Threading the Needle: Resolving the Impasse Between Equal Protection and Section 5 of the Voting Rights Act

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**NOTES**

**Threading the Needle: Resolving the Impasse Between Equal Protection and Section 5 of the Voting Rights Act**

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I. INTRODUCTION: A GEORGIA BULLDOG CHASES ITS TAIL: ONE STATE'S DISTRICTING DILEMMA

When it comes to legislative reapportionment, the Peach State is in a pickle. Consider this: the results of the 1990 census entitled Georgia to an additional representative in the United States Congress, bringing the state's total number of seats to eleven. In order to comply with the Voting Rights Act of 1965 (the "Voting Rights Act"), the state's legislative district map was redrawn three times during the 1990s before the legal battle over redistricting finally ground to a halt in 1997. Barely giving the state’s General Assembly and the federal courts a chance to catch their collective breath, the 2000 census revealed that Georgia's population had again increased—this time enough for two additional congressional seats. Many of the questions raised by the redistricting litigation of the 1990s have not been answered, including the problems presented by the non-retrogression principle of the Voting Rights Act.

States such as Georgia, which are subject to U.S. Department of Justice preclearance for their redistricting plans, are faced with a dizzying dilemma. On the one hand, refusal to draw majority-minority districts provides states with near-certain assurance that the Justice Department will find them in violation of section 5 of the Voting Rights Act, and thus, refuse preclearance. On the

5. 42 U.S.C. § 1973c. The non-retrogression principle precludes states from enacting any new voting plan that would place minorities in a position where their capacity to elect the candidate of their choice is diminished vis-à-vis the state's current voting plan. Id.
6. Id. States subject to the preclearance requirements of section 5 of the Voting Rights Act are obligated to seek Justice Department approval before implementing any voting plan different from that in effect in the state before November 1, 1964, November 1, 1968, or November 1, 1972. Id. Such states have the option of seeking a declaratory judgment from the U.S. District Court for the District of Columbia in lieu of Justice Department approval. Id.
7. Majority-minority districts are those in which the majority of the voters are members of a race that constitutes a minority of the state's overall voting population. See Pamela S. Karlan, Still Hazy After All These Years: Voting Rights in the Post-Shaw Era, 26 CUMB. L. REV. 287, 289 (1996) (remarking that states will face challenges under the Voting Rights Act if they do not draw majority-minority districts).
other hand, drafting a plan that includes one or more majority-minority districts exposes states to lawsuits by majority white voters on the basis that such districts violate the Equal Protection Clause of the Fourteenth Amendment. States' high-wire balancing act has become even more shaky in light of certain Supreme Court language and the language of the Voting Rights Act, which indicates that preclearance will not necessarily insulate a state from an equal protection claim.

In a nutshell, the problem that a state faces in redrawing its congressional districts is this: in order to avoid suits alleging equal protection violations, the state must prove that race was not a predominant factor in sketching district boundaries. For a state to overcome the preclearance hurdle, however, it has to prove that its new plan complies with the section 5 non-retrogression principle, which almost always requires race-conscious districting.

The states' dilemma is caused by two overlapping concerns. The first problem is the way in which the Court has failed to precisely define "race-conscious districting." The cases brought after the 1990 census largely involved racial gerrymandering of congressional districts. Generally, the Court has held that the drawing of racially gerrymandered districts violates the Equal Protection Clause of the Constitution.

Throughout the 1990s, the Court made clear that a district's irregular shape may play a role in determining whether the district was drawn by impermissibly using race as

8. Id. (noting that if states draw majority-black districts, they face lawsuits under the Equal Protection Clause).
9. 42 U.S.C. § 1973c (stating that “[n]either an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General’s failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure”); see also Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 335-36 (2000).
11. See, e.g., id. at 920 (discussing whether drawing a district based on communities of common interest reflects a "wholly legitimate purpose," though such an action may be "race-conscious").
12. See, e.g., Bush v. Vera, 517 U.S. 952 (1996); Miller, 515 U.S. 900; Shaw v. Reno, 509 U.S. 630 (1993) (Shaw I). Racial gerrymandering occurs when the state legislature draws an election district composed of a majority of minority voters without respect for traditional districting principles such as geographic contiguity or respect for traditional political subdivisions. See Bush, 517 U.S. at 958-65; Miller, 515 U.S. at 910-16; Shaw I, 509 U.S. at 644-49.
13. See, e.g., Miller, 515 U.S. at 927-28. The Equal Protection Clause of the Fourteenth Amendment states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.
the dominant factor.\textsuperscript{14} Yet, the Court has not clearly articulated what constitutes an irregular shape. Moreover, it is unclear if a threshold showing of irregularity is necessary, or simply sufficient, to sustain an equal protection claim.\textsuperscript{15} A plaintiff alleging an equal protection violation because of racial gerrymandering will have great difficulty in proving that race was impermissibly used as a factor in congressional reapportionment if irregular shape is not sufficient to sustain such a claim.\textsuperscript{16}

The second problem is the non-retrogression principle, which has a murky history in the legal system.\textsuperscript{17} The non-retrogression principle requires that a state's proposed congressional reapportionment plan not give minority voters less opportunity to elect the candidate of their choice than the state's current plan. In other words, a new plan may not dilute the voting power of minority voters. This haziness around the non-retrogression principle exists primarily because the Supreme Court has yet to define clearly how to measure whether a minority group is going to suffer more severe vote dilution under a proposed districting plan. What is clear is that non-retrogression presents serious problems for both white voters concerned about equal protection violations and minority voters worried about the discriminatory effect of new districting plans.\textsuperscript{18} White majority voters lament that non-retrogression forces states to ensure that any new congressional district is composed of a majority of minority voters. Minority voters are likewise dissatisfied with the non-retrogression principle because it does not necessarily deny preclearance to a districting plan with a discriminatory purpose as long as the plan is not retrogressive.\textsuperscript{19}

Part II of this Note will examine the evolution of the Voting Rights Act's non-retrogression principle. Part III will investigate the effect of the legislative reapportionment cases concerning equal protection issues heard before the Supreme Court following the 1990 census. By dissecting the interaction between equal protection and non-retrogression, Part IV will observe how that relationship creates a districting conundrum for jurisdictions subject to the Voting Rights Act's preclearance requirements. Finally, Part IV will

\begin{itemize}
\item \textsuperscript{14} See Shaw \textit{i}, 509 U.S. at 646-47.
\item \textsuperscript{15} See Karlan, \textit{supra} note 7, at 288.
\item \textsuperscript{16} See id. at 301-05.
\item \textsuperscript{17} See generally \textit{Bush}, 517 U.S. 952; \textit{Miller}, 515 U.S. 900; Shaw \textit{i}, 509 U.S. 630 (discussing concept of racial gerrymandering).
\item \textsuperscript{18} Karlan, \textit{supra} note 7, at 310.
\end{itemize}
propose three solutions capable of solving a state's district-drawing migraine.

II. RETROGRESSION SESSION: BACKSLIDING, PRECLEARANCE, AND SECTION 5 OF THE VOTING RIGHTS ACT

The Voting Rights Act imposed sweeping changes on the ability of many Southern states to create their own legislative apportionment plans. The Voting Rights Act prevented states from limiting a citizen's right to vote because of race or color.\(^{20}\) Such an abridgement of the franchise occurred if any individual experienced a diminished opportunity to elect the representative of his choice compared to other individuals in the same jurisdiction.\(^{21}\) In particular, section 5 of the Voting Rights Act had far-reaching consequences. This section prohibited any jurisdiction that met the criteria enumerated in section 4 of the Voting Rights Act from enforcing a new voting apportionment plan without first seeking preclearance.\(^{22}\) Preclearance is the process whereby jurisdictions submit proposed voting plan changes to the U.S. Attorney General for approval.\(^{23}\) The Justice Department either grants or denies preclearance based on whether the new plan meets section 5's non-retrogression mandate.\(^{24}\) If the Justice Department denies preclearance, the state may petition the U.S. District Court for the District of Columbia for approval of the voting plan.\(^{25}\) A proposed


\(^{21}\) Id.

\(^{22}\) 42 U.S.C. § 1973c. The preclearance requirement applies to any jurisdiction that the U.S. Attorney General determines maintained a test or device designed to present a prerequisite to voting on November 1, 1964. Id. In addition, the Director of the Census must determine that less than fifty percent of the voting age population residing in the jurisdiction in question was registered to vote on November 1, 1964 or that less than fifty percent of the jurisdiction's population voted in the presidential election held in November, 1964. Id. The act was later amended to mandate the same requirements as of November 1, 1968 and as of November 1, 1972. 42 U.S.C. § 1973(b) (1994). Section 4 of the Voting Rights Act also covers jurisdictions that provided English-only voter registration or election materials, contained a registered voting-age population of less than fifty percent, and contained a single language minority group greater than five percent of its total population. “Reaffirmation or Requiem for the Voting Rights Act? The Court Will Decide,” A Public Policy Alert from the American Civil Liberties Union (May 1995), at http://www.aclu.org/issues/racial/racevote.html#act (last visited Feb. 18, 2001). Jurisdictions covered by the preclearance requirement include the entire states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. Id. Certain counties and towns within California, Colorado, Connecticut, Florida, Hawaii, Idaho, Maine, Massachusetts, Michigan, New Hampshire, New York, North Carolina, South Dakota, and Wyoming are also subject to preclearance. Id.

\(^{23}\) Id.

\(^{24}\) See id.

\(^{25}\) Id.
plan is non-retrogressive as long as it does not diminish the chances for minority voters to elect the candidate of their choice in relation to the current voting apportionment plan.\textsuperscript{26} Section 5 was designed to prevent state legislatures from enacting a continuous stream of discriminatory voting plans without giving minority plaintiffs an opportunity to challenge those plans through the legal system.\textsuperscript{27}

\textbf{A. Beer v. United States}

The Court first explained the non-retrogression doctrine in \emph{Beer v. United States}, a decade after the passage of the Voting Rights Act.\textsuperscript{28} After the 1960 census, the city of New Orleans was divided into five council districts, one of which had a majority-black population.\textsuperscript{29} The 1970 census revealed population changes that prompted the city council to redraw the council districts.\textsuperscript{30} The council created a scheme in which two of the districts were majority-minority, one of which contained a majority of black registered voters.\textsuperscript{31} When the Attorney General denied preclearance, New Orleans sought a declaratory judgment from the U.S. District Court for the District of Columbia stating that the plan did not abridge the right to vote on account of color.\textsuperscript{32} The district court agreed with the Attorney General and refused to grant the declaratory judgment.\textsuperscript{33} The minority plaintiffs appealed to the Supreme Court.\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{26} \textit{Reno v. Bossier Parish Sch. Bd.}, 528 U.S. 320, 324 (2000).
\item \textsuperscript{27} \textit{See infra} note 179.
\item \textsuperscript{28} \textit{425 U.S. 130, 131-34 (1975)} (explaining that change in districting plan cannot abridge voting rights on basis of race or color).
\item \textsuperscript{29} \textit{Id. at 135.} Although one district had a majority-black population, the majority of voters in the district were not black. \textit{Id.} This apportionment plan resulted in the election of no black candidates to the city council from 1960 to 1970. \textit{Id.}
\item \textsuperscript{30} \textit{Id.}
\item \textsuperscript{31} \textit{Id at 136.} This plan was adopted as a substitute when the original plan failed to achieve Justice Department preclearance. \textit{Id.} The first plan had also called for the creation of two majority-minority districts, but neither of these districts contained a majority of registered black voters. \textit{Id. at 135.} The Attorney General refused to grant approval, noting that it seemed to "dilute black voting strength by combining a number of black voters with a larger number of white voters in each of the five districts." \textit{Id.}
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{Id.} The district court reasoned that "if Negroes 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." \textit{Id.} The court noted that under the second plan, minority voters would only be able to elect one councilman because only one district contained a majority of registered black voters and city council elections were inevitably decided along strictly racial lines. \textit{Id.}
\item \textsuperscript{34} \textit{Id. at 138.}
The Supreme Court began its analysis by determining that whether or not the right to vote had been abridged on account of color was directly related to Congress's intent in drafting section 5 of the Voting Rights Act. That intent was to "insure that the gains thus far achieved in minority political participation [should] not be destroyed through new discriminatory procedures and techniques." In other words, the Justice Department was charged with prohibiting any change in legislative apportionment until the authors of the redistricting legislation could prove that the change was not discriminatory. In 1975 Congress clarified the standard under which section 5 voting discrimination was to be measured, when it stated: "[T]he standard (under Section 5) can only be fully satisfied by determining . . . whether the ability of minority groups . . . to elect their choices to office is augmented, diminished, or not affected by the change affecting voting." The Court made it explicitly clear that it understood "non-retrogression" to mean that a court could not accept any voting plan changes that would result in the backsliding of minority voting opportunities. At the very least, this understanding of non-retrogression effectively mandated the maintenance of the same number of majority-minority districts as had existed under the previous plan.

The Court then addressed the merits of the second proposed districting plan. The Court held that New Orleans' second plan did not violate section 5 because implementation of that plan gave every reason to hope that at least one minority candidate would be elected. By comparison, under the 1960 plan, there were no majority-black registered voter districts, and therefore, little hope of electing a minority-preferred candidate. Thus, the standard articulated in Beer indicated that retrogression would be measured against the baseline of the last legally enacted voting plan. In affirming the new plan as an "ameliorative new legislative apportionment," however, the Court noted that the redrafted plan could

35. Id. at 139.
38. Id. at 141.
40. Beer, 425 U.S. at 141.
41. Id. at 142.
42. Id.
43. See id.
44. Id. at 141.
still violate section 5 if it “so discriminates on the basis of race or color as to violate the Constitution.”

**B. Abrams v. Johnson**

More than twenty years later, the Court further muddied the waters of the non-retrogression principle in litigation stemming from Georgia’s epic redistricting struggle following the 1990 census. The unworkable nature of the non-retrogression requirement is most clearly understood in light of the *Abrams v. Johnson* decision. Black voters in *Abrams* challenged the constitutionality of a congressional apportionment plan drawn by the U.S. District Court for the Southern District of Georgia, which contained only one majority-minority district. The appellants contended that the creation of only one such district was a violation of section 5 of the Voting Rights Act.

The most significant problem in complying with the non-retrogression principle is discerning which baseline should be used when measuring the effects of a new districting plan. The Court faced several choices for determining how to judge a proposal for new congressional districts. The appellants in *Abrams* argued that the baseline should be either the plan initially drawn by the legislature after the 1990 census, or the first plan precleared by the Justice Department. The Court declined to use either one of these plans as the starting point for a normative determination of whether the plan drawn by the district court was non-

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45. *Id.*

46. 521 U.S. 74, 79-85 (1997) (highlighting Georgia’s difficulty in drawing districting plan that qualified for preclearance and also followed traditional districting principles).

47. *Id. at 78.* *Abrams* was a continuation of the redistricting litigation first encountered in *Miller v. Johnson*, 515 U.S. 900 (1995). The Supreme Court held in *Miller* that Georgia’s Eleventh Congressional District was unconstitutional because the legislature had used race as a predominant factor in drawing district lines. 515 U.S. at 921. On remand, the district court asked the state legislature to draft a new plan, but the legislature was unable to work out a compromise. *Abrams*, 521 U.S. at 77-78. The district court then took matters into its own hands and drew a plan containing only one majority-black district. *Id.* at 78.


49. *See* Karlan, *supra* note 1, at 747-48. The “baseline” is whichever plan against which the court determines the proposed plan should be measured to judge whether the new plan satisfies non-retrogression. *See id.* at 742.

50. *Abrams*, 521 U.S. at 96. The first plan drawn after the 1990 census, proposed by the General Assembly in 1991, called for two majority-black districts, but failed to garner preclearance support from the Justice Department. *Id.* A second plan, precleared in 1992, also planned two majority-minority districts, but was struck down by the Supreme Court as unconstitutional because race was used as a predominant factor in drawing the Eleventh Congressional District. *Id.* at 97.
Instead, the Court determined that the district court had identified the proper benchmark in pointing to the 1982 plan that had been in effect for more than a decade. Under the 1982 redistricting plan, approved by the state legislature, only one of the state’s ten districts was majority black. The Court chose the 1982 plan as the baseline because the Justice Department’s preclearance regulations state that a plan’s degree of retrogression is measured by comparing a new plan to the one in force at the time the proposed plan is submitted. The Court maintained that an existing plan cannot serve as the baseline measurement if it was not enacted before the deadline for coverage to become effective or does not meet the requirements of section 5. Because the two previous plans proposed after the 1990 census were either unconstitutional or never legally enacted, the last legally enforceable plan was the one drawn after the 1980 census, the 1982 plan.

Despite the Court’s finding that the 1982 plan was the baseline from which to measure retrogression, the appellants still maintained that the district court’s redrawn plan resulted in a reduction of minority voting strength. They based this argument on the fact that every time Georgia gained another congressional seat, the percentage of minority districts in relation to the total number of districts would decrease unless the new seat was established in a majority-minority district. The Court rejected this reasoning because of the untenable results it would produce. Under such a rationale, if a state with at least one majority-minority district experienced population growth that resulted in the addition of congressional seats, the state’s new voting plan would have to draw those new districts as majority-minority. The Court held that the Voting

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51. *Id.* The Court noted that it was highly illogical to use either plan as a benchmark because neither plan was in effect at the time of the appeal. *Id.*

52. *Id.* at 97.

53. *Id.*

54. *See 28 C.F.R. § 51.54(b)(1) (1996).*

55. *Abrams,* 521 U.S. at 97. By holding that the last legally enacted plan was the baseline by which proposed plans were to be measured for possible retrogression violations, the Supreme Court was effectively saying that previously proposed plans, even if in compliance with section 5, could not be used as the non-retrogression benchmark. Plans previously proposed, but never enacted, fell short of serving as the non-retrogression baseline measurement not because they violated section 5, but because the Court had determined that they violated equal protection under the Fourteenth Amendment. *Id.*

56. *Id.*

57. *Id.; see also Karlan,* supra note 1, at 749 (“As a purely formal matter, Georgia’s black voters were quantitatively worse off under the district court’s plan than they had been in 1982. Their share of the state’s overall population had increased . . . and yet the fraction of the state’s seats that were majority black had gone down.”).

58. *Abrams,* 521 U.S. at 97-98.
Rights Act could not reasonably be read as mandating that a state could never again draw a majority-white district simply because it would result in a reduced percentage of majority-minority districts.\textsuperscript{59}

The district’s minority voters nevertheless contended that the district court’s plan violated the non-retrogression principle, even using the 1982 voting plan as a starting point for measuring retrogression.\textsuperscript{60} The plan drawn after the 1980 census, which allotted Georgia ten congressional seats, required one of the ten districts to be drawn with a majority-minority voting population.\textsuperscript{61} When the district court substituted its new reapportionment scheme for the legislature’s scheme after the \textit{Miller v. Johnson} \textsuperscript{62} remand,\textsuperscript{63} the new plan challenged in \textit{Abrams} retained only the one majority-minority district despite the fact that the 1990 census had increased Georgia’s congressional representation to eleven seats.\textsuperscript{64} The Supreme Court held that the new plan was constitutional because the Voting Rights Act did not require state legislatures to designate each new district that a state acquired as majority-minority.\textsuperscript{65} Thus, the importance of \textit{Abrams} is that the Court refused to interpret the non-retrogression principle as mandating that states continue to draw the same percentage of majority-minority districts after each census.

\textbf{C. Reno v. Bossier Parish School Board}

The Court revisited the retrogression principle again in 2000 in \textit{Reno v. Bossier Parish School Board}, a case concerning the districting plan for electing school board members in a Louisiana parish.\textsuperscript{66} After the 1990 census, the Bossier Parish School Board (the “Board”) redrew its election districts to reflect population shifts.\textsuperscript{67} Neither the previous plan, adopted after the 1980 census, nor the

\begin{itemize}
  \item \textsuperscript{59} Id.
  \item \textsuperscript{60} Id.
  \item \textsuperscript{61} Id.
  \item \textsuperscript{62} 515 U.S. 900 (1995).
  \item \textsuperscript{63} \textit{Abrams}, 521 U.S. at 78. While this did not constitute retrogression in absolute terms, it did decrease the percentage of minority districts relative to the rest of the state’s majority-white districts. \textit{Id.} Under the 1980 plan, ten percent of the state’s districts had a majority-black voting population, but under the 1990 plan, only nine percent could claim majority-black citizenship. \textit{Id.}
  \item \textsuperscript{64} \textit{Id.} at 97-98.
  \item \textsuperscript{65} 528 U.S. 320 (2000).
  \item \textsuperscript{66} \textit{Id.} at 324.
\end{itemize}
proposed plan, contained any majority-minority districts.\textsuperscript{67} When the Board applied for preclearance in 1993, the Justice Department rejected the newly drawn scheme, noting that there were enough black voters concentrated in geographically contiguous areas to enable the Board to draw two majority-minority districts.\textsuperscript{68} After having been thwarted by the Justice Department, the Board filed the same plan for preclearance with the U.S. District Court for the District of Columbia.\textsuperscript{69}

Black voters contesting the Board’s plan were precluded from asserting the same argument as those defending Georgia’s redistricting plan in \textit{Abrams}\textsuperscript{70} because Bossier Parish’s plan did not result in the retrogression of minority voting influence.\textsuperscript{71} The Board’s new plan simply maintained the status quo in that there were no majority-minority districts under the plan enacted under the 1980 census, and none were added in the plan created after the 1990 census.\textsuperscript{72} Consequently, the appellants contended that even though they could not prove traditional retrogression under the \textit{Beer} standard, the new plan nonetheless violated section 5 of the Voting Rights Act because it was drawn with a “discriminatory purpose.”\textsuperscript{73}

The Supreme Court affirmed the district court’s opinion on another ground,\textsuperscript{74} but remanded to the district court the question of “whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent.”\textsuperscript{75} The district court avoided addressing the

\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id. The Voting Rights Act permits jurisdictions seeking voting plan preclearance to either petition the U.S. District Court for the District of Columbia for a declaratory judgment stating that the proposed plan is non-retrogressive or to seek approval from the U.S. Attorney General 42 U.S.C. § 1973c (1994). The Attorney General has sixty days from the date the plan is submitted to interpose an objection, or the jurisdiction seeking preclearance may implement its proposed plan. Id.
\textsuperscript{70} See Abrams v. Johnson, 521 U.S. 74, 97 (1997). Black voters in \textit{Abrams} maintained that the reduction in the percentage of majority-minority districts in relation to the overall number of congressional districts constituted a violation of the non-retrogression principle, an argument that the Supreme Court rejected as beyond the scope of section 5. Id. at 97-98.
\textsuperscript{72} Id. at 323-24.
\textsuperscript{73} Id. at 325. The district court disagreed, holding that the Board had sufficiently proven that the new plan had two valid non-discriminatory purposes: to gain Justice Department preclearance, and to implement quickly a new plan that did not require a complete overhaul of district lines. Id.
\textsuperscript{74} Id. The Court held that an otherwise valid districting plan could not be denied preclearance simply because it violated section 2 of the Voting Rights Act, which bars discriminatory voting practices. Id. A suit for preclearance is to be denied only if the plan violates the non-retrogression principle. Id.
\textsuperscript{75} Id. at 325-26.
issue of whether retrogression also encompasses an examination of discriminatory purpose. The Justice Department appealed the district court's holding as clearly erroneous on the grounds that there was no evidence of a discriminatory but non-retrogressive purpose. They also contended that the Voting Rights Act did not allow the Justice Department to issue preclearance of a discriminatory voting plan, even if it was non-retrogressive. The Supreme Court held that as a matter of statutory construction the purpose prong of section 5 only covered retrogressive purpose and not discriminatory purpose. Concluding that the section 5 purpose inquiry does not extend to looking for a discriminatory purpose, but only looks to retrogressive intent, the Court stated that, "in vote-dilution cases, § 5 prevents nothing but backsliding, and preclearance under § 5 affirms nothing but the absence of backsliding." Finding that the new plan should receive section 5 preclearance, the Court seemed to ignore the language in Beer stating that a districting plan violates section 5 if "the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." In Bossier Parish School Board, the Court limited its holding to a finding that preclearance does not indicate that the new plan will survive any constitutional challenge. According to the Bossier Parish School Board Court, section 5 preclearance

76. Id. at 326. The district court declined to address the question because they claimed that "the record will not support a conclusion that extends beyond the presence or absence of retrogressive intent." Id. (quoting Bossier Parish Sch. Bd. v. Reno, 7 F. Supp. 2d 29, 31 (D.D.C. 1998).
77. Id.
78. Id.
79. Id. at 328. The court noted that section 5 of the Voting Rights Act states that jurisdictions seeking preclearance have to prove that (1) the plan "does not have the purpose . . . of denying or abridging the right to vote on account of race or color," and (2) the plan "will not have the effect of denying or abridging the right to vote on the account of race or color." Id. (citing 42 U.S.C. § 1973c). The appellants argued that when Congress wrote the statute prohibiting a plan "abridging the right to vote on account of race or color" that they intended to ban retrogressive effects and discriminatory purpose. Id. at 329. Appellants also cited Richmond v. United States, 422 U.S. 358 (1975) as an occasion on which the Court gave "purpose" a broader definition than "effect." Id. at 330. The Court distinguished that case, however, as one where preclearance was sought when the city was attempting to expand its borders, a change that resulted in a reduction in the percentage of black voters within the city. Id. The Court further held that "although the annexation may have had the effect of creating a political unit with a lower percentage of blacks, so long as it fairly reflected the strength of the Negro community as it existed after the annexation, it did not violate Section 5." Id. (citing Richmond, 422 U.S. at 371). Limiting its ruling to cases involving annexation, the Court observed that failure to limit the effect prong would result in the "invalidation of all annexations of areas with a lower proportion of minority voters than the annexing unit." Id. (citing Richmond, 422 U.S. at 378-79).
80. Id. at 335.
merely signaled the Justice Department's ruling that the new plan does not result in greater minority vote dilution than the current voting procedures. The holding in *Bossier Parish School Board* also seems to contradict the Court's reasoning in *Miller*, which holds that "[a]meliorative changes . . . cannot be found to violate section 5 unless they so discriminate on the basis of race or color as to violate the Constitution." In fact, the *Miller* Court referenced its earlier decision in *Pleasant Grove v. United States*, which held that the state was obligated to prove its proposed plan was nondiscriminatory under section 5. The *Miller* Court further held that Georgia had satisfied this burden by asserting that it had rejected the Justice Department's "max-black" plan in order to adhere to traditional districting principles.

On the issue of discrimination and preclearance, the Court's reasoning in these cases seems inconsistent because it confuses the purposes of section 2 and section 5. Under the Court's reasoning of the Voting Rights Act, an "ameliorative" change, like that proposed in *Miller* or *Beer*, can be refused preclearance if it unconstitutionally discriminates on the basis of race. A change that merely

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83. *Id.* at 335. The Court noted that any new voting plan, as long as it does not violate non-retrogression "cannot be stopped in advance under the extraordinary burden-shifting procedures in Section 5, but must be attacked through the normal means of section 2 action." *Id.*


85. *Miller*, 515 U.S. at 923-24 (citing *Pleasant Grove v. United States*, 479 U.S. 462, 468 (1987)). *Pleasant Grove* involved a petition from an Alabama town to the Attorney General of the United States seeking preclearance of a new voting plan enacted after the town incorporated an uninhabited area. *Pleasant Grove v. United States*, 479 U.S. 462, 464 (1987). The Attorney General refused to issue section 5 preclearance because the town had ignored the request of surrounding areas, heavily populated by black residents, for annexation to the town. *Id.* at 466. After the town filed a motion for declaratory judgment with the U.S. District Court for the District of Columbia, the Supreme Court affirmed the Attorney General's denial of preclearance on the basis that the town had attempted to engage in future vote dilution by not allowing the areas populated by black residents to incorporate within the town. *Id.* at 472.

86. *Miller*, 515 U.S. at 924.

87. *Id.* A "max-black" plan draws districts in such a way as to maximize the number of majority-minority districts within the state by connecting geographically scattered black populations. *Id.* Although the Supreme Court accepted the district court's finding that the state had successfully articulated a nondiscriminatory reason for their districting plan, Pamela Karlan noted that Georgia's "traditional" districting practices were "constitutionally obnoxious," as Georgia had declined to redraw its districts for nearly thirty years after 1931 even though the state's population continued to shift from rural to urban. Karlan, *supra* note 1, at 745. For a comprehensive discussion of *Miller*, see *infra* Part III.B.

88. Section 2 of the Voting Rights Act states: "No voting [practice] 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 . . . ." 42 U.S.C. § 1973a (1994).

89. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000). Justice Scalia rejected this interpretation by saying that "[a]t the time *Beer* was decided, it had not been established that
maintains the status quo, however, like the one proposed in *Bossier Parish School Board*, does not need to pass constitutional muster in relation to discrimination.90 The *Bossier Parish School Board* Court held that such a plan cannot dilute minority voting any more than the one currently in effect.91 In *Bossier Parish*, the question of whether or not the plan impermissibly discriminated on the basis of race was reserved for legal challenges to be brought under section 2 of the Voting Rights Act, not one to be solved on the accelerated timetable accorded to section 5 preclearance actions.92 The Court, however, maintained that this distinction was immaterial because judicial preclearance did not preclude an attack on the voting plan because of unconstitutional vote dilution under section 2.93 In summary, the battle in the preceding cases was over section 5 preclearance rather than section 2 vote dilution because section 5 is the mechanism that prevents costly and fruitless legal challenges to voting plans enacted by reticent state legislatures. Section 5 protects minority voters from the necessity of bringing suit against the state for enacting a more discriminatory districting plan than the one currently in use by blocking the proposed plan from ever taking effect. By contrast, section 2 provides protection against plans that are objectively, rather than comparatively, discriminatory.94

III. STAYIN' ALIVE ON I-85: SHAW, MILLER, AND OTHER RACIAL GERRYMANDERING BLUNDER

The redistricting cases that arose after the 1990 census differed significantly from those encountered by the Court in the 1980s. The majority of cases before the Court in the 1980s concerned suits brought by minority voters alleging that redistricting plans were unconstitutional because they allowed for minority vote

\[\text{discriminatory purpose as well as discriminatory effect [were] necessary for a constitutional violation.}\] Id. at 337 (citations omitted). Justice Scalia continued that “[a] much more plausible explanation of the statement is that it referred to a constitutional violation other than vote dilution—and, more specifically, a violation consisting of a ‘denial’ of the right to vote, rather than an ‘abridgement.’” Id. at 337-38. He also conceded, however, that the Court had “quoted [this] dictum in subsequent cases” while hastily denying that the Court had ever used it to deny preclearance. Id. at 338.

90. Id. at 339.
91. Id. at 340.
92. Id. at 336.
93. Id. at 338-39. Justice Scalia affirmed that the “fully available remedy [under section 2] leaves us untroubled by the possibility that [section] 5 could produce preclearance of an unconstitutionally dilutive redistricting plan.” Id. at 339.
94. Id. at 333-35.
dilution in violation of the Voting Rights Act.\textsuperscript{95} The cases arising in the 1990s, however, usually involved claims brought by white voters contending that districts were gerrymandered to produce majority-minority populations, which constituted discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{96}

\textbf{A. Shaw v. Reno}

North Carolina was one of the first states confronted with a suit challenging the constitutionality of race-based congressional redistricting after the 1990 census.\textsuperscript{97} In \textit{Shaw v. Reno}, the North Carolina legislature attempted to redraw the state’s congressional districts as a result of the state receiving an additional congressional seat.\textsuperscript{98} Any plan that the North Carolina General Assembly drew was subject to pre-approval by the U.S. Attorney General under section 5 of the Voting Rights Act.\textsuperscript{99} The first newly-crafted plan included one majority-black district out of twelve total districts statewide. The Justice Department rejected this plan, finding that it diluted minority voting strength.\textsuperscript{100} Following preclearance rejection, the Assembly returned to the drawing board to sculpt a second plan that included two majority-black districts, Districts One and Twelve, for a state in which blacks composed twenty percent of the voting-age population.\textsuperscript{101} District One was described as follows:

\begin{quote}
[I]t is somewhat hook shaped. Centered in the northeast portion of the state, it moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southern-most part of the state near the South Carolina border. District 1 has been compared to a "Rorschach ink-blot test"\textsuperscript{102} and a "bug splattered on a windshield."\textsuperscript{103}
\end{quote}

\textsuperscript{95.} See, e.g., Busbee v. Smith, 549 F. Supp. 494, 509-10 (D.D.C. 1982) (holding that the reapportionment plan adopted by the Georgia state legislature after the 1980 census violated section 2 because the plan was racially discriminatory).


\textsuperscript{97.} Shaw v. Reno, 509 U.S. 630, 633 (1993) (\textit{Shaw I}).

\textsuperscript{98.} \textit{Id.} at 633. The 1990 census revealed that North Carolina was entitled to increase the state's number of congressional districts from eleven to twelve. \textit{Id.}

\textsuperscript{99.} Preclearance by the Justice Department or the U.S. District Court for the District of Columbia is mandatory for certain covered jurisdictions before any change can be made in a "standard, practice, or procedure with respect to voting" established after November 1, 1964. 42 U.S.C. § 1973c (1994); see also supra note 22 (describing preclearance requirement).

\textsuperscript{100.} Shaw I, 559 U.S. at 633.

\textsuperscript{101.} \textit{Id.} at 635. Although blacks comprised one-fifth of the state's potential electorate, minority populations were not concentrated in identifiable population centers. \textit{Id.} at 634. Only five percent of the State's counties contained a majority of minority citizens. \textit{Id.}

\textsuperscript{102.} \textit{Id.} at 635 (quoting Shaw v. Barr, 868 F. Supp. 461, 476 (E.D.N.C. 1992)).

\textsuperscript{103.} \textit{Id.} (quoting \textsc{Wall} St. J., Feb. 4, 1992, at A14).
The second majority-minority subdivision, District Twelve, was a long, snake-like creation that ran the 160-mile length of Interstate 85 through the state. One member of the General Assembly deadpanned that "if you drove down the interstate with both car doors open, you'd kill most of the people in the district." This plan survived Justice Department scrutiny only to be confronted with an equal protection challenge by white voters in the two gerrymandered districts. The U.S. District Court for the Eastern District of North Carolina held that the creation of the majority-black First and Twelfth Districts did not violate the Equal Protection Clause. The court decided that creation of the two majority-minority districts did not constitute an equal protection violation because the districts did not have the effect of diluting white voting strength.

On appeal to the Supreme Court, the plaintiffs claimed that the North Carolina redistricting plan violated the Fourteenth Amendment Equal Protection Clause because it separated blacks from whites for the purpose of voting. The Court began its analysis of the equal protection claim by noting that a voting plan motivated primarily by racial concerns garnered the same strict scrutiny that the Court applied to any legislation that categorized citizens by race. The Court agreed that the General Assembly’s plan to create two majority-minority voting districts was closely related to the objective of maintaining adequate minority representation. The Court rejected, however, the State’s assertion that it had a compelling interest in creating a majority-black district in order to comply with the Voting Rights Act.

104. Id.
105. Id. at 636 (quoting WASH. POST, Apr. 20, 1993, at A4).
106. Id. at 636-38. The appellants in this case filed suit in the U.S. District Court for the Eastern District of North Carolina on the grounds that the two majority-minority districts were an impermissible racial gerrymander, and therefore, violated the Equal Protection Clause of the Fourteenth Amendment. Id. at 638-39.
107. Id. Compliance with the Voting Rights Act, and not the intention to undermine white voters’ electoral representation, was the state’s true purpose in creating the two districts in question. See id. at 638.
108. Id. at 638-39.
109. See id. at 642.
110. Id. at 643; see also Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (stating that “[r]acial and ethnic distinctions of any sort are inherently suspect” and are thus subject to strict scrutiny review). Strict judicial scrutiny of legislation involves the application of a two-prong test that asks both if the legislation is closely related to its proposed objectives and if the legislation is narrowly tailored to serve compelling state interests. Shaw v. Reno, 509 U.S. 630, 643 (1993) (Shaw I).
111. Id. at 655.
112. Id. at 654. The Supreme Court maintained that neither of its decisions concerning the non-retrogression principle under section 5 was intended to give those jurisdictions covered by
The plaintiffs asserted that the district's strange geographic shape subverted the race-neutral districting principles in favor of using race as the sole criterion for redrawing the electoral map. Although the Court observed that state legislatures invariably take the racial composition of a district into account when drawing district lines, awareness alone of race was not a violation of equal protection. If blacks lived together in one community, the General Assembly would be entitled to group them together in a single district. Assigning a district to blacks who lived together in a single community would not constitute an "awareness" of race any more than would grouping whites of the same community in a single district. Such an arrangement would conform to traditional districting principles, which include respect for traditional political subdivisions.

Acknowledging this, however, the Supreme Court held that geographic irregularity was a sufficient ground upon which to bring an equal protection claim. Noting that "reapportionment is one area in which appearances do matter," the Court found that grouping black voters in a district in which the residents had little in common except for the color of their skin bore "an uncomfortable resemblance to political apartheid." The bizarre shape of a district provided proof that the districting plan was simply an attempt to create a district whose identifying characteristic was the race of its inhabitants.

The Court's reasoning with regard to the shape of the contested districts foreshadowed the calamity that would befall several other jurisdictions covered under the section 5 preclearance requirement. Per the Voting Rights Act, after the 1990 census, the act "carte blanche to engage in racial gerrymandering in the name of non-retrogression."
North Carolina drew a plan containing only one majority-minority district.\textsuperscript{122} The Justice Department denied preclearance, forcing the state legislature to redraft a plan that contained two majority-minority districts.\textsuperscript{123} Unfortunately, in order to draw those two districts, the legislature was forced to connect black populations in regions of the state far removed from one another.\textsuperscript{124} By taking race into account in forming Districts One and Twelve, North Carolina then exposed itself to an equal protection claim.\textsuperscript{125}

\textbf{B. Miller v. Johnson}

Two years after \textit{Shaw}, the Supreme Court was again asked to examine the constitutionality of a congressional district drawn after the 1990 census, this time in Georgia.\textsuperscript{126} Before 1990, Georgia’s population was twenty-seven percent black, but only one of the state’s ten congressional districts was majority black.\textsuperscript{127} When the decennial census showed that Georgia was entitled to an additional district, the General Assembly proceeded to redraw the state’s congressional districts.\textsuperscript{128} The Georgia State General Assembly, like that of North Carolina, was subject to Section 5 preclearance by the U.S. Attorney General.\textsuperscript{129} Georgia, like North Carolina in \textit{Shaw}, was also confronted with a troubling dilemma due to the Justice

\begin{itemize}
  \item \textsuperscript{122} \textit{Id.} at 633.
  \item \textsuperscript{123} \textit{Id.}
  \item \textsuperscript{124} \textit{Id.} at 635.
  \item \textsuperscript{125} The Supreme Court remanded the case to the U.S. District Court for the Eastern District of North Carolina for a determination of whether the reapportionment plan drawn by the state legislature was narrowly tailored to serve a compelling governmental interest. \textit{Id.} at 658. The district court held that the voting plan survived strict scrutiny because it served the state’s compelling government interest in complying with section 2 and section 5 of the Voting Rights Act. See \textit{Shaw v. Hunt}, 517 U.S. 899, 901-02 (1996) (\textit{Shaw II}). The plaintiffs again appealed the district court’s ruling. \textit{Id.} at 902. The Supreme Court reversed, holding that state’s plan was not narrowly tailored to serve a compelling governmental interest because section 2 of the Voting Rights Act did not mandate the creation of District Twelve, the state’s second majority-minority district. \textit{Id.} at 918. In order for the state to be in violation of section 2, the legislature would have had to refuse to draw a majority-minority district in an area in which the minority group was “geographically compact.” \textit{Id.} at 916. The Supreme Court found that “[n]o one looking at District [Twelve] could reasonably suggest that the district contains a ‘geographically compact’ population of any race.” \textit{Id.}
  \item \textsuperscript{126} \textit{Miller v. Johnson}, 515 U.S. 900 (1995).
  \item \textsuperscript{127} \textit{Id.} at 906.
  \item \textsuperscript{128} \textit{Id.}
  \item \textsuperscript{129} \textit{See supra} note 22 (describing the preclearance requirement).
\end{itemize}
Department’s mandate that any new districting plan could not reduce minority voting strength relative to prior levels.130

In their attempt to comply with the myriad Justice Department requirements for redistricting, the Assembly drew two majority-minority districts, the Fifth and the Eleventh, as well as a third district, the Second, where blacks comprised thirty-five percent of the population.131 The Justice Department rejected this plan, along with a modified alternative that increased the percentage of blacks in the three districts.132 Consequently, the U.S. Attorney General pressed for the creation of yet a third majority-minority district in order to enable the state to receive preclearance.133 The General Assembly ceded to Justice Department demands and created the third majority-minority district by redrawing the Second District to include the heavily black areas surrounding Macon, and retooling the Eleventh District to encompass the black population in Savannah.134

Congressional elections were held under the new districting plan in November of 1992, and resulted in the election of black candidates from each of the three majority-minority districts redrawn after the 1990 census.135 White voters from the Eleventh District subsequently brought suit against the state, alleging that their district violated the Equal Protection Clause of the Fourteenth Amendment because it had been racially gerrymandered.136 The district court agreed with the plaintiffs and held that the redistricting plan was unconstitutional under Shaw because race was the

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130. See Karlan, supra note 1, at 748-49 (noting that this requirement placed states redrawing their districts in an untenable position). If a state such as Georgia, which had one majority-minority district before 1990, received an additional congressional seat, was it obligated to make the additional district majority black? Before 1990, minority voting strength would have been one in ten, or ten percent of the State’s districts. Id. If Georgia did not designate its new district as majority-minority, however, minority voting strength would drop to one in eleven, or 9.1%. Id. The Court did not explain whether this action would constitute reducing minority voting strength relative to prior levels. Id.


132. Id. at 907.

133. Id.

134. Id. This plan, originally proposed by the American Civil Liberties Union, was known as the “max-black” or “Macon/Savannah trade.” Id. Under this plan, “the black population of Meriwether County was gouged out of the Third District and attached to the Second District by the narrowest of land bridges; Effingham and Chatham Counties were split to make way for the Savannah extension, which itself split the City of Savannah.” Id. When the dust had settled, “the plan as a whole split 26 counties, 23 more than the existing congressional districts.” Id.

135. Id. at 909.

136. Id.
overriding factor in drawing the districts. The state appealed on the grounds that simply showing that race was the motivating factor in redrawing the districts was not enough to sustain a claim under Shaw. In addition, Georgia claimed that, in order to violate the Fourteenth Amendment, the district must be so visually irregular that there could be no rational explanation for its bizarre shape other than that it was drawn to create a majority-minority district.

In Miller v. Johnson, the Supreme Court affirmed the district court's holding that the Georgia legislature's districting plan was unconstitutional. The Miller Court rejected a key element of the Shaw holding, finding that the plaintiffs were not required to show that the districts were geographically irregular. In attempting to clarify its opinion in Shaw, the Court reasoned that a plaintiff alleging an equal protection violation did not need to show that a district was visually bizarre in order to meet its burden of proof. A geographically bizarre district, therefore, provided a court with proof that the legislature had subsumed traditional districting principles, such as compactness and contiguity, in favor of drawing districts based entirely on racial considerations.

The Miller Court was concerned that forcing plaintiffs to show a lack of geographical compactness would make proof of unconstitutionality too difficult in cases where a plan might be facially neutral, but nonetheless enacted with a racial purpose or objective

137. Id. at 910. The district court made this determination on the basis of legislative history revealing the General Assembly's intent and purpose in creating the reapportionment plan containing three majority-minority districts. Id. The court also cited the district's shape as persuasive evidence that the legislature drew the district's boundaries specifically to include concentrations of minority populations. Id.

138. Id.
139. Id. at 910-11.
140. Id. at 928.
141. The Court applies strict judicial scrutiny when a district "is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for the purposes of voting." Shaw v. Reno, 509 U.S. 630, 642 (1993) (Shaw I).
142. Miller v. Johnson, 515 U.S. 900, 915 (1995) ("In sum, we make clear that parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness").
143. Id. at 913.
144. Id.
145. Id.
in mind. The Court narrowed the Shaw holding by observing that the odd shape of the district provided sufficient proof for the plaintiffs' claim of racial gerrymandering, but that evidence other than visual irregularity could be used to support a claim.

Because geographical compactness ceased to be a constitutional requirement after Miller, it became unclear what plaintiffs alleging an equal protection violation were required to prove in order to compel the Supreme Court to use strict scrutiny in evaluating a districting plan. In Miller, the Court maintained, on the strength of its previous equal protection decisions, that racial classifications were inherently suspect. Therefore, the plaintiffs needed to show that race was the primary factor in the Assembly's decision to redraw the congressional districts in such a manner.

To show that race was the Assembly's main concern in choosing the plan that contained three majority-minority districts, the plaintiffs would need to prove that the Assembly abandoned other concerns such as "compactness, contiguity, [and] respect for political subdivisions or communities defined by actual shared interests. . . ." The state admitted that one of these considerations, contiguity, was shelved in the creation of at least one of the majority-black districts when it stated that "to the extent that precincts in the Eleventh Congressional District are split, a substantial reason for their being split was the objective of increasing the black population of that district." The Court decided that because race was the main consideration in drawing the Eleventh District, the General Assembly's plan was subject to strict judicial scrutiny under the compelling governmental interest test.

146. Id. (citing to such cases as Gonillion v. Lightfoot, 364 U.S. 339 (1960), in which the "redrawing of Tuskegee, Alabama's municipal boundaries left no doubt that the plan was designed to exclude blacks").

147. Id. at 914. Other types of evidence that could support a claim of racial gerrymandering are lack of respect for traditional political subdivisions or failure to protect incumbency. See id. at 916-17.

148. Id. at 915; see also Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226-27 (1995) (holding that the use of even benign race-based classifications invited the application of strict judicial scrutiny and the compelling governmental interest test).


150. Id. (noting that the enumeration of these three criteria was not intended to suggest that they were the only traditional principles that could have been abandoned in favor of race as a consideration).

151. Id. at 918.

152. Id. at 920. The Court also gave considerable weight to evidence submitted by the plaintiffs showing that there were no discernable "communities of interest" connecting the far-flung minority populations of the Eleventh District, and in fact, that the district's black population was divided by widely differing political, social, and economic goals. Id. at 919-20.
For legislation to satisfy the compelling governmental interest test, it must be both closely related to the legislative objective and narrowly tailored to achieve that compelling governmental interest.\textsuperscript{153} One governmental concern that the Court had previously found “compelling” was the interest in remedying past discrimination.\textsuperscript{154} The Miller Court, however, noted that Georgia did not claim that it created the Eleventh District in order to remedy past discrimination.\textsuperscript{155} The only reason that the state redrew the Eleventh District to include the concentrated black populations in Savannah was to satisfy the Justice Department’s preclearance demands.\textsuperscript{156} Thus, the Court found that Georgia did not have a compelling interest in adopting the precleared plan, and noted that the Justice Department’s mandate alone did not ensure constitutionality of the districting scheme.\textsuperscript{157}

C. Lawyer v. Department of Justice

After the Shaw and Miller opinions, the Court’s application of the strict scrutiny standard seemed to portend that gerrymandered majority-minority districts could not withstand an equal protection challenge. However, the Court belied that trend in a 1997 Florida case concerning state legislative redistricting.\textsuperscript{158} Florida sought to redraw its state district boundaries after the 1990 census showed significant population redistribution in several of its major urban areas, including Tampa.\textsuperscript{159} Five Florida counties, including Tampa’s Hillsborough County, are subject to Justice Department preclearance under the Voting Rights Act.\textsuperscript{160} The Justice Department refused to clear the state’s initial plan, stating that it separated minority populations in Hillsborough County into different legislative districts and declined to create a majority-black district in the county.\textsuperscript{161} In light of the Justice Department’s objections, the

\begin{itemize}
\item \textsuperscript{154} Shaw v. Reno, 509 U.S. 630, 656 (1993) (Shaw I).
\item \textsuperscript{155} Miller v. Johnson, 515 U.S. 900, 920-21 (1995).
\item \textsuperscript{156} Id. at 921.
\item \textsuperscript{157} Id. at 923. The Court observed that although it often deferred to an agency’s legislative interpretations, the Court had declined to do so when the agency’s reading of the statute implicated constitutional issues. Id. “When the Justice Department’s interpretation of the Act compels race-based districting, it by definition raises a serious constitutional question.” Id.
\item \textsuperscript{158} See Lawyer v. Dept of Justice, 521 U.S. 567 (1997).
\item \textsuperscript{159} Id. at 569.
\item \textsuperscript{160} Id. at 570; see also supra note 22 (describing the preclearance requirement).
\item \textsuperscript{161} Lawyer, 521 U.S. at 570.
\end{itemize}
state redrew the districts to create a gerrymandered state senate district, District Twenty-One, whose population was approximately forty-six percent black.\textsuperscript{162} The Florida Supreme Court explicitly noted that the major consideration in the creation of the district was “racial and ethnic fairness,” and that the district was “contorted” in a way that joined blacks who had “little in common besides their race.”\textsuperscript{163} After elections were held under this plan in 1992 and 1994, several white residents of Hillsborough County brought suit alleging a violation of the Equal Protection Clause.\textsuperscript{164}

The majority of the plaintiffs reached a settlement agreement with the state that redrew the district’s boundaries to decrease the percentage of black residents.\textsuperscript{165} Although a U.S. District Court in Florida found that the new plan did not place primary importance on race in its creation, the Supreme Court held that the standard of review for the district court’s finding was clear error.\textsuperscript{166} In holding that the new plan did not violate the Equal Protection Clause, the Supreme Court placed heavy emphasis on the appearance of the new district, noting that it was “demonstrably benign and satisfactorily tidy.”\textsuperscript{167} Although the district was still somewhat irregularly shaped, as it bridged Tampa Bay and included parts of three counties, the Court did not find its shape troubling because many Florida districts had similar characteristics.\textsuperscript{168} In fact, the Court intimated that the district’s irregular shape constituted evidence that the state legislature had not engaged in racial gerrymandering because Florida’s unique geography and numerous bodies of water often forced the creation of strangely-shaped districts.\textsuperscript{169} Although the Supreme Court had previously held that plaintiffs are not required to prove that a district is oddly shaped in

\textsuperscript{162} Id. at 571.
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 571-72. Initially, five white residents brought suit against the State, contending that District Twenty-One violated the Fourteenth Amendment. Id. Four of the plaintiffs reached a settlement with the State, under which the boundaries of District Twenty-One would be revised in order to shape them in a more traditional fashion. Id. at 572. The new plan also decreased minority voting strength from the forty-six percent under the original plan to approximately thirty-six percent. Id. at 573.
\textsuperscript{165} Lawyer v. Dept of Justice, 521 U.S. 567, 573 (1997).
\textsuperscript{166} Id. at 580.
\textsuperscript{167} Id. at 575.
\textsuperscript{168} Id. at 581. The end-to-end distance of the district was fifty miles, which placed it well within the range of distances state-wide. Id. at 581 n.8. The Court also noted that the meaning of the term “traditionally shaped districts” was relative to Florida because the state’s geography, as well as the number of districts in relation to the number of counties, often made for uniquely-shaped districts. Id. at 581 n.9.
\textsuperscript{169} Id. at 581.
order to establish a racial gerrymander, Lawyer represents yet another case in which the Court looked to shape as a determining factor. This is primarily because shape is the most striking indicator of the presence or absence of racial gerrymandering.\footnote{See Miller v. Johnson, 515 U.S. 900, 910 (1995) (holding that "race was the overriding and predominant force in the districting determination" because "several appendages drawn for the obvious purpose of putting black populations in the district" contributed to its irregular shape).}

In addition, the Court further found the new District Twenty-One to be constitutional because of the district's racial composition.\footnote{See Lawyer v. Dep't of Justice, 521 U.S. 567, 582 (1997).} The Court upheld the district court's finding that the district's population shared common economic interests, which constituted evidence that traditional, race-neutral districting principles dominated the new plan.\footnote{See id.} Additional proof that the new plan did not use race as its primary factor in deciding district lines came from the fact that the redrawn District Twenty-One was not majority-minority.\footnote{See id. at 581. The Court noted that the districts "white and black members alike share a similarly depressed economic condition." Id.} The Supreme Court, therefore, upheld the district court's finding that District Twenty-One was constitutionally drawn because race was not used as the most prominent factor in its drafting.\footnote{Id.}

The Supreme Court's analysis in both Shaw and Miller presents states that are attempting to redistrict under the preclearance requirement with a confusing set of directives. For instance, the Voting Rights Act requires Georgia to obtain Justice Department preclearance any time it redraws its districts.\footnote{See supra note 22 (describing the preclearance requirement).} After the 1990 census, Georgia submitted two redistricting plans for preclearance and was twice told that its plans did not satisfy the minority voter non-retrogression principle. After the Justice Department made clear that it would not accept a plan that did not include a third majority-minority district, Georgia's General Assembly had no choice but to manipulate the state's black populations into irregularly shaped districts. However, the fact that the state

\footnote{170. See Miller v. Johnson, 515 U.S. 900, 910 (1995) (holding that "race was the overriding and predominant force in the districting determination" because "several appendages drawn for the obvious purpose of putting black populations in the district" contributed to its irregular shape).}
\footnote{171. See Lawyer v. Dep't of Justice, 521 U.S. 567, 582 (1997).}
\footnote{172. See id. District Twenty-One's population consisted primarily of low-income urbanites and was the poorest of the nine districts in and around Tampa. Id. at 581. The Court noted that the district's "white and black members alike share a similarly depressed economic condition." Id.}
\footnote{173. Id. The new District Twenty-One's black voting-age population was 36.2% of the total electorate. Id. The district court emphasized that the reduction in minority voting strength from the original plan created a district that could no longer be considered an automatic win for a minority candidate. Id. The new district "offers to any candidate, without regard to race, the opportunity to seek and be elected to office." Id. (citing Scott v. Dep't of Justice, 920 F. Supp. 1248, 1256 (M.D. Fla. 1996)).}
\footnote{174. Id. at 582-83.}
\footnote{175. See supra note 22 (describing the preclearance requirement).}
used race as the primary criterion for redrawing the districts left Georgia vulnerable to a court challenge by white voters under the Equal Protection Clause. Georgia was essentially left with no choice but to adopt the Justice Department's plan and hope that white voters would not challenge the newly created majority-minority districts.  

The Lawyer Court further muddied the congressional reapportionment waters by implying that a district irregularly shaped on its face may nonetheless survive strict scrutiny if the district's population is not majority-minority, even if the district's percentage of minority voters is greater than that of the counties that comprise the district. The major challenge for states facing reapportionment after the 2000 census will be attempting to confront the problem of being subject to both Justice Department and Supreme Court mandates that are at odds with one another.

IV. WALKING A TIGHTROPE: RESOLVING THE CONFLICT BETWEEN EQUAL PROTECTION AND NON-RETROGRESSION

A. Review of the Conflict

At one time, the non-retrogression principle was an integral part of enforcing the Voting Rights Act, which was established to eliminate racial discrimination in voting. The jurisdictions subject to section 5 preclearance were able to maintain discriminatory districting practices by staying one step ahead of available law enforcement techniques. Statutes enacted by the state legislatures remained good law until the Justice Department or an affected voter brought a lawsuit proving that the legislature's districting plan discriminated against minority voters. Congress's purpose in enacting section 5 was to solidify the past progress made towards ensuring minority voter participation in the political process and

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176. See generally Karlan, supra note 7, at 306-11 (discussing difficulty of satisfying preclearance requirements while at the same time preventing equal protection lawsuits).
178. Karlan, supra note 7, at 289.
179. H.R. REP. No. 94-196, at 57-58 (1964) ("Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down.").
180. Beer v. United States, 425 U.S. 130, 140 (1976) ("Congress therefore decided, as the Supreme Court held it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.' ").
181. Id. at 141.
to buttress these gains through section 5 preclearance procedures. In requiring new plans to be non-retrogressive, Southern states' legislatures were discouraged from enacting new discriminatory voting plans because they realized that such plans would never survive Justice Department scrutiny.

Non-retrogression was easily defined in the years immediately following passage of the Voting Rights Act. Indeed, virtually none of the jurisdictions subject to the preclearance requirement of section 5 contained any majority-minority districts. For instance, in *Beer*, the New Orleans City Council districts drawn after the 1960 census did not include any districts in which blacks constituted a majority of registered voters, and only one in which they were a majority of the population. After the 1970 census, these states were compelled to redraw their districts to include at least one with a majority-black voting population. For these jurisdictions, a non-retrogressive plan consisted of simply not eliminating the one majority-minority district that was created after 1970. In other words, the baseline of one district was clearly delineated.

As seen in this Note, the non-retrogression principle began to encounter problems during the period after 1990, the third decennial census after the passage of the Voting Rights Act. As states gained additional congressional seats, the baseline for retrogression shifted and became unclear. Georgia, in particular, experienced the tensions between the principles of non-retrogression and equal protection. After the 1980 census, Georgia had ten congressional districts, one of which was majority-minority. In the decade between the 1980 and 1990 censuses, Georgia experienced population growth sufficient for the addition of one congressional seat, forcing the Georgia General Assembly to draw a new voting plan that would survive Justice Department scrutiny under the section 5 non-retrogression principle. When white voters in *Abrams* brought a claim protesting the districting changes made after the 1990 cen-

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182. Id.
183. Id.
184. See, e.g., id. at 130.
185. See id. at 135.
186. Because the Voting Rights Act was passed in 1965, the period following the 1970 census represented the first opportunity for many jurisdictions to redraft their legislative apportionment plans to reflect changes in the growth and location of minority populations. See 42 U.S.C. § 1973c (1994).
sus, the Supreme Court held that the Voting Rights Act does not compel states to create a new majority-minority district every time they gain a new district. Because the non-retrogression baseline is the previous legal voting plan, Georgia reasonably believed it could enact a new voting plan as long as it contained the same one majority-minority district as under the current plan. The Justice Department refused preclearance, however, and Georgia spent the rest of the decade grappling with how to resolve the state's conflicting needs of attaining preclearance and avoiding equal protection lawsuits.

One answer to the states' redistricting nightmares is to redefine the non-retrogression principle altogether. The current retrogression standard disadvantages black voters because it allows preclearance of any voting plan that does not dilute black votes more than the current plan. From a minority perspective, this understanding of retrogression has two main drawbacks. First, it does not account for the fact that the new plan can be precleared even if it represents no improvement over representation of minority voting interests. This "backsliding" prohibition once made sense given that the jurisdictions covered by the Voting Rights Act had a tendency to have one discriminatory voting policy waiting in the wings while their current voting policy was being challenged in the courts. The Court's recent cases have suggested, however, that the appropriate baseline for measuring retrogression is the last legally enacted voting plan. In some cases, the "current" or "last legally enacted" voting plan is more than ten years old and no longer accurately reflects the racial and geographic composition of the state. Thus, if the minority population of the state has shifted or increased, measuring non-retrogression by the last legally enacted plan does not prevent discrimination for a group that may currently comprise a larger percentage of a state's population.

Second, the Supreme Court's most recent redistricting decision declined to read section 5 as explicitly prohibiting a discriminatory voting plan, but read it instead to require only that the plan

190. Id. at 97.
191. Id. at 98.
192. See Abrams, 521 U.S. at 98; Miller, 515 U.S. at 906-08.
194. Id. at 334-35.
197. See, e.g., id.
not be retrogressive. Like the preclearance problem, this principle also effectively continues the practice of diluting minority voting strength. If a discriminatory plan can gain preclearance, section 5 provides no safeguards of voting rights in cases where the last enacted plan contains no majority-minority districts and the proposed plan also does not create a new majority-minority district. This scenario places a nearly impossible burden of proof on a minority plaintiff. The plaintiff will have to prove that the new plan is discriminatory under section 2 of the Voting Rights Act, which will be difficult to show given that the last legally enacted plan passed constitutional muster and contains the same number (zero) of majority-minority districts as the proposed plan.

The Court contemplated this sort of future discrimination in the 1980s. The appellants in Bossier Parish School Board challenged the premise that section 5 permits the Justice Department to issue preclearance when a plan is discriminatory but non-retrogressive. The appellants claimed that the Pleasant Grove Court had determined that the purpose prong of section 5 extends beyond non-retrogression. The Court rejected this argument, noting that the facts in Pleasant Grove presented the Court with a peculiar situation. The city in that case consisted of a nearly exclusively white population, with only thirty-two black citizens, none of whom were registered to vote. After annexing new land, mostly vacant or inhabited by whites, the city sought section 5 preclearance for their new districting plan. The Court upheld the district

199. See id. at 334-35.
200. See Beer v. United States, 425 U.S. 130, 156 (1976) (Marshall, J., dissenting). In disagreeing with the majority, Justice Marshall asserted that the Court's Fourteenth Amendment jurisprudence indicated that "dilution of voting power refers to resulting voting strength that is something less than potential (i.e., proportional) power, not to a reduction of existing power." Id. Under Justice Marshall's reasoning, a minority plaintiff could simply assert that the city has not maximized minority voting potential. But see Miller v. Johnson, 515 U.S. 900, 925 (1995) (rejecting the Justice Department's assertion that section 5 requires the state legislature to enact a "max-black" plan, i.e., a plan that would maximize the potential power of minority voters were those voters to be consolidated into a single congressional district).
201. In order to sustain a cause of action for violation of section 2 of the Voting Rights Act, the plaintiff must plead and prove the three "Gingles factors": (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) that it is "politically cohesive," and (3) that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." Karlan, Still Hazy, supra note 7, at 307 (quoting Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986)).
204. Id. (citing Pleasant Grove, 479 U.S. at 465 n.2).
205. Id. at 340.
court's finding that the city had a discriminatory purpose because section 5 "looks not only to the present effects of changes, but to their future effects as well... [and] it is quite plausible to see [the annexation] as motivated by the impermissible purpose of minimizing future black voting strength."\textsuperscript{206} Thus, the Court held in \textit{Pleasant Grove} that a jurisdiction that attempts to dilute potential future minority voting strength through the enactment of a new voting procedure may fail to gain preclearance because of a retrogressive purpose.\textsuperscript{207}

Not only will black voters have a claim for dilution of future voting strength, but the states face serious equal protection concerns under the current non-retrogression principle.\textsuperscript{208} If the last legally enacted plan is the benchmark by which to measure section 5 violations, a state faces a unique problem if its minority populations have relocated in a way that decreases the minority population of any of its majority-minority districts to the point where blacks are no longer a political majority of the voters in that district. For instance, if blacks constituted twenty percent of a state's population after the 1980 census, the state could have drafted its voting plan to create two majority-minority districts out of ten total districts. If the black population drained out of those two majority-minority districts and did not re-concentrate in another location, the state might feel compelled to draw two new majority-minority districts elsewhere to ensure Justice Department preclearance.\textsuperscript{209} But, if the state tried to draw two new majority-minority districts in a different location, it could face an equal protection challenge from white voters who suddenly found themselves in a majority-minority district with little hope of electing a candidate of their choice.\textsuperscript{210} It is at this point that states trying to gain preclearance would be forced into the impossible situation of trying to defend a

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\textsuperscript{206} \textit{Id.} (citing \textit{Pleasant Grove}, 479 U.S. at 471-72).
\textsuperscript{207} \textit{Id.}
\textsuperscript{208} The dissent in \textit{Miller} noted that "[a] history of exclusion from state politics left racial minorities without clout to extract provisions for fair representation in the lawmaking forum." \textit{Miller v. Johnson}, 515 U.S. 900, 948 (1995) (Ginsburg, J., dissenting). "The majority, by definition, encounters no such blockage." \textit{Id.} "White voters in Georgia do not lack means to exert strong pressure on their state legislators." \textit{Id.} The white voter placed by the state legislature in a majority-minority district has the same miniscule opportunity of electing a representative of his choice as the black voter placed in a majority-white district. While white voters, as a group, do not face the same struggle for representation, Justice Ginsburg seems to ignore that the essence of the equal protection doctrine is to insulate \textit{individuals} from discrimination by the state.
\textsuperscript{209} See, e.g., \textit{Id.} at 907-08 (noting that Georgia was continually frustrated by the Justice Department's refusal to grant preclearance and its insistence on the creation of a new majority-minority district that linked minority populations hundreds of miles apart).
\textsuperscript{210} See \textit{Id.}
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district from an equal protection challenge. The problem is that
the very factor that makes a districting plan likely to achieve pre-
clearance (successfully preserving minority voting strength) would
also make the plan vulnerable to an equal protection challenge on
the basis that the district was not geographically compact.

The shifting of minority populations is where the problems
with the non-retrogression principle and gerrymandered election
districts intersect. The Supreme Court has held that districts
drawn using race as the predominant factor are unconstitutional
violations of equal protection. The Court has likewise noted, how-
ever, that it will not subject reapportionment plans to strict scrut-
tiny when states create majority-minority districts, as long as state
legislatures do not use race as the predominant factor or ignore
traditional districting principles when drawing proposed election
plans. Yet, in order to obey non-retrogression principles, race
must always be the most important criterion used in drawing elec-
tion districts. In order to avoid backsliding in creating opportuni-
ties for minority voters, the state has to draw enough districts with
blacks as a majority of the voting population to ensure that minor-
ity votes are not diluted relative to prior levels.

B. Three Solutions to the Conflict

There are currently three prominent solutions for ending the
stalemate between equal protection concerns and the non-
retrogression principle of the Voting Rights Act. This Note under-
takes a critique of the first option, as proposed by David Guinn,
Christopher Chapman, and Kathryn Knechtel, of one court’s at-
tempt to redefine the non-retrogression baseline. Barring redefi-

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211. See id.
212. See, e.g., id. at 921.
214. Section 2 of the Voting Rights Act also bars states from drawing districts in a way that
gives minority voters a diminished capacity to elect the representative of their choice in the way
that white voters are able to do simply because they are the majority. Id. at 993. Section 2 may
therefore require that a state draw a majority-minority district if three factors (known as the
Gingles factors) are present: (1) the minority group is "sufficiently large and geographically comp-
act to constitute a majority in a single-member district," (2) "it is politically cohesive," and (3)
"the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's
preferred candidate." Id. at 993-94 (quoting Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986)).
215. See Karlan, supra note 1, at 747-49.
216. David M. Guinn et al., Redistricting in 2001 and Beyond: Navigating the Narrow Chan-
el Between the Equal Protection Clause and the Voting Rights Act, 51 BAYLOR L. REV. 225, 261-
nition of the non-retrogression baseline, a second option calls for the abolition of the non-retrogression requirement for Justice Department preclearance. Lastly, a third option contemplates using proportionality as a non-retrogression baseline. Each of these options offers certain advantages and drawbacks, but each also offers a starting point to address the inherent confusion in the current Court jurisprudence regarding self-contradicting reapportionment doctrines and the Voting Rights Act and envisions a new solution for states.

1. Option 1: Redefine the Retrogression Baseline

One method that the courts could use to help states avoid drawing discriminatory districts is to redefine the retrogression baseline. The benchmark by which a districting plan is currently measured for non-retrogression is the last legally enacted voting plan. The problem with this baseline is that when states attempt to redraw districts after the 2000 census, the last legal voting plan that they will use as a benchmark could be unconstitutional not because it discriminates against minority voters, but because it violates the Equal Protection Clause. Such plans were not unconstitutional when state legislatures enacted them after the 1990 census, but seen through the prism of the Supreme Court’s decisions in Miller and Shaw, states may be forced to recognize that they impermissibly drew plans using race as the predominant factor.

Redefining the benchmark by which the Justice Department measures non-retrogression could solve the problem presented by states that might have an unconstitutionally drawn reapportionment scheme operating as their last legally enacted plan. One pro-

218. Guinn et al., supra note 216, at 253. The authors observe that although some states “may have gone through an entire decade with a benchmark that may have been constitutionally suspect, by adhering to traditional redistricting principles, if the new plan does not cause retrogression, the political subdivision will have overcome its old, constitutionally suspect benchmark.” Id. Although it is certainly important for a district to adhere to achieving the goals of both traditional districting principles and the current non-retrogression principle, this argument fails to solve the problem of balancing constitutional and Voting Rights Act concerns. State legislatures will have great difficulty adhering to traditional districting principles, such as geographic compactness and contiguity, while at the same time avoiding retrogression of minority voting opportunities. Because retrogression is measured from the last legally enacted voting plan, and many such plans drafted after the 1990 census created unconstitutional, impermissibly drawn majority-minority districts in order to prevent equal protection violations, a state legislature will almost certainly require a reduction in the number of majority-minority districts, inevitably causing some reduction in the opportunity for minority voters to elect a candidate of their choice.
posal has suggested that when the U.S. Attorney General recognizes that a state's current plan is an impermissible racial gerrymander, the Justice Department could use traditional districting principles as a baseline for deciding whether the new plan results in diminished opportunities for minority voters. This solution seems unworkable because of the conflict between traditional districting principles and adequate minority voting opportunities.

In the past, traditional districting principles, including geographical compactness, contiguity, and respect for political subdivisions, have led states to draw districts in which minorities were not a majority of a district's population. Most majority-minority districts have sprung from a state legislature's willingness to manipulate or overlook traditional principles and place race above all other considerations. Therefore, taking traditional principles into account would almost certainly result in a retrogression of minority voting opportunities, beyond even those properly diminished by eliminating racially gerrymandered districts. Also, redrafting the section 5 non-retrogression baseline would force the Justice Department to define what it considers traditional districting principles. Many of the states covered by the section 5 preclearance requirement used apportionment schemes that included traditional districting principles before Congress passed the Voting Rights Act.

219. Id. at 252. The authors concede that this plan would force the Justice Department to accept an inevitable decline in minority voting strength in districts that were formed on the basis of an unconstitutional racial gerrymander to begin with. Id. Preclearance proceedings would therefore recognize a difference between diminished minority voting strength due to the elimination of racially gerrymandered districts, and a decline in minority voting strength because a state's plan purposefully forced the decline of minority voters' opportunity to elect the candidate of their choice.


221. See, e.g., Shaw v. Reno, 509 U.S. 630, 644-49 (1993) (Shaw I) (holding that racially gerrymandered election districts violate the Equal Protection Clause because race was used as the predominant factor in drawing district lines).

222. But see Guinn et al., supra note 216, at 252 (suggesting that the 2000 census will reveal that the population growth experienced by many states subject to preclearance will be due to an increase in minorities as both a percentage and total number of the state's citizenry, and therefore, using traditional districting principles will not have the same malevolent impact on minority voting opportunities that such principles had when minorities were a smaller segment of the population).

223. But see Karlan, supra note 1, at 745 (noting that Georgia's concept of traditional districting principles before Miller was "constitutionally obnoxious"). Before Congress passed the Voting Rights Act, Georgia's refusal to split traditional political subdivisions, such as counties, resulted in the disproportionate influence wielded by rural white voters throughout the early part of the twentieth century. Id.
A second method of reshaping the non-retrogression baseline calls for any jurisdiction covered under the preclearance requirement to ask a district court to declare whether that state's districting plan is invalid under Shaw.\textsuperscript{224} Following a district court's declaration of invalidity, the Justice Department's benchmark for measuring that state's degree of non-retrogression would then become the last legally enacted voting plan before the one declared unconstitutional on equal protection grounds.\textsuperscript{225} This solution seems valid for states that had a recently enacted legal voting plan, but it creates a potential nightmare for others. Such a solution might force the Justice Department to look backwards in time nearly twenty-five or thirty years to find a voting plan that did not violate either the Equal Protection Clause or section 2 of the Voting Rights Act. In most states, a voting plan more than two decades old would bear little relation to the current population demographics, thereby creating a potential "Catch-22" for state legislatures.

A third practical suggestion for redefining the non-retrogression baseline is to seek judicial preclearance rather than Justice Department approval.\textsuperscript{226} Under this option, states would file suit for a declaratory judgment granting preclearance in the U.S. District Court for the District of Columbia.\textsuperscript{227} By conceding that its current districting plan is unconstitutional, the state could then ask the court to identify the appropriate, most recently enacted election plan.\textsuperscript{228} The greatest advantage to this approach is the flexibility that it allows the court in determining the appropriate benchmark. For those states that have never enacted a baseline that would be considered constitutional under Shaw, the court could employ an alternative benchmark based on a state's particular circumstances.\textsuperscript{229} With flexibility, however, comes the danger inherent in increased judicial activism. This scenario would obligate the court to undertake an intensive study of a state's unique population and

\textsuperscript{224} Guinn et al., supra note 216, at 252.
\textsuperscript{225} Id. For this proposition, the authors cite to the Supreme Court's holding in Abrams that "section 5 cannot be used to freeze in place the very aspects of a plan found unconstitutional." Id. at 249.
\textsuperscript{226} Id. at 253.
\textsuperscript{227} Id.
\textsuperscript{228} Id. The authors note that this would allow the court to examine the constitutionality of the benchmark before the state drafts a reapportionment plan, and would prevent the state from erroneously employing an unconstitutional retrogression baseline. Id.
\textsuperscript{229} Id. The court would have many options in choosing a baseline for states without a legally enacted benchmark. The foremost advantage of the court choosing the non-retrogression baseline is that it could take into account a state's ability to draw majority-minority districts while also respecting geographical compactness.
racial demographics in order to determine a reasonable non-retrogression baseline, an investigation for which the Justice Department is better suited due to its administrative nature. In addition, when the Justice Department denies preclearance, a state currently has the option of seeking a declaratory judgment from the U.S. District Court for the District of Columbia.230 Because this scenario obligates the state to bypass the Justice Department and seek preclearance from the court, the state legislature would have no recourse if the court proposed a plan that the legislature found unworkable.

Both the courts and the jurisdictions subject to section 5 preclearance requirements would encounter serious hurdles in the application of all three of these proposals for altering the retrogression baseline. The major obstacle in implementing these suggestions, and what makes them eventually unworkable, is their reliance on the courts for either finding or creating a retrogression baseline for each state that concedes its current plan violates the Equal Protection Clause. The Justice Department is better able to handle the challenges of finding a suitable retrogression baseline because of its expertise in dealing with each individual state's historical voting practices.

2. Option 2: Eliminate the Non-Retrogression Principle

Yet another option to help states draw constitutionally acceptable districts is to eliminate the non-retrogression principle. The non-retrogression principle could be eliminated as a requirement for preclearance from the U.S. Attorney General because it is inconsistent with the equal protection principles embodied in the Fourteenth Amendment.231 Equal protection demands that legislative districts cannot be drawn with race as the dominant factor,232 and if they are, such districts will be subject to strict judicial scrutiny.233 Surviving strict scrutiny requires that the state prove the

231. The Miller Court held that the Justice Department's interpretation of section 5 requiring states to maximize the number of majority-minority districts wherever possible was not supported by the language or legislative history of the statute. Miller v. Johnson, 515 U.S. 900, 925 (1995). Because there was "no indication Congress intended such a far-reaching application of section 5," the Court declined to address "the constitutional problems that interpretation raises." Id. at 927.
232. Id. at 925.
233. To subject a state's plan to strict scrutiny, a plaintiff claiming an equal protection violation must assert that "the State has relied on race in substantial disregard of customary and traditional districting practices." Id. at 928 (O'Connor, J., concurring).
way in which its districts were drawn was narrowly tailored to serve a compelling governmental interest.\textsuperscript{234} Because the Supreme Court has rejected compliance with the non-retrogression principle of section 5 as a compelling governmental interest, the states are left with virtually no way for their plans to survive strict scrutiny.\textsuperscript{235} The Court, however, would not accept compliance with the Justice Department's directives for complying with section 5 because these Justice Department mandates raised serious equal protection questions.\textsuperscript{236} The Court's constitutional role prohibits it from deferring to an agency's interpretation of a statute such as Section 5 when that interpretation raises a serious constitutional issue.\textsuperscript{237}

Also, the Supreme Court's ruling in \textit{Bossier Parish School Board} severely diminished the stated purpose of section 5.\textsuperscript{238} Because the Court held that the Justice Department was obligated to preclear even discriminatory apportionment schemes as long as they were non-retrogressive, minority plaintiffs no longer have the advantage of preventing a state from simply replacing one discriminatory plan with another.\textsuperscript{239} Next, because state legislatures have become more sophisticated, they are unlikely to submit plans to the Justice Department for preclearance that are overtly retrogressive under the "previous legally enacted plan" baseline.\textsuperscript{240} The real fight over district plans of the future is going to be not whether they are more discriminatory than the current voting plan, but whether they constitute discrimination in light of the ideal of equal opportunity to elect a representative of one's choice. The courts have steadfastly maintained, despite some dicta to the contrary,\textsuperscript{241}

\begin{itemize}
\item \textsuperscript{234} Shaw v. Reno, 509 U.S. 630, 657 (1993) (\textit{Shaw I}).
\item \textsuperscript{235} Miller, 515 U.S. at 920 (citing \textit{Shaw I}, 509 U.S. at 656). One state justification that could survive the application of the strict scrutiny test is the state's interest in remedying the effects of past racial discrimination. \textit{Id}.\textsuperscript{236} Id. at 923 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978)).
\item \textsuperscript{237} Id. (noting that such deference would be "surrendering to the Executive Branch [the Court's] role in enforcing the constitutional limits on race-based official action").
\item \textsuperscript{238} See supra notes 198-207 and accompanying text (discussing \textit{Bossier Parish School Board}); J. Gerald Herbert, \textit{Redistricting in the Post-2000 Era}, 8 GEO. MASON L. REV. 431, 444 (2000) (noting that "[i]t is no longer sufficient to argue that the adoption of \textit{Bossier Parish School Board} was too broad in its application because it is clear that the end result is plainly at odds with the prophylactic purposes of section 5, which Congress intended to place the burdens of time and inertia on the shoulders of the perpetrators of discrimination rather than the victims").
\item \textsuperscript{240} Johnson v. DeGrandy, 512 U.S. 997, 1018 (1994) (observing that Congress recognized this point when it adopted a 1982 amendment to the Voting Rights Act, stating that "since the adoption of the Voting Rights Act, [some] jurisdictions have substantially moved from direct, overt impediments to the right to vote to more sophisticated devices that dilute minority voting strength").
\item \textsuperscript{241} See \textit{Bossier Parish Sch. Bd.}, 526 U.S. at 336-41 (holding that although dicta in both \textit{Beer v. United States}, 425 U.S. 130 (1975), and \textit{Pleasant Grove v. United States}, 479 U.S. 462 (1987),
that this fight lies under a standard section 2 action for declaring a plan unconstitutional and not in the section 5 preclearance determination by the Justice Department. Essentially, section 5 actions were instituted to shift the burden of proving the discriminatory nature of a voting plan from the wronged minority plaintiff to the state legislature.\(^2\) Therefore, by eliminating the non-retrogression principle, states would be freed from the pointless exercise of seeking Justice Department preclearance for a plan that will not survive an equal protection challenge in the courts. In short, elimination of the non-retrogression principle as the criterion for preclearance would simply recognize what the Supreme Court has already acknowledged: that the real battle over discriminatory reapportionment plans has shifted to section 2 claims.

3. Option 3: Use Proportionality As the Non-Retrogression Baseline

A state's proposed districting plan could be measured according to the change in the state's racial demographics, rather than by the previously enacted legal voting plan. This approach is more logical than the non-retrogression principle because non-retrogression does not take into account the fact that minority voters could voluntarily relocate from their current districts. Such a redistribution of the minority population would make the creation of geographically compact districts with a majority of minority voters an impossible task. Non-retrogression also does not plan for the possibility that minority voters could actually decline as a percentage of the state's overall population. If a state that contains only one majority-minority district faces a decrease in the percentage of its minority residents, that state could be obligated to continue providing the minority population with that one district in order to avoid backsliding under the non-retrogression principle.\(^3\)

At least one Supreme Court case has alluded to taking into account the percentage of a jurisdiction's minority population when measuring whether a proposed districting plan would grant a mi-


\(^3\) But see Guinn et al., supra note 216, at 252 (asserting that "[i]f because of declining population in the minority community, a political subdivision is simply unable to maintain the previous benchmark, this physical impossibility will certainly not be considered retrogressive").
nority equal voting opportunity.\textsuperscript{244} The plaintiffs in \textit{Johnson v. DeGrandy} alleged that a Florida state legislative apportionment scheme violated section 2 of the Voting Rights Act.\textsuperscript{245} Minority voters claimed that the plan divided both blacks and Hispanics among separate legislative districts when their populations were sufficiently concentrated and contiguous to have formed one or more majority-minority districts.\textsuperscript{246} The Supreme Court held that the plan did not violate section 2 because the Florida plan provided for majority-minority districts that were approximately proportional to minorities' voting shares of the overall population.\textsuperscript{247} The Court noted that this concept of "proportionality" was distinct from that prohibited under section 2, which disclaimed the idea that minority candidates had a right under the statute to be elected in proportion to their share of the voting population.\textsuperscript{248}

The Court declined, however, to adopt proportionality as definitive of whether a districting plan caused vote dilution.\textsuperscript{249} The main reason for rejecting proportionality as a "safe harbor" for jurisdictions seeking to implement new voting plans was that "the rights of some minority voters under section 2 may be traded off against the rights of other members of the same minority class."\textsuperscript{250} Another rationale cited against proportionality was that it would sometimes perversely force a state to create a majority-minority district, even where there was no need for race-conscious districting.\textsuperscript{251} The Court's final reason for refusing to implement the proportionality standard was that section 2 commanded an investigation into discrimination "based on the totality of the circumstances."\textsuperscript{252}

\textsuperscript{244} \textit{DeGrandy}, 512 U.S. at 1014 n.11.
\textsuperscript{245} Id. at 997.
\textsuperscript{246} Id.
\textsuperscript{247} Id.
\textsuperscript{248} Id. at 1014 n.11.
\textsuperscript{250} Id. at 1019 (noting that "under the State's view, the most blatant racial gerrymandering in half of a county's single-member districts would be irrelevant under section 2 if offset by political gerrymandering in the other half, so long as proportionality was the bottom line").
\textsuperscript{251} Id. at 1019-20. The Supreme Court observed that the \textit{Gingles} factors for proving a section 2 action were created because "society's social and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity." Id. at 1020 (citing \textit{Thornburg v. Gingles}, 478 U.S. 38, 50-51 (1986)). However, for other minority communities able to unite with majority voters under common interests, majority-minority districts would be unnecessary and would insulate them from the realities of compromise that are at the heart of the American political process. Id.
\textsuperscript{252} Id. at 1018.
While some fear that proportionality would sacrifice the voting opportunities of some individuals in favor of others, all race-conscious districting forces state legislatures to make this bargain. Whenever a state creates a majority-minority district, it effectively limits the voting opportunities of the white voters that reside in that district in order to increase the chances that minority voters will be able to elect a candidate of their choice. The same is true of the creation of majority districts—the chance that minority voters will elect their preferred candidate is reduced when they do not constitute the majority of the electorate. Given that the American form of government is a representative democracy, this is a fundamental truth of the nature of American elections. Race-conscious districting creates a presumption based on a parliamentary system of proportional representation. By creating a number of majority-minority districts to correspond with the state's percentage of minority voters, proportional representation assumes that one minority candidate from one district adequately represents the interests of the state's minority citizens. This rationale probably explains why the Court cannot seem to articulate districting standards that make sense in light of the country's electoral system.

Proportionality gains a methodological advantage in that states will not be forced to obsess over how to distribute new legislative districts created due to a state's population growth. Under current retrogression principles, a plan created after the addition of congressional seats would have to provide at least one majority-minority district. When new congressional seats are awarded after the census, a state needs only to examine whether the minority population has a corresponding percentage of majority-minority districts. For instance, when Georgia increases the number of legisla-

253. Id. at 1025 (O'Connor, J., concurring) (commenting that "any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large") (quoting Thornburg, 478 U.S. at 84 (O'Connor, J., concurring)).

254. Shaw v. Hunt, 517 U.S. 899, 916-17 (1996) (Shaw II). The Supreme Court held that "if a [section] 2 violation is proved for a particular area, it flows from the fact that individuals in this area 'have less opportunity than other members of the electorate to participate in the political process and to elect the representative of their choice.' The vote dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the state." Id.

255. Karlan points out that one reason Georgia may have been required to form one majority-minority district out of ten in 1982 was that the respective populations of those ten districts (546,000 each) was larger than the populations of the eleven districts granted after the 1990 census (496,000 each). Karlan, supra note 1, at 749. Blacks could have constituted a majority in a single-member district under the 1990 district size. Id.
tive districts from eleven to thirteen, they can note that blacks constitute twenty-eight percent of the state's population, and draw three majority-minority districts. Given that both proportionality and other types of race-conscious districting share the drawback of sacrificing individual rights for the sake of the group, proportionality seems the lesser of two evils.

It is a tenuous argument to say that proportionality would require the creation of majority-minority districts in some areas where it was not necessary. This assumes that the bulk of majority-minority districts are created after careful examination of whether certain minority populations reside in areas so rife with ethnic conflict that their majority-white neighbors vote in a way that regularly defeats the minority choice candidate. This bloc voting by the white majority is in fact the first of the three Gingles criteria necessary to prove a violation under section 2.256 The gerrymandered districts that appeared before the Court in the 1990s, however, revealed that minority populations were often connected by no more than several hundred miles of a common interstate.257 It seems unlikely that in the creation of a district separated by both geographic and economic interests that the legislature was able to tell whether each of these numerous black communities was so politically at odds with its white neighbors that they were unable to reach a viable political compromise. This premise, in turn, assumes that in each district there is a candidate always identifiable as a "minority" candidate.258 If minorities were able to form voting coalitions with their geographically contiguous white neighbors, there would be no need for race-conscious districting in the first place.

The Court's insistence that voting opportunity be measured based on the "totality of the circumstances" also does not explain why proportionality would be a less promising test than the current non-retrogression standard. The DeGrandy Court emphasized the totality of the circumstances approach because of the "demonstrated ingenuity of state and local governments in hobbling minor-

256. See supra note 201 (listing the Gingles factors).
257. See, e.g., Shaw II, 517 U.S. at 903.
258. See Shaw v. Reno, 509 U.S. 630, 647 (1993) (Shaw I). The Supreme Court flatly rejected this assumption as a dangerous one in Shaw I. See id. Race-conscious districting "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." Id. The Court also noted that race-conscious districting sends the message that representatives for majority-minority districts should "believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." Id. at 648.
ity voting power.\textsuperscript{289} As some of the cases discussed above have noted, however, jurisdictions continue to implement districting plans that are arguably either discriminatory towards minorities or violate the equal protection rights of white voters—yet, these plans still receive Justice Department preclearance under section 5 because they do not violate the non-retrogression principle.

Regardless of the DeGrandy Court's refusal to recognize proportionality as a safe harbor for a legislature's districting plan, the Court did acknowledge that it could be used as one factor in determining whether a section 2 violation has occurred.\textsuperscript{260} But, the courts could also adopt proportionality as the main indicator of whether a section 5 violation has occurred. A legislature's main dilemma is that by engaging in race-conscious districting, they expose themselves to equal protection claims. If they fail to draw districts by taking race into account, they become vulnerable to section 2 claims for discriminatory voting practices. The courts could agree, however, that making the number of majority-minority districts proportional to the percentage of minorities in the state's population would insulate the state from both an equal protection claim by majority-white voters and preclearance rejection from the Justice Department.

V. CONCLUSION

Those states that are forced to redraft congressional districting plans following the 2000 census face an imponderable dilemma. Those jurisdictions currently subject to section 5 preclearance under the Voting Rights Act must balance the competing claims of white voters concerned with racially gerrymandered districts drawn in violation of the Equal Protection Clause with those of minority citizens angered by reapportionment plans that seem to dilute their potential voting power. Supreme Court decisions such as Shaw, Miller, and Bossier Parish School Board obligate state legislatures that propose districting plans following the 2000 census to reassess their understanding of the non-retrogression principle.\textsuperscript{261} This high-wire act will demand that state legislatures understand that Shaw prohibits using race as the overriding factor in crafting a new districting plan.\textsuperscript{262} In addition, Bossier Parish School Board mandates

\begin{itemize}
\item \textsuperscript{260} Id. at 1021.
\item \textsuperscript{261} Guinn et al., \textit{supra} note 216, at 253.
\item \textsuperscript{262} Karlan, \textit{supra} note 7, at 300-03.
\end{itemize}
that the Justice Department preclear all non-retrogressive plans, regardless of their discriminatory effects. However, a state must constantly remember that such preclearance does not relieve it of the obligation to ensure that such plans do not violate the equal voting opportunity principles of section 2.

In light of these competing concerns, the most logical solution to the districting gridlock is the elimination of the non-retrogression principle from the section 5 preclearance requirement. Because preclearance does not insulate states from suits based on section 2 violations, state legislatures should focus on creating reapportionment plans that relieve equal protection concerns. By concentrating on satisfying criteria such as geographical compactness and respect for political subdivisions, states are more likely to meet the districting standards the Court imposed in Shaw and Miller. By adhering to these traditional districting principles, state legislatures choose the lesser of two evils and remove themselves from the potentially paralyzing situation of fighting a districting war on two fronts.

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