. Cromartie II, 532 U.S. at 244.
33. Id. at 246.
34. Id.
35. Id.
36. Id. at 240-41.
was sufficient to create a safe Democratic seat, while conceding that District 12 created a greater-than-60% reliable Democratic district.\textsuperscript{38} Weber also attacked the legislature's motives in placing certain majority-white precincts outside of District 12; however, he could not refute the fact that none of the excluded white districts were as reliably Democratic as the black precincts included in the district.\textsuperscript{39} Finally, Weber testified that the legislature could have crafted a safe Democratic district without including the large number of majority-black precincts by using means besides race.\textsuperscript{40} Noting that "the Constitution does not place an affirmative obligation on the legislature to avoid creating districts that turn out to be heavily, even majority, minority," Justice Breyer found that Weber failed to provide any evidence that the North Carolina Legislature drafted District 12 for predominantly racial reasons.\textsuperscript{41} Neither did he find Dr. Weber's evidence to show that a politically practicable alternative plan existed.\textsuperscript{42}

Next, the majority reviewed the testimony of Dr. Peterson, the state's primary expert witness.\textsuperscript{43} Peterson declared that the boundaries of a district drawn predominantly on racial considerations would correlate more with race than politics.\textsuperscript{44} He completed a boundary segment analysis that compared corresponding precincts immediately inside and outside of District 12 to establish whether district boundaries had a stronger correlation with race or politics.\textsuperscript{45} Peterson's findings demonstrated that politics was as good an explanation for the makeup of District 12 as was race.\textsuperscript{46} The evidence he compiled, in the form of maps comparing the district's boundaries with Democrat/Republican voting behavior rather than party registration, further influenced the Court to conclude that the legislature drew district boundaries that kept more reliable Democratic voters in the twelfth district,

\begin{itemize}
\item \textsuperscript{38} Id. at 246.
\item \textsuperscript{39} Id.
\item \textsuperscript{40} Id. at 248.
\item \textsuperscript{41} Id. at 249. (emphasis in original).
\item \textsuperscript{42} Cromartie II, 532 U.S. at 249-50. Weber would have had the Court adopt an alternative plan, adopted by the legislature in 1998 in response to court challenges over the 1997 plan. Id. at 250. This plan was not helpful, according to the Court, because it still divided communities along racial lines while making District 12 less reliable for Democrats. Id. Under this plan, a group of highly Democratic precincts was transferred into two safely Republican districts, a result the 1997 plan sought to avoid. Id.
\item \textsuperscript{43} Id. at 251.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id. at 252.
\end{itemize}
leaving less-reliable voters out.\textsuperscript{47}

Finally, the Court reviewed the two pieces of evidence relied upon by the district court to establish the North Carolina Legislature's discriminatory intent: Senator Cooper's testimony and the Cohen-Cooper email. State Senator Cooper, in testimony before a legislative committee in 1997, asserted that the plan satisfied a need for "racial and partisan balance."\textsuperscript{48} According to the majority, the district court simply construed the statement as admitting the need for a "racial . . . balance."\textsuperscript{49} The district court ignored, \textit{inter alia}, the word "partisan," and failed to consider whether race played a predominant role in the districting decision.\textsuperscript{50} Justice Breyer concluded that the statement accomplished little more than establishing that race was a \textit{consideration} in the districting process, because the statement did not show that race, in comparison to partisan and geographic considerations, was the "predominant factor" motivating the legislature.\textsuperscript{51}

The other piece of evidence relied upon by the district court was an email sent from Gerry Cohen, the legislative staffer responsible for drafting districting plans, to Senator Cooper and Senator Leslie Winner.\textsuperscript{52} In the email, Cohen wrote: "I have moved the Greensboro Black community into the 12\textsuperscript{th} and now need to take [about] 60,000 out of the 12\textsuperscript{th}. I await your direction on this."\textsuperscript{53} Although the majority conceded that the reference to race, i.e. "Black community," was obvious, the Court pronounced the email to be more important for what it did not discuss.\textsuperscript{54} The email failed to address: (1) why black voters from Greensboro were placed in the 12\textsuperscript{th} District; and (2) the political consequences of not including them.\textsuperscript{55} As a result, the Court found the email to be "less persuasive than the kinds of direct evidence we have found significant in other redistricting cases."\textsuperscript{56}

Justice Breyer concluded the majority opinion by stating that,

\begin{itemize}
\item \textsuperscript{47} Cromartie II, 532 U.S. at 252 (emphasis added).
\item \textsuperscript{48} \textit{Id.} at 253. His entire statement was: "Those of you who dealt with Redistricting before realize that you cannot solve each problem that you encounter and everyone can find a problem with this Plan. However, I think that overall it provides for a fair, geographic, racial and partisan balance throughout the State of North Carolina." \textit{Id.} See supra note 17 and accompanying text.
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} Cromartie II, 532 U.S. at 254. See supra note 18 and accompanying text.
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Id.}
\end{itemize}
although there was some evidence that supported the district court's conclusion, the evidence as a whole failed to prove that the legislature drew District 12's boundaries using race as the "predominant factor," the primary reason being that, in District 12, race has a high correlation with political behavior. He stated:

In a case such as this one where majority-minority districts (or the approximate equivalents) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles.

Here, according to the Court, the plaintiffs simply failed to meet their burden of proof. Therefore, the judgment of the district court was reversed.

Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, dissented, scolding the majority for disregarding its role as a reviewing court and engaging "in its own factual enterprise." According to Justice Thomas, the district court's conclusion that race was the predominant factor motivating the North Carolina Legislature was a factual finding that should be overturned only if the Supreme Court has a "definite and firm conviction that a mistake has been committed." The dissent suggests that the district court's decision was based on reliable evidence, and, therefore, its conclusions were not "clearly erroneous."

Encompassed within the Fourteenth Amendment to the United States Constitution, the Equal Protection Clause declares: "No State

57. Cromartie II, 532 U.S. at 257.
58. Id. at 258.
59. Id.
60. Id.
61. Id. at 259 (Thomas, J., dissenting).
63. Id. at 259 (Thomas, J., dissenting).
64. Id. at 262-67. The dissent stated that the district court relied on several key pieces of evidence, including: (1) objective measures of compactness; (2) the expert testimony of Dr. Weber indicating that Democratic precincts with low black populations were excluded from District 12; (3) Weber's testimony declaring that districting decisions were unexplainable by political motives; (4) the district court's belief that Dr. Peterson's evidence was unreliable because it was incomplete; and (5) Senator Cooper's "racial balance" testimony and the Cohen-Cooper email. Id. Justice Thomas stated that the district court's finding of racial predominance, based on the evidence and inferences drawn therefrom, was "permissible, even if not compelled by the record." Id. at 267 (Thomas, J., dissenting).
shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the law." Equal protection, in the constitutional sense, is based on a theory of individual rights, emphasizing that minorities are afforded the same protections and individual rights that those in the majority enjoy. Frequently, minorities were denied their equal protection rights in the racially segregated South; prior to the Supreme Court's decision in *Baker v. Carr*, the actions of states in drawing legislative districts were off limits to the Court, seen as nonjusticiable political questions. In *Baker v. Carr*, however, the Court ruled that an allegation of a denial of equal protection flowing from legislative redistricting presents a justiciable constitutional cause of action.

Expanding upon the holding in *Baker*, the Court in *Reynolds v. Simms* faced whether the Equal Protection Clause required substantially equal legislative representation for all citizens in a state, regardless of where they reside. The Court held that the "fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without

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65. U.S. CONST. amend. XIV § 1.
67. 369 U.S. 186 (1962). Deference was given to precedents such as *Colegrove v. Green*, 328 U.S. 549, 556 (1946), in which the Court held that an equal protection challenge to the Illinois legislature's reapportionment scheme was a non-justiciable political question. In his dissent, Justice Black stated that the reapportionment scheme violated the petitioners' constitutional right to Equal Protection under the Fourteenth Amendment. *Id.* at 568.
68. *Baker*, 369 U.S. at 186. The Court's decision in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), is illustrative. In *Gomillion*, the Alabama State Legislature drafted a law that redefined the boundaries of Tuskegee, Alabama and changed the shape of the city from a square to a 28-sided figure. *Gomillion*, 364 U.S. at 340. The effect was to remove from the city almost every black voter. Black citizens brought an action claiming that the alteration of the city's shape constituted discrimination against them in violation of the Equal Protection Clause of the 14th Amendment, and denied them the right to vote under the 15th Amendment. *Id.* The Court's decision that the action was unconstitutional rested on the 15th Amendment. According to the majority, the legislature's actions deprived the citizens of the right to franchise by changing the city's boundaries. *Id.* at 347. Of greater interest, however, was the concurring opinion of Justice Whittaker. He stated that the decision should rest on the 14th Amendment, not the 15th Amendment. *Id.* at 349. As he persuasively concluded, "the right . . . to vote" is the right to vote as all others within the same election precinct enjoy it. *Id.* Thus, the move out of Tuskegee did not affect the petitioners' right to vote. Justice Whittaker believed that the State's purpose of "fencing Negroes out of" Tuskegee was an unlawful racial segregation in violation of the Equal Protection Clause. *Gomillion*, 364 U.S. at 349. However, he was certain to mention that the 14th Amendment claims should be decided on grounds of segregation and not upset "the Colegrove problem" (i.e., racial gerrymandering cases are non-justiciable political questions). *Id.* See *supra* note 67.
70. 377 U.S. 533 (1964).
regard to race, sex, economic status, or place of residence within a State.”

Explaining, Justice Douglas for the majority stated:

Legislators represent people, not trees or acres . . . as long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.

The Court concluded by enunciating the famous “one man, one vote” principle, declaring that “an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.”

Similarly, in White v. Regester, the Supreme Court confronted the issue of whether multimember districts that had erected barriers to the nomination and election of minority candidates violated the Equal Protection rights of voters within those districts. Multimember districts, districts from which more than one representative to the state legislature are elected from a single district, are not unconstitutional per se. Furthermore, an Equal Protection claim cannot be sustained where the racial group allegedly discriminated against does not have legislative seats in proportion to its voting potential. The burden is on the complainants to advance evidence that supports “that the political processes leading to nomination and election were not equally open to participation by the group in question — that its members had less opportunity than did other residents in the district to

71. Reynolds, 377 U.S. at 560-61.
72. Id. at 562.
73. Id. at 568.
75. White, 412 U.S. at 765.
76. Id. at 766.
participate in the political processes and to elect legislators of their choice."^{77}

In *White*, the Court examined the political processes of Dallas County, Texas existing at the time of the lawsuit, and noted that a Texas law required a majority vote to win a nomination during a primary election.^{78} Also, a “place” rule existed to limit candidates for legislative office from a multimember district to a specified place on the ticket.^{79} Furthermore, the Dallas Committee for Responsible Government, the white-dominated organ of the Democratic Party that was in control of candidate “placing” or “slating,” had only slated two black candidates since the Reconstruction.\(^80\) The result was a primary system dominated by white candidates that restricted the ability of minority candidates to have their names on the primary ballot.^{81}

Because Dallas County did not afford black voters or candidates the same treatment as whites enjoyed, the Court concluded that the multi-district system was unconstitutional.^{82} The order of the three-judge panel of the district court requiring disestablishment of two of the multimember districts was affirmed because the minorities in the district had lesser opportunity than whites to participate in the political process and elect candidates of their choice.\(^83\)

*Baker, Reynolds*, and *White* demonstrate, as noted by Justice Ginsburg in her dissent in *Miller v. Johnson*, that the Equal Protection Clause will be invoked to justify intervention in “the quintessentially political task of legislative districting” in two circumstances: (1) to enforce the one-person-one-vote requirement; and (2) to prevent dilution of a minority group’s voting strength.^{84} For a state engaged in the redistricting process, however, statutory demands under the Voting Rights Act of 1965 must be met in addition to constitutional demands under the Fourteenth Amendment.^{85} Section 2 of the Voting Rights Act prohibits states from imposing impediments or minimum qualifications for voting or

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77. Id.
78. Id.
79. Id.
81. *Id. at 767.*
82. *Id. at 767, 769-70.*
83. *Id. at 769.*
voting practices or procedures based on race or color. Members of a class of citizens can establish a Section 2 violation if they show that they have less of an opportunity than other members of the electorate "to participate in the electoral process and to elect representatives of their choice." Section 2 specifically states, however, that there is no "right for members of a protected class to have its members elected in numbers equal to their proportion in the population."

The landmark Supreme Court case interpreting Section 2 of the Voting Rights Act is Thornburg v. Gingles. In Gingles, the Court resolved whether using a legislative redistricting plan of multimember black districts in five North Carolina legislative districts violated Section 2 of the Voting Rights Act by impairing the opportunity of black voters to "participate in the political process and to elect representatives of their choice." In analyzing a Section 2 claim, the test is not the intent of the plan, but rather the plan's results. According to the majority, the essence of a Section 2 claim is that "a certain law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Though the use of multimember districts is not per se unconstitutional, voters contending that a particular districting plan violates Section 2 must prove that the

86. 42 U.S.C. § 1973(a). Section 2 states:
(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS § 1973b(f)(2)], as provided in subsection (b). (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

87. Id.
88. Id.
89. 478 U.S. 30 (1986).
90. Gingles, 478 U.S. at 34.
91. Id. at 43.
92. Id. at 47.
93. See supra note 75 and accompanying text.
multimember structure operates to minimize or cancel out their ability to elect their preferred candidate.94

Uncertainty over the analysis of Section 2 claims led the Court to develop the famous Gingles preconditions — three prima facie factors that must be satisfied before the Court can determine that Section 2 has been violated.95 The preconditions are:

1. The minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district;
2. The minority group must be able to show that it is politically cohesive; and
3. The minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances, such as the minority candidate running unopposed — usually to defeat the minority’s preferred candidate.96

The District Court for the Eastern District of North Carolina concluded, and the Supreme Court agreed, that black citizens constituted “a distinct population and registered-voter minority in each challenged [legislative] district.”97 For example, the political cohesiveness of one of the districts was evident in voting statistics indicating that black voters supported black candidates between 71-92% of the time.98 In contrast, on average, 82% of white voters did not vote for any black candidate in the primary elections.99 Furthermore, nearly two-thirds of white Democrats did not vote for black candidates that won primaries and ran in the general elections, even when the choice was between voting for a black Democratic candidate or a Republican.100 Additionally, evidence also showed that, in multi-candidate fields, the names of black candidates were consistently ranked at the bottom of the ballot.101 The Supreme Court affirmed the decision of the district court, concluding that the majority of challenged districts violated Section 2 of the Voting Rights Act.102

A racial gerrymandering claim can also implicate Section 5 of the

94. Gingles, 478 U.S. at 48.
95. Id. at 50.
96. Id. at 50-51.
97. Id. at 38.
98. Id. at 59.
100. Id.
101. Id.
102. Id. at 80.
Voting Rights Act.\textsuperscript{103} Section 5 provides that certain covered states or political subdivisions\textsuperscript{104} are prohibited from enforcing "any voting qualification or prerequisite to voting, or standard practice or procedure with respect to voting" unless: (1) the jurisdiction obtains a declaratory judgment from the United States District Court for the District of Columbia stating that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or (2) the proposed change is submitted to the Attorney General who does not object to it.\textsuperscript{105}

In \textit{Beer v. United States}, the city of New Orleans sued under Section 5 and sought a declaratory judgment from the D.C. District Court that the reapportionment of its city council districts did not have the "purpose or effect of denying or abridging the right to vote on account of race or color."\textsuperscript{106} Under the previous apportionment plan, drawn prior to the enactment of the Voting Rights Act, none of New Orleans' five council districts had a clear majority of black voters, and no black candidates had been elected to the New Orleans City Council with the former plan in effect.\textsuperscript{107} After the redistricting plan, blacks would constitute a majority of the population in two of the five districts, being a clear majority of registered voters in one of them.\textsuperscript{108} The district court determined that the plan abridged the right of minorities to vote.\textsuperscript{109} The court calculated that "if black voters could elect city councilmen in proportion to their share of the city's registered voters, they would be able to choose 2.42 of the city's seven councilmen, and, if in proportion to their share of the city's population, to choose 3.15 councilmen."\textsuperscript{110} According to the district court, black votes were diluted because it was likely that blacks would only be able to elect one black candidate on city council.\textsuperscript{111}

\begin{itemize}
\item \textsuperscript{103} 42 U.S.C. §1973c (1982).
\item \textsuperscript{104} \textit{Id.} Such states are subject to Section 4 of the Voting Rights Act, 42 U.S.C. §1973b because of a history of past racial discrimination in voting practices and procedures.
\item \textsuperscript{105} \textit{Id.}
\item \textsuperscript{106} 425 U.S. 130, 133 (1976)
\item \textsuperscript{107} \textit{Beer}, 425 U.S. at 135.
\item \textsuperscript{108} \textit{Id.} New Orleans' plan called for seven councilmen to be elected. \textit{Id.} There are five districts encompassing the city, each of which elected a councilman; two other councilmen were elected by the city at large. \textit{Id.}
\item \textsuperscript{109} \textit{Id.} at 136.
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} \textit{Id.} The plan under review in \textit{Beer} produced black population majorities in two districts and a black voting majority in one. \textit{Id.} At the time of redistricting in 1961, approximately 45\% of the city's population was black. \textit{Id.} at 135.
\end{itemize}
The Supreme Court, on appeal, disagreed.\textsuperscript{112} The Court viewed the issue to be whether a redistricting plan that enhances the position of racial minorities can constitute a violation of Section 5.\textsuperscript{113} A legislative reapportionment that \textit{enhances} the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the effect of diluting or abridging the right to vote on account of race within the meaning of Section 5.\textsuperscript{114} In the plan at issue, the position of minorities was enhanced by the creation of two districts with black majorities because, under the former plan, none of the five districts had a majority of black citizens.\textsuperscript{115} The district court's proposition that minorities in New Orleans should control greater than two districts based on their percentage of the population was rejected by the Court, which noted that members of a minority have no federal right to be represented in legislative bodies in proportion to their number in the general population.\textsuperscript{116} The Court concluded that where the effect of a redistricting plan is ameliorative, not retrogressive, the apportionment cannot violate Section 5 unless the new plan itself so discriminates on the basis of race or color as to violate the Constitution.\textsuperscript{117}

The interplay between Sections 2 and 5 of the Voting Rights Act, the Fourteenth Amendment, and racial gerrymandering claims is seen in a series of cases beginning with \textit{Shaw v. Reno} ("\textit{Shaw I})".\textsuperscript{118} As previously mentioned, \textit{Shaw I} involved an action alleging that the initial District 12 drafted by the North Carolina legislature was an unconstitutional racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{119} The district court had concluded that the plaintiffs failed to state an Equal Protection claim because the state's purpose was to comply with the Voting Rights Act, which it did to the district court's satisfaction, without leading to a proportional statewide underrepresentation of white voters.\textsuperscript{120} On appeal, the Supreme Court framed the issue to be whether a claim of racial gerrymandering could be brought under the Equal Protection

\begin{footnotes}
\footnote{112. \textit{Beer}, 425 U.S. at 130.}
\footnote{113. \textit{Id.} at 141.}
\footnote{114. \textit{Id.}}
\footnote{115. \textit{Id.}}
\footnote{116. \textit{Id.} at 136. \textit{See supra} note 88 and accompanying text.}
\footnote{117. \textit{Beer}, 425 U.S. at 141.}
\footnote{118. \textit{Shaw I}, 509 U.S. at 630.}
\footnote{119. \textit{Id.} at 636-37. \textit{See supra} notes 4-8 and accompanying text.}
\footnote{120. \textit{Id.} at 638-39.}
\end{footnotes}
The majority determined that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by "alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." Under the Fourteenth Amendment, the Court had consistently applied strict scrutiny to state laws that expressly classify citizens by race. Here, the Court extended the reach of strict scrutiny to facially neutral redistricting laws so bizarre on their face that they are "unexplainable on grounds other than race." The "bizarre" and "irrational" shape of District 12 led the Court to conclude that the plaintiffs had stated a claim under which relief could be granted. The case was reversed and remanded to the district court for resolution of "whether the North Carolina redistricting plan is narrowly tailored to further a compelling government interest."

After Shaw I was remanded, another redistricting case, Miller v. Johnson, came before the Court. Miller revolved around Georgia's Eleventh Congressional District and involved the issue of whether parties can rely on evidence other than the bizarre shape of a district to establish race-based districting. The Court reasoned that parties alleging a racial gerrymander "are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness." However, for the complainants to meet their burden of proof, they must prove that the questioned statutes subject to strict scrutiny under the Equal Protection Clause are "motivated by a racial purpose or object." Plaintiffs challenging legislative redistricting must prove that race was the "predominant factor" motivating the legislature's districting decision. Demonstrating that "traditional race-neutral districting principles, including but not

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121. Id. at 641-42.
122. Id. at 649.
123. Shaw I, 509 U.S. at 644. See infra note 127.
124. Id.
125. See supra note 6 for a discussion of District 12's shape.
126. Shaw I, 509 U.S. at 658.
127. Id. The requirement that a state law must be narrowly tailored to further a compelling state interest is known as the strict scrutiny standard.
129. Miller, 515 U.S. at 913.
130. Id. at 915.
131. Id. at 913.
132. Id. at 916.
limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, are subordinated to racial considerations” can show this.\textsuperscript{133}

Once it is determined that a district has been drawn with race as the “predominant factor,” the Court will apply a strict scrutiny review, with redistricting legislation only able to survive an Equal Protection challenge if the state demonstrates that its districting legislation is “narrowly tailored to achieve a compelling state interest.”\textsuperscript{134} Compliance with federal antidiscrimination laws, such as Sections 2 and 5 of the Voting Rights Act, provide no justification for a redistricting program that was not “reasonably necessary under a constitutional reading and application of those laws.”\textsuperscript{135} Similarly, a determination by the Attorney General that race-based districting, necessary to comply with the Voting Rights Act, is not sufficient to prove that the legislation is narrowly tailored to serve a compelling state interest. Only the judicial branch can make that determination, otherwise, the judiciary would be violating the separation of powers doctrine and surrendering its role in enforcing constitutional limits on race-based official action to the Executive Branch.\textsuperscript{136}

Applying the facts of \textit{Miller}, the Court found race to have been the predominant factor motivating the legislature in drawing Georgia’s Eleventh District.\textsuperscript{137} The shape of District 11 was not “bizarre” on its face; however, evidence from state officials revealed an objection by the Georgia Attorney General to the Justice Department claiming that the state would have to “violate all reasonable standards of compactness and contiguity” to construct three majority-black districts.\textsuperscript{138} This, along with a comprehensive report issued at trial that displayed the Eleventh District’s lack of tangible communities of interest and fractured political, social and economic interests within the district’s black population, led the Court to find that the district was constructed with race as the predominant factor.\textsuperscript{139}

To counter that finding, Georgia argued that it had a narrowly tailored compelling state interest in drafting District 11 —

\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Miller}, 515 U.S. at 921.
\textsuperscript{135} \textit{Id.}
\textsuperscript{137} \textit{Id.} at 919.
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Miller}, 515 U.S. at 919.
compliance with Section 5 of the Voting Rights Act. The Court noted that it had no doubt that Georgia intended to create a third majority-black district in order to satisfy the Justice Department's preclearance demands. However, Georgia's drawing of the Eleventh District as a majority-black district was not required under Section 5 of the Voting Rights Act because there was no reasonable basis to believe that the state's earlier plans, which increased the number of Georgia's majority-minority districts, violated Section 5. The state's earlier plans were ameliorative - because the number of Georgia's majority-minority districts were increased, the plan could not violate the nonretrogression principle. The purpose of Section 5 is to ensure that there is no retrogression in voting procedures, and a plan that is ameliorative cannot violate Section 5 unless the new apportionment discriminates on the basis of race or color so as to violate the Constitution, such as the Equal Protection Clause. According to the Court, the Justice Department's objective in mandating a third majority-black district was "far removed from this purpose." Thus, Section 5 did not provide a narrowly tailored compelling state interest sufficient to survive strict scrutiny.

Prior to the Court's ruling in Miller v. Johnson, a district court in North Carolina, on remand from Shaw I, decided that North Carolina's redistricting plan for District 12 classified voters by race; however, to the district court, that the classification survived strict scrutiny because the State's reapportionment scheme was narrowly tailored to serve a compelling state interest. The district court's ruling was appealed to the Supreme Court, and in Shaw II, the Court decided whether the North Carolina reapportionment plan was actually narrowly tailored to serve a compelling state interest. Citing Shaw I and Miller, the Court commented that the burden of proving a race-based motive is on the proponent, who is required to meet the burden by either: (1) circumstantial evidence

140. Id. at 921.
141. Id. Redistricting plans of the Georgia Legislature were rejected twice by the Justice Department; the Justice Department finally granted preclearance after Georgia crafted a third majority-black district, the Eleventh. Id. at 907.
142. Id. at 923.
143. Id. at 924.
144. Miller, 515 U.S. at 924.
145. Id. at 926.
146. Id.
147. See supra notes 4-8 and accompanying text.
149. Id. at 902.
of a district's shape or demographics (Shaw I); or (2) more direct evidence going to the legislature's purpose (Miller). Because the district court determined that the North Carolina General Assembly had deliberately drawn District 12 to have an effective voting majority of black citizens, the Court used strict scrutiny to examine the redistricting plan.

The Court analyzed the three compelling interests that the district court found to have existed that allowed the plan to survive strict scrutiny:

1. The eradication of past and present discrimination;
2. North Carolina's duty to comply with §5 of the Voting Rights Act; and
3. The State's interest in avoiding §2 liability.

In the Court's view, the first interest was not compelling because an interest in ameliorating past racial discrimination did not precipitate the use of race in the redistricting plan. Secondly, with respect to the State's duty to comply with Section 5 of the Voting Rights Act, the majority disagreed that creating a second majority-black district in North Carolina was required by Section 5. Citing Miller, where a similar argument was rejected, Chief Justice Rehnquist noted, "compliance with that [Section 5] law could not justify race-based districting." Finally, although the Court agreed that compliance with Section 2 could be a compelling interest, it was not in this case because District 12's creation was not "narrowly tailored" to its asserted end. For avoidance of Section 2 liability to be considered a compelling state interest, the racial classification must "remedy the anticipated violation or achieve compliance to be narrowly tailored." In Shaw II, District 12 could not remedy any potential Section 2 problem because liability is established only if the minority group is "geographically compact," and the shape of District 12 confirmed that it was anything but "compact." Furthermore, the Court found that the new district did not address the United States Attorney General's original complaints that black voters living between the

150. Id. at 905.
151. Id.
152. Id. at 910-15.
153. Shaw II, 517 U.S. at 910. See infra note 175 and accompanying text.
154. Id. at 911.
155. Id.
156. Id. at 915.
157. Id. at 916.
158. Shaw II, 517 U.S. at 916. See supra notes 6, 8, and 16 and accompanying text.
south-central and southeastern regions of North Carolina faced discrimination because these voters were not included in the new District 12.\footnote{159}

A case decided on the same day as Shaw II, and involving the same issues in a Texas congressional redistricting plan, was Bush \textit{v.} Vera.\footnote{160} The Court explained that strict scrutiny is to be applied to redistricting legislation when such legislation is so "extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles."\footnote{161} In resolving whether strict scrutiny should be applied, the Court discussed three factors weighing towards the application of strict scrutiny: (1) that Texas had neglected traditional districting criteria such as compactness; (2) that the state was committed from the outset to creating majority-minority districts; and (3) that Texas manipulated district lines to exploit detailed racial data.\footnote{162}

The Court cited the influential study on districting compactness performed by Professors Richard H. Pildes and Richard G. Niemi,\footnote{163} which ranked Texas's 1991 redistricting plan among the worst in the nation, and the three challenged districts, in particular, among the twenty-eight least compact congressional districts nationwide.\footnote{164} In terms of a commitment to creating majority-minority districts, the most influential piece of evidence was a letter submitted by Texas to the Department of Justice for Section 5 preclearance, in which the state reported that the proposed three new districts "should be configured in such a way as to allow members of racial, ethnic and language minorities to elect Congressional representatives."\footnote{165} The most compelling evidence pointing toward manipulation of district lines was Texas's use of a computer program that contained racial data at the block-by-block level.\footnote{166} In fact, the new District 30 used this computer data to split individual streets in many places.\footnote{167} Sixty percent of residents in Districts 18 and 29 lived in split precincts, leading to a disruption in traditional

\begin{footnotes}
\item[159] \textit{Id.} at 917.
\item[161] \textit{Vera}, 517 U.S. at 958.
\item[162] \textit{Id.} at 962.
\item[164] \textit{Vera}, 517 U.S. at 960.
\item[165] \textit{Id.} at 960-61.
\item[166] \textit{Id.} at 961.
\item[167] \textit{Id.} at 970.
\end{footnotes}
forms of political activity — for example, Harris County had to increase its number of voting precincts from 672 to 1,225 to accommodate the new Congressional boundaries.\textsuperscript{168} Examining all three of the challenged districts, the Court determined that the district court did not err in applying strict scrutiny.\textsuperscript{169}

This brought the Court to its second issue: whether the plan had a narrowly tailored compelling state interest so as to survive strict scrutiny.\textsuperscript{170} The Court first discussed that compliance with Section 2 could only be a compelling state interest if the three \textit{Gingles} preconditions were met.\textsuperscript{171} In this case, the Court found that the first element of the test, that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, was not met.\textsuperscript{172} As the Court noted, if the minority population is so widely dispersed that a reasonably compact minority district cannot be created, a majority-minority district is \textit{not} required under Section 2.\textsuperscript{173} Thus, Texas did not have a compelling state interest under Section 2.\textsuperscript{174}

An interest in ameliorating the past effects of racial discrimination can be a compelling state interest if two conditions are met: (1) the discrimination is specific and identified; and (2) the state has a strong evidentiary basis for concluding that remedial action is necessary \textit{before} it embarks on an affirmative action program.\textsuperscript{175} In \textit{Vera}, Texas claimed that remediation was necessary because racial bloc voting had diluted the minority vote; this, however, was the "same concern that underlined the State's §2 defense."\textsuperscript{176} Because racial bloc voting is not a specific, identified discrimination, but rather a general premise, the Court concluded it was not a valid justification.\textsuperscript{177}

Finally, the Court addressed Texas' assertion of a compelling state interest under Section 5 of the Voting Rights Act.\textsuperscript{178} Section 5 has a \textit{limited} substantive goal to ensure that no voting procedure changes exist to lead to a \textit{retrogression} in the position of racial minorities with respect to their effective exercise of the electoral
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As the Court explained, "nonretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral success; it merely mandates that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly by the state's actions." Here, Texas indicated that the creation of the majority-minority districts was necessary to ensure nonretrogression. Therefore, the Court concluded that none of the three challenged districts survived strict scrutiny — all were declared unconstitutional under the Equal Protection Clause.

Abrams v. Johnson\textsuperscript{183} came to the Court as a result of the remand in Miller. When Miller went back on remand, and once it became clear that the Georgia Legislature could not draw a new redistricting plan, the District Court for the Southern District of Georgia drafted its own redistricting plan for the state.\textsuperscript{184} The district court's plan contained only one majority black district; the absence of a second or third majority black district, which existed in Georgia's original redistricting plan, precipitated an Equal Protection challenge.\textsuperscript{185} On appeal, the Supreme Court faced two major issues: (1) whether the district court erred in drafting its plan by disregarding the State's legislative policy choices; and (2) whether the district court's plan violated Sections 2 and 5 of the Voting Rights Act.\textsuperscript{186}

In creating a court-authored redistricting plan, the district court must consider legislative preferences.\textsuperscript{187} The Court cited Upham v. Seamon,\textsuperscript{188} a Texas case where the Court found that legislative preferences were not being complied with under court reapportionment.\textsuperscript{189} In Upham, the Attorney General objected to only a specific part of the plan, the apportionment of two districts in Southern Texas.\textsuperscript{190} The district court, required to draw new lines, redrew the districts at issue and also some unrelated districts in Dallas County.\textsuperscript{191} According to the majority, Upham can be

\textsuperscript{179} Vera, at 982-83.
\textsuperscript{180} Id. at 983.
\textsuperscript{181} Id.
\textsuperscript{182} Id. at 986.
\textsuperscript{183} Abrams, 521 U.S. 74 (1997).
\textsuperscript{184} Id.
\textsuperscript{185} Id. at 78.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} 456 U.S. 37, 38 (1982).
\textsuperscript{189} Abrams, 521 U.S. at 85.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
distinguished from Abrams for two reasons: (1) the precleared plan in Abrams\textsuperscript{192} did not deserve the same deference as the Texas plan because it subordinated traditional districting principles to racial considerations; and (2) the constitutional violation in Abrams affected so large an area that any remedy undertaken by the district court would necessarily affect almost every district in Georgia.\textsuperscript{193} No legislative plan existed to demonstrate that a second or third majority-black district could be drawn within the constitutional requirements that race not predominate over traditional districting principles.\textsuperscript{194}

To resolve whether the district court violated Section 2 of the Voting Rights Act, the Supreme Court declared that it would assume that "courts should comply with the section when exercising their equitable powers to redistrict."\textsuperscript{195} In an almost reverse application of the Gingles preconditions, the Court upheld the findings of the district court that the black population of the Georgia district was not sufficiently compact for a second majority-black district, and that no high degree of racially polarized voting existed.\textsuperscript{196} Past election results showed that white voters were generally willing to vote for black candidates — in fact, all three black incumbents won under the court plan, two in majority-white districts running against white candidates.\textsuperscript{197} Thus, the plan did not violate Section 2.\textsuperscript{198}

Next, in determining whether the district court's plan violated Section 5 retrogression principles, the chief issue was deciding which benchmark the district court should have used to measure retrogression.\textsuperscript{199} The Abrams appellants-plaintiffs argued that a 1991 plan containing two majority-black districts should be used as the benchmark; contrarily, the Justice Department argued that the 1992 pre-cleared plan containing three majority-black districts should be used.\textsuperscript{200} However, the Court determined that neither of these benchmarks was appropriate.\textsuperscript{201} The Court enunciated the rule that if "an existing practice or procedure which, upon submission, was

\textsuperscript{192} Id. at 86. The precleared plan, allowing for three majority-minority districts in Georgia, was ruled unconstitutional in Miller. See supra notes 138-39 and accompanying text.

\textsuperscript{193} Id. at 86.

\textsuperscript{194} Abrams, 521 U.S at 88.

\textsuperscript{195} Id. at 90.

\textsuperscript{196} Id. at 92.

\textsuperscript{197} Id. at 93.

\textsuperscript{198} Id.

\textsuperscript{199} Abrams, 521 U.S at 95.

\textsuperscript{200} Id. at 96.

\textsuperscript{201} Id.
not in effect on the jurisdiction's applicable date for coverage and is otherwise not enforceable under §5, it cannot serve as a benchmark.\textsuperscript{202} The benchmark to be applied under Section 5 is the last legally enforceable practice or procedure used by the jurisdiction.\textsuperscript{203} In Abrams, the appropriate benchmark was Georgia's 1982 redistricting plan.\textsuperscript{204} Under that plan, as under the court-ordered plan, Georgia had one majority black district.\textsuperscript{205} The plaintiffs argued that the district court's plan was retrogressive under the 1982 plan because, under that plan, one out of ten districts was majority black (10%), while under the new plan one out of eleven districts was majority black (9%).\textsuperscript{206} However, this decrease in percentage, according to the majority, is not a retrogression.\textsuperscript{207} The Court stated that such an application of Section 5 would be contrary to the Voting Rights Act because it would require that each time a state with a majority-minority district gained a congressional district, it would be compelled to add only a majority-minority district.\textsuperscript{208}

The review of the cases involving racial gerrymandering claims has illustrated that determining whether race is the predominant factor motivating a state legislature's districting decision is a fact-intensive enterprise.\textsuperscript{209} As demonstrated by the Supreme Court's holding in Cromartie I,\textsuperscript{210} the motivation of the legislature is a genuine issue of material fact.\textsuperscript{211} Thus, each particular case must be analyzed within its own factual context. Because classifications based on race are afforded heightened protection under the Equal Protection Clause, strict scrutiny is applied if proponents alleging a racial gerrymander meet, at a minimum, one of two tests: (1) that traditional race-neutral districting principles were subordinated by the state legislature to racial considerations; and/or (2) that an otherwise facially neutral law is unexplainable on grounds other than race. In determining whether a redistricting plan is entitled to strict scrutiny review, the Court will focus on two types of evidence: direct evidence as to the legislature's purpose, and

\begin{itemize}
  \item \textsuperscript{202} Id. (emphasis added).
  \item \textsuperscript{203} Id. (citing 28 CFR §51.54(b)(1)).
  \item \textsuperscript{204} Abrams, 517 U.S. at 97.
  \item \textsuperscript{205} Id.
  \item \textsuperscript{206} Id.
  \item \textsuperscript{207} Id.
  \item \textsuperscript{208} Id.
  \item \textsuperscript{209} See J. Gerald Hebert, Redistricting in the Post-2000 Era, 8 George Mason L. Rev. 431, 447 (Spring 2000).
  \item \textsuperscript{210} See supra notes 13-14 and accompanying text.
  \item \textsuperscript{211} See supra note 13.
\end{itemize}
cursomstantial evidence of a district’s shape and demographics. A redistricting plan can survive strict scrutiny only if it is narrowly tailored to achieve a compelling state interest.

Examples of traditional race-neutral districting principles as named in Miller are, inter alia, compactness, contiguity of district boundaries, and respect for political subdivisions and communities of interest. In Miller, the primary piece of direct evidence relied upon by the Court to show that racial considerations trumped race neutral districting decisions was a letter from the Georgia State Attorney General to the Justice Department claiming that the state would “violate all standards of compactness and contiguity” if the legislature followed the plan that was eventually adopted. As was later shown in Cromartie II, however, such direct statements must be considered within the factual context in which they were made. In Cromartie II, statements made by legislators and staff were not dispositive indications of whether race was the predominant factor motivating the districting decision; in that case, the Court determined that the statements demonstrated only that race was a consideration in the districting decision. None of the cases examined has declared that race cannot be a relevant consideration in the districting decision. It is only when race is the predominant factor in the legislature’s consideration that strict scrutiny is warranted. As Cromartie II demonstrates, a legislative predisposition to craft a district based primarily on racial concerns is not always easily discovered by examining statements made by legislators and their staffs. In terms of this type of evidence, it seems that nothing short of a tacit acknowledgement by legislators or their staffs that racial considerations are trumping traditional race-neutral districting decisions (e.g., Miller) will cause the Court to conclude that race is the predominant factor motivating the legislature’s districting decision.

Miller, as well as Vera, relied on the nature of the reapportionment data used by state legislatures to make their districting decisions in order to determine that state legislative districting plans were predominantly motivated by race. The Miller Court expressed concern over a comprehensive report of Georgia’s Eleventh Congressional District that depicted that the “district lacked tangible communities of interest” and that “fractured

212. Shaw II, 517 U.S. at 905.
213. Miller, 515 U.S. at 916.
214. Id. at 919. See supra note 138 and accompanying text.
215. See supra notes 51, 57-58 and accompanying text.
political, social and economic interests [existed] within the Eleventh District's black population." Evidence in Vera, illustrating that the Texas legislature manipulated district lines by using a computer program that provided racial data at the block-by-block level, was another example of disrespect for traditional districting decisions. Using such a program permitted the manipulation of election data at an unprecedented level, ignoring foundational units such as precinct and census tracts in the process, and resulting in a severe disruption in traditional forms of political activity.

Abnormally shaped districts, lacking compactness or contiguity, provide evidence that they may have been constructed predominantly on race. As shown most prominently in Shaw I and Shaw II, an irregularly shaped district that absorbs minority populations in accordance with its abnormal shape is circumstantial evidence of the legislature's racial motivations. The "Shaw district" lacked compactness because of its length (approximately 160 miles) and narrowness. It was not contiguous because the district passed through ten counties, dividing towns along the way. Most glaringly, the north and southbound lanes of I-85 were frequently located in different districts. The split precincts at issue in Vera were another example of non-contiguous districts. In that case, streets were frequently divided between Districts 18 and 29.

Of note in both Shaw I and Vera was the reliance by the Court on the influential compactness study performed on congressional districts by Professors Pildes and Niemi. The Court accepted the study primarily because it was a benchmark against which to measure the compactness of other districts across the country. In both cases, the districts invalidated were, according to the study, some of the least compact in the nation.

Once strict scrutiny is applied, a racial classification can only

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216. Id. See supra note 139 and accompanying text.
217. Vera, 517 U.S. at 960-61. As previously noted, Harris County had to increase the number of voting precincts from 672 to 1,225 in order to accommodate the new plan. See supra note 168 and accompanying text.
218. One commentator has stated that a district is contiguous if "it is possible to travel from one part of the district to another part without crossing the district boundary." Hebert, supra note 209, at 451. A contiguous district is "not divided into two or more discrete parts." Id.
219. See supra note 6.
220. Id.
221. Vera, 517 U.S. at 970.
222. See supra notes 16 and 163 and accompanying text.
survive, and not violate the Equal Protection Clause, if it is narrowly tailored to achieve a compelling state interest. The Supreme Court has repeatedly rejected arguments that compliance with Sections 2 and 5 of the Voting Rights Act is sufficient to survive strict scrutiny review. Although the Court has hinted that compliance with Section 2 may, under some circumstances, survive strict scrutiny, there has yet to be a case where a redistricting plan has survived under Section 2. Mainly this is because all three Gingles preconditions must first be satisfied before Section 2 can provide a compelling state interest. In Shaw II, Vera, and Abrams, the Section 2 arguments failed because the minority groups in those districts were not sufficiently large and geographically compact to constitute a majority in a single-member district.

Likewise, it is difficult for the state to argue that compliance with Section 5 allows a districting plan to survive strict scrutiny. A state's duty to comply with Section 5 does not justify race-based districting. A state must be able to demonstrate that the creation of a majority-minority district is necessary to ensure nonretrogression in the position of minorities' effective right to vote. If a new districting plan adds an additional majority-minority district, the plan is ameliorative and cannot be a violation of Section 5. With the Court's holding in Abrams, that a districting plan containing the same number of majority-minority districts as a previous plan is not retrogressive, it is difficult to imagine any instance in which compliance with Section 5 could survive strict scrutiny.

The question remains: what type of district will be invalidated following Cromartie II? The majority decision makes it even more difficult to challenge and defeat an alleged racial gerrymander in cases where race correlates with political behavior. Proponents of alleged racial gerrymander must prove three elements to be successful: (1) the state legislature drew boundaries "because of race rather than because of political behavior (coupled with traditional, non-racial districting considerations)," the legislature could have used alternate means, consistent with traditional districting principles, to achieve permissible and legitimate political objectives; and (3) the districting alternatives

223. See Shaw II, 517 U.S. at 915.
224. Vera, 517 U.S. at 978-79
225. See Shaw II, 517 U.S. at 911.
226. Cromartie II, 121 S.Ct. at 1466 (emphasis in original).
227. Id. at 1462.
"would have brought about significantly greater racial balance."\textsuperscript{228} This is a heavy burden for plaintiffs alleging a racial gerrymander to satisfy. The Court specifically mentions "majority-minority districts (or the equivalent thereof)" in articulating this standard. Thus, rather than the "predominant factor" test in \textit{Miller}, or the "unexplainable on grounds other than race" test in \textit{Shaw II}, plaintiffs bringing a racial gerrymandering suit have additional burdens to satisfy to successfully demonstrate a racial gerrymander: that alternative means, besides redistricting, exist to achieve political objectives and that those means will bring about greater racial balance.

If the minority population in a district is less than 50\%, a plaintiff will have more difficulty proving that a state intended for race to be the predominant factor motivating its districting decision, i.e., that the district was drawn \textit{because of} race. It cannot be said, however, that a district in which minorities are not in the majority will \textit{never} be invalidated. Challenges against minority-influenced districts are more likely to be successful under the \textit{Shaw II} test; such a district would have to be so irregularly shaped as to be "unexplainable on grounds other than race." Notwithstanding this possibility, it is most likely that future successful racial gerrymandering claims will be brought against majority-minority districts that violate the test articulated in \textit{Cromartie II}.\textsuperscript{229} As Justice Breyer pointed out in \textit{Cromartie II}, however, there is no affirmative obligation placed on legislatures by the Constitution to avoid creating majority-minority districts.\textsuperscript{230} Furthermore, the difficulty is enhanced in a situation such as \textit{Cromartie II} where there is a high correlation between race and party politics.

Of course, a district from which those involved in the redistricting process admit that race was the predominant consideration likely will render a district unconstitutional. As \textit{Cromartie II} demonstrated, though, this is difficult to prove. More likely, a district will be invalidated where a state legislature micro-manages the districting process to the point that the district is so irregular on its face that it can only be viewed as an effort to classify voters on the basis of race. This micromanagement is manifested in two ways. First, where the shape of a district is so bizarre, with its bizarre shape following minority demographics, it must lack any reasonable semblance of compactness and

\textsuperscript{228} \textit{Id.}

\textsuperscript{229} See supra notes 226-228 and accompanying text.

\textsuperscript{230} \textit{Id.}
contiguity. This was the district at issue in Shaw I and Shaw II. However, with the Supreme Court's determination in Cromartie II that the new District 12 (very similar in shape to its predecessor, which was declared unconstitutional racial gerrymander, one cannot state with any certainty what type of district could fail Shaw II's bizarre-shape test.

The second type of micromanagement, seen in every case invalidated after Shaw I, is the use of computer programs that provide racial data down to the census block level. The Court condemned the use of census blocks as the fundamental unit for a redistricting plan in Vera primarily because the use of such units is open to manipulation and allows a state to focus too heavily on race in drawing district lines. Commentator J. Gerald Hebert has provided a compelling argument for requiring state legislatures to use precincts and census tracts as the building blocks for a redistricting plan. This process would help to ensure that a state is following traditional race-neutral districting principles instead of grouping voters by race.

State legislatures faced with redistricting in the post-Cromartie II era should take heed of the wide latitude that they are given to make districting decisions. When crafting a district, legislatures have the discretion to consider race in the districting process. It is only when race predominates the legislature's districting decision that a districting plan will be ruled unconstitutional. The cases we have examined, culminating with Cromartie II, demonstrate that only a grave error in the districting process will cause a legislature's decision to be overturned. Proponents seeking to prove a racial gerrymander after Cromartie II face a daunting challenge. They are faced with the difficult task of proving either that race was the predominant factor in the districting decision, or that the district's construction is "unexplainable on grounds other than race." With the addition of the new test articulated in Cromartie II

231. Hebert, supra note 209, at 461.
232. Id.
233. Id. Hebert states that the use of these devices effectively forecloses the degree of racial fine-tuning that the Court condemned in Vera, and helps ensure that congressional districts are not dramatically irregular in shape. Id. at 462.
234. This is an important statement from the Supreme Court. Beginning with the Shaw I line of cases, it was uncertain to what degree, if at all, race could be used in designing districts. With Cromartie II, the Court conclusively notes that race, like other factors in the political process of reapportionment, is a valid consideration. As long as the district is not created because of race, and there are not alternative means to achieve the legislature's political objectives and bring about greater racial balance, racial considerations are permissible.
plaintiffs must further establish that alternative means exist to achieve the political objectives sought by the redistricting plan, and that those means will effect a greater racial balance. An intelligent legislature that watches what it says during the process, constructs districts where race and political identification highly correlate, and uses census tracts and precincts as the building blocks of a congressional district, will likely survive any constitutional challenge to its districting decision. In the future, only a major error by a state legislature will cause districting decisions to be invalidated as racial gerrymanders.

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235. See supra notes 226-228 and accompanying text.