Redistricting in a Post-Shaw Era: A Small Treatise Accompanied by Districting Guidelines for Legislators, Litigants, and Courts

Katharine Inglis Butler

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REDISTRIBUTING IN A POST-SHAW ERA: A SMALL TREATISE ACCOMPANIED BY DISTRICTING GUIDELINES FOR LEGISLATORS, LITIGANTS, AND COURTS

Katharine Inglis Butler

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INTRODUCTION

I. SHAW V. RENO LIMITS THE STATES' OPTIONS FOR CREATING MINORITY DISTRICTS

Legislators in jurisdictions with even modest minority populations will find adopting a challenge-resistant redistricting plan to be more difficult than ever before. The problem is how much consideration to give to race. Too little consideration may produce a plan subject to challenge under the Voting Rights Act (the “Act”). Too much consideration may produce a plan subject to challenge on constitutional grounds.

The present seemingly irreconcilable pressures on the districting process can, I maintain, be traced to advice peddled to legislators on the eve of the last round of redistrictings by an odd coalition of civil rights groups and the Republican National Committee, whose message was reinforced by the Voting Section of the Department of Justice. The advice, which was wishful thinking at best and cynically self-serving at worst, was taken willingly by the nation’s legislators, some of whom were understandably perplexed by the law, and others who saw following the advice as an opportunity to further their own political agendas.

While the packaging may have been more subtle, the underlying message to the legislators was that “the Voting Rights Act requires you to create as many minority controlled districts as physically possible.” Following this widely disseminated advice, legislators across the country declared themselves “legally bound” to subjugate, even abandon, all race-neutral districting standards, save population equality, in the pursuit of minority districts. The quest for the correct number of ideal minority dis-

2. States by law or custom follow certain standards in creating election districts. Districting standards are needed to encourage legislators to create sensible units for political participation by voters and candidates, and to quell their natural tendencies to engage in gerrymandering for personal and partisan advantage. Most states include within their districting standards provisions for the creation of compact districts, with easily recognized boundaries, made up solely of contiguous territory. Other typical standards call for creating districts that respect political subdivision boundaries, retain the cores of existing districts, avoid placing more than one incumbent in a district, and accommodate communities of interest. For comprehensive, state-by-state information on redistricting principles, see Center for Voting and Democracy, Mapping Our Future: A Public Interest Guide to Redistricting, at http://www.fairvote.org/redistricting/reports/remanual/frames.htm
districts became the Holy Grail of redistricters in 1990, much the way "one-person, one-vote" did some three decades earlier.3

In an earlier era, the impact of this advice would have been limited. Prior to the 1990 Census, neither the racial population data nor the technology was available to separate minority population concentrations from the surrounding general population for aggregation into minority districts. The 1990 Census, however, reported population-by-race data for every closed polygon in America. This meant that, with the help of modern software, legislators could literally sit at a computer screen and aggregate minority population concentrations as needed to create their notions of ideal minority districts.

The results of this legislative, computer-aided artistry were the now infamous districts that were drawn down interstates or resembled Rorschach Ink Blots or Modigliani paintings. Those of us who were shocked that the blatant use of race as a significant basis for state action was so earnestly advocated and so willingly embraced were not surprised when, in Shaw v. Reno,4 the Supreme Court declared that, absent a compelling state interest, race-based assignment of voters to districts was prohibited by the same Fourteenth Amendment that prohibited states from using race to assign children to schools. Under certain circumstances, the state's interest in complying with the Voting Rights Act could justify its use of race, but only to the extent that the state "narrowly tailored" its race-based efforts to those necessary to satisfy the Act. Despite a series of subsequent cases addressing the issue, the Court has not clarified the exact limitations on the state's use of race.5 Nor has it endorsed a precise use of race that

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This article makes several references to Hunt v. Cromartie, 532 U.S. 234 (2001). The Preliminary Print of the United States Reports indicates that, pursuant to Supreme Court Rule 35.3, Governor Michael F. Easley was substituted as a party for former Governor James B. Hunt, and thus, the style of the case officially has changed to Easley v. Cromartie. Because, however, the case has already been widely cited as Hunt v. Cromartie, it will be referenced throughout as such.
is both “necessary” to comply with the Voting Rights Act and sufficiently “narrowly tailored” to avoid offending the Constitution.

As legislators confront conforming districts to the 2000 Census, Shaw remains the law of the land—but precariously so. Notwithstanding the views of those of us who believe that Shaw was consistent with every Supreme Court decision on the state’s use of race post-Brown v. Board of Education, it was a five-four decision. The Shaw progeny decisions have also been decided by a five-Justice majority, with the four Justices in the minority retaining to their original dissenting views. Retirement of a single Shaw majority Justice would raise the possibility that Shaw could be significantly modified or even reversed. Moreover, interpretation of some of the more critical of the Shaw holdings depends on the views of Justice O’Connor—meaning that line drawers must tailor their actions to her positions. Thus, legislators can be justifiably anxious that they will be “damned by the Constitution” if they consider race and “damned by the Voting Rights Act” if they do not. Moreover, even if they endeavor to carefully navigate the precarious course between the Constitution and the Act, their best efforts may yet be undone by the change of a single vote on the Court.


8. Conventional wisdom no doubt is that, with a Republican in the White House, appointees to the Court in the near future will be ideologically in tune with the Shaw majority. Appointees’ future positions, however, are not fully predictable. Justice Souter, appointed by George H. W. Bush, is one of Shaw’s most adamant detractors. See Shaw, 509 U.S. at 679–87 (1993) (Souter, J., dissenting); see also Vera, 517 U.S. at 1045–77 (Souter, J., dissenting).

9. Just last term, Justice O’Connor joined the Shaw dissenters in upholding North Carolina’s redrawn Twelfth Congressional District—a district that was less bizarre than its predecessor, which had been the subject of the original Shaw decision, but that nevertheless was significantly gerrymandered. Cromartie II, 532 U.S. 234, reh’g denied, 121 S. Ct. 2239 (2001). Cromartie II technically held that the plaintiffs had failed to prove that race, rather than politics, was responsible for the district’s deviation from traditional districting standards. Id. at 257–58. Practically, however, Cromartie II means that legislators so inclined can evade Shaw if they employ just the right tactics to satisfy Justice O’Connor—not necessarily an easy task.
The highly polemical literature generated by Shaw quite properly debated the merits of the majority's view, contemplated the impact of the decision on minority voting power, protested the awful dilemma it forced legislators to face, and proposed alternatives to race-based districts. Important though they are, I will not revisit those issues here. It is time for concrete proposals to deal with the redistricting task confronting legislators now. As interesting, politically sound, and racially fair as non-majoritarian representational schemes proposed by Shaw detractors may be, as a practical matter, few jurisdictions are likely to abandon their geographically based, single-member-district electoral schemes now in place. Thus, a major objective of Part One of this article will be to clarify Shaw's impact on districting options.

II. PRODUCTION OF A FAIR AND LAWFUL DISTRICTING PLAN REQUIRES MORE THAN COMPLIANCE WITH SHAw

Avoiding Shaw problems clearly is the most perplexing of the obstacles to a lawful districting plan, but there are others. First and foremost, of course, districts must conform to the Constitution's population equality requirements—the so-called "one-person, one-vote" mandate. The Constitution also prohibits the political party in power from intentionally diluting the minority party's voting strength. The Supreme Court's recognition of political gerrymandering claims will no doubt encourage challenges, but problems of proof mean that few actually will be successful. Shaw notwithstanding, jurisdictions must in some circumstances take race-based steps to comply with the Voting Rights Act. The problem with the steps legislators took in the 1990s was that they went beyond anything actually required by the Act. Section 2 of the Act prohibits dilution of minority voting strength. All jurisdictions with even modest minority populations must consider whether steps are necessary to avoid subsequent section 2 liability. Section 5 of the Act, which applies in only a limited number of jurisdictions—primarily the states of the old Confederacy—requires covered jurisdictions to obtain a determination from federal authorities in advance of implementing a redistricting plan that such plan will not discriminate against minorities. Understanding both of these unfortunately complicated provisions is essential, not only because they impose genuine limitations on the line drawers' options, but also because race-based
steps actually necessary to comply with them will not run afoul of Shaw.

Thus, my objective in Part One of this article is to provide a small treatise analyzing and clarifying all aspects of federal law affecting redistricting. The information and analysis in Part One will help legislators, their would-be challengers, and courts called upon to act in the legislature’s stead to understand their redistricting obligations and options. Part One also provides the background necessary to evaluate the districting guidelines and procedures I suggest in Part Two.

Lest the reader believe that my only concern here is to help legislators successfully negotiate the obstacles federal law places in the path of their districting efforts, I note that legislators themselves are almost always the greatest threat to fair districting plans. With all the debate in recent years focused on the merits and demerits of affirmative racial gerrymandering, one can lose sight of the fact that, throughout history, incumbency protection and partisan advancement have been the chief forces behind the creation of most election districts. It is the traditional standards supplied by state law that must keep these historic forces from undercutting the creation of fair and functional districting plans.

While the Court’s Shaw decisions prohibit violating traditional districting standards for predominantly racial reasons, they also emphasize that violations for political reasons generally do not raise federal issues. Unfortunately, there are signs that legislators may take the absence of federal constraints as a green light to engage in outrageous political gerrymandering, creating districts whose ugly shapes will rival the notorious districts of the 1990s. Options available under state law to enforce traditional districting standards are beyond the scope of this article. However, in Part Two I extol the benefits of following these standards, which also are incorporated into the proposed guidelines.

Over the past two decades, governing bodies from state legislatures to small town councils have abandoned long-utilized multimember districts and at-large elections, usually in response to ac-

10. In the 1990s, these forces almost certainly interacted with those calling for minority districts to produce districts that were more bizarre than they would have been had they been driven only by racial concerns.
tual or perceived threats of racial vote dilution litigation. Most have adopted electoral systems made exclusively or predominantly of single-member districts. Consequently, the largest number of jurisdictions in history must, in light of the 2000 Census, adjust their district lines to conform with the requirements of "one-person, one-vote." While nothing can insulate their redistricting products from judicial challenge, this article provides guidance that, if heeded, will produce a plan that should survive any challenge largely intact—even if my predictions as to the resolution of open *Shaw* issues prove to be incorrect.
PART ONE: A SMALL TREATISE ON FEDERAL LAW AFFECTING REDISTRICTING

I. FEDERAL LIMITATIONS ON REDISTRICTING, OTHER THAN THOSE BASED ON SHAW V. RENO

Despite a longstanding recognition that reapportionment is a matter generally left to the states, legislators' choices must be guided by, and often are driven by, limitations imposed by federal law. Indeed, it was the perception that the Voting Rights Act trumped all state standards that encouraged many legislators in 1991 to engage in rampant gerrymandering contrary to their states' own districting guidelines. The Constitution and the Voting Rights Act do impose limits on the states' line drawing options, but seldom must a state actually ignore its traditional districting standards to comply with federal law.

Jurisdictions with even modest percentages of minority voters are likely to find that their most difficult districting task, both politically and legally, will be to comply with Shaw's limitations on the use of racial data to create districts. This, coupled with the fact that Shaw-related issues dominated redistricting litigation in the 1990s, dictates that Shaw and its progeny be a major focus of this article. Shaw's mandate, however, is better understood in the context of the requirements that the Voting Rights Act imposes on the districting process. Accordingly, limitations imposed by the Voting Rights Act, by the constitutional requirement of "one-person, one-vote," and by the modest constitutional restraints on partisan gerrymandering are the subjects of this section. Shaw's impact on the process is considered in the section that follows.

A. The Constitution Requires Districts to Be of Equal Population

A new era of federal involvement in state and local redistricting began in 1962 when, in Baker v. Carr, the Court removed malapportionment cases from the restrictions of the political question doctrine. In Baker, the Court held that federal courts have jurisdiction over claims that state legislative apportion-
ments violate the Fourteenth Amendment, that such claims are justiciable despite the political question doctrine, and that residents of malapportioned districts have standing to sue. In *Gray v. Sanders*, the first of the plethora of post-*Baker* cases to reach the Court on the merits, Justice Douglas declared that "all who participate in the election are to have an equal vote." Further, "political equality . . . can mean only one thing—one-person, one-vote." The rationale for the rule is that, unless districts contain roughly equal populations, the votes of residents of overpopulated districts are diluted relative to citizens in underpopulated districts.

Subsequent decisions extended the one-person, one-vote rationale to legislative elections of virtually every ilk. In *Reynolds v. Sims*, the Court refused to recognize an exception for the "little federal" legislative system—lower house elected based on population, upper house elected on the basis of counties, often "one senator per county" regardless of population—holding that the Fourteenth Amendment mandates equally populated districts for both houses of a bicameral state legislature. Other cases extended the rule to local governing bodies. The only elected bodies exempt from the requirement are judicial offices and special limited-purpose bodies, such as water districts.

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14. *Id.* at 186.
16. *Id.* at 379.
17. *Id.* at 381.
18. *Id.* at 380–81. For example, within the same city, a voter in a city council district of 1000 has less chance to influence the outcome of the election in his district than does a voter in a neighboring district of 500. The voter in the 1000-person district also must share access to his representative with more people.
20. *Id.* at 561–63, 568.
23. *See Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 730–32 (1973) (exempting water district officials); *Sailors v. Bd. of Educ.*, 387 U.S. 105, 108 (1967) (exempting appointed administrative officials). In *Board of Estimate v. Morris*, 489 U.S. 688 (1989), the exemption for appointed offices was found not applicable to the most powerful of New York City's governing bodies. The Board of Estimate consisted of eight members, three of whom were elected at-large. The remaining five members were the presidents of the city's five boroughs and were elected by only their borough's voters.
The Court has made clear, however, that its rule does not mean that single-member districts are mandatory under the Fourteenth Amendment. Multimember districts and at-large elections do not raise “one-person, one-vote” issues. Moreover, multimember districts and floterial districts can be combined with single-member districts within a common legislative election plan, so long as the proper population-to-representative balance is maintained.

1. Permissible Deviation from Population Equality in Congressional Districts

The equal population requirement for congressional districts comes not from the Fourteenth Amendment, but from Article I, Section 2. The Court concluded that even though the presidents of the boroughs served ex officio on the board, they were “elected” and performed general governmental functions; therefore, the one-person, one-vote principles applied. Because the boroughs differed widely in population (Brooklyn, the city’s most populous borough, had a population of over two million at the time, while Staten Island’s population was only about 350,000), the board could not continue to exist as a governing body with the borough presidents as members.


25. A “floterial district” is one created by combining two or more districts whose combined electorates then elect some number of additional representatives. See Davis v. Mann, 377 U.S. 678, 686–87 n.2 (1964). Typically, this system is used when none of the included districts has sufficient population to be entitled to additional seats but their combined populations entitle the entire area to another seat.

26. Reynolds v. Sims, 377 U.S. 533, 576–77, 579 (1964). The notion of “equally populated districts” is misleading in that it implies that all districts must contain the same population, which would suggest that a mixture of multimember, floterial, and single-member districts would not be acceptable. More accurately, each representative must represent roughly the same number of total people. It would have been a natural extension of the “one-person, one-vote” rule to conclude that all voters must be given the opportunity to vote for the same number of representatives to a legislative body. However, in Whitcomb v. Chavis, 403 U.S. 124 (1971), the Court upheld the constitutionality of a districting plan that combined multimember districts and single-member districts. Id. at 146–47. In Whitcomb, which is better known as an early racial vote dilution case, voters in single-member districts argued that voters in multimember districts had greater representation than those in single-member districts because each multimember district voter was able to vote for more than one representative. Id. at 128–29. The Court disagreed, concluding, essentially, that the appropriate comparison was “representatives to voters.” Id. at 141. Thus, a multimember district with a population of 5000 electing five representatives, was comparable to a single-member district with a population of 1000 electing one representative.

"Floterial districts" would be evaluated using the same rationale. For example, consider a county of 10,000 that elects ten council members, for a ratio of one councilman per 1000 persons. The county could be divided into nine single-member districts and one floterial district. Seven single-member districts would contain 1000 persons, two would contain 1500. The two more populous districts would be combined to form a floterial district electing one additional representative.
section 2 of the Constitution, which mandates that representatives to Congress be chosen “by the People of the several States.” While the Court recognized in Wesberry v. Sanders that mathematical precision in drawing congressional districts might not be possible, it nevertheless held that the Constitution requires that “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.” “As nearly as practicable” was subsequently interpreted in Kirkpatrick v. Preisler to require “a good-faith effort to achieve precise mathematical equality.” Thus it appeared that the failure to comply with mathematical precision was justifiable only if precision was not possible.

In Karcher v. Daggett, the Court rejected New Jersey’s argument that its 1980 congressional redistricting plan should be regarded per se as the product of a good faith effort to achieve population equality because the deviation among districts was smaller than the predictable undercount in available census data (less than one percent). The Court went on to say, however, that slight deviations are allowed if supported by “[a]ny number of consistently applied legislative policies,” which could include “making districts compact, respecting municipal boundaries, pre-

29. Id. at 18.
30. Id. at 7–8.
32. Id. at 530–31; see also id. at 537 (Fortas, J., concurring).
33. Id. at 531. The Court in Kirkpatrick rejected all of the following “justifications” for the plan’s 5.97% population variance: (1) to avoid fragmenting communities of interest; (2) to allow for political compromise; (3) to avoid fragmenting political subdivisions and thereby to limit partisan gerrymandering; and (4) to create geographically compact districts. Id. at 533–36.
35. Id. at 735–37. In the language of “one-person, one-vote,” population deviation means the percentage by which an individual district is “over” or “under” populated relative to the ideal. The “ideal” is absolute equality, so that for a city with a population of 5000, divided into five districts, the “ideal” district population would be 1000. A district that contained a population of 950 would have a deviation of -5%, while one that contained 1025 people would have a deviation of +2.5%. For constitutional purposes, it is a plan’s “overall” or “total” deviation that is significant. See id. at 99. This figure is the difference between the most populous and the least populous districts. If the most populous district has a deviation of +5% and the least populous has a deviation of -5%, the “total deviation” equals 10% (+5% - (-5%) = 10%). See Abrams v. Johnson, 521 U.S. 74, 98–100 (1997) (discussing and applying population deviation principles).
serving the cores of prior districts, and avoiding contests between incumbent[s]. The upshot of Karcher is that no avoidable deviation from population equality will be viewed as de minimis, and consequently, any avoidable deviation from absolute equality must be justified.

In Abrams v. Johnson, a 1997 case involving a congressional districting plan produced by a federal court after Georgia was unable to produce one, the Court accepted the justification offered for the plan’s very small deviation. Abrams, however, provides only slight relief from the “absolute equality” straightjacket. The Court reiterated that “absolute population equality [is] the paramount objective” in congressional redistricting. The population deviation at issue in Abrams was exceedingly slight, 0.35%, almost certainly less than the error in the census itself. Yet, the Court gave full consideration to whether the justification offered by the court was adequate and ultimately concluded that it was, based largely on the futility of making minor adjustments to the plan at issue six years after the census in “one of the fastest-growing States.”

Because computers and more detailed census data make it possible to avoid virtually all deviation, future debate is likely to involve how much deviation can be justified; what state interests will provide a justification; and, as a factual matter, whether an alternative plan can be produced that satisfies the state interest with a lower deviation than the challenged plan. One interest that no doubt was offered to justify deviations prior to Shaw, was

37. Id.
38. Karcher set up a two part test for determining the legal significance of a population deviation. First, the challenger must demonstrate that the deviation could be eliminated altogether by “a good-faith effort to draw districts of equal population.” Id. at 730. If this showing is made, the burden shifts to the state to demonstrate that “each significant variance between districts was necessary to achieve some legitimate goal.” Id. at 731.
40. Id. at 101. The deviation was justified by the state’s preference for not splitting counties and precincts.
41. Id. at 98 (quoting Karcher, 462 U.S. at 732).
42. Id. at 99–100.
43. Id. at 100.
to permit the creation of a majority-minority district. After Shaw, this justification may not be as readily accepted.

2. Permissible Deviation from Population Equality in Legislative Districts

The mandate for equally populated legislative districts comes from the Fourteenth Amendment, which the Court has concluded permits greater flexibility in deviation from population equality than Article I, section 2 of the Constitution permits in congressional districts. If based on legitimate considerations, the state may deviate from exact population equality in its legislative plans to: (1) make provisions for compact districts; (2) maintain (to a degree) the integrity of various political subdivisions; and (3) employ multimember or floterial districts. The Court has emphasized, however, that no interests are sufficient to justify deviation from population as the basis for representation. Furthermore, the equal population rule applies to both houses of a bicameral state legislature, and the constitutional infirmity of a non-population-based representative plan cannot be avoided by the fact that a non-judicial, political remedy, such as initiative and referendum, caused the adoption of the plan and is available to change it.

Note, moreover, that it is total population—not voting age population, citizen population, or registered voters—that must be approximately equal. In certain circumstances, basing districts

45. See, e.g., Karcher, 462 U.S. at 742.
46. See discussion, infra Part One, II.B.
47. U.S. Const. amend. XIV, § 2.
49. Id. at 578–79.
50. Id. at 579–80. Among the reasons found insufficient to justify a deviation from population-based representation by Reynolds and its companion cases were: (1) to accord recognition to a state’s heterogeneous characteristics; (2) to balance power between urban and rural areas in a legislature; (3) to insure effective representation of sparsely settled areas; (4) to protect insular minorities; (5) to insure accessibility of representatives to their constituents by preventing overly large districts; (6) to secure representation for economic or other group interests; (7) to take either geographic or topographic factors into consideration; (8) to grant greater representation to permanent rather than temporary military, or related personnel, or adhere to history or tradition. Annotation, Inequalities in Population of Election Districts or Voting Units as Rendering Apportionment Unconstitutional—Federal Cases, 12 L. Ed. 2d 1282, 1286 (1965).
52. See Reynolds, 377 U.S. at 579.
on total population seems inconsistent with the underlying rationale that each voter's vote have roughly the same impact on the outcome of elections. Individual voters in an election district that contains a large non-voting population—imprisoned felons, non-citizens, the military, or students—often will have a greater opportunity to influence the electoral outcome than voters in jurisdictions without these populations. Legislators can use the presence of large non-voting populations to accomplish goals that might not otherwise be possible within the stricture of "one-person, one-vote"—particularly if the non-voting population is geographically concentrated. For example, it may be possible to create a district in which African-Americans will be a majority of the electorate by combining one of these population concentrations with an African-American community that otherwise would be too small to be a majority of a district.

The Court has thus far refused to provide specific parameters for acceptable deviation from precise equality, stating instead that what is marginally permissible in one state may be unsatisfactory in another, and therefore, apportionment plans must be judged on a case-by-case basis. Nevertheless, in Brown v. Thompson, Justice Brennan gleaned from earlier decisions a four step test for evaluating deviation in apportionment plans.

53. If they satisfy the residence requirement, members of the military and students are eligible to vote on the same basis as other residents. See Dunn v. Blumstein, 405 U.S. 330, 336–39 (1972) (striking down a durational residence requirement for Tennessee voters as unconstitutionally restricting the fundamental rights to vote and travel). As a practical matter, however, most transients elect to retain a permanent, and therefore voting, residency elsewhere. In many jurisdictions, persons convicted of felonies lose their right to vote, at least while incarcerated. Richardson v. Ramirez, 412 U.S. 24, 54 (1974) (noting that the exclusion of felons from the vote is affirmatively sanctioned in section 2 of the Fourteenth Amendment). Even when felons are not automatically disfranchised, most inmates will not be residents for voting purposes of the county in which they are incarcerated. Id.

54. For example, suppose the ideal population for a county council district is 1000. A population of 1000 might contain, say, 600 persons of voting age. If half the district's population are not citizens, the 500 total citizen population might translate to only 250 voting age citizens. Thus, in a district with few non-citizens, an individual vote is 1/600th of the potential vote, whereas in the district with a substantial non-citizen population, it is 1/250th of the potential vote. Put another way, a citizen in the district with fewer actual voters has to share his representative with significantly fewer other voters than a citizen in other districts.


56. Id. at 852 (Brennan, J., dissenting).
First, the plaintiff must show deviation sufficient to make out a prima facie case.\textsuperscript{57} Deviations below ten percent ordinarily will be considered de minimis.\textsuperscript{58} However, legislators should not be tempted by the "de minimis" rule to aim for a ten percent deviation, because their obligation is to make "an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable."\textsuperscript{59} Were a state to set "ten percent deviation" as a goal, this in and of itself may provide sufficient additional evidence of invidious discrimination to constitute a prima facie case of unconstitutionality. Otherwise, if the deviation is less than ten percent, a challenger must establish that the legislature did not make "a good faith effort" to achieve population equality.\textsuperscript{60} Second, the state must advance a legitimate reason for any deviation above ten percent.\textsuperscript{61} Third, the state must show that the policy behind the deviation is indeed furthered by the plan.\textsuperscript{62} Fourth, even if the deviation is justified, a court must nevertheless determine "whether [it is] small enough to be constitutionally tolerable."

The Court has not established an absolute ceiling on the deviation that is constitutionally tolerable. In \textit{Mahan v. Howell},\textsuperscript{64} the Commonwealth of Virginia was able to justify a deviation of at least 16.4\% by establishing that this was the minimum deviation possible while keeping political subdivisions intact.\textsuperscript{65} The Court indicated that a deviation of this magnitude "may well approach tolerable limits."\textsuperscript{66} Presumably, the general parameters applica-
ble to deviations in state legislative plans also apply to districting plans for local governmental bodies.\textsuperscript{67}

B. \textit{Section 2 of the Voting Rights Act Prohibits Districting Plans that Dilute Minority Voting Strength}\textsuperscript{68}

When Congress adopted the Voting Rights Act in 1965, its most pressing concern was to put in place a comprehensive scheme to address massive state-sponsored disfranchisement of black voters in the South.\textsuperscript{69} Of the two Voting Rights Act provisions of consequence to redistricting today, the first, section 2,\textsuperscript{70} was not part of the original Act, and the second, section 5,\textsuperscript{71} received very little attention until the problem of disfranchisement had been largely addressed.

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additional deviations caused by adding a representative were minimal. \textit{Id.} at 847. The outcome in the case should be seen as strictly limited to the unique facts and posture of the case, and not as reopening the issue of acceptable deviation from population equality. \textit{Id.}
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67. \textit{See Abate v. Mundt}, 403 U.S. 182, 184–85 (1971) (holding that an 11.9\% maximum deviation in a county legislative apportionment plan was justified by the county’s desire to respect town boundaries).
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68. Section 2 has a long history in terms of the number of decided cases, if not in actual years, since its amendment in 1982. A Westlaw query limited to “Section 2,” “Voting Rights Act,” and “dilution” produced 475 cases which, while over-inclusive of actual cases in which the provision was outcome determinative, demonstrates the difficulty of providing general statements of the law beyond the issues directly addressed by the Supreme Court. Twenty years ago, I noted that lower courts applied a “Chinese menu” approach to conclude whether dilution was present which resulted in differences in outcomes that were not easily reconciled by differences in the facts. Katharine I. Butler, \textit{Constitutional and Statutory Challenges to Elections Structures: Dilution and the Value of the Right to Vote}, 42 \textit{La. L. Rev.} 851, 888 (1982). Today, guidance from the Supreme Court has produced somewhat greater consistency, but many issues remain open and outcomes continue to differ across federal appellate circuits and sometimes within circuits, depending upon the predisposition of the trial courts. On the issue of inter-circuit difference, compare \textit{Goosby v. Hempstead Town Bd.}, 180 F.3d 476 (2d Cir. 1999), \textit{cert. denied}, 528 U.S. 1138 (2000) (affirming trial court’s finding of dilution that gave virtually no weight to the political explanations for why black Democrats lost in a heavily Republican town), with \textit{League of United Latin Am. Citizens v. Clements}, 999 F.2d 831 (5th Cir. 1993) (en banc), \textit{cert. denied}, 510 U.S. 1071 (1994) (concluding that racial vote dilution is not present when divergent voting patterns are best explained by partisan preferences). Here, my objective is to provide only such background and detail as necessary to permit a legislative body to evaluate its redistricting options, including those I propose later for avoiding section 2 liability.
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71. \textit{Id.} § 1973c.
In jurisdictions where it applies, section 5 is the more burdensome of the Act’s two provisions for line drawers because it prevents implementation of a new districting plan until the state or political subdivision has established to the satisfaction of federal authorities that the plan is not discriminatory in purpose or effect.\(^7\)

Section 2 potentially influences more redistricting decisions than section 5 because it applies nationwide. However, it is less burdensome to legislators because those claiming that a districting plan violates its provisions must take the initiative to institute a judicial challenge and prove their case. It was a misunderstanding of section 2 that prompted some jurisdictions, particularly those not subject to section 5, to distort traditional districting standards in order to create majority-minority districts. While, technically, a legislative body is free to ignore section 2, leaving it up to would-be challengers to establish that its districting plan violates section 2, such a course would be ill-advised.\(^7\) That said, deciding what, if any, steps to take to avoid potential section 2 liability is difficult. As Shaw makes clear, if the precautions take the form of “race-based” districting, the legislature must first be certain that it is at risk for section 2 liability and second, must be certain that it does not make a greater use of race than is necessary to avoid potential liability.\(^7\) Thus, the redistricter must understand section 2’s prohibitions.

1. Vote Dilution Prior to 1982

Congress adopted the present version of section 2 in 1982 in response to the Supreme Court’s decision in City of Mobile v. Bolden,\(^7\) which held that racial vote dilution was actionable under the Constitution only if the dilutive election scheme had been

\(^7\) See discussion infra Part One, I.E.7.

\(^7\) Obviously, legislators could elect to ignore all districting criteria, leaving it up to challengers to compel compliance. However, a federal court will promptly enjoin implementation of a districting plan that has not obtained section 5 preclearance, or one that is constitutionally malapportioned because few facts will be in dispute, and the challengers’ right to prevail is clear. Section 2 is different in that the burden on the challenger is more onerous, the standards for a violation are much more subjective than those for “one-person, one-vote” and section 5, and the relevant facts are more numerous and more likely to be in dispute.


\(^7\) 446 U.S. 55 (1980).
adopted or maintained for the purpose of discriminating against minorities.\textsuperscript{76} Prior to \textit{Bolden}, plaintiffs were entitled to relief if they established that, under the "totality-of-the-circumstances," a challenged election device resulted in minorities having less opportunity than others in the electorate to participate in the political process and to elect candidates of their choice—a standard based on two Supreme Court decisions from the early 1970s, \textit{Whitcomb v. Chavis}\textsuperscript{77} and \textit{White v. Regester}.\textsuperscript{78} Both cases involved challenges to multimember state legislative districts—the method of election, which along with its local government counterpart, at-large elections, was the most common target of vote dilution litigation.\textsuperscript{79}

In \textit{Whitcomb}, the Court recognized that multimember election districts would be unconstitutional if, in combination with past and present discrimination, they permitted a bloc-voting white majority to fence the minority group out of the political process.\textsuperscript{80} The \textit{Whitcomb} plaintiffs were unsuccessful, however, because the Court concluded that it was politics, not race, that resulted in the defeat of the electoral choice of a black ghetto area in Indianapolis.\textsuperscript{81}

By emphasizing distinctions between Texas and Indiana, the plaintiffs in \textit{White} were successful. They convinced the lower court that Texas's long history of discrimination against minorities (including that directed toward the exercise of their right to vote), its peculiar form of multimember district elections (which included a post requirement and a majority vote requirement), and the present racist attitude of the electorate (which bloc-voted against minority candidates and which white candidates exploited through racist campaign tactics) deprived them of equal

\textsuperscript{76} Id. at 75–80.
\textsuperscript{77} 403 U.S. 124 (1971).
\textsuperscript{78} 412 U.S. 755 (1973).
\textsuperscript{79} A multimember district is a district in a legislative plan from which more than one representative is elected. Often, as was true in \textit{Whitcomb}, an entire county is designated a single election district from which enough representatives are elected to comply with one-person, one-vote requirements. Members of a state legislative body often are elected from a combination of multimember and single-member districts. A multimember district thus differs from "at-large" elections where all of a jurisdiction's voters elect all of the representatives to the governing body. The at-large method of election is used commonly by local government entities, such as counties, cities, and school boards.
\textsuperscript{80} \textit{Whitcomb}, 403 U.S. at 141–44.
\textsuperscript{81} Id. at 153.
access to the political process. The Supreme Court affirmed, concluding that the lower court's factual findings were sufficient to support the conclusion that the minority groups had been denied an equal opportunity to participate in the political process.

*Whitcomb* and *White* predated the Court's landmark decision in *Washington v. Davis,* which held that proof of a discriminatory purpose was an essential element in an Equal Protection challenge to facially neutral state action. Rather than viewing vote dilution as an infringement of the right to vote—a right protected without regard to discriminatory purpose—the *Bolden* Court concluded that it was indistinguishable from other disparate impact cases; thus, the mandate of *Washington* applied. Although plaintiffs had enjoyed only mixed success under *Whitcomb-White*'s vague, highly subjective, totality-of-the-circumstances test for discriminatory results, most saw the addition of an "intent" requirement as a virtual death knell for racial vote dilution claims.

2. Vote Dilution Under Amended Section 2

*Bolden* was decided on the eve of congressional hearings on the extension of certain key provisions of the Voting Rights Act. Civil rights organizations used the occasion to mount a lobbying effort to "overrule" *Bolden* by providing an alternative statutory basis for the racial vote dilution claim, which would be based on "discriminatory results" alone. It is likely that proponents of the amendment actually wanted something akin to a guarantee of proportional representation, but knew better than to ask for it. Opponents argued that abandoning the intent requirement would in fact result in proportional representation—a "fair share" being substituted for a "fair shake."

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84. 426 U.S. 229 (1976).
85. *Id.* at 239.
In the end, Congress compromised, giving proponents what they said they wanted—a return to the Whitcomb-White totality-of-the-circumstances test—instead of the proportional representation they privately wished for, and tried to appease opponents by including a disclaimer of any right to proportional representation. Amended section 2 prohibits voting practices that result “in a denial or abridgement of the right of any citizen . . . to vote on account of race or color, [or language minority status].” The statutory standard tracks the language from Whitcomb-White:

A violation . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by [minorities] in that [they] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

To aid interpretation of the Act’s vague language, Congress did little more than refer the courts to the pre-Bolden cases. Long after passage of section 2 was already assured, the Senate Judiciary Committee issued a report, which was influential in early court interpretations of the new amendment. The report set out a laundry list of factors gleaned from White and other pre-Bolden cases, which became popularly known as the “Senate Report factors.”

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89. See Boyd & Markman, supra note 87, at 1413–28.
91. Id. § 1973(b).
92. The report of the Senate Judiciary Committee states, “In adopting the ‘result standard’ as articulated in White v. Regester, the Committee has codified the basic principle in that case as it was applied prior to the Mobile litigation.” S. Rep. No. 97-417, at 28 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 205 [hereinafter Senate Report].
93. Id. Boyd and Markman observed that the report “seemed to be directed, not toward Senators, but toward federal judges who almost certainly would be called upon . . . to interpret . . . the new proposal.” Boyd & Markman, supra note 87, at 1420.
94. The factors include: (1) a past history of discrimination affecting voting; (2) the presence of racially polarized elections; (3) the use of election devices that enhance the opportunities for discrimination against minorities; (4) denial of minority access to a candidate slating process, if one existed in the jurisdiction; (5) the degree to which minorities still bear the effects of discrimination hindering their participation in the political process; (6) the presence of racial appeals in campaigns; and (7) the extent to which minorities have been elected to public office in the jurisdiction. Senate Report, supra note 92, at 206–07. Unresponsiveness of elected officials to minority concerns and the presence of unusually large election districts could in some circumstances be relevant. Id.
The impact of the amendment of section 2 would have been slight if it had resulted merely in reviving the Whitcomb-White totality-of-the-circumstances test since that test had not resulted in wholesale invalidation of multimember districts even in an era when minority voters had considerably less success in electing candidates of their choice than they had in 1982. However, judging from the subsequent disproportionate plaintiff success rate, the courts saw the amendment as an indication that Congress intended a more lenient standard. Relying largely on the Senate Report factors, the lower courts found dilution much more commonly than they had before Bolden.\footnote{95 See, e.g., Jones v. City of Lubbock, 727 F.2d 364 (5th Cir. 1984); Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984); United States v. Marengo County Comm'n, 731 F.2d 1546 (11th Cir. 1984); Major v. Treen, 574 F. Supp. 328 (E.D. La. 1983).}

3. \textit{Thornburg v. Gingles} Results in a Significant Increase in Majority-Minority Single-Member Districts

\textit{Thornburg v. Gingles},\footnote{96 478 U.S. 30 (1986).} the Supreme Court's first major decision interpreting amended section 2, gave a major boost to efforts to force jurisdictions to adopt some number of single-member districts in which minorities would constitute a majority of the electorate. In \textit{Gingles}, the Court explained that the gravamen of a dilution claim was that multimember districts permitted a numerically superior majority, voting as a bloc, to consistently defeat the minority group's preferred candidates despite their receiving high levels of support from the group.\footnote{97 Id. at 48-49.} Cohesive minorities, however, were in a position to blame the election structure for their defeat only if their residential patterns were such that an alternative electoral system would permit them to elect candidates without support from outside the group.\footnote{98 Id. at 50.} While many factors, including those from the Senate Report, were relevant to the ultimate determination of dilution, three conditions were essential to the plaintiffs' success:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes suffi-
cienly as a bloc to enable it—in the absence of special circum-
stances . . . usually to defeat the minority’s preferred candidate.\textsuperscript{99}

After Gingles, the lower courts continued to consider the Sen-
ate Report factors, but in fact most cases turned on the presence
or absence of the three Gingles preconditions.\textsuperscript{100} The Supreme
Court later made clear in Johnson v. De Grandy,\textsuperscript{101} however, that
the existence of all three preconditions was necessary, but not
sufficient.\textsuperscript{102} Plaintiffs were also required to demonstrate that,
based on the totality-of-the-circumstances, the challenged elec-
tion structure denied them an equal opportunity to participate in
the political process and to elect candidates of their choice.\textsuperscript{103}
Nevertheless, only rarely have plaintiffs not prevailed when they
established the preconditions.\textsuperscript{104} Moreover, rather than face the
staggering attorneys’ fees that accompany losing a section 2 suit,
many jurisdictions likely opted to abandon at-large elections at
the first sign of litigation.

It is a safe assumption that as a result of actual or threatened
litigation under section 2 over the past two decades, a substantial
number of jurisdictions that contain even modest percentages of
minority voters have abandoned at-large elections and multi-
member districts in favor of single-member districts, designed so
that some number contained a majority of minority voters. Con-
sequently, the number of jurisdictions at every level of govern-
ment that had to redraw their election districts in 2001 was sub-
stantially greater than for the last round of redistrictings. Thus,
future battles are less likely to involve whether single-member
districts must be adopted and more likely to involve whether
some of those districts must be majority-minority, and if so, how
many there must be and where they should be created.\textsuperscript{105}

\textsuperscript{99} Id. at 50–51 (citations omitted).
\textsuperscript{100} See, e.g., Williams v. State Bd. of Elections, 718 F. Supp. 1324, 1330 (N.D. Ill.
991, 997–98 (E.D. La. 1988); Neal v. Coleburn, 689 F. Supp. 1426, 1435 (E.D. Va. 1988);
\textsuperscript{101} 512 U.S. 997 (1994).
\textsuperscript{102} Id. at 1011–12.
\textsuperscript{103} Id.
\textsuperscript{104} See Clark v. Calhoun County, 21 F.3d 92, 97 (1994) (noting that only in an
unusual case should a plaintiff fail to establish a violation of section 2 when all three precon-
ditions are established). De Grandy itself was one of those rare cases. See also NAACP v.
Fordice, 252 F.3d 361, 374 (5th Cir. 2001).
\textsuperscript{105} The primary targets of vote dilution litigation prior to 1990 were at-large election
A potential problem for line drawers is the unresolved issue of whether a group that is unable to constitute a majority of a single-member district may nevertheless obtain relief under section 2 for dilution of its “influence.”\textsuperscript{106} Basically, the claim is that the group could influence the outcome of election contests and possibly elect candidates of its choice with white cross-over support in a single-member district constructed for its benefit, but could not do so in the challenged system.\textsuperscript{107} The Supreme Court has on a number of occasions assumed without deciding that an influence dilution claim is available, but has not confronted a situation where it was necessary to resolve the issue.\textsuperscript{108} Despite the fact that the Court has expressly left the issue open, recognizing an influence claim would seem to make the first \textit{Gingles} precondition superfluous—at least where the relief requested is a race-based single-member district.\textsuperscript{109}

Nearly two decades after \textit{Gingles}, a substantial number of unresolved issues remain, which, after \textit{Shaw}, presents a dilemma for line drawers. They should create majority-minority districts if necessary to avoid section 2 liability, but if the jurisdiction is not in fact potentially subject to liability under section 2, they risk violating \textit{Shaw} if they create such districts.\textsuperscript{110} I propose a resolution for the “create/don’t create" minority districts dilemma in Part Two.


\textsuperscript{107} See id.

\textsuperscript{108} See, e.g., Voinovich v. Quilter, 507 U.S. 146, 154 (1993); Growe, 507 U.S. at 41 n.5. See generally Pierre-Louis, supra note 106.

\textsuperscript{109} See Voinovich, 507 U.S. at 158 (recognizing that if an influence claim were to be recognized, the analysis of the \textit{Gingles} first precondition would have to be modified); see also Cousin v. Sundquist, 145 F.3d 818, 828–29 (6th Cir. 1998) (concluding that the trial court erred in recognizing an influence claim under section 2); Turner v. Arkansas, 784 F. Supp. 553, 569–70 (E.D. Ark. 1991), aff’d, 504 U.S. 952 (1992) (concluding that an influence dilution claim does not exist under section 2).

\textsuperscript{110} See infra notes 168–75 and accompanying text (discussing potential section 2 liability as a justification to created race-based districts).
C. The Constitution Prohibits Districting Plans that Purposely Result in Dilution of Minority Voting Strength

After *Bolden*, a dilutive electoral system is unconstitutional only if it has been adopted or maintained for the purpose of discriminating against minority voters.\(^{111}\) Moreover, as a subspecies of Equal Protection claims, a constitutional vote dilution claim requires both a discriminatory intent and a discriminatory impact.\(^{112}\) Because section 2 prohibits districting schemes that result in dilution of minority voting strength, without regard to the drafters’ intentions, the constitutional prohibition adds little, unless vote dilution means something different under the Constitution than it does under section 2.

The issue that has not been addressed by the Supreme Court is whether a group too small to satisfy the first *Gingles* precondition can claim “intentional dilution” of its ability to influence elections.\(^{113}\) Intentional dilution of a group’s political influence must be distinguished from “negative racial gerrymandering,” which is merely the flip side of *Shaw’s* affirmative racial gerrymandering.\(^{114}\) Just as it cannot assign voters to districts in contravention of traditional districting standards to enhance minority votes, the state cannot do so for the purpose of diminishing minority votes.\(^{115}\)

The influence dilution issue thus only arises when a jurisdiction makes one “otherwise standard” districting choice instead of another for the purpose of diluting a minority group’s influence. Consider, for example, a legislature faced with two choices for the creation of two standard districts. One choice would keep together a minority population concentration too small to be a majority of a single-member district, yet sufficiently large that, intact, it might have substantial influence over electoral outcomes.

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112. Davis v. Bandemer, 478 U.S. 109, 127 (1986). *Bandemer* was a political gerrymandering claim, but it relied almost exclusively on racial vote dilution cases for its conclusion that “equal protection violations [may be found] only where a history [actual or projected] of disproportionate results” demonstrates that the group “had essentially been shut out of the political process.” *Id.* at 139 (plurality opinion).
113. Were the Supreme Court eventually to recognize an “influence dilution” claim under section 2, there should be no reason to pursue relief under the Constitution.
in a district, including possibly electing candidates of its choice with support from non-group members. The other choice, while still respecting traditional districting standards, would divide the group so that it is too small in each of the two resulting districts to influence election outcomes in either district. If the jurisdiction selects the scheme that divides the group in order to dilute its influence as a minority group, and not as a subset of a partisan political group, the issue of racially discriminatory influence dilution is squarely raised.\(^\text{116}\)

In favor of recognizing the claim is simply the notion that relief should be available for any negative impact that results from racially discriminatory motives.\(^\text{117}\) The argument to the contrary is that, when the remedy sought is for the injury of “vote dilution,” then it is “vote dilution” that the plaintiffs must establish.\(^\text{118}\) If the Gingles preconditions are an essential part of the definition of the cognizable injury known as vote dilution, then no lesser injury will entitle the plaintiff to a race-based single-member district, regardless of the underlying theory of recovery. In other words, the impact necessary to satisfy the discriminatory effects element of an Equal Protection claim is dilution as defined by Gingles.\(^\text{119}\) Moreover, influence dilution claims would present an even more difficult problem of proof than ordinary dilution claims. As the size of the minority group diminishes, determining whether the group’s influence is in fact diminished by one

\(^{116}\) Because black voters’ predictable support of the Democratic Party makes them tempting targets for political gerrymandering, it may be impossible to determine whether a decision to divide a black population concentration is “racially motivated” or merely a short-cut for partisan gerrymandering. Racial data, but not political data, is provided by the census. It is far easier to manipulate the racial makeup of a district than it is to manipulate the political makeup, which requires superimposing registration or election data on the census data.

\(^{117}\) See Garza v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990) (stating that proof of first precondition not required when districts were drawn with the intent to discriminate).

\(^{118}\) See Johnson v. DeSoto County, 204 F.3d 1335, 1344 (11th Cir. 2000) (expressing doubts that plaintiffs who failed to establish the requisite injury for a section 2 claim could establish a constitutional dilution claim, pointing to the fact that the standards for the two are identical, except for the intent requirement); see also Turner v. Arkansas, 784 F. Supp. 553, 578 (1991).

\(^{119}\) Of course, dilution is not the only kind of voting related injury for which Equal Protection would provide a claim for relief. For example, proof of dilution obviously is not required when the claim is that the a state carefully selects disfranchising crimes with the purpose and effect of disfranchising more blacks than whites. See, e.g., Hunter v. Underwood, 471 U.S. 222, 227–33 (1985).
districting scheme rather than the other likely becomes highly subjective.120

My objective in this article is to provide redistricting advice, supported by legal analysis. Consequently, the influence dilution issue need not be resolved.121 The advice is obviously the same regardless of how the issue is ultimately resolved: do not set about to discriminate on the basis of race.122

D. The Constitution Prohibits Districting Plans that Purposefully Dilute the Minority Political Party's Voting Strength

On the same day that it handed down Thornburg v. Gingles, the Supreme Court also released Davis v. Bandemer,123 a political gerrymandering challenge to Indiana's post-1980 redistricting plan.124 The plan—which had been prepared in secret by a Repub-

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120. For example, would a group that could constitute 40% of one district and 0% of another be worse off if the districts were drawn so that the group makes up 20% of each, if the group would predictably control the Democratic primary in the 40% district but just as predictably lose the general election, and (equally predictably) two 20% minority districts would each elect a Democrat but not necessarily the group's first choice Democrat?

121. The rationale of Palmer v. Thompson, 403 U.S. 217 (1971), could provide a workable resolution, assuming that it is still good law. Palmer, a case that arose at the height of the 1960s desegregation movement, involved a challenge to Jackson, Mississippi's decision to close all city-operated swimming pools—a decision clearly undertaken to avoid integrating them. Id. at 221. The Court found no constitutional violation. Id. at 227. The Court concluded that, because the city was under no obligation to maintain swimming pools, its decision to cease to operate pools affected all citizens equally in that none of the city citizens would have access to city sponsored pools. Id.

In the redistricting arena, if a jurisdiction does not consider the representational interests of any non-political groups (the most likely candidates would be residents of identifiable neighborhoods) when devising districts, its intentional extension of that principle to a minority group should not be actionable, absent proof of dilution. If, however, its redistricting principles include respecting communities of interest, the jurisdiction's intentional failure to preserve minority groups intact under circumstances where others similarly situated were preserved, would raise Equal Protection concerns. A discriminatorily motivated decision to select "at-large" elections is distinguishable in that an at-large election system affects all geographically concentrated groups the same way. None receives a representational benefit from their "residential concentration."

122. A more significant problem for line drawers may be to avoid an after-the-fact argument that their decision not to benefit a minority group is a decision to discriminate against the group. A jurisdiction that follows the proposed procedures for redistricting set out in Part Two will be well positioned to respond to such a charge.


124. In several earlier cases, the Court had implied that districting that operated to cancel out the voting strength of racial or political elements of the voting population would raise constitutional questions. See Burns v. Richardson, 384 U.S. 73, 88-89 (1966); Fortson v. Dorsey, 379 U.S. 433, 436-37 (1965). In the Court's only decision to address political gerrymandering prior to Bandemer, Gaffney v. Cummings, 412 U.S. 735 (1973), the Court upheld a redistricting scheme formulated with bipartisan support to maintain the political
lican-only committee, had passed both houses of the legislature with a strict party-line vote, and had been signed into law by the Republican governor—was conceded to have been designed to maintain Republican control of the legislature. In the first election held under the new plan, Democratic candidates for the House won 51.9% of the vote but captured only 43% of the seats up for election. Democrats challenged the plan as a violation of their Equal Protection rights.

The lower court refused to dismiss the case as raising a non-justiciable “political question” and ultimately concluded that the Democrats were entitled to relief. The Supreme Court agreed that political gerrymandering presented a justiciable issue, not falling within the political question doctrine. Earlier cases had suggested that the matter was non-justiciable, either because matters of apportionment are delegated to the state, or because of the absence of a manageable standard—issues the Court concluded were not raised by the claim at hand. Rather, the Bandemer plaintiffs contended that as members of a political group, they had been denied the same chance to elect representatives of its choice as other groups. Adequate representation, the Court held, is protected by the Fourteenth Amendment.
The plaintiffs’ victory on this point, however, turned out to be rather hollow because the Court rejected the lower court’s conclusion that the challenged plan denied Equal Protection to Democratic voters.\(^{134}\) Citing the Court’s racial vote dilution cases, a majority of the Justices agreed that to establish an Equal Protection claim, plaintiffs must establish both an intent to discriminate against an identifiable political group and an actual discriminatory effect on the group.\(^{135}\) The Court agreed that the evidence sufficiently supported the lower court’s finding of intent, but only two Justices accepted the district court’s legal and factual bases for concluding that the effects of the reapportionment were sufficiently adverse to violate Equal Protection.\(^{136}\)

As pointed out by the other opinions in the case, discerning from the plurality opinion the “effect” sufficiently adverse to be discriminatory is no small feat.\(^{137}\) The plurality notes that the simple fact that a scheme makes winning elections more difficult and that the group failed to achieve proportional representation were not enough to constitute impermissible discrimination.\(^{138}\) Rather, unconstitutionality must be based on “evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.”\(^{139}\) Consequently, the Court concluded that reliance on a single election to establish a discriminatory impact was unsatisfactory.\(^{140}\)

The trial court had not found that Democrats’ chances would be unsuccessful in the future; that they would be consigned to

\(^{134}\) Id. at 143.

\(^{135}\) Id. at 127.

\(^{136}\) Id. at 185 n.25 (Powell, J., concurring in part, dissenting in part). Justices Powell and Stevens concluded that the facts found by the lower court were sufficient to support findings of discriminatory intent and effect. Id. at 162. The three dissenting Justices on the justiciability issue did not reach the issue of standards for a violation. Id. at 145 (O’Connor, J., concurring). Justice White provided an opinion, which was joined by the remaining three Justices. Id. at 113.

\(^{137}\) Justice White, the opinion’s author, concedes as much: “We recognize that our own view may be difficult of application. Determining when an electoral system has been ‘arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole,’ is of necessity a difficult inquiry.” Id. at 142–43; see also id. at 155 (O’Connor, J., concurring); id. at 161–62 (Powell, J., concurring in part, dissenting in part).

\(^{138}\) Id. at 130–32.

\(^{139}\) Id. at 133.

\(^{140}\) Id. at 135.
minority status in the Assembly throughout the upcoming decade; or that it was impossible to do better in the next reapportionment. The Court indicated that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." Consequently, noted the plurality, the district court erred in concluding that the apportionment violates the Equal Protection clause.

In the final analysis, Bandemer provides one more basis for those dissatisfied with a redistricting plan to challenge it, but the Court's standard of proof means that few challenges will actually be successful. The Republican majority had utilized all the standard gerrymandering devices: likely Republican voters were spread over as many districts as their numbers could control; Democratic voters were stacked into as few districts as possible, creating supermajorities in those districts and submerging the remaining Democrats in Republican districts. The Republican majority gave virtually no consideration to having district lines conform to existing political subdivisions boundaries. It made no attempt to "nest" the two plans (having a large Senate district contain several entire House districts). Nor did it solicit any public input in the process. Finding a more extreme case of political gerrymandering would be difficult.

Despite the dim prospects for success, a number of post-Bandemer partisan gerrymandering cases were attempted. The outcome in Badham v. March Fong Eu, a case alleging that California's congressional districting plan was a Democratic gerrymander, was typical. The court easily found discriminatory intent, but dismissed the case for failure to allege a legally cognizable discriminatory effect. The court set out a two-part test for

141. Id. at 135–36.
142. Id. at 132.
143. Id. at 143.
144. While there was not majority support for the standard, there is little reason to believe that the Justices voting against justiciability would adopt a lesser standard.
146. Id. at 115–16.
147. Id.
148. Id.
150. Id. at 670.
151. See id. at 673.
discriminatory effect: (1) a history of disproportionate results and (2) strong evidence that the plaintiffs lacked political power and were denied fair representation. As to the second requirement, the court concluded that it "would be ludicrous for plaintiffs to allege that their interests are being 'entirely ignore[d]' in Congress" when Republicans held the governor's office, a U.S. Senate seat, forty percent of the congressional seats, and a Republican and former governor of California had been President for seven years. Almost all reported political gerrymandering claims reached similar results. Thus, it appears that the only practical limitations on partisan gerrymandering are those imposed by state law and legislative self-restraint.

152. Id. at 670.
153. Id. at 672.
154. Id.
155. See, e.g., La Porte County Republican Cent. Comm. v. Bd. of Comm'rs, 43 F.3d 1126 (7th Cir. 1994); Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992), aff'd, 506 U.S. 801 (1992); Republican Party v. Wilder, 774 F. Supp. 400 (W.D. Va. 1991). In one post-\textit{Bandemer} case, \textit{Republican Party v. Hunt}, 77 F.3d 470 (4th Cir. 1996) (unpublished table decision), available at No. 94-2410, 1996 U.S. App. LEXIS 2029 (4th Cir. Feb. 12, 1996), the lower court twice found sufficient evidence of discriminatory purpose and effect to violate Equal Protection, but the issue became moot when the legislature enacted a different electoral scheme. \textit{Id.} at *1-2. This case graphically demonstrates, first, the cost of a majority party's succumbing to blatant gerrymandering instincts, and second, the downside of the Supreme Court opening the door to a legal challenge without providing a workable standard to resolve it. The case began in 1988 when the Republican Party of North Carolina brought suit alleging that the state's system of electing superior court judges constituted an unconstitutional political gerrymander. \textit{Id.} at *3. An early appeal reversed the district court's dismissal of the claim as raising a non-justiciable political question. (The lower court had distinguished \textit{Bandemer} on the grounds that judicial elections, which are exempt from the "one-person, one-vote" mandate, were inherently different from legislative elections. See \textit{Republican Party v. Hunt}, 841 F. Supp. 722, 730-31 (E.D.N.C. 1994)). On remand, the lower court concluded that the plaintiffs would likely prevail and granted a preliminary injunction, which was partially modified in the second appeal of the case. \textit{Hunt}, 1996 U.S. App. LEXIS 2029, at *3-4. On the subsequent remand, the lower court concluded that permanent relief was merited. \textit{Id.} at *6. This decision was also reversed on appeal because the lower court had not considered whether the most recent elections, which had produced the first statewide Republican victories for these offices in many years, undermined the court's prediction that Republican electoral exclusions would continue into the future under the statewide scheme. \textit{Id.} at *5-7. While the case was pending again in the lower court, the legislature changed the method of election, calling for non-partisan district elections. \textit{Id.} at *2. The lower court reaffirmed its conclusion that the prior system was unconstitutional but found the issue mooted by the new legislation. \textit{Id.} at *2-3. The litigation finally ended nine years after it started, when the appellate court dismissed an appeal of the decision as moot. \textit{Ragan v. Vosburgh}, 110 F.3d 60 (4th Cir. 1997) (unpublished table decision), available at No. 96-2621, 1997 U.S. App. LEXIS 6626 (4th Cir. Apr. 10, 1997).
E. Section 5 Prohibits Districting Plans that Cause, or Intend to Cause, Retrogression in Minorities' Electoral Opportunities

Section 5 of the Voting Rights Act applies only in a limited number of jurisdictions—initially, those that in 1965 had long and substantial histories of intentional disfranchisement of African-Americans. In 1975, Congress imposed Section 5's unusual requirements on certain additional jurisdictions in order to provide heightened protection for Hispanics. In jurisdictions where it applies—the so-called "covered jurisdictions"—section 5 is the most onerous of the federal limitations on state redistricting. A perception that section 5 required that minority districts be created at any cost was the leading explanation for bizarre districts in covered jurisdictions after the 1990 Census. As will be seen below, a properly conceived concern about section 5 compliance may indeed supply the compelling state interest needed to justify race-based districting.

Section 5 prohibits covered jurisdictions from administering changes in their election laws until they have been federally "precleared." A section 5 jurisdiction must seek preclearance either by filing a declaratory judgment action in the United States District Court for the District of Columbia, or by submitting the election law change to the United States Attorney General for administrative preclearance. The Voting Section of the Civil Rights Division of the Department of Justice is charged with administering preclearance on behalf of the Attorney General, as well as with defending preclearance actions brought in the District of Columbia court. To obtain preclearance, a covered jurisdiction must convince federal authorities that the change was not adopted for

156. The jurisdictions initially subject to section 5's special provisions were the entire states of Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, forty counties in North Carolina, and a smattering of counties from other states. Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, As Amended, 28 C.F.R. pt. 51 app. (2001) [hereinafter Appendix].


158. See Miller v. Johnson, 515 U.S. 900, 921 (1995); see also discussion infra Part One, II.C.1.
the purpose of discriminating against protected minorities and will not have that effect.159

1. Retrogression: The Substantive Standard for Section 5 Preclearance

While the Supreme Court has adopted a very broad interpretation of the election law changes subject to section 5,160 it consistently has seen the purpose of the preclearance requirement as limited to preventing covered jurisdictions from eroding minorities’ existing political opportunities.161 Thus, in Beer v. United States,162 the Court held that changes in election laws are entitled to preclearance unless they “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”163 Even if the change perpetuates existing discrimination, it is entitled to preclearance unless it actually increases the degree of discrimination.164

Despite earlier Department of Justice (the “Department” or “Justice Department”) regulations to the contrary, it is now clear that section 2 liability is not incorporated into section 5’s standard. After section 2 was amended in 1982, the Department’s regulations for governance of section 5 took the position that a


160. Congress’s likely purpose for including section 5 in the 1965 Voting Rights Act almost certainly was to prevent the target ("covered") jurisdiction from adopting new restrictions on registration and ballot access. See Abigail Thernstrom, The Odd Evolution of the Voting Rights Act, 55 PUB. INT. 49, 52, 58–68 (1979). However, early on, the Supreme Court gave the provision a much broader reading, holding that it requires covered jurisdictions to obtain preclearance of every change affecting voting in even a minor way. Allen v. State Bd. of Elections, 393 U.S. 544, 565–66 (1969). In Georgia v. United States, 411 U.S. 526 (1973), the Court specifically held that redistricting changes are subject to preclearance. Id. at 531–35.

161. See, e.g., City of Richmond v. United States, 422 U.S. 358, 388 (1975) (Brennan, J., dissenting) (“I take to be fundamental the objective of § 5 . . . the protection of present levels of voting effectiveness for the black population.”).


163. Id. at 141.

non-retrogressive change would be denied preclearance if it was so discriminatory as to constitute a clear violation of section 2. The Department based its position upon language in *Beer* to the effect that a non-retrogressive change could be denied preclearance only if it so discriminated on the basis of race as to violate the Constitution. Interpreting this dictum to mean that a change resulting in "dilution," as defined by the *Whitcomb-White* totality-of-the-circumstances test, should not receive preclearance, the Department reasoned that a change that violated section 2—which adopted the same standard—should also be denied preclearance.

The Court disagreed, holding in *Reno v. Bossier Parish School Board* ("Bossier Parish I"), that section 5 preclearance may not be denied solely on the basis that the change involved produces a clear violation of section 2. The Court concluded that the Justice Department's position "would inevitably make compliance with § 5 contingent upon compliance with § 2 . . . [which would] replace the standards for § 5 with those for § 2 [thereby] contradict[ing] . . . [the Court's] longstanding interpretation of these two sections of the Act."  

2. The "Benchmark" Plan Against Which Retrogression is Measured

Because section 5's objective is to freeze in place at least the minimum minority influence that existed prior to the time a covered jurisdiction adopted a change affecting voting, identification of a benchmark is essential to the preclearance decision. Two determinations must be made: which plan is to serve as the benchmark, and by what yardstick should minority influence be measured pre-change and post-change? Often these questions are not as easily resolved as might appear at first blush.

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165. See 28 C.F.R. § 51.55(b)(2) (1996). This provision was amended in 1998, eliminating a "clear violation of Section 2" as a basis to deny preclearance. *Id.* § 51.54 (2001).
166. See *Bossier Parish I*, 520 U.S. 471, 504 (1997).
167. See *id*.
169. *Id.* at 477.
170. *Id.* The Court subsequently held that the *Beer* language upon which the Justice Department regulation was based was dictum. *Bossier Parish II*, 528 U.S. at 338.
a. The Benchmark When a Post-Census, Precleared Plan is Judically Invalidated

Absent unusual circumstances, the existing plan at the time a change is enacted is the benchmark plan.171 Therefore, in the context of the districting changes likely in 2001, the usual benchmark plan will be the one based on the 1990 Census, so long as it was precleared.

Most questions about the appropriate plan for benchmark purposes arise when a plan enacted after a new census obtains section 5 preclearance, but subsequently is invalidated by a federal court. The court must give the legislative body an opportunity to devise a replacement plan that will comply with federal law—including obtaining preclearance through the ordinary channels172—devising its own plan only on the clear failure of the legislature to act.173 If the legislature is unable to produce a plan, a plan drawn by the court is not subject to preclearance,174 but nevertheless must respect section 5’s non-retrogression standard.175 Regardless of whether the issue comes up in a preclearance context (because the state has enacted a replacement plan) or in the context of the court’s devising its own plan, a benchmark plan must be identified. Should the last precleared plan continue to serve as the benchmark, even though it is the very plan that the court has just determined violated federal law?

The answer should depend upon the reasons for the plan’s invalidity. When the existing plan is found to be unconstitutional because the jurisdiction has subjugated its traditional districting criteria to race—a violation of Shaw’s mandate—the number of minority districts in the plan, by definition, has been artificially

171. See Holder v. Hall, 512 U.S. 874, 883–84 (1994). The regulations governing section 5 specify that to serve as a benchmark, the existing plan must be “legally enforceable.” 28 C.F.R. § 51.54 (2001). A plan is legally enforceable if it has been precleared under section 5, or had been ordered into effect by a federal court, and therefore was exempt from preclearance, or was already in existence on the effective date for section 5 coverage of the jurisdiction. See id.

172. McDaniel v. Sanchez, 452 U.S. 130, 150 (1981). Only after a jurisdiction’s plan has obtained preclearance is the trial court to evaluate it as a remedy for the violation at issue in the litigation. See id. at 145.


174. See McDaniel, 452 U.S. at 138.

175. See id. at 149.
inflated. "But for" affirmative racial gerrymandering, the invalidated plan would have contained fewer majority-minority districts. The lower court in Abrams v. Johnson\(^{176}\) faced this situation when the Georgia legislature failed to produce a replacement plan for its 1990 congressional reapportionment plan, which the court had invalidated earlier on Shaw grounds.\(^{177}\) After the 1990 Census, Georgia enacted a plan containing two majority black districts, an increase over its prior plan, which contained only one, but in order to obtain section 5 preclearance, the state engaged in substantial racial gerrymandering to add a third district.\(^{178}\) Challengers to the court-drawn plan argued that the trial court's plan, which contained one majority black district, was retrogressive, but they had difficulty defining a benchmark plan.\(^{179}\) The Court rejected the argument that the invalidated three black districts plan, cured of its constitutional defects, was the benchmark because this hypothetical plan had never been implemented.\(^{180}\) The Court further noted that using the invalidated precleared plan with its constitutional defects as the benchmark "would validate the very maneuvers that were a major cause of the unconstitutional districting."\(^{181}\) The Court then concluded that the benchmark plan was the last precleared districting plan not found to be the product of an unconstitutional racial gerrymander, which in Georgia's case was the plan based on the 1980 Census.\(^{182}\)

While the form of gerrymandering challenged in Abrams involved subjugation of state districting standards of compactness and respect for political subdivisions to race, the Court's reasoning should apply with equal force when the number of majority-minority districts has been artificially inflated by violating the constitutional principle of one-person, one-vote. For example, suppose that in order to provide a district for a geographically compact African-American population, which was too small to

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\(^{176}\) 521 U.S. 74 (1997).
\(^{177}\) Id. at 81.
\(^{178}\) Id. at 80–81.
\(^{179}\) Id. at 95–97.
\(^{180}\) Id.
\(^{181}\) Id. at 86.
\(^{182}\) Id. at 97. The Supreme Court also rejected the challengers' argument that the benchmark plan should be the two black districts' plan that Georgia originally submitted for preclearance. Id. at 96. This plan, the Court observed, had never been implemented because it had been refused preclearance. Id. at 97.
constitute a majority of an "equally populated" district, the legislature included the group in a district that was "underpopulated." If, as a result, the total deviation for the plan exceeded constitutional limits, the legislature's actions should be seen as an affirmative racial gerrymander, and the plan, which will be invalidated on one-person one-vote grounds, should not then serve as the benchmark for measuring retrogression in its replacement.

When a precleared plan is subsequently invalidated for reasons unrelated to artificial inflation of the number of minority districts, the invalidated plan should serve as the benchmark. For example, if a precleared plan is later determined to violate section 2—which in effect says that there were too few minority districts in the plan—there is every reason for the invalidated plan to serve as the benchmark. Similarly, if the plan is unconstitutionally malapportioned for reasons unrelated to efforts to artificially inflate the number of minority districts, the invalidated plan should be the benchmark for measuring retrogression.

b. The Benchmark When the Existing Plan is "Race-Based," but Was Never Judicially Challenged

Adjudicated claims of race-based districting in the 1990s very likely represented only the tip of the iceberg in terms of the true number of state and local redistricting plans that might have been invalidated had they been challenged. While acknowledg-

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183. Note that if the district in question is otherwise standard—meaning one which might have been produced to favor representation of the minority population concentration without regard to its racial make-up—the state can justify fairly substantial deviations from population equality. If, for example, the underpopulated district happens to be an entire majority black county in a state that includes respect for county boundaries as a districting standard, the state's justification burden would be light. See discussion supra Part One, I.A. "Racial gerrymandering" by "malapportionment" occurs only when the deviation produced by underpopulating a majority-minority district is too great to be justified.

184. When creating majority-minority districts causes the existing plan's invalidity, returning to an earlier plan as the benchmark puts the minority group in exactly the position it would have occupied, absent the state's improper efforts to benefit the group in the invalidated plan.

185. Thus, if the replacement plan remedies the section 2 dilution, it inevitably will include more majority-minority districts than its predecessor and thus easily should obtain preclearance.

186. Given the documented pressure the Justice Department applied to states to "maximize" the number of minority districts, it is reasonable to assume that similar pres-
ing Abrams's benchmark rule, the Justice Department's Guidelines, released January 2001, take the position that the rule does not apply "[a]bsent such a finding of unconstitutionality under Shaw." Consequently, the existing plan, constitutionality notwithstanding, will be the benchmark, and its constitutionality "will not be considered during the Department's Section 5 review." The Department's position thus "freezes" in place levels of minority influence artificially created in response to its own improper pressure.

3. The Court's Measure of Effective Political Participation

The basic mandate of section 5 is to block election law changes that make minority voters "worse off" than they were under existing law. To make the comparison obviously requires some measure of how "well off" the minorities are in their exercise of the political franchise.

The measure of "effective exercise of the political franchise" differs, depending upon the election law change at issue. When section 5 was adopted in 1965, black registration in the covered jurisdictions was severely depressed. Any practice or procedure that imposed new restrictions on registration—even ones that were absolutely racially neutral in their impact on new registrants—would easily have been viewed as retrogressive because it impeded blacks' ability to close the registration gap. In other situations, the Court found election law changes to be retrogres-

188. Id. at 5412–13.
190. As noted previously, Congress probably had new restrictions on ballot access in mind when it adopted section 5, which was based on the so-called "freezing principle" developed by the federal courts in the South to prevent jurisdictions from adding new registration requirements. See Beer v. United States, 425 U.S. 130, 140 (1976) ("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.") (quoting H.R. Rep. No. 94-196, at 57 (1976)). See generally Derfner, supra note 69, at 546.
sive when the effect of the change was to increase black voters' dependency on white votes to elect candidates of their choice.\footnote{See City of Rome v. United States, 446 U.S. 156, 183–87 (1980).} Thus, a change that increased the number of votes required for election was retrogressive because a finite number of black voters would need to attract more white votes to elect their choices. Similarly, annexations were retrogressive if blacks made up a smaller percentage of the enlarged city than they did of the pre-annexation city. Rather than prohibit annexations outright, however, the Court permitted preclearance if the municipality adjusted its election system to “fairly reflect” black voting strength within the enlarged city.\footnote{City of Richmond v. United States, 422 U.S. 358, 370–71 (1975). In City of Richmond, the annexation actually changed the city's population from majority black to majority white, thereby depriving blacks of potential control of city government. Id. at 363. Thus, it was a reasonable compromise to condition preclearance of the annexation on a change in the method of election (from at-large to single-member districts) to assure that blacks would control their share of seats in the enlarged city. Later, however, in City of Port Arthur v. United States, 459 U.S. 159, 167, 170 (1982), the Court extended the rule to an annexation that caused a drop in the black percentage of an at-large city from 45% to 40%. Moreover the Supreme Court upheld the lower court's determination that a guarantee of a third of the governing seats, via a change in the method of election, did not fairly reflect the group's voting strength in the enlarged city. Id. at 167–68. Blacks made up 34.6% of the potential voters. Id. at 162 n.3. Because annexations that reduce the black percentage of the city present a situation where compromise of the retrogression standard is necessary, the “fairly reflects” standard announced in these cases should not lightly be transferred to other situations. See also Katharine Inglis Butler, Reapportionment, the Courts, and the Voting Rights Act: A Resegregation of the Political Process?, 56 U. Colo. L. Rev. 1, 30–32 (1984).} For these kinds of changes, “theoretical retrogression” was sufficient to trigger an objection. It was immaterial that the group’s chances for electing a candidate of its choice were very slim in the existing system, if under the new system its chances were slimmer still. Likewise, the extent to which white voters supported candidates preferred by the minority appeared to be irrelevant if more white support was in fact required after the change.\footnote{For example, before the changes at issue in City of Rome, blacks, constituting about twenty-one percent of the voting-age population, had a theoretical (but highly unlikely) opportunity to elect a candidate to the city commission and school board without white support. See City of Rome, 446 U.S. at 159. The changes eliminated this theoretical possibility. Moreover, the lower court found that black voters fully participated in the city's political life and that white voters demonstrated a willingness to support black candidates. Id. at 183–87. Neither of the facts were found material to the preclearance decision. See id.; see also Butler, supra note 68, at 929–34 (discussing the changes in City of Rome and their impact on black voters).}

This ability of the group’s vote to impact elections is unworkable as a measure of effective political participation when the
change involves redrawing all of the jurisdiction's election districts. For example, a city with five existing districts with black populations of say, 45%, 40%, 30%, 20%, and 10% respectively, in most circumstances could not maintain those exact percentages in a new plan. Is a proposed redistricting plan for the city “retrogressive” if the two most black districts become more black—making it easier for the group to elect its candidates in those districts, while the other three districts lose black population, making election of the group's candidates more difficult?

The Court's only actual section 5 case involving preclearance of a redistricting plan was Beer, the case that produced the retrogression standard. In Beer, the Court spoke of black influence in terms of blacks constituting “a clear majority of [a district's] registered voters” and also of blacks as “a majority of [a district's] population” in the plan submitted for preclearance. Because the benchmark plan in Beer did not have any district satisfying either of these conditions, the Court found the new plan, which did, to be “ameliorative” and thus entitled to preclearance.

Additional support for the number of minority districts serving as the measure of effective participation comes from the section 5 annexation cases, where a reflection of “minority voting strength” was deemed to be the number of majority black districts. In still other cases, the Court has also written of the measure of “effective exercise of the political franchise” as if it were the number of “minority” districts, but with a different definition of that term. For example, compare Abrams v. Johnson, where the Court implied that a “black district” was one in which blacks constituted an actual majority of the population, with Bush v. Vera, where certain language can be read as defining a black district as one in which the minority has actually elected a minority candidate, regardless of its percentage of the district.

195. Id. at 142.
196. Id. at 141–42.
197. See, e.g., City of Port Arthur, 459 U.S. at 167; City of Richmond, 422 U.S. at 370–72.
200. The district at issue in Vera had not been majority black in the prior, benchmark, plan, but had nevertheless elected African-American candidates for two decades. See discussion infra Part One, II.C.2.d.
In an early preclearance action, *Mississippi v. United States*, the District of Columbia district court saw the measure of "effective exercise" as the number of black voting age majority districts, with consideration given to the actual black percentages in those districts. It granted preclearance to the districting plan at issue because it concluded that the proposed plan had "a greater number of black voting age majority districts than did the [benchmark] plan and [it] provide[d] higher percentages of black voting strength in those districts than did the [benchmark] plan."

4. The Justice Department's Measure of Effective Political Participation

As a practical matter, the important definition of effective political participation is the one likely to be employed by the Justice Department. While the Department is bound by Supreme Court precedent, it faces situations that arguably are factually distinguishable from all of the relatively limited number of judicial preclearance determinations. The Department acts well within its discretion when it fills in gaps in the law in a manner consistent with section 5's underlying freezing principle. That said, many (including the Supreme Court's conservative majority) viewed the Department as abusing its discretion when it conditioned preclearance of redistricting changes after the 1990 Census on "maximization" of the number of majority-minority districts.

202. Id. at 582 n.6.
203. Id. at 583.
204. Id. at 582 n.6.
205. Miller v. Johnson, 515 U.S. 900, 925 (1995). Some courts hearing affirmative racial gerrymandering cases openly criticized the Department's coercion of covered jurisdictions to create majority-minority districts when no feasible argument existed that these districts were necessary to avoid retrogression. See, e.g., Johnson v. Mortham, 926 F. Supp. 1460, 1486 (N.D. Fla. 1996) (discussing the Department's refusal to preclear districts unless it included a proportionate number of majority-minority districts); Smith v. Beasley, 946 F. Supp. 1174, 1208-09 (D.S.C. 1996) ("[T]he Court has made clear that the Department of Justice's interpretations of the [Voting Rights] Act should be accorded no deference."). See generally MAURICE J. CUNNINGHAM, MAXIMIZATION, WHATEVER THE COST: RACE, REDISTRICTING, AND THE DEPARTMENT OF JUSTICE (2001) (providing exhaustive documentation of the Department's pressure on covered jurisdictions to "maximize" the number of majority black districts in the redistricting following the 1990 Census).
Despite the absence of judicial approval for any basis to deny preclearance other than retrogression, the Department has never limited its objections to retrogressive changes. However, in the last two decades, the Supreme Court has rejected several of the Department's other theories for objections, leaving no room to argue that there are legitimate bases other than retrogression to deny preclearance to election law changes, including redistrictings. To avoid open defiance of Supreme Court precedent, the Department will have to find another alternative if it plans to continue its campaign to increase opportunities for the election of minorities.

The alternative the Department appears to have selected is to use plausible uncertainty about the Supreme Court's measure of effective political participation when the change involved is a redistricting. Arguably still open is the question of whether the number of minority districts is the only acceptable measure, and if so, how such districts are to be defined. Absent further word from the Court, the Department is likely to answer these questions on a case by case basis, using any plausible measure of influence and any plausible definition of a minority district to find retrogression if it believes that the jurisdiction could have produced a plan more favorable to the election of minority candidates.

The Justice Department's recently released Guidelines (the "Guidelines") include an explanation of the circumstances that cause a redistricting plan to be retrogressive:

The effective exercise of the electoral franchise usually is assessed in redistricting submissions in terms of the opportunity for minority voters to elect candidates of their choice. The presence of racially polarized voting is an important factor in assessing minority voting strength. A proposed redistricting plan ordinarily will occasion an

206. For examples of objections not based on retrogression, see Butler, supra note 192, at 28–32.
207. See Bossier Parish II, 528 U.S. 320, 341 (2000) (section 5 does not prevent preclearance of a plan adopted for a discriminating purpose unless that purpose is to cause retrogression in the protected group's ability to participate in the political process); Bossier Parish I, 520 U.S. 471, 483 (1997) (the fact that a change that will result in a violation of section 2 is not a basis to deny preclearance to a non-retrogressive change); City of Lockhart v. United States, 460 U.S. 125, 134–36 (1983) (finding that a non-retrogressive change is entitled to preclearance even if it perpetuates existing discrimination).
208. Bossier Parish I, 520 U.S. at 498 (Stevens, J., dissenting) ("T]he Court holds that retrogression is the only kind of effect that will justify denial of preclearance under § 5.").
objection . . . if the plan reduces minority voting strength relative to
the benchmark plan and a fairly drawn alternative plan could ame-
liorate or prevent that retrogression.\footnote{209}

Whatever the Department has in mind as an operational defi-
nition of “opportunity to elect,” it is not merely the number of ma-
jority-minority districts. Otherwise, the Guidelines would simply
say so. The Guideline’s notation that “[t]he presence of racially
taxed polarized voting is an important factor” in measuring “minor-
voting strength”\footnote{210} is a further indication that the Department
will not equate “opportunity to elect” with the number of “major-
ity-minority districts.” If a minority group is a majority of a dis-
tract, the electoral outcome is in minority hands, regardless of the
voting patterns of the majority. The Guidelines thus lend support
to Maurice Cunningham’s observation, predating the Guidelines,
that the Department’s new terminology for “black district” is the
nebulous “black opportunity district.”\footnote{211}

If, as it now appears, the Department expects to apply a sliding
scale for defining “opportunity” by adjusting for the possibility
that reliable white cross-over support will help elect the group’s
candidate, covered jurisdictions seeking administrative preclear-
ance will be less capable than ever of predicting whether their re-
districting plans will be precleared. The Supreme Court’s elimi-
nation of all bases to deny preclearance other than retrogression
thus will have produced virtually no change in the Department’s
behavior. A few examples will demonstrate the wide open possi-
bilities for finding retrogression in a protected group’s opportu-
nity to elect.

Consider a city with five single-member districts, where the ex-
tisting malapportioned districts were 45%, 40%, 35%, 30%, and
25% black, respectively. A Justice Department analyst might
conclude that the 45% and 40% districts were “opportunity” dis-
tricts in the existing plan, based on anticipated white cross-over
support for black candidates. If the proposed replacement plan
contained one 50% district, and the next highest black percentage
district was only 30%, the analyst would then conclude that the
proposed plan was retrogressive: two opportunity districts had
been reduced to one. Or suppose that the hypothetical city modi-

\footnotetext{209}{Guidelines, \textit{supra} note 187, at 5413.}
\footnotetext{210}{\textit{Id}.}
\footnotetext{211}{CUNNINGHAM, \textit{supra} note 205, at 88, 126–27.}
fies its five districts to equalize the population, but is able to replicate the existing percentages exactly. The Department analyst might decide that the 45% district in the old plan was an opportunity district because of its location, but the 45% district in the proposed plan in a different location is not.212 Or suppose that one of the existing districts is 55% black, and at the time of redistricting, the district's incumbent is black. The city dutifully protects the incumbent, actually increasing the black percentage to 60% at his behest, but in so doing it drops a 45% black district, where the incumbent is white, to 40%. The Department analyst concludes that the incumbent's district in the new plan would be an "opportunity district" at 50% black, and the 45% black district in the old plan was also an "opportunity district," albeit unfulfilled to date. The Department thus insists that two opportunity districts (as it defines them) be preserved, which can only be accomplished by reducing the black incumbent's district to 50%.

All told, adopting "opportunity to elect" as a measure of influence gives the Department an open-ended, case-specific, highly subjective basis to object. Given the Department's recent efforts to maximize the number of blacks elected in covered jurisdictions, one suspects that the "opportunity to elect" is just a different route to get there. Ironically, rather than increasing white support for black candidates translating into "no need to engage in race-based districting," the Department sees it as an opportunity for "customized" racial manipulation, with the end game being an increase in black elected officials.214

212. A footnote to an explanation in the Guidelines hints at why information beyond the census data, which "may not reflect significant differences in group voting behavior" for the existing and proposed plans, must be provided. Guidelines, supra note 187, at 5413. The footnote explains that:

[a] redistricting plan may result in a significant, objectionable reduction of effective minority voting strength if it changes district boundaries to substitute poorly-participating minority populations (for example, migrant worker housing or institutional populations) for active minority voters, even though the minority percentages for the benchmark and proposed plans are similar when measured by Census population data.

Id. at 5413 n.1.

213. If indeed this is the intent of the new Guidelines, the Department may find itself at odds with minority office holders. It is a rare elected official who parts happily with reliable supporters, even to benefit a political ally! Moreover, the incumbent legitimately may be concerned that dropping the minority percentage will encourage more white challengers—challengers who would not have liked the odds in a sixty percent minority district.

214. "But for" the Department's notorious history, one might interpret the new guide-
As if having retrogression decided by the number of "opportunity districts" were not sufficiently subjective to permit the Department to retain its de facto veto power, the Guidelines suggest still greater subjectivity in the standard by their inclusion of "factors" that will be relevant to the preclearance determination. Indeed, these "factors" are exactly the same as those contained in the long-standing Procedures for the Administration of Section 5—procedures under which the Department had not limited objections to changes that were retrogressive. According to the Guidelines:

These factors include whether minority voting strength is reduced by the proposed redistricting; whether minority concentrations are fragmented among different districts; whether minorities are overconcentrated in one or more districts; whether available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered; whether the proposed plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and whether the plan is inconsistent with the jurisdiction's stated redistricting standards.

Among the enumerated factors, only reduction in minority voting strength appears to be tied to the number of minority opportunity districts—and then only if voting strength is defined as the number of seats under the group's control. Inclusion of the additional factors in the new Guidelines, which were formulated af-
ter the Court confirmed retrogression as the only valid basis for a section 5 objection, provides further evidence that the Department’s past practice of objecting to non-retrogressive changes will continue, but will now be justified by a new definition of retrogression.

When the Supreme Court confronts the issue of what is to be measured for retrogression, I predict that it will reject the Department’s subjective “opportunity district” test, as well as its incorporation of nebulous, unmeasurable “factors” into the preclearance decision, and will adopt a test capable of objective application. While there are many situations in which minorities can elect candidates of their choice without comprising a majority of a district’s electorate, majority districts have the dual advantages of placing the electoral outcome in the group’s hands and also of being readily identified, usually by merely consulting the census data. With no loss of objectivity, districts in which the group has elected a member of the group, regardless of its actual percentages, could also be considered minority districts. Under such a standard, “potential” would be preserved by retaining as many genuine majority-minority districts as existed in the old plan, and “demonstrated influence” would be preserved by retaining, to the extent possible, districts in which the group has in fact elected its choices. A more open-ended definition provides virtually no guidance to covered jurisdictions and leaves them more than ever at the mercy of the Justice Department.

5. Modification of the Retrogression Standard for Unavoidable Retrogression

It is a fair assumption that the economic prosperity of the past decade has enabled many minority citizens to move out of historically minority neighborhoods into more racially integrated com-

219. The Guidelines were issued after the Court’s decision in Bossier Parish II, 528 U.S. 320, 332 (2000), which held that the only intent that will trigger an objection under section 5 is an intent to cause retrogression.

220. Depending on the circumstances, it may be necessary to consider the impact of non-voting populations on whether the group is a genuine majority of the potential electorate. A seventy percent majority black district, per the census, will not be majority black in potential voters if most of the black population reported by the census as residing in the district is housed in a prison. If this is the kind of adjustment to census data contemplated by the footnote in the Guidelines, it is perfectly reasonable. See supra note 212. It is also objectively verifiable information, generally available from the census itself.
munities, which will mean that jurisdictions will have difficulty maintaining their existing number of minority election districts.\textsuperscript{221} The frenzy to create majority-minority districts nationwide after the 1990 Census—many of them in fact non-standard districts, whether or not they were ever challenged as such—potentially will add to the number of jurisdictions that will have difficulty complying with section 5's non-retrogression standard.\textsuperscript{222} The Justice Department's recently released Guidelines recognize that in some circumstances, retrogression cannot be avoided.\textsuperscript{223} However, the limitations the Guidelines impose on covered jurisdictions' options when confronting retrogression driven by demographic changes appear to be inconsistent with the admittedly limited case law.\textsuperscript{224}

The Department's Guidelines indicate that if a retrogressive plan is submitted, the jurisdiction must demonstrate that "a less retrogressive plan cannot reasonably be drawn."\textsuperscript{225} If the Department concludes that a less retrogressive alternative plan exists, it will interpose an objection.\textsuperscript{226} It is in defining when a less retrogressive plan "reasonably can be drawn" that the Guidelines appear to part company with Supreme Court precedent. The Guidelines indicate that some traditional districting standards will have to be sacrificed to avoid retrogression.\textsuperscript{227} The Department will not require greater deviation from population equality than constitutionally permissible in congressional plans, and in the case of state and local plans, it will not require deviations in excess of ten percent to avoid retrogression.\textsuperscript{228} Beyond that, the Guidelines indicate that almost all other districting criteria must be ignored if necessary to avoid retrogression or to make an un-

\begin{itemize}
\item \textsuperscript{221} I will use "minority districts" as the measure of influence with the caveat that, as indicated above, the term may mean one thing to the Justice Department and another to the courts.
\item \textsuperscript{222} These districts will be particularly susceptible to population shifts. The more irregular the district, and the more that irregularity correlates with race, the greater will be the difficulty in maintaining its existing minority percentage without further gerrymandering.
\item \textsuperscript{223} Guidelines, supra note 187, at 5413.
\item \textsuperscript{224} Id. at 5412-13.
\item \textsuperscript{225} Id.
\item \textsuperscript{226} Id.
\item \textsuperscript{227} Id.
\item \textsuperscript{228} Id. This, of course, is hardly an indication of a new leniency. Section 5's statutory scheme cannot require covered jurisdictions to engage in unconstitutional acts—such as ignoring "one-person, one-vote." 
\end{itemize}
avoidably retrogressive plan less so.\textsuperscript{229} It will consider whether a lack of geographic compactness of the minority population impacts the ability to create a district but will examine the jurisdiction's historic allegiance to "compactness" in evaluating whether an alternative, less retrogressive, plan would deviate from the jurisdiction's practices.\textsuperscript{230} If "compactness" is a standard generally followed, such "compactness" may have to "give way to some degree to avoid retrogression."\textsuperscript{231} A covered jurisdiction must ignore other traditional districting criteria if necessary to avoid retrogression, including policies of "least change,"\textsuperscript{232} respect for political subdivision boundaries, protection of incumbents, and preservation of partisan balance.

It remains to be seen whether the Supreme Court will find the Department's position on the degree to which standard districting criteria must be ignored to avoid retrogression consistent with its \textit{Shaw} line of decisions. In terms of Supreme Court precedent, the closest analogy to an "unavoidably retrogressive" redistricting plan is presented by municipal annexations that result in a lowering of the minority's percentage of the municipality's electorate. \textit{City of Richmond v. United States}\textsuperscript{233} recognized that strict application of the non-retrogression standard would obviously mean that municipalities subject to section 5 either could not grow, or would be required, as the price of annexation, to assign to the black community "the same proportion of council seats as before, hence perhaps permanently overrepresenting them and underrepresenting other elements in the community."\textsuperscript{234} The Court re-

\textsuperscript{229} Id.

\textsuperscript{230} Id. A defense frequently offered in \textit{Shaw}-type challenges for highly distorted minority districts was that they were no less compact than other districts in the plan. See, e.g., \textit{Miller v. Johnson}, 515 U.S. 900, 917 (1995) (finding race to be the predominate factor causing a district's bizarre shape, despite the presence of other non-race-based districts that were equally bizarre). In many situations, this argument was disingenuous because it was the need to create minority districts, which could only be accomplished by ignoring compactness, that had a ripple effect on the entire redistricting plan, inevitably resulting in other non-compact districts. The Department should be accused of bootstrapping if it uses a jurisdiction's partial abandonment of "compactness," done in response to the Department's maximization pressure, to conclude that "compactness" is not among the jurisdiction's districting standards, and therefore, should not stand in the way of creating more minority districts to avoid retrogression.

\textsuperscript{231} Guidelines, supra note 187, at 5413.

\textsuperscript{232} This means changing existing districts only so much as necessary to comply with "one-person, one-vote."

\textsuperscript{233} 422 U.S. 358 (1975).

\textsuperscript{234} Id. at 371.
jected these alternatives as consequences not intended by Congress.\textsuperscript{235} Rather, the Court held that annexations were entitled to preclearance if the electoral system “fairly reflects the strength of the [black] community” in the expanded city.\textsuperscript{236} The Court did not define “fairly reflects,” but in the case of \textit{City of Richmond}, it was satisfied by the fact that the percentage of majority black districts was roughly the same as the black percentage of the electorate in the expanded city.\textsuperscript{237}

There is an indication in \textit{Bush v. Vera},\textsuperscript{238} one of the Shaw progeny cases, that a similar modification of the retrogression standard will be necessary when the state’s failure to maintain the number of minority districts cannot be attributed to the state’s own acts. In \textit{Vera}, Texas argued that one of its bizarre majority African-American districts was justified by the state’s obligation to maintain the district as one in which the group could elect its choices—an objective that could only be accomplished by extending the district’s boundaries to bring in geographically dispersed minority population concentrations.\textsuperscript{239} The Court rejected the argument, instead concluding that, “[n]onretrogression is not a license for the State to do whatever it deems necessary to insure continued electoral success; it merely mandates that the minority’s opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State’s actions.”\textsuperscript{240}

This language, coupled with the actual outcome in \textit{Vera}, implies that when, as a result of demographic changes, a jurisdiction faces either creating fewer minority districts in its proposed plan than were in its existing plan, or engaging in substantial racial gerrymandering to maintain the status quo, it must opt for the first alternative.

The precedential value of \textit{Vera}’s dictum for a modification of the standard, however, is weakened because Texas went far beyond avoiding retrogression when it drew the challenged district. African-Americans made up 40.8\% of one district’s 1980 popula-

\begin{itemize}
  \item \textsuperscript{235} \textit{Id.}
  \item \textsuperscript{236} \textit{Id.}
  \item \textsuperscript{237} \textit{Id. at} 372; \textit{see also} the earlier discussion of \textit{City of Richmond}, supra note 192.
  \item \textsuperscript{238} 517 U.S. 952 (1996).
  \item \textsuperscript{239} \textit{Id. at} 961, 965–66.
  \item \textsuperscript{240} \textit{Id. at} 982 (third emphasis added).
\end{itemize}
tion, but by 1990 their percentage had dropped to 35.1%.\textsuperscript{241} Despite their lack of majority status, African-Americans had elected their candidates of choice, all of them African-Americans, in this district over the previous two decades.\textsuperscript{242} However, rather than simply maintain the existing minority percentage, Texas increased the group's portion of the district's population to 50.9% in the new plan, ostensibly to maintain the group's electoral control of the district.\textsuperscript{243} It was not clear whether maintaining the group's population at 35.1% or restoring it to its 1980 level of 40.8% (a level that had been sufficient over the decade for the group to control the district's electoral outcome) could have been accomplished without violating traditional districting standards.

The Court's decision in \textit{Abrams v. Johnson} provides additional support for a modification of the preclearance standard when it is not possible, without extreme gerrymandering, to create the same number of minority-controlled districts as are present in the existing plan. \textit{Abrams} involved a congressional redistricting plan produced by a federal court after Georgia's legislature had failed to pass one.\textsuperscript{244} The lower court's plan contained a single majority-black district,\textsuperscript{245} which challengers claimed made the plan regressive when compared with earlier plans.\textsuperscript{246} Ultimately the Court rejected the benchmark plan chosen by the challengers but went on to indicate that even if the challengers were correct that the benchmark plan contained two majority black districts, they were incorrect in their position that the lower court's plan required two districts.\textsuperscript{247} The lower court had concluded that it was not possible to create a second majority-black district within "constitutional bounds."\textsuperscript{248} The constitutional problem with a second majority black district was that it could not be created without subjugation of traditional districting criteria to race.\textsuperscript{249}

\textsuperscript{241} Id. at 983.
\textsuperscript{242} Id.
\textsuperscript{243} Id.
\textsuperscript{244} Abrams v. Johnson, 521 U.S. 74, 78 (1997).
\textsuperscript{245} Id. at 78–79.
\textsuperscript{246} Id. at 97.
\textsuperscript{247} Id. at 96.
\textsuperscript{248} Id. at 91, 96.
\textsuperscript{249} Id. at 91 (noting that the trial court found creation of a second majority black district to "require subordinating Georgia's traditional districting policies and allowing race to predominate").
The clear import of the language in Abrams is that a plan satisfies section 5's substantive standards if, for reasons beyond the jurisdiction's control, it cannot maintain the existing number of majority-minority districts as long as its plan "fairly reflects" the present day voting strength of the minority group. While "fairly reflects" remains undefined, the definition most consistent with the cases would be one that requires a jurisdiction faced with unavoidable retrogression to create as many minority districts as possible without violating traditional districting standards, up to a number equal to either the group's share of the electorate or the number of districts in the benchmark plan, whichever is smaller.

The seeming conflict between the Department's Guidelines and dicta in Vera and Abrams disappears if the Guidelines simply mean that certain of the jurisdiction's traditional criteria must be elevated above others if necessary to avoid, or lessen, retrogression. Rarely will every district adhere equally to all districting criteria. The traditional criterion most likely to aid the creation of majority-minority districts is "recognition of communities of interest." No conflict with traditional districting criteria is presented if a covered jurisdiction is required to create a district for a minority community under circumstances where it could have accommodated a non-racial "community of interest." Note, however, to be consistent with traditional districting standards, the minority district must be one that would have been sensible had it been created for a non-racial group. Unfortunately, nothing in the Department's prior performance indicates that the Guidelines will be so limited. While certainly incumbency protection and partisan advancement must yield to avoid retrogression, and while, arguably, the community of interest concept must be stretched somewhat to accommodate minorities, it is likely that

250. See id. at 96. As with the statement in Vera, the Court's conclusion in Abrams is dictum. Having concluded that the appropriate benchmark for measuring retrogression was a plan containing only one majority black district, it was unnecessary for the Court to address the issue of whether, had the benchmark plan contained two minority districts, gerrymandering to avoid retrogression would have been justified. See id. at 96-97.

251. For example, to recognize an economic community of interest—say, a state's fishing industry—the state might create a district that incorporates the coastal portions of several counties, which is inconsistent with the traditional criterion that districts respect political subdivision lines.

252. See infra Part Two, I.A.1.

253. Id. While respect for communities of interest is a traditional districting standard, typically the "interest" underlying a community is one tied to a geographically identifiable area, such as a neighborhood, a political subdivision, or a region.
the Supreme Court will see jurisdictions as having crossed the Shaw line if they use this concept as justification for creating geographically distorted minority districts—even to avoid retrogression.

6. Mitigation of Unavoidable Retrogression

When a jurisdiction is unable to maintain the number of minority districts in its existing plan, it nevertheless must mitigate retrogression to the extent reasonably possible. Just what will constitute mitigation is unclear. For example, suppose that African-American voters are a majority of two of a county's seven commissioner districts and that both are significantly underpopulated. Suppose further than the county cannot add the population to the two districts necessary to comply with one-person, one-vote and also maintain both as African-American majority districts. However, it can, consistent with traditional districting standards, shift enough of the African-American population in one of the districts to the other district to maintain its African-American majority. The other alternative is to keep both districts with substantial, but less than majority, African-American populations.

A bright line measure of minority influence, such as the number of majority-minority districts, seemingly would mean that the first option (one majority African-American district rather than none) would be the “less-retrogressive” alternative. However perhaps in the limited circumstance where retrogression is inevitable when measured by the number of majority-minority districts,

254. The Department's Guidelines are clear on this point. "If a retrogressive redistricting plan is submitted, the jurisdiction seeking preclearance of such a plan bears the burden of demonstrating that a less-retrogressive plan cannot reasonably be drawn." Guidelines, supra note 187, at 5413. Seemingly, the Supreme Court would agree. As noted in the previous section, where the Court and the Department may part company is over the degree to which traditional districting standards must be ignored to avoid, or lessens, retrogression.

255. This is a very plausible scenario in 1990-era districts centered around historically black neighborhoods, many of which will have lost significant population over the past decade. Redrawing the district lines to add African-American population may be difficult. Maintaining majority Hispanic districts often presents the reverse problem. Substantial growth in the country's Hispanic population over the past decade may mean that majority Hispanic districts are overpopulated. Typically, for Hispanics to constitute an actual majority of a district's potential electorate, they must be a supermajority of its population because many are not citizens. Retaining the group's supermajority status, while redrawing the district to remove population, will be particularly difficult.
the Department's more flexible measure, the "opportunity district," is a better alternative. The measure of influence in the baseline plan would still be the number of minority districts, objectively determined. The "opportunity district" would be substituted as the measure of influence in the proposed plan only if it were clear than maintaining the existing number of actual minority districts would be impossible, or would be possible only by extreme gerrymandering. The burden would be on the covered jurisdiction to establish that it had selected the less-retrogressive option under the "opportunity district" standard. In the hypothetical above, two districts with substantial, but not majority-minority populations, would be the less-retrogressive option if it appeared that the group would retain the ability to elect its choices in both districts.

7. The Section 5 Test for Discriminatory Purpose

Section 5 also requires a covered jurisdiction to demonstrate that it has not adopted a submitted election law change for a discriminatory purpose. In Reno v. Bossier Parish School Board ("Bossier Parish II"), the Court held that the only "discrimina-

256. As noted above, the Justice Department Guidelines would use the number of opportunity districts as the measure of influence in both the baseline and the proposed plans.

257. One could argue that the jurisdiction should always have the option to demonstrate that a less-than-majority district would provide the same influence as a majority one. The counter, and I believe better argument is that the danger of miscalculating future voter behavior mandates that electoral outcomes be left solely in the hands of the minority group when possible. In most circumstances, a measure of influence based on census data or other irrefutable evidence will provide the best balance between preservation of minority influence and the covered jurisdictions' need for clear direction. Substitution of the subjective opportunity district should be limited to circumstances where application of an objective measure of influence will clearly lead to greater retrogression.

258. A recent article by three political scientists who sometimes serve as consultants for the Justice Department contains suggestions for how to determine the percentage minority population necessary to provide an "opportunity district." See generally Bernard Grofman, Lisa Handley & David Lublin, Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence, 79 N.C. L. Rev. 1383 (2001). In my response to these authors' observations, I argue, as I do here, that the opportunity district standard should be employed only to mitigate retrogression. See generally Katharine Inglis Butler, A Functional Analysis of Potential Voting Rights Act Liability May Demonstrate that the Intentional Creation of Black Remedial Districts Cannot be Justified, 79 N.C. L. Rev. 1431 (2001).


tory purpose” sufficient to support denial of preclearance was an intent to bring about “retrogression”—in other words, an intent to worsen the position of minorities.\textsuperscript{261} As with the retrogression standard generally, the Court’s rationale for this limitation rested upon the limited purpose of section 5—to prevent backsliding.\textsuperscript{262} An intent to perpetuate an existing discriminatory system does not, reasoned the Court, make minorities worse off than they were before the change.\textsuperscript{263}

As the dissent in \textit{Bossier Parish II} points out, the legal effect of this rule is to make the “purpose” prong of section 5 superfluous.\textsuperscript{264} It catches only those legislators who are inept in their efforts, since if they had been successful in bringing about their goal of retrogression, the plan would have been denied preclearance under the Act’s “effects” prong anyway. Moreover, it makes sense under the majority’s view of section 5 as an “anti-backsliding” provision only if the jurisdiction has adopted a plan with precisely the same impact on minorities as the plan it replaces \textit{and} only if all neutrally motivated plans would inevitably result in an actual improvement in the group’s electoral chances. Otherwise, failing to preclear the plan provides no benefit to minorities.

There is, perhaps, a sensible explanation for why Congress included the “purpose” language in section 5, even though it appears to add virtually nothing to the prohibition on retrogressive changes. First, in 1965 Congress likely envisioned section 5 as a “fail-safe” provision to back up the stringent ballot access protections put into place by other parts of the Voting Rights Act. Second, Congress could have been concerned that a law with a possible discriminatory effect might be precleared because it was not possible to determine its actual impact on minorities prior to implementation.\textsuperscript{265} Third, while freezing voter qualifications was its

\begin{itemize}
\item \textsuperscript{261} \textit{Id.} at 340.
\item \textsuperscript{262} \textit{Id.} at 335.
\item \textsuperscript{263} \textit{Id.}
\item \textsuperscript{264} \textit{See id.} at 369 (Souter, J., concurring in part, dissenting in part).
\item \textsuperscript{265} Given the history of the jurisdictions covered by section 5, it was entirely possible for a seemingly racially neutral, even sensible, limitation to turn out to have a negative impact on black voters. For example, a new provision requiring that voters produce positive evidence of their identity—either their voter registration card or a photo identification card—might not readily be viewed as having a discriminatory impact on minorities prior to its implementation. Evidence that such a provision had been adopted because election officials expected black voters, more so than white voters, to be uninformed about the re-
likely objective, nothing in the legislative history suggests that Congress had any particular standard in mind for when a change would be discriminatory in purpose or effect.\textsuperscript{266} As the Court's standards for "discriminatory effect" ultimately evolved, a theoretical discriminatory effect has been sufficient to merit an objection, thereby subsuming many changes that might have been envisioned earlier as slipping through without a "purpose" prong in the statute.\textsuperscript{267}

\textit{Bossier Parish II} means that submitting jurisdictions that receive Justice Department objections to non-retrogressive changes have an excellent chance of prevailing, should they elect to take the Department to court. Not only is the particular prohibited discriminatory purpose very narrow, but the Court has also rejected as impermissible some of the circumstances in which the Department has in the past inferred a discriminatory purpose.\textsuperscript{268} Less helpful to covered jurisdictions is the Court's conclusion in \textit{Bossier Parish I} that evidence of an election law change's dilutive effect within the meaning of section 2 can be relevant to the intent inquiry.\textsuperscript{269} The Court reasoned that a jurisdiction adopting a dilutive change "is more likely to have acted with a[n] . . . intent" to worsen the position of minorities "than a jurisdiction whose plan has no such impact."\textsuperscript{270} The Court emphasized, however,
that the dilutive impact of a plan is not dispositive of the existence of discrimination, because otherwise section 2's standard effectively would be incorporated into section 5. The Court further noted the mere fact that a jurisdiction selected a more rather than less dilutive plan is not dispositive of purpose, regardless of whether the jurisdiction selected the more dilutive plan because it better complied with traditional districting principles, or for no reason at all.

It remains to be seen whether the Court's restrictive interpretation of the purpose standard will have any practical impact on the Department's preclearance decisions. The burden of proof on lack of discriminatory intent is on the submitting jurisdiction. Thus, the Justice Department is as free as ever to determine that it is unable to conclude that the jurisdiction has met its burden of proof on this issue. Indeed, while Bossier Parish II appears to mean that a jurisdiction that takes the Department to court over a non-retrogressive change will probably prevail, Bossier Parish I gives the Department ample room to "be unconvinced" on the purpose issue. Bossier Parish I specifically incorporates the standard for intent from Arlington Heights v. Metropolitan Housing Development Corp., a key element of which is the degree to which the law bears more heavily upon one race than another. Bossier Parish I approves a "dilutive impact" under section 2 as a "disparate impact." This "evidentiary use" of section 2 may actually give the Department greater license to object to non-retrogressive changes than would incorporation of section 2 into section 5's standard. The Department's regulations at least purport to place on the "challenger" the burden of demonstrating that a non-retrogressive change violated section 2. The burden of proof of a lack of discriminatory purpose, however, remains

271. Id. at 485.
272. Id. at 486.
273. Id. at 488.
275. Bossier Parish I, 520 U.S. at 483. The Arlington Heights factors include: (1) the historical background of the decision; (2) the sequence of events leading up to the decision; (3) any departures from the normal procedural sequence in adoption; and (4) the legislative or administrative history of the enactment, including contemporaneous statements by members of the legislative body. Arlington Heights, 429 U.S. at 266-68.
276. Bossier Parish I, 520 U.S. at 489-90.
277. See Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 487 (Jan. 6, 1987) ("[U]nder Section 2 . . . the complainant shoulders the burden of proving that the proposed change is discriminating.").
squarely on the covered jurisdiction, which the Department's re-
cent Guidelines emphasize: "If the jurisdiction has not provided
sufficient evidence to demonstrate that the plan was not intended
to reduce minority voting strength, either now or in the future,
the proposed redistricting plan is subject to a Section 5 objec-
tion."²⁷⁸

In summary, section 5's substantive standard, as interpreted
by the Supreme Court, does not impose a particularly onerous
burden in most circumstances. If, however, the Justice Depart-
ment adopts an interpretation of recent cases that permits it to
continue to demand outrageous racial gerrymandering as the
price for preclearance, many covered jurisdictions will be forced
to choose their poison: either incur the financial and political
costs of judicial preclearance or acquiesce in the Justice Depart-
ment's demands and hope that no one notices.

II. CONSTITUTIONAL LIMITATIONS ON RACE-BASED DISTRICTING
AFTER SHAW

The most important development in the law of redistricting
during the 1990s was the Supreme Court's much maligned, much
debated decision, Shaw v. Reno ("Shaw I"),²⁷⁹ which limited the
states' ability to engage in affirmative racial gerrymandering.
There is, of course, general agreement that the Constitution pro-
hibits using race to create election districts in order to limit the
representational interests of racial and ethnic minorities.²⁸⁰ How-
ever, Shaw supporters and Shaw detractors occupy very little
common ground on the more difficult question of when states may
use race to benefit minorities. There are two primary issues.
First, to what extent may, or must, a legislative body use race to
design its districting plan to favor minorities? Second, what
measures that are not per se "race-based" may it, or must it, take
for the underlying purpose of favoring minorities? The purpose of

²⁷⁸ Guidelines, supra note 187, at 5414.
²⁸⁰ All agree that legislators are prohibited from engaging in negative racial gerry-
mandering (deviating from race-neutral districting standards to disadvantage minority
voters). For example, legislators cannot create a bizarrely shaped district to avoid creating
a district that naturally would be majority-minority. Nor can they divide political subdivi-
sions for the purpose of limiting minority influence, if otherwise the subdivision would
have been left whole.
this section is to examine how the Shaw doctrine, regardless of its merits, limits states' redistricting options. Line drawers must be aware that unanswered Shaw-related questions obscure the safe path to a federally acceptable districting plan. These questions, and their tentative answers, are discussed in Part Two.

A. The Extreme Measures Legislators Took to Create Majority-Minority Districts Precipitated the Court's Decision in Shaw

In the redistricting that followed the 1990 Census, an odd coalition of civil rights groups and the Republican National Committee joined with local minority legislators to pressure legislative bodies to adopt majority-minority election districts. The pressure was backed by a widespread belief that both section 2 and section 5 of the Voting Rights Act required minority-controlled districts, even if they could only be created by ignoring traditional districting standards.

Justice Department lawyers, who applied the most compelling pressure, let it be known that redistricting plans would not be precleared unless covered jurisdictions created as many minority controlled districts as possible. Although the Department's "maximization" policy was not supported and indeed was directly contradicted by decisions of the Supreme Court, most covered jurisdictions probably acquiesced rather than incur the expense of judicial preclearance.

281. See Adam Pertman, GOP, Minorities Find Common Ground on Gains Through House Redistricting, BOSTON GLOBE, May 26, 1992, at N1; Jack Quinn et al., Redrawing Political Maps: An America of Groups?, WASH. POST, Mar. 24, 1991, at C1; Abigail M. Thernstrom, A Republican-Civil Rights Conspiracy, Working Together on Legislative Reapportionment, WASH. POST, Sept. 23, 1991, at A11. Republicans, who, philosophically, might have opposed affirmative racial gerrymandering, likely realized that they would be the beneficiaries of a policy that concentrated black voters into fewer and fewer districts, leaving behind overwhelmingly white (and often, therefore, majority Republican) districts. White Democrats, likely to be the big losers, probably could not oppose these districts and retain black voter support, which was arguably central to the party's political fortunes.


283. As the earlier discussion of section 5 indicates, "maximization" is absolutely inconsistent with the retrogression standard of Beer. See supra Part One, I.E.1. Note the Court's observation in Miller: "The Justice Department's maximization policy seems quite far removed from the retrogression policy." Miller, 515 U.S. at 926.

While pressure from the Justice Department and others to create minority-controlled districts was hardly new, all restraints were abandoned after the 1990 Census. Emboldened by recent success under amended section 2, and aided by a more localized census\textsuperscript{285} and improved districting software, proponents of minority districts pushed for and received a total abandonment of state districting standards when necessary to achieve their goals.\textsuperscript{286} The press picked up some of the more extreme products of this effort, which led to public scrutiny and eventually to lawsuits.\textsuperscript{287}

B. Shaw v. Reno Holds that Race-Based Districting Must Be “Narrowly Tailored” to Meet a “Compelling State Interest”

In Shaw I,\textsuperscript{288} the first of the affirmative racial gerrymandering cases to reach the Court, white voters alleged that North Carolina had ignored all standard districting criteria in order to create two majority black congressional districts, one of which was the infamous “interstate” district created by connecting pockets of black population together along a 160-mile stretch of interstate highway.\textsuperscript{289} The plaintiffs alleged that the state had deliberately

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\textsuperscript{285} Prior to the 1990 Census, population outside of urbanized areas was reported only for fairly large geographic areas known as enumeration districts. See Bureau of Census, U.S. Dept. of Commerce, 1990 Census of Population and Housing Guide: Part A, Text 59 (1992) [hereinafter Census Guide]. More detail was available in urban areas, where the Census Bureau reported the population by block. See id. In 1990, the Bureau reported the population for every closed polygon in the United States, producing more than seven million blocks, in contrast to the 2.5 million from the 1980 Census. See id.

\textsuperscript{286} See sources cited supra note 281.


\textsuperscript{288} Shaw v. Reno, 509 U.S. 630 (1993) [hereinafter Shaw I].

\textsuperscript{289} Id. at 635–36.
segregated voters into separate election districts on the basis of race.290 The lower court dismissed the complaint, holding that race-based districting to benefit a minority group is not per se unconstitutional.291 The lower court found that white votes were not diluted as a consequence of the creation of a small number of majority black districts and that, at any rate, the state's action was necessary to comply with the Voting Rights Act.292

The Supreme Court reversed, holding that the plaintiffs had stated a valid Equal Protection claim when they alleged that North Carolina's reapportionment plan could not be rationally "understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."293 The relevant line of constitutional authority, the Court said, was that of Brown v. Board of Education.294 In Brown, the Court held that the state's use of race to classify and assign citizens was presumptively invalid and thus subject to strict scrutiny.295 Racial classification, with its special harms, was the injury; no further injury needed to be alleged. The Shaw Court explained that joining geographically dispersed voters in the same district solely because they have the same skin color "bears an uncomfortable resemblance to political apartheid."296 It "reinforces the perception that" racial group status determines interests and behavior, an "impermissible racial stereotype" that retards the progress of a multiracial democracy.297 Moreover, it "undermine[s] our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole."298 Thus, there is no constitutional immunity for state-based action that favors minorities. "Indeed," the Court wrote,

290. Id.
292. Id.
293. Shaw I, 509 U.S. at 649.
294. Id. at 643–44 (citing Brown v. Bd. of Education, 347 U.S. 483 (1954)).
296. Shaw I, 509 U.S. at 647.
297. Id.
298. Id. at 650.
"racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally."\(^{299}\)

The Court concluded that if the plaintiffs' racial gerrymandering claims remained uncontradicted on remand, the district court would be required to determine whether North Carolina's use of race in the plan was "narrowly tailored to further a compelling state interest."\(^{300}\) To rely on the need to comply with section 5 as a compelling interest, the state had to demonstrate that it had not made greater use of race than was necessary to avoid retrogression.\(^{301}\) The Court left open the possibility that either the need to avoid section 2 liability or the desire to neutralize the impact of racially polarized voting on minority candidates could constitute a compelling interest.\(^{302}\)

Although the views of the four dissenting Justices, each of whom wrote an opinion, differed in some respects, the key factor that distinguished them from the majority was their perception of the claim. The majority saw the case as one involving the state's use of race to classify and assign citizens, which therefore meant the claim should be evaluated by the standards of cases such as \textit{Brown v. Board of Education}, \textit{Gomillion v. Lightfoot},\(^{303}\) and \textit{City of Richmond v. Croson}.

\(^{304}\) According to the majority, assigning citizens to voting districts on the basis of race represented just one more example of race-based state action that should be subjected to strict scrutiny.\(^{305}\)

The dissenting Justices, however, saw the case as one involving the state's choice of election structure, which in their view should be controlled by the Court's racial vote dilution cases, \textit{Whitcomb}, \textit{White}, and \textit{Bolden}.

Plaintiffs claiming to have been injured by the state's selection of the election structure, including its crea-

\(^{299}\) Id. at 651.

\(^{300}\) Id. at 658.

\(^{301}\) Id. at 654–55.

\(^{302}\) See id. at 655–56.

\(^{303}\) 364 U.S. 339 (1960) (holding that the City of Tuskegee, Alabama, violated the Constitution when it redrew its municipal boundaries to exclude all of its black citizens while retaining within the city all of its white citizens).

\(^{304}\) 488 U.S. 469 (1989) (holding unconstitutional a city ordinance setting aside a percentage of the city's contracts for minority contractors).

\(^{305}\) \textit{Shaw I}, 509 U.S. at 658.

\(^{306}\) Id. at 659–65 (White, J., dissenting); id. at 680–81 (Souter, J., dissenting); see the discussion of these cases, \textit{supra} Part One, I.B.
tion of specific election districts, must demonstrate that the "political processes ... were not equally open to ... [their participation in that they] had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." In an opinion joined by Justices Stevens and Blackmun, Justice White argued that plaintiffs unable to establish both discriminatory purpose and effect simply had no claim. These Justices would not agree that North Carolina had segregated the voters by using their race to assign them to election districts, but, they argued, even if that term were appropriate, plaintiffs were still required to demonstrate that their political influence was thereby diluted.

C. Subsequent Cases Clarify Shaw's Holding

1. Miller v. Johnson

In its first post-Shaw I decision, Miller v. Johnson, the Court rejected Georgia's argument that its congressional redistricting plan should not have been subjected to strict scrutiny because the district at issue was not so bizarre as to be unexplainable on non-racial grounds. The Court wrote that it is not bizarre districts, but rather the use of race for its own sake that offends the Constitution. The bizarre shape of the district is merely "persua-

308. Id. at 666-67.
309. Id. at 671 n.7.
310. Id. at 671. Justice Stevens dissented for the additional reason that, in his view, it was constitutionally permissible for the state to create districts for the purpose of facilitating the election of members of any identifiable underrepresented group. Id. at 676 (Stevens, J., dissenting). The state routinely draws boundaries to provide for representation of rural voters, so why not minority voters? In his view, it was immaterial that districts for minorities were created using non-standard districts because there is no constitutional requirement that states follow traditional districting requirements. He lamented that "African-Americans may now be the only group to which it is unconstitutional to offer specific benefits from redistricting." Id. at 679 (Stevens, J., dissenting).

Justice Souter was of the opinion that a state's decision to create a district "for" minorities is distinguishable from its decision to take other affirmative action because a state must consider race when redistricting to avoid problems with the Voting Rights Act. He argued that there were no victims because no one was denied representation merely by his placement in a particular district. Id. at 681-82 (Souter, J., dissenting).

312. Id. at 913-14.
313. Id.
sive circumstantial evidence that race for its own sake... was the legislature's dominant and controlling rationale in drawing its district lines."\textsuperscript{314} The lower court properly concluded that the plaintiff had, through other evidence, carried its burden to establish that the state had subordinated traditional districting principles to racial concerns.\textsuperscript{315}

The Court then rejected Georgia's argument that its race-based districts were justified by its need to obtain section 5 preclearance. The Court concluded that the Department improperly rejected the state's prior two plans—plans that in fact satisfied the substantive standards for section 5 without including the challenged district. The Justice Department's unauthorized pressure for an additional black district could not insulate the plan from constitutional challenge. Thus, the Court refused to find the need to comply with "whatever preclearance mandates the Justice Department issues"\textsuperscript{316} to be a compelling state interest. To do so, said the Court, would be to surrender to the Executive Branch the Court's duty to enforce constitutional limits on race-based action. To rely on the Voting Rights Act, the state must demonstrate that its use of race was in fact required by a correct reading of the Act.\textsuperscript{317}

The same five Justices from the Shaw majority made up the Miller majority, but Justice O'Connor wrote a short concurrence to explain her view that the state may appropriately consider race in the districting process. Strict scrutiny is triggered only if "the State has relied on race in substantial disregard of customary and traditional districting practices."\textsuperscript{318} Justice O'Connor's position on this point ultimately prevails because it is more acceptable to the four dissenting Justices than the view of the remaining majority Justices that "any use of race triggers strict scrutiny."\textsuperscript{319}

\textsuperscript{314} Id. at 913.

\textsuperscript{315} Id. at 910--11. There was little dispute that Georgia had adopted the challenged plan to satisfy the Justice Department's demands, which the Court labeled a "black-maximization" policy. Id. at 921. When necessary to make the district majority black, Georgia ignored its objective districting standards and used racial data instead. Id.

\textsuperscript{316} Id. at 922.

\textsuperscript{317} Id. at 921--22.

\textsuperscript{318} Id. at 928 (O'Connor, J., concurring).

\textsuperscript{319} In Miller, Justices Souter and Stevens were joined in dissent by Justices Ginsburg and Breyer, who replaced Justices Blackmun and White after Shaw. Justice Stevens filed
2. **Bush v. Vera and Shaw v. Hunt**

The next two cases, *Bush v. Vera*\(^{320}\) and *Shaw v. Hunt (Shaw II)*\(^{321}\) were argued together, and the Court released the opinions at the same time. The lower court in *Vera* found three highly irregular majority-minority Texas congressional districts to be racial gerrymanders not narrowly tailored to satisfy a compelling state interest.\(^{322}\) On very similar facts, the *Shaw II* lower court concluded that North Carolina’s two majority black congressional districts were race-based but were narrowly tailored to satisfy the state’s compelling interest in complying with the Voting Rights Act.\(^{323}\) Both lower courts rendered their decisions without the benefit of the Supreme Court’s decision in *Miller*.

a. The Cases in the Lower Courts

The difference in outcomes in the lower courts was attributable to the two courts’ differing understandings of *Shaw I* rather than to any significant differences in the circumstances surrounding the challenged districts. The *Shaw II* lower court saw the Supreme Court as having created a new claim in voting rights jurisprudence—a claim that the state had separated voters into different districts on the basis of race without sufficient justification.\(^{324}\) The *Vera* lower court, however, saw *Shaw I* as a

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\(^{320}\) 517 U.S. 952 (1996).

\(^{321}\) 517 U.S. 899 (1996) [hereinafter *Shaw II*] (an appeal from the lower court's decision in *Shaw I* after remand).


\(^{324}\) *Shaw*, 861 F. Supp. at 471.
standard application of the Equal Protection principle that the state should not make decisions that classify citizens by race.\textsuperscript{325} Thus, the lower court in \textit{Shaw II} looked for sufficient justification and found it in North Carolina's belief that any plan not containing two majority black congressional districts would violate section 2 or section 5 or both.\textsuperscript{326} The court concluded that compact majority-minority districts would not have provided for effective African-American majorities.\textsuperscript{327} Moreover, one irregular majority black district was made up of urban population and the other of rural population, which the court saw as an additional positive feature not available in majority black districts that adhered to traditional districting criteria.\textsuperscript{328} The lower court further concluded that the state's use of race was narrowly tailored because the districts were not "overly" majority black. Two such districts were not excessive; no quota was involved, but two seats out of twelve was close to the group's twenty-two percent of the population; the race-based remedy was temporary in that it would exist only until the next census; and no other group suffered vote dilution.\textsuperscript{329} Moreover, the relevance of standard districting criteria was merely evidence of racial gerrymandering. Once the use of race was justified, standard districting criteria played no further role because the criteria was not, in the \textit{Shaw} Court's view, essential to the goal of "fair and effective representation to all citizens."\textsuperscript{330}

On similar facts, the lower court in \textit{Vera} concluded that the three minority districts actually created were not required by a correct reading of section 5's substantive standard, and, if minority districts in fact were required to address concerns about section 2 liability, the districts produced were not narrowly tailored to achieve that end.\textsuperscript{331} It disagreed with the lower \textit{Shaw II} court's position that the state's failure to follow standard districting criteria was merely evidence of racial gerrymandering. The lower \textit{Vera} court's view was that race-based districts would be narrowly

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{325} Vera, 861 F. Supp. at 1338–39.
\item \textsuperscript{326} Shaw, 861 F. Supp. at 474.
\item \textsuperscript{327} Id. at 475.
\item \textsuperscript{328} Id.
\item \textsuperscript{329} Id. at 475.
\item \textsuperscript{330} Id.
\end{itemize}
\end{footnotesize}
tailored to comply with the Voting Rights Act only if the state followed traditional districting criteria in the process, which the court saw as a "concomitant part of truly 'representative' single member district plans."332

b. The States' Arguments on Appeal

Both states changed their arguments in the Supreme Court based on the Court's post-trial decision in Miller. Picking up on Justice O'Connor's controlling position that standard districts do not trigger strict scrutiny, the states argued that the challenged districts were in fact consistent with their own districting standards.333 Texas took the novel position that its foremost districting principles were to seek partisan advantage and to protect incumbents.334 It routinely ignored compactness and respect for political subdivisions when necessary to further these "higher" principles.335 The states contended that it was not possible to create compact minority districts and protect incumbents. Thus, the bizarre districts resulted from an attempt to protect incumbents, not minorities.336 North Carolina argued that it had, in fact, considered most traditional districting criteria, such as respecting communities of interest, protecting incumbents, and partisan advancement when it created the two challenged districts.337 The only criteria it ignored were compactness and respect for political subdivision lines, which the district court had found did not adversely affect fair representation for all the state's citizens.338

Because Miller effectively undercut the states' reliance on section 5 to justify their bizarre districts, both of them also argued that their use of race was justified by a compelling state interest in avoiding section 2 liability.339 Further, the states asserted that the presence of geographically compact, politically cohesive mi-

332. Id. at 1334 n.43.
334. Vera, 517 U.S. at 975.
335. Id. at 981.
336. Id. The district court's finding made this argument dubious at best. While acknowledging that incumbency protection added to the bizarre boundaries of the challenged districts, the court concluded that all other concerns were secondary to maintaining minorities as a specific percentage of the district's populations. Id.
337. Shaw II, 517 U.S. at 907.
338. Id.
339. Vera, 517 U.S. at 980; Shaw II, 517 U.S. at 911.
minority groups within the general area of the challenged districts (whose electoral choices would be defeated in districts in which the groups were a minority) compelled the state's creation of majority-minority districts. These districts were then structured to also accommodate the state's other interests in incumbency protection and partisan advancement.

c. Shaw II in the Supreme Court

In Shaw II, the Supreme Court reversed the lower court's decision. The Court agreed that strict scrutiny was properly applied and turned its attention to whether any of the compelling interests put forward could justify the state's use of race and, if so, whether the use was narrowly tailored to satisfy the interest. The need to comply with section 5 was easily eliminated because the Court found that the state's earlier non-gerrymandered plans to which the Attorney General had objected without the gerrymandered districts, satisfied the provision's non-retrogression standard. The Court assumed arguendo that compliance with section 2 would be a compelling state interest

340. Vera, 517 U.S. at 980; Shaw II, 517 U.S. at 911.
341. Vera, 517 U.S. at 980; Shaw II, 517 U.S. at 911. This argument was also dubious. In Vera, the lower court specifically found that the challenged districts were bizarre because otherwise they would not be majority black or Hispanic. There was no evidence that compact minority districts could have been created and that bizarre districts were drawn instead to accomplish partisan or other political goals. Vera v. Richards, 861 F. Supp. 1304, 1344 (S.D. Tex. 1994), aff'd sub nom. Bush v. Vera, 517 U.S. 952 (1996). At oral argument in Shaw II, North Carolina was unable to identify any plan in the record with two compact minority districts, and the United States, which intervened on behalf of the state, conceded that compact minority districts could not be produced. Vera, 517 U.S. at 899.
342. Justice Rehnquist provided the opinion, which was joined without further elaboration by the other members of the Shaw I and Miller majorities. Justice Stevens filed a dissenting opinion, which was joined in part by Justices Ginsburg and Breyer, who also joined Justice Souter's separate dissenting opinion. The Court reached the merits only as to District Twelve because none of the plaintiffs resided in District One, the other challenged district, and thus no party to the suit had standing to challenge District One. Id. at 900; see United States v. Hays, 515 U.S. 737 (1995).
343. Shaw II, 517 U.S. at 906–07. The Court agreed with the lower court that race was the predominant consideration in the way the challenged districts were drawn. "Race was the criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play only after the race-based decision had been made." Id. at 907.
344. Id. at 911.
but concluded that the challenged district was not narrowly tailored to accomplish that objective.\footnote{345}{Id. at 914–15.}

The Supreme Court rejected the lower court's position that once potential section 2 liability was found, the state could use race to produce a remedial district without regard to whether the compact minority was actually in the district.\footnote{346}{Id. at 916–17.} The Court indicated, "[w]e do not see how a district so drawn without regard to the geographically compact minority population] would avoid § 2 liability."\footnote{347}{Id. at 917.} The Court went on to explain that a section 2 claim belonged solely to the individuals who were part of the politically cohesive, geographically compact minority that could benefit from a standard compact district. The creation of a non-compact district for other minorities somewhere else in the jurisdiction did not address their claim. Consequently, the challenged district was not narrowly tailored to further the state's interest in avoiding section 2 liability.\footnote{348}{Id.}

The Court also indicated that the state's interest in remedying the effects of past or present discrimination might, in a proper case, justify its remedial use of race. To constitute a compelling interest, however, it was necessary that the state first identify the discrimination with specificity; "generalized" past discrimination was insufficient.\footnote{349}{Id.} Second, the state had to have a strong basis for believing that remedial action was necessary before, not after, it embarked on an affirmative action plan. The Court noted that North Carolina could not rely on this justification because the district court had found that "remedying past discrimination" had not actually precipitated the use of race in the districting plan.\footnote{350}{Id. at 910.}

d. \textit{Vera} in the Supreme Court

The five Justice \textit{Shaw-Miller} majority splintered in \textit{Vera}, producing three opinions. Justice O'Connor authored the plurality opinion, but it is her separate concurring opinion that resolves a
number of issues.\textsuperscript{351} Her views, while not endorsed by the dissenting Justices, will be more palatable to them than the views of the remaining Justices who voted to reverse the lower court.\textsuperscript{352} Set out below are the issues seemingly resolved by Vera, either by virtue of majority support, or by a combination of Justice O'Connor's position expressed in her concurring opinion and the anticipated future support of the four dissenting Justices.

(1) \textit{Strict scrutiny applies only when challengers establish that traditional districting criteria have been subjugated to racial concerns so that intentionally created majority-minority districts that otherwise comply with standard districting criteria are immune from strict scrutiny.}

The use of race in districting does not alone trigger strict scrutiny, nor does the failure to follow standard districting criteria. Rather, strict scrutiny is triggered only when traditional districting criteria have been subordinated to race. This potentially important proposition is clearly dictum—no one could possibly have viewed the districts at issue in \textit{Vera} as “otherwise complying with traditional districting criteria.” However, absent a change in the make-up of the Court, it appears that race-based districts that otherwise comply with traditional districting criteria will escape strict scrutiny. It is likely therefore that a district created for a minority group under any theory by which such a district could have been created for a non-minority group escapes strict scrutiny.

(2) \textit{When mixed motives are present, it must be race—and not other legislative concerns—that causes the challenged district to deviate from traditional districting criteria.}

Race must be the predominant factor causing a deviation from traditional criteria. Race for its own sake, and not some other districting concern, must have been the legislature’s dominant and


\textsuperscript{352} When a fragmented court decides a case, with no single rationale enjoying majority support, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” Gregg v. \textit{Georgia}, 428 U.S. 153, 169 n.15 (1976). In \textit{Vera}, Justice O'Connor filed an opinion joined by Justice Kennedy and the Chief Justice. \textit{Vera}, 517 U.S. at 956. Justice Thomas, joined by Justice Scalia, filed an opinion concurring in the judgment. \textit{Id.} at 999 (Thomas, J., concurring). Justices Stevens and Souter filed dissenting opinions, both of which were joined by Justices Ginsburg and Breyer. \textit{Id.} at 1003 (Stevens, J., dissenting); \textit{id.} at 1045 (Souter, J., dissenting).
controlling rationale. Thus, if districting criteria were overridden by concerns for incumbency protection or partisan advancement, strict scrutiny does not apply.\(^3\)

Justice O’Connor’s position as to when race will be viewed as having predominated contains an important caveat—one with which the remaining members of the majority would agree. When race is used as a proxy to accomplish some other objective, such as incumbency protection or partisan gerrymandering, and as a result a non-standard district is produced, race will be viewed as having predominated. Presumably, Justice O’Connor would conclude that race has not “predominated” if a compact minority formed the core of a district, but the district was then distorted to separate incumbents without any further use of race.\(^4\)

(3) The need to comply with the Voting Rights Act and the desire to remedy the effects of past discrimination provide “compelling state interests,” which may justify race-based districts.

Justice O’Connor and the four dissenting Justices also supply majority support for the proposition that a jurisdiction subject to section 5 has a compelling interest in avoiding retrogression and that all jurisdictions have a compelling interest in avoiding section 2 liability.\(^5\)

As the Court’s response to the “need to comply with Section 5” rationale in both Vera and Shaw II demonstrates, a mere incantation of the “Voting Rights Act made us do it” will not suffice. The “need” must arise from a correct interpretation of the law. There also must be strong basis for the belief that race-based re-

\(^3\) The dissenting Justices did not join Justice O’Connor’s opinion because they did not agree that race had determined the bizarre lines of the challenged districts at issue, and consequently they would not have applied strict scrutiny. Id. at 1004 (Stevens, J., dissenting). In future cases, however, these dissenters are likely to find Justice O’Connor’s position more palatable than that of Justices Scalia, Thomas, and Kennedy, who would have found the matter of strict scrutiny resolved by the state’s admission that it had intentionally created a majority-minority district, which would not have existed “but for its affirmative use of racial demographics.” Id. at 1002 (Thomas, J., concurring).

\(^4\) For example, suppose that a compact minority population constitutes a majority in a district to which a particular incumbent’s residence has been “added” by a “tentacle,” and from which another incumbent’s residence has been “excluded” by a finger-like projection of the adjacent district in the minority district. In that case, standard districting criteria laws have been ignored but not subordinated to race.

\(^5\) The remaining Vera majority Justices “assume without deciding” that section 2 is a compelling interest and appear to agree that avoiding retrogression is a compelling state interest for covered jurisdictions. Id. at 979.
medial action is necessary, which in the case of section 2, means strong evidence of the presence of the three \textit{Gingles} preconditions. A "strong basis" can take many forms, but the state may not "rely on generalized assumptions about the prevalence of racial bloc voting."\textsuperscript{356} Subject to the limitations discussed in \textit{Shaw II}, the Court would also recognize a compelling state interest in remedying past discrimination.

(4) \textit{The State's race-based districting must be narrowly tailored to satisfy its compelling state interest.}

Once past the disagreement among the Justices over whether strict scrutiny is to be applied to affirmative racial gerrymandering, and, if so, under what circumstances, all appear to agree that a compelling state interest can justify the use of race. However, the use must be narrowly tailored to make no further use of race than necessary to satisfy the interest.

If a strong basis in evidence exists to fear section 2 liability, the state is permitted "a limited degree of leeway" in furthering its compelling interest to avoid such liability.\textsuperscript{357} Thus, if there is in fact a "compact minority" satisfying the first precondition (and the other two \textit{Gingles} preconditions are also present), a race-based district "addressing the violation" satisfies strict scrutiny even if it is not the most compact district possible: "A § 2 district that is \textit{reasonably} compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests.'"\textsuperscript{358} Flexibility is permitted, but is not limitless. A district drawn to avoid section 2 liability "must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid § 2 liability."\textsuperscript{359}

\textsuperscript{356.} \textit{Vera}, 517 U.S. at 994 (O'Connor, J., concurring).
\textsuperscript{357.} \textit{Id.} at 977.
\textsuperscript{358.} \textit{Id.}
\textsuperscript{359.} \textit{Id.} at 979. In the final part of the article, I will address the possible significance of the difference between Justice O'Connor's separate, broader position that "standard" majority-minority districts are not subject to strict scrutiny at all and the view of the conservative Justices that such districts can survive strict scrutiny if they are in fact necessary to avoid section 2 liability. \textit{See} discussion \textit{infra} Part Two, I.A.4.
(5) Application of the announced principles to the challenged districts.

An examination of how the Court arrived at its ultimate conclusion that the challenged districts were unconstitutional is helpful for understanding the decision's implications.

i. Strict scrutiny applied because, while mixed motives were present, race was the predominant factor that produced the nontraditional districts. The lower Vera court had found that: (1) the state had substantially neglected traditional districting criteria; (2) that it was committed from the outset to creating the majority-minority districts; and (3) that it manipulated district lines to exploit racial data.360 The plurality concluded that none of these factors standing alone were sufficient to trigger strict scrutiny, but that when combined were sufficient to merit further examination of what role race played in relation to other factors in the production of the districts at issue.361 If race-neutral incumbency protection or race-neutral political gerrymandering predominated over race, strict scrutiny would not be appropriate. Likewise, if the district lines were best explained by “respect for communities of interest,” this would weaken the claim that race predominated. The determination of whether the predominate influence in the production of any of the districts was race would require a district-by-district evaluation.362

The plurality then examined the lower court’s findings that related to the factors producing each district and ultimately agreed with its conclusion that race was the predominate factor in the drawing of all three.363 While the findings were district-specific, some generic themes emerged. First, as was typical of the post-1990 redistrictings, the state was in no position to deny that it intentionally created the majority-minority districts. Denial was difficult in part because the state originally “sold” these bizarre districts to a skeptical public as “necessary” to assure fair representation to minorities. Indeed, in one instance the state “sold” the district to the Justice Department as “entitled to preclearance” by representing that it had “constantly reconfigured [the district lines] in an attempt to maximize the voting strength

360. Vera, 517 U.S. at 962.
361. Id.
362. Id. at 962–64.
363. Id. at 965.
for ... the black community.” Second, alternative explanations for the distorted district lines were clearly devised after the fact. Bloc level racial data from the census had been used to construct the districts. Information about non-racial “communities of interest,” for example, had simply not been available. Third, incumbency protection for Democratic congressmen and would-be congressmen was achieved by manipulating the placement of minority population concentrations, not by manipulating the placement of Democratic voters who just happened to be minorities. Thus, “political gerrymandering was accomplished in large part by the use of race as a proxy.” The fact that “tentacles” extending out from the core of the districts added minority populations, when Democratic-leaning non-minority population could have been included in the district without employing “tentacles” was very telling evidence that political gerrymandering was less important than the racial makeup of the district. In sum, in each district, the creation of a majority-minority district was a qualitatively greater influence on the district lines than other interests.

ii. The use of race was not narrowly tailored to avoid section 2 liability. The Court assumed without deciding that the state had a “strong basis in evidence” for finding that the minority groups for whom the districts had been created were “politically cohesive,” and that their candidates of choice would be defeated by racial bloc voting if members of the group did not constitute a majority of the districts—the so-called second and third Gingles preconditions for section 2 liability. The problem for the state’s position, however, was the first precondition. There was no evidence of the existence of a minority group sufficiently numerous and geographically compact to constitute a majority in a single-member district. Indeed, the fact that numerous small minority populations had to be added to the district by “tentacles” was strong evidence that there was no “compact and sufficiently nu-

364. Id. at 969; see also id. at 970, 975.
365. Id. at 969–70.
366. Id. at 969.
367. Id.
368. Id. at 971.
369. Id. at 979.
370. Id.
merous” minority group to satisfy this precondition.\textsuperscript{371} The plurality noted, “These characteristics defeat [narrow tailoring] . . . because § 2 does not require a State to create, on predominantly racial lines, a district that is not ‘reasonably compact.’\textsuperscript{372}

The plurality rejected the state’s argument that shape was irrelevant to narrow tailoring, writing that bizarre shape and non-compactness convey the inappropriate message that “political identity is, or should be, predominantly racial.”\textsuperscript{373} It went on to say that ignoring traditional districting principles is “part of the constitutional problem insofar as it disrupts nonracial bases of political identity and thus intensifies the emphasis on race.”\textsuperscript{374}

The plurality implied that it saw greater merit in the United States’s argument that the “narrow tailoring” requirement would not have been implicated had a minority group satisfying the first pre-condition in fact existed, but the district containing the group had been drawn in a bizarre and noncompact fashion to simultaneously achieve incumbency protection, or some other non-racial districting goal.\textsuperscript{375} The plurality concluded, however, that the argument was not available in this case because the bizarre shape of the districts at issue was attributable to efforts to make the district majority black, not to other factors.\textsuperscript{376}

iii. Race-based districting was not justified by the need to comply with section 5. The Court also rejected the state’s argument that in one of the districts, racial manipulation was necessary to avoid retrogression and thus to satisfy section 5.\textsuperscript{377} The prior districting plan had included a congressional district from which African-Americans had elected their representatives of choice.\textsuperscript{378} The prior district had been 40.8% African-American in 1980 but, through population shifts, had become only 35.1% African-American by 1990.\textsuperscript{379} Through gerrymandering, the state had in-

\textsuperscript{371} Id.
\textsuperscript{372} Id. Justices Thomas and Scalia agreed that the state’s redistricting efforts were not narrowly tailored to achieve its purported interests. Id. at 1003 (Thomas, J., concurring).
\textsuperscript{373} Id. at 980.
\textsuperscript{374} Id. at 981.
\textsuperscript{375} See id.
\textsuperscript{376} Id.
\textsuperscript{377} Id. at 982–83.
\textsuperscript{378} Id. at 983.
\textsuperscript{379} Id.
increased the African-American percentage to 50.9%—action which according to the plurality, was not necessary to avoid retrogression. In what may later prove to be a very important statement, the plurality noted that "[n]onretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral success; it merely mandates that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." 

iv. Ameliorating the effects of past discrimination in voting was not available to serve as a compelling interest. Similar to the Court's decision in Shaw II, the plurality indicated that ameliorating past discrimination could supply a compelling interest. However, the only identified discrimination was alleged vote dilution flowing from racial bloc voting; this was the same concern raised by the state's section 2 compliance defense, and for which the same response applied—race-based districting was not justified unless the state employed sound districting principles, and the minority group's residential patterns permitted it to benefit thereby.

3. Abrams v. Johnson

The congressional districting plan for Georgia was before the Supreme Court for a second time in Abrams v. Johnson. The Court (with the same Justices in the majority and minority) affirmed a plan produced by the lower court after the Georgia legislature was unable to enact one. The fact that the lower court's plan included only one majority black district (in contrast to the challenged plan's inclusion of three), was the primary issue on appeal. The Court agreed with the lower court that section 5 did not require a second majority district. The Court also agreed that, in light of the absence of a second "sufficiently large,
geographically compact minority group," there was no basis to create a second district to comply with section 2. It reiterated that the inquiry into the existence of a "compact" minority group "should take into account 'traditional districting principles, such as maintaining communities of interest and traditional boundaries.'

D. Hunt v. Cromartie Offers Legislators an Effective Means to Evade Shaw

North Carolina's congressional districting plan returned to the Court two more times. The first time, the state appealed the lower court's grant of summary judgment to the plaintiffs, who had challenged North Carolina's redrawing of the districts undone in Shaw II on racial grounds. A unanimous Supreme Court reversed the decision, concluding that the legislature raised a genuine issue of fact as to whether race had been the "predominant factor" in the drawing of the districts, thereby precluding summary judgment. On remand, the lower court once again concluded that race had been the predominant factor in redrawing the district. Once again, the ruling of the lower court was reversed. Justice O'Connor joined with the four dissenting Justices from earlier cases to conclude that the evidence was inadequate to support the lower court's finding that race, rather than politics, drove the legislature's districting choices.

Cromartie II was the first case to reach the Court in which the plan at issue had been drawn with full knowledge of the limitations Shaw would place on the use of race in districting. In all of

388. Id. at 91.
389. Id. at 92 (quoting Bush v. Vera, 517 U.S. 952, 977 (1996)).
390. Two cases resulting from North Carolina's 1990's congressional redistricting reached the Supreme Court with the style Hunt v. Cromartie. The first, a 1999 decision, Hunt v. Cromartie, 526 U.S. 541 (1999), will hereinafter be referred to as Cromartie I. The Court's second decision, also styled Hunt v. Cromartie, 532 U.S. 234 (2001), will hereinafter be identified as Cromartie II. It is this second decision that we are primarily concerned with for the remainder of this section.
391. Cromartie I, 526 U.S. at 543.
392. Id. at 552–54.
394. Cromartie II, 532 U.S. at 258.
395. Id.
the earlier affirmative racial gerrymandering cases, challengers had little difficulty demonstrating that racial concerns had driven the districting process. The states had openly used racial data to create the minority districts, often justifying their bizarre shapes and their negative impact on other interests as necessary to insure minority representation.\textsuperscript{396} \textit{Cromartie II} demonstrates that challengers will have substantial difficulty making the showing necessary to trigger strict scrutiny in the absence of a record of admissions to racial motivation.

In \textit{Cromartie II}, the lower court findings were examined under the “clearly erroneous” standard.\textsuperscript{397} Under this standard, the Court concluded that the plaintiffs failed to carry their “demanding” burden of proof to demonstrate that race was the predominant factor motivating the districting decision.\textsuperscript{398} The factual issue was whether the shape of the district—specifically its failure to follow traditional districting criteria—was the product of racial concerns or political ones.\textsuperscript{399} The lower court found that in redrawing the districts invalidated in \textit{Shaw I}, the legislature sought to avoid putting two incumbents in the same district and also to preserve the existing district’s partisan cores—objectives which it accomplished, however, by the use of racial data. The subsidiary findings supporting the use of racial data included the fact that the district was snake-like in shape; it split cities and towns and contained a 47% African-American voting population—facts which the Supreme Court had concluded in its review of the lower court’s grant of summary judgment were insufficient to demonstrate that, as a matter of law, racial concerns predominated.\textsuperscript{400} The only additional fact noted by the lower court on remand was that “the legislature had drawn the boundaries in or-

\textsuperscript{396} Undoubtedly, all of the challenged districts were made more bizarre because line drawers were attempting to create majority-minority districts while still protecting incumbents and perpetuating partisan advantages. It was also almost certainly the case that the political objectives could have been accomplished without the serious violence that was done to traditional districting standards, whereas without the race-based gerrymandering, the districts involved would not have contained black or Hispanic majorities.
\textsuperscript{397} \textit{Cromartie II}, 532 U.S. at 237.
\textsuperscript{398} \textit{Id.} at 258.
\textsuperscript{399} \textit{Id.} at 237.
\textsuperscript{400} \textit{Cromartie}, 133 F. Supp. 2d at 423.
\textsuperscript{401} \textit{Cromartie II}, 532 U.S. at 239.
der "to collect precincts with high racial identification rather than political identification."\(^{402}\)

This latter finding turned on whether, when the legislators created the district using precincts as their building blocks, they sorted the precincts into districts on the basis of their racial characteristics or their political ones. The lower court concluded that the precincts were sorted by race, primarily because heavily African-American precincts were put into the districts, while heavily Democratic precincts, which could have been included to produce a more compact, still Democratic district, were left out. The Supreme Court saw this findings as resting "solely upon evidence that the legislature excluded heavily white precincts with high Democratic Party registration, while including heavily African-American precincts with equivalent, or lower, Democratic Party registration."\(^{403}\) The Court went on to conclude that the lower court erred when it gave insufficient weight to testimony that precincts were included or excluded based on voter behavior in the precincts, not on voter registration. According to North Carolina, white Democrats were much more likely than black Democrats to "cross-over" and vote for Republicans. Consequently, when the more reliable Democratic precincts were included in the district, they inevitably were more heavily black.\(^{404}\)

Ultimately, the Court concluded that because race and political affiliation were so highly correlated, the party attempting to demonstrate that race rather than politics drove district lines faces a difficult task. The party must demonstrate that its legitimate political objective could be achieved in an alternative manner more consistent with traditional districting principles and that the alternative plan would have been more racially balanced. The plaintiffs in *Cromartie II* failed to make that showing.\(^{405}\)

*Cromartie II* ostensibly is a case about the adequacy of evidence required to support a finding that race was the predominant motive, particularly in a situation where mixed motives were present. As a practical matter, *Cromartie II* modifies *Vera*'s holding that race cannot be used as a proxy to accomplish other objectives. The distinction between the *impermissible* use of race

\(^{402}\) *Id.* at 240.

\(^{403}\) *Id.* at 244.

\(^{404}\) *Id.* at 245.

\(^{405}\) *Id.* at 258.
in 

and the permissible use in 

appears thin. In 

the state constructed the challenged districts by direct reliance on racial data, with the well-founded expectation that the minorities involved would support the Democratic Party's nominee. In 

the state constructed the challenged district by reliance on actual voting behavior, placing the most loyal Democratic precincts in the challenged district and leaving those that were somewhat less loyal out. To no one's surprise, the more solidly Democratic the precinct's voting record, the more heavily African-American it turned out to be.

It remains to be seen whether 

will simply reintroduce the bizarre districts of the 1990s through the use of a different rationale. Political gerrymandering and incumbency protection do require the cooperation of other legislators. In 

at the time the district at issue was redrawn, it was represented by a black Democrat. Because competing political forces had come to rest, so to speak, producing the then-existing partisan balance within the state's congressional delegation, perhaps there was simply little political opposition to preserving the seat of the district's incumbent. When all districts are again subject to being redrawn, the political climate may not be as hospitable for finding non-racial "substitutes" that will produce additional districts tailor-made for minorities. With minority incumbents elected from the racially distorted districts that are already in place, there are likely to be competing forces at work. On the one hand, without the threat of the Voting Rights Act to support the preservation of the seat—indeed, with the threat of 

litigation if it is maintained in violation of traditional districting standards—the incumbent may find that hers is an easy district to justify eliminating in order to accomplish other political objectives. On the other hand, the incumbent may receive some benefit from being a visible incumbent with a support group that extends beyond her district. It was not just a fear of Voting Rights Act liability that produced the majority-minority districts

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407. Cromartie II, 532 U.S. at 244–45.
408. Id. at 240.
409. Of course, in section 5 jurisdictions, the Justice Department will still press for preservation of the district as an "opportunity district" that must be retained to avoid retrogression. Even here, however, jurisdictions may not be as willing as they have been in the past to acquiesce if to do so exposes them to other litigation.
of the past decade. Other forces also played a role, and these are likely to remain powerful in the upcoming redistrictings. Included among these forces were: legislators’ genuine beliefs that “racial fairness” demanded minority districts; the very substantial clout of minority voters in the Democratic Party—clout that threatened white Democrats with defeat if they did not take steps to increase minority representation; and a realization on the part of Republicans that creating majority-minority districts tended to substitute a black Democrat for a white one, and to enhance the election of Republicans in the now “whiter” surrounding districts.

Even if Cromartie II provides willing jurisdictions the means to indirectly produce racially gerrymandered districts, there are also factors that ensure that these districts will not be as bizarre as the challenged districts from the 1990s. A critical practical distinction between using racial data from the census directly and using voting behavior, knowing that it correlates highly with race, is that the latter is only available at the precinct level. Because voting precincts are designed for the convenience of voters, precinct boundaries generally correspond to known landmarks and encompass reasonably compact geographic areas. Districts constructed by aggregating hundreds of precincts can still significantly violate standard districting criteria—as demonstrated by the district at issue in Cromartie II—but the end product is not likely to be as bizarre as a district constructed by aggregating thousands of smaller census blocs. A second circumstance that will reduce the number of bizarre districts created for minorities is simply that greater geographic dispersion of the minority population—particularly the African-American population—will limit the circumstances where it is possible to cobble together a sufficient number of majority-minority precincts to create a district.410

The Court’s eight opinions setting out limits on affirmative racial gerrymandering resolve many issues but raise others. I will address the remaining uncertainties concerning the states’ use of race in Part Two and will offer concrete advice to guide lawmak-

410. Ironically, Cromartie II’s greatest impact may be in the aura of legitimacy it casts upon gerrymandering for political purposes. After Cromartie II, Justice Stevens’s oft-quoted comment from his dissent in Shaw—“African-Americans may now be the only group to which it is unconstitutional to offer specific benefits from redistricting” may now be true. Shaw v. Reno, 509 U.S. 630, 679 n.4 (Stevens, J., dissenting). Bizarre districts can be created for any imaginable reason, except for the openly expressed purpose of sorting voters into districts on the basis of race.
ers between the limitations the Constitution places on the use of race and the duty the Voting Rights Act imposes on lawmakers to take race into account.

III. FURTHER COMPLEXITIES WHEN THE JUDICIARY BECOMES ENMESHED IN THE REDISTRICTING PROCESS

Given the seemingly inevitable future involvement of the courts in the redistricting process, legislators may be tempted to do nothing and simply let the process start there. However, in part because the Supreme Court has imposed additional limitations on the line drawing options of federal courts, legislative abdication in favor of the judiciary may result in a plan satisfactory to no one. This is particularly true in jurisdictions subject to section 5.

A. General Principles Governing Court-Ordered Districting Plans

(1) Respect legislative judgment. In recognition of the principle that redistricting is a legislative function, the Supreme Court's first limitation on federal court involvement is that judicial relief is appropriate only upon a clear failure of the legislature to act.\(^411\) In *Growe v. Emison*,\(^412\) the Court held that deference to the states in matters of redistricting extended to state courts. If redistricting efforts are underway in a state body, the federal court must not interfere, unless it appears that "[the] state branches will fail timely to perform [their] duty."\(^413\)

When a court determines that a plan is unconstitutional or that it violates section 2 of the Voting Rights Act, the court must afford the jurisdiction an opportunity to propose a replacement, which the court must adopt if it complies with federal law.\(^414\) When the court is forced to draw its own plan, it should follow legislative policy to the extent possible,\(^415\) modifying the state's


\(^{413}\) Id. at 34.

\(^{414}\) Wise, 437 U.S. at 542-43.

\(^{415}\) White v. Weiser, 412 U.S. 783, 785 (1973) (finding reversible error in the lower court's selection of the plaintiff's plan instead of the one that most closely resembled the legislative proposal).
plan only to the extent necessary to remedy the violation of federal law.\textsuperscript{416} The more exacting standards for court-ordered plans apply only to the portions of the state's plan modified to comply with federal law.\textsuperscript{417}

(2) \textit{Strictly comply with one-person, one-vote.} When a court finally must act, its plan must achieve population equality with little more than de minimis variation from population equality.\textsuperscript{418} Court-ordered legislative plans are not required to attain the near zero deviation required for congressional districting,\textsuperscript{419} but variances that would be de minimis in the state's plans are not acceptable in court-ordered plans without adequate justification.\textsuperscript{420} The court must explain the reasons for failure to attain population equality and must articulate the relationship between the plan's variance and the state policy being furthered.\textsuperscript{421}

(3) \textit{Avoid the use of multimember districts.} A court-ordered plan must avoid the use of multimember districts,\textsuperscript{422} or, in local election plans, at-large seats,\textsuperscript{423} unless these devices were part of the existing districting plan and were otherwise consistent with federal law.\textsuperscript{424} Otherwise, the court must articulate sufficient unique factors to justify their inclusion.\textsuperscript{425} Occasional judicial misunderstanding of this limitation notwithstanding, it merely prohibits a federal court from imposing these devices on a jurisdiction that has not chosen to use them.\textsuperscript{426} In recent times, the issue has most

\begin{footnotesize}
\begin{enumerate}
\item[416.] Upham v. Seamon, 456 U.S. 37, 43 (1982).
\item[417.] Id.
\item[418.] Chapman v. Meier, 420 U.S. 1, 26–27 (1975).
\item[419.] Id. at 27 n.19.
\item[421.] Chapman, 420 U.S. at 24.
\item[422.] Id. at 18.
\item[424.] Id. at 19; Whitcomb v. Chavis, 403 U.S. 124, 160–61 (1971).
\item[426.] See, for example, Citizens for Good Gov't v. City of Quitman, 148 F.3d 472 (5th Cir. 1998), where after a successful section 2 challenge to the town's at-large election system, the town declined to propose a remedy. A court-appointed master recommended, and the lower court accepted, a plan which retained one at-large seat, an arrangement specifically permitted by state law. Id. at 476. The appellate court reversed because the district court had failed to articulate any justification for not using all single member districts. Id. at 476–77. Arguably, however, the trial court's remedy was appropriate, so long as it adequately remedied dilution, the existence of which was the only basis for the federal court to provide a remedy at all. Since all the seats in the invalidated plan had been elected "at-large," the court's remedy merely retained the at-large feature, rather than imposed it. Since a remedy is inherently limited by the nature of the violation, there was no need for
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commonly arisen in the context of a court-devised remedy for a section 2 violation, rather than in the context of a court-devised redistricting plan. However, in the future, local federal courts may have to confront the issue in the redistricting context when faced with devising a replacement for a plan that has been rejected by the Attorney General because it retained some number of at-large seats.

(4) Avoid fragmenting concentrations of minority population, but do not subjugate traditional districting criteria to race. In an earlier era, when fewer voices were heard in support of producing minority districts, courts were admonished to avoid departures from neutral guidelines that resulted in fragmentation of minority population concentrations—concentrations that might otherwise form a majority of a district. Such departures could give rise to charges that the court was intentionally diluting minority voting strength. In more recent years, with most of the participants in the process insisting that more minority districts be created, the courts are required to be vigilant in the opposite direction. Without the discretion enjoyed by legislatures to compromise traditional districting criteria in order to balance competing interests, the federal courts should adhere strictly to traditional districting criteria, deliberately creating only such minority controlled districts as satisfy these criteria, or deviating from these standards only to the extent necessary to avoid violations of the Voting Rights Act.

the court to eliminate an at-large seat specifically permitted by state law, unless the remedy was actually required to avoid dilution. See also Williams v. City of Texarkana, 32 F.3d 1265 (8th Cir. 1994) (employing similar reasoning to refuse to include an at-large seat).

427. In recent years, a number of federal courts have found at-large seats acceptable in remedial plans presented by defendant legislative bodies. See Hines v. Maryoe of Ahoskie, 998 F.2d 1266 (4th Cir. 1993); Tallahassee Branch of NAACP v. Leon County, 827 F.2d 1436 (11th Cir. 1987); James v. City of Sarasota, 611 F. Supp. 25 (M.D. Fla. 1985).

428. See discussion infra Part One, III.B.


430. See, e.g., Abrams v. Johnson, 521 U.S. 74, 101 (1997). Gerrymandering for partisan advancement and incumbency protection does not trigger strict scrutiny. Thus, after Cromartie II, a legislative body can use political, rather than racial, data to construct its non-traditional districts and escape strict scrutiny. A court, however, has no discretion to promote partisan advancement. Its discretion to "protect incumbents," even if based on an obvious state policy to do so, should be limited in its ability to separate incumbents—because otherwise it makes a political decision that only one of them will be returned to the legislature—and then only through, at most, modest modifications to traditional districting criteria.
B. Limited Subject Matter Jurisdiction for Preclearance Actions Produces a Procedural Quagmire for Court-Ordered Plans

If federal court litigation involves a section 5 jurisdiction, another layer of seemingly intractable complexity is added to the court's production of a redistricting plan. The court's options depend upon the context in which its obligation to produce a plan arises. Various scenarios are discussed below.

*Scenario 1: The legislature is unable to adopt a redistricting plan at all.* If the legislative body is unable to adopt a redistricting plan to replace its malapportioned districts, a federal court will be asked to produce a plan in the legislature's stead. The court's first obligation will be to respect the legislative judgments presently existing in the now malapportioned districting plan. Unless other federal issues are presented by the old plan, the court should undertake to make only such changes as are needed to correct for population deviations to comply with the substantive standards for section 5, and, if established to be necessary, to avoid vote dilution as defined by section 2. Thus, in this scenario, the court's obligation generally is very similar to that of a legislature that chooses to enact a "least change" replacement for a malapportioned plan, except that its districts must adhere more strictly to population equality.

It is very likely that there are many post-1990 redistricting plans that contain unconstitutional, but never challenged, race-based districts. The existence of these districts in a plan for which the court must create a replacement complicates its task. Possible Shaw-type violations in the existing plan are generally moot because the plan must be replaced anyway. Nevertheless, the presence of race-based districts in the existing plan can impact the court's remedial plan because of the court's obligation's to respect legislative policy and to avoid retrogression. As to the former, Shaw seemingly prohibits the court from maintaining a district that can only be constructed by elevating racial concerns over traditional districting criteria. Moreover, since the court lacks

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434. Note, however, that if a race-based district was constitutional when cre-
the mandate to balance political concerns, it should not use political data—a la Cromartie—to replicate a non-traditional district, even if the legislature would have done so. As to its obligation to avoid retrogression, Abrams v. Johnson strongly suggests that the court's obligation does not extend to the creation of bizarre districts.435

Scenario 2: The legislature adopts a new redistricting plan, but the Attorney General refuses preclearance, and the legislature is unable to adopt a replacement. A local three-judge court's jurisdiction in section 5 matters is limited to determining whether a covered jurisdiction has adopted an election law change that is subject to section 5, and if so, whether it has obtained preclearance.436 The only remedy available from the local three-judge court is an injunction against implementation of the change until the Attorney General or the District of Columbia court preclears it.437

Today, however, it would be rare for a jurisdiction to attempt to utilize a plan which has not been precleared. The more common scenario involves a jurisdiction that has adopted a new districting plan but has been unable to obtain its preclearance. Imagine a scenario where, as elections draw near for the jurisdiction involved, someone implores the federal court to produce a plan. Now things get murky. Since the “new plan” has not been precleared, one might assume that it is of no further significance, and the court merely is to follow the guidelines discussed in Scenario 1, including respect for the legislative judgment expressed in the last precleared plan. However, the Supreme Court took a different tact in Upham v. Seamon.438 There, when faced with a

437. See id. at 646–47.
438. 456 U.S. 37 (1982). Technically, the “plan” subject to suit is the existing “malapportioned” plan, which is the only plan for which the local federal court can provide a remedy. The state’s unprecleared plan is a state-sponsored “remedy” which the court should use, except for those portions that failed to obtain preclearance.
congressional redistricting plan to which the Attorney General had objected, the lower court modified the objected-to districts, but then made additional adjustments to comply with the requirements for court-ordered plans. The Supreme Court reversed, holding that unobjectionable parts of the state's plan were to be preferred as a remedy, so long as they did not violate federal law.

Since the lower court in Upham undertook to "cure" the section 5 objection, the Supreme Court did not address the issue of whether it was required to do so. Subsequently, however, in Lopez v. Monterey County, the Court addressed a slightly different issue when it determined that a local court could not order elections to be conducted at-large, even temporarily, when adoption of at-large elections was the very reason for which the county had not obtained section 5 preclearance. Monterey County's treatment of a never-submitted, and thus totally unprecleared at-large plan is arguably not directly comparable to a districting plan that has been submitted and to which the Attorney General has entered an objection to some specific aspect—particularly in light of Upham's admonition that unobjected-to parts of the state's plan should be given deference as a remedy. At the very least, however, Monterey County suggests that the court cannot use as a part of its remedy any portion of the state's plan to which an objection has been entered.

439. Id. at 38.
440. Id. at 43.
441. See id. at 44.
443. Id. at 20–25. This factually complicated case involved several changes to the manner of electing certain judges in Monterey County, California, the net result of which was change from district to at-large elections for these positions. Id. at 12. The local court enjoined implementation of the new scheme because it had not been precleared and ordered that, pending preclearance, elections be conducted from districts which it devised. Id. at 15–18. Rather than seek preclearance of the at-large plan—a plan now specifically mandated for the county by state law—the county, after joining with minority plaintiffs in an agreement that the at-large plan violated section 5's substantive standards, adopted the court's districts, which were then precleared by the Attorney General. See id. at 18. Subsequently, the lower court had second thoughts about the constitutionality of its districts, which in addition to possibly raising Shaw issues, were clearly contrary to California law. Id. After several years of waiting for the county and the state to devise a plan that satisfied state law and could also be precleared under section 5, the Court ordered elections to be conducted at-large—which was precisely the "change" which had not been precleared. Id. at 18–19.
444. See Upham, 456 U.S. at 43.
If the Justice Department only objected to retrogressive changes, a court could easily accommodate both the procedural limitations and the substantive requirements flowing from section 5. A court could do this merely by respecting the non-retrogression principle. However, as the Shaw line of cases so dramatically demonstrated, in the past the Department made no pretense of limiting objections to retrogressive changes. There are indications that the Department will continue its prior practice, but will now justify its objections under a strained notion of “retrogression.”

The lower court’s dilemma is thus what to do when the objection is one which, had it been challenged in the District of Columbia court, would have been overturned. On the one hand, it must not utilize portions of the state’s plan to which an objection has been entered, even when the objection is clearly not based on retrogression. On the other hand, it cannot itself “cure” the Attorney General’s invalid objection if to do so would involve unconstitutional race-based action in violation of Shaw. Seemingly the only resolution is to ignore the legislature’s policies in the objected to (even if substantively valid) parts of the state’s plan, but not to follow the Attorney General’s “suggestions” for race-based districting except when it would be consistent with Shaw.

In some redistricting situations, the court seemingly can avoid Shaw yet comply with Monterey County simply by making only minor changes to the objectionable districts in the state’s plan. However, in other circumstances a court faces a more daunting challenge to act in a manner simultaneously consistent with Shaw, Monterey County, and Upham. One easily anticipated problem is that the Attorney General, instead of couching his objection in terms of the contours of a specific district, will allege that the submitted plan is retrogressive because it does not contain as many minority opportunity districts as were present in the benchmark plan. So long as it does not violate Shaw, a court could elect to create an additional opportunity district—based on its own view of the evidence concerning the characteristics of

445. See Guidelines, supra note 187, at 5412-14; see also discussion supra Part One, I.E.7.

446. In producing a remedial redistricting plan, the court must confront all of the uncertainties concerning the extent to which compliance with section 5 actually requires that traditional districting criteria be ignored. See discussion supra Part One, I.E & Part Two, I.A.5.
such a district—even if, in the court’s view, such a district were not required under a correct reading of the retrogression standard. The court confronts greater difficulty when the Attorney General’s objection cannot be cured without violating the Constitution. While Abrams v. Johnson is not directly on point for this scenario because it involved a precleared plan subsequently successfully challenged on Shaw grounds, the Court’s analysis there nevertheless provides guidance.

Several of the Abrams parties argued that under Upham, the Court was required to follow the state policies inherent in the invalided plan, particularly the policy to create a second minority district. The Court disagreed, distinguishing Upham on several points. First, the portions of the precleared plan at issue in Abrams that “subordinated traditional districting principles to racial considerations” were not entitled to deference. Federal courts, the Court noted, must “correct—not follow—constitutional defects in districting plans.” Second, in Upham the plan’s violation of federal law was narrowly confined—the lines for two contiguous districts had not been precleared. The remainder of the plan had been precleared and was otherwise consistent with federal law. It was therefore possible to redraw the objected-to districts, leaving the remainder of the state’s plan mostly intact. In Abrams, however, the constitutional violation affected almost every district in the state’s plan, meaning that a remedy necessarily would involve redrawing most of the state’s districts. Thus, the Court found that the lower court in fact complied with Upham when it made substantial changes in the existing district lines necessary to conform the plan to constitutional requirements but did so in a manner consistent with the state’s general traditional districting principles.

When the federal problem with the state’s plan is that the Attorney General has refused to preclear any part of it and has suggested that the state must engage in unconstitutional race-based

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447. The Abrams Court was not faced with the possibility that its inclusion of some part of the state’s plan in its remedial plan would permit the state to circumvent section 5’s preclearance mandate.
448. Abrams, 521 U.S. at 85.
449. Id.
450. Id. at 86. The Court followed the state’s generic districting principles—such as respecting county boundaries—but did not necessarily follow the specific district lines contained in the state’s plan.
districting to obtain preclearance, the court seemingly follows the course suggested by Abrams if it adheres to the various Supreme Court mandates in hierarchal order. Since Shaw is a constitutional principle, it must be strictly followed. Then section 5's substantive, non-retrogression standard must be followed to the extent that doing so is consistent with the Constitution. Finally, Monterey County, as the embodiment of Congress's intent that changes reflecting the policy judgments of the jurisdiction's elected officials not be implemented unless precleared, takes precedent over legislative judgments expressed in the unprecleared plan. Thus, in drafting its replacement plan, the court should, if possible, retain specific districts in the challenged plan when these districts also were in the last precleared plan and follow the state's more general districting standards.451

Local redistricting plans that contain some number of at-large seats can present a version of the Monterey County dilemma. Single-member districts in a mixed plan will have to be adjusted after the census to correct for malapportionment. Legally, retaining the at-large seats is not a change in the jurisdiction's election laws when the jurisdiction redraws its single-member districts, thus retaining these seats in the new plan per se cannot be a basis to deny preclearance.452 However, if the jurisdiction is unable to maintain its existing number of majority-minority single-member districts, the Attorney General may refuse preclearance and "suggest" that retrogression can be avoided by abandoning the at-large seat or seats, thereby permitting the creation of an additional majority-minority seat.

If the jurisdiction subsequently fails to enact a replacement plan, some may argue that the court is prohibited from using at-large seats as part of its court-ordered remedy. The response should be that, if the only claim is that the single-member districts are malapportioned, the at-large seats, which cannot possibly contribute to malapportionment, are simply not before the court. Moreover, their inclusion in the court's plan would not constitute implementation of an unprecleared change prohibited by

451. For example, if the state's last precleared plan placed specific counties together in a district, the court should be permitted to follow that policy, even if these districts are identical to ones in the state's current unprecleared plan. If the state's unprecleared plan reflects a policy of not splitting small counties unnecessarily, the court should respect that policy, unless it has been implicated by the Attorney General's objection.
Monterey County. However, the court must come up with replacements for the unprecleared new districts which must comply with the non-retrogression principle. If the Court's statement in Bush v. Vera that section 5 "merely mandates that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's action,"\(^4\) is taken literally, the court seemingly fulfills its obligation so long as its plan contains as many minority districts as can be created consistent with traditional districting standards, even if that number is fewer than were in the prior plan.\(^4\)

Scenario 3: The state acquiesces in the Attorney General's demands for race-based districting, and its plan is precleared. After receiving a section 5 objection, most jurisdictions simply modify their redistricting plans to satisfy the Attorney General without regard to the validity of the objection. Moreover, many jurisdictions adjust their plans to satisfy the Department's actual, or anticipated, demands, thus avoiding drawing an objection in the first instance. In the context of a redistricting change, the modifications necessary to satisfy the Attorney General almost inevitably will require race-based districting, which is precisely the circumstance that led to the Shaw cases. Ironically, while a local federal court must enforce an objection, even one that is patently invalid, a covered jurisdiction's race-based actions undertaken to overcome, or to avoid, an objection are fully reviewable. As a part of its review, the court must consider the objection's validity in order to determine if the state's race-based action in response to it is justified.

As noted above, Abrams presented just this scenario. Georgia eventually acquiesced to the Department's demand that it add a third majority black district to its congressional districting plan, which was then granted preclearance.\(^4\) Thereafter, the precleared plan was successfully challenged by voters as a racial ger-

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\(^4\) Retrogression in the number of minority districts caused by demographic changes cannot be seen as comparable to retrogression in a minority's voting strength brought about by a municipality's voluntary annexation of a population that results in a lowering of the group's percentage of the city's electorate. Consequently, there is no reason to apply the "fairly reflects" modification of the retrogression standard from City of Richmond v. United States, 422 U.S. 358 (1975). See supra notes 233-37 and accompanying text.

\(^4\) Abrams, 521 U.S. at 80.
rymander in *Miller v. Johnson*. Politically unable to enact a replacement plan, the legislature left the matter up to the court. Because the plan at issue in *Miller* and *Abrams* had been fully precleared, the Attorney General's objection to the state's earlier plan was an issue in the case only because the state offered it as a justification for the state's use of race in the challenged plan.

Ultimately, the *Abrams* Court adopted a remedial plan that contained only one African-American district—the same number as in the post-1980 precleared plan, and one fewer than Georgia's initial post-1990 Census plan which the Attorney General refused to preclear. The Court concluded that there was not a second concentration of black population sufficient to constitute a majority of another district. It rejected arguments that Georgia's first plan, containing two majority districts, should have been considered as a remedial plan, concluding that this plan was also impermissibly driven by race. Thus, the end product was probably not very reflective of any plan adopted by legislature, all of which admittedly had been adopted under improper pressure from the Justice Department. Inevitably, the effect of the Court's decision was to "overturn" the Attorney General's substantive section 5 determination.

So long as section 5 is the law, and politics remains politics, Georgia's tortious path to a federally acceptable districting plan is likely to be repeated by other jurisdictions. A change of administrations is unlikely to have much impact on the Justice Department's Voting Section's push for race-based districts. Theoretically, one need have little sympathy for the Georgias of the world who could have short-circuited the process by initially seeking judicial preclearance. However, there is enormous political pressure to create majority-minority districts, especially when backed by an objection from the Attorney General that to the press and the public is accepted as proof that the submitted plan is discriminatory in purpose or effect. There is an element of unfairness in not permitting the state to acquiesce to the Department's demands

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457. *Abrams*, 521 U.S. at 82. It would have been interesting to see the Attorney General's response had Georgia re-submitted the plan to which the original objection had been entered after the court invalidated its three black districts plan.
458. *Id.* at 74–75.
459. See *id.* at 86–88.
460. See *id.* at 74–75.
for race-based districting, rather than incur the expense of distant, unpopular litigation. However, in the final analysis the interest of the electorate in not being saddled with a race-driven, often totally irrational, election district is more compelling. *Shaw*-type litigation now provides the only source of relief for citizens of all stripes who are aggrieved by the Attorney General’s overreaching and their own legislators’ often expedient decision to buy peace at the expense of sensible districting standards.
PART TWO: SAFE DISTRICTING PRACTICES AFTER SHAW: CONSIDER RACE LAST, NOT FIRST

In the almost forty years since *Baker v. Carr* opened the door to federal involvement in state redistricting, many of the legal issues concerning federal limitations on the process have been settled. Jurisdictions with insignificant or highly dispersed minority populations need be concerned only with the liberal population equality requirements and exercise modest self restraint in the area of partisan gerrymandering to be assured that their redistricting plans will survive federal challenge. Congressional districts must satisfy more exacting population equality standards, which, while occasionally annoying, seldom significantly thwart the line drawer's efforts to advance other interests.

Jurisdictions with even relatively small concentrations of minority citizens face a more harrowing task, and a safe path is less clear. Federal litigation in the upcoming decade will focus on the appropriate balance between "too little concern for minority representation" and "too much use of race and ethnicity in the creation of districts." Jurisdictions will face both legal and practical problems in their efforts simultaneously to placate minority voters and legislators while avoiding litigation from both the left and the right.

From the electorate's perspective, there are signs that in the upcoming redistrictings, legislators themselves may prove to be the greatest hazard to the creation of a fair and workable districting plan. Sometimes forgotten in the preoccupation with racial issues is that old-fashioned, non-racial gerrymandering has not gone away. As a practical matter, compliance with federal and state limitations on redistricting has always been secondary to the personal and political interests of those who ultimately control the line drawing process. These more traditional forms of
gerrymandering harm the political process, negatively impacting would-be candidates and the electorate as a whole. In the past, traditional districting criteria provided some protection from excessive gerrymandering. One unfortunate side effect of the Shaw decisions is that they have inadvertently lent an aura of legitimacy to non-racial gerrymandering, which may tempt legislators to throw off all restraints in the interest of self and party promotion.

I have four objectives in Part Two of this article: (1) to highlight important unresolved legal issues concerning the use of race in redistricting; (2) to extol the virtues of traditional districting standards, adherence to which not only is essential to the health of the political process but also provides a measure of protection against future challenges to a districting plan; (3) to propose specific districting standards; and (4) to suggest a process that will produce a functional, politically acceptable redistricting plan that should survive challenges from either the right or the left mostly intact. At the outset, however, the reader must understand that compromise will be necessary. The most functional plan may not be the most preferred plan politically, and both function and politics must at times yield to federal or state restrictions on the process.

I. REMAINING LEGAL AND PRACTICAL ISSUES CONCERNING THE USE OF RACE IN DISTRICTING

Unresolved issues remain in connection with virtually all of the race-related aspects of redistricting. In some instances, line drawers should be able to produce a plan that will be satisfactory regardless of how the issues are ultimately resolved. In others, jurisdictions must take their chances. An appreciation of these issues is important to understanding the proposed districting standards and procedures that follow.
A. Unanswered Shaw Questions

1. How Can a Jurisdiction Have the Intent to Create a Minority District, Yet Comply with Traditional Districting Standards?

According to Justice O'Connor, whose position is controlling, two circumstances must coexist to trigger strict, and therefore often fatal, scrutiny of state districting decisions. First, the state must have neglected traditional districting criteria when it constructed the challenged district, and second, the neglect must be "predominantly due to the misuse of race." Thus, "so long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration without coming under strict scrutiny." Justice O'Connor reiterates, however, that "districts that are bizarrely shaped and non-compact, and that otherwise neglect traditional districting principles . . . for predominantly racial reasons, are unconstitutional."

Because a district's racial make-up is not a traditional districting criterion, it is not clear how the state can simultaneously consider race but not let it predominate, and still comply with these criteria. One possibility is simply an affirmation of the obvious: a state may select one standard districting option, rather than another, precisely because a majority-minority district will be produced. Thus, districts that accommodate the interests of racial

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465. Id. Justice Kennedy and the Chief Justice (who together with Justice O'Connor formed the plurality in Vera) agree: "[states] may avoid strict scrutiny altogether by respecting their own traditional districting principles . . . . And nothing that we say today should be read as limiting 'a State's discretion to apply traditional districting principles,' ... in majority-minority, as in other, districts." Id. at 978.
466. Id. at 994 (emphasis added).
467. Given that many minorities live in communities in which they are in the majority, some number of majority-minority districts should quite naturally emerge by simply following traditional districting standards. Depending on the jurisdiction's population, size, and the number of districts to be created, there will be dozens of options available to produce a redistricting plan, all of which will comply with traditional districting criteria. All the Justices agree that selecting one standard option rather than another, knowing that it will include majority-minority districts does not involve the use of racial classification in districting. It bears no relationship to the sorting of whites into one district and blacks into another that was undertaken to create the districts invalidated in Shaw, Vera, and Miller.
groups could be created in the same manner that districts traditionally have been created for non-racial groups.

One traditional means to create such a district is available when the group is concentrated in a political subdivision, such as a county, which can supply the population for all, or part, of one or more districts. For example, a district can be made up primarily of the population of, say, a highly Republican county. Another example would be a district created by combining the population of several rural counties to accommodate rural interests. Making similar use of majority-minority counties or other political subdivisions as the core of districts clearly should be acceptable to every member of the Court. The test should be whether the decision to create this district would have been as sensible if it were not possible to know the district’s racial make-up. If not, the district is not a standard one, but rather one in which race was the predominant factor in its creation.

A second traditional means to create a district for a group is by adherence to the criterion “respect for” or “accommodation of” a community of interests. This method is available even when the minority community does not correspond to a political subdivision boundary. The Court specifically noted in *Miller* that:

> [a] State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests. “When members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.”

Suggestions by *Shaw*’s critics that North Carolina’s interstate district should have been seen as accommodating an African-American community of interests were based on a distorted notion of this concept. In a territorial system of representation, oversimplified, in a territorial system of representation, members of the governing body are elected from geographically defined districts. The elected official, regardless of her political persuasion, represents the district. By contrast, in an interest-based system, seats in the governing body are distributed to political parties in accordance with the portion of the votes they received. Elected officials then directly represent the particular interests of supporters of their party, without regard to the supporters’ residences.
as ours is, no provision is made for the direct representation of any group or interest. Rather, representation is tied to geographically constructed, territorial election districts. Thus a “community of interests” that can be accommodated by the districting process must be one that is tied to a definable geographic area.  

A “Polish district,” for example, is just short-hand for a district created to accommodate the residents of an identifiable neighborhood who are Polish. The person elected represents the interests of the district, including its non-Polish citizens and, at least technically, does not represent Polish citizens who live outside the district. Moreover, unlike the African-American district challenged in Shaw, districts “for” Polish voters generally are not constructed by using narrow corridors to connect distinct Polish neighborhoods in cities hundreds of miles apart.

It is precisely the community's strong connection to an identifiable geographic area that permits its accommodation as a community of interest. Equally strong interest groups—teachers, for example—cannot be accommodated because their residences are not concentrated in specific areas which can be included in a district. Thus, while the community of interests concept is available to support the intentional creation of a majority-minority district, in order to be consistent with traditional districting standards, the district must not be one that would require detachment of the concept from its territorial mooring. The real test of whether this concept has been employed in a traditional fashion would be to ask, if the racial data from the census were unavailable to pinpoint the group's location, could this district nevertheless have been created to accommodate a “community of interest”?  

If to escape strict scrutiny an intentionally constructed minority district must be consistent with traditional districting standards, then shared racial characteristics should not be sufficient
to deem a minority population concentration a "community of interest." The community must be a physical one, identifiable without having to resort to census data. Impermissible stereotyping is not involved when one assumes that residents of a neighborhood or economic region share representational interests. However, the equation of race and interest makes the very stereotypical assumptions Shaw rejects. Thus, creation of a majority-minority district using a reasonably compact minority population concentration, but one which could not be deemed a "community of interest," would violate traditional districting standards unless the district is one that otherwise sensibly could have been created without regard to race.472

2. Is a Compact Minority District that Causes Wide-Spread Distortion in Other Districts One that is Consistent With Traditional Districting Criteria?

Proponents of minority districts may argue that legislators should create compact minority districts first because gerrymandering for other reasons does not offend the Constitution. Support for the success of such a ploy can be found in Hays and Shaw II, which limit standing to persons who actually reside in a "race-based" district.473 The Court has refused to recognize that a citizen has suffered a cognizable injury from race-based districting on the theory that serious distortions in the boundaries of the race-based district have a ripple effect on the district in which he resides.474 If the standing issue permits the "neat minority districts" tactic, the Court has a myopic view of "race-based" distortions of the districting process.475 Indeed, distortion of a few districts to make them minority districts (the 1990's version of race-

472. Such a district should trigger strict scrutiny, but would survive strict scrutiny as “necessary to avoid Section 2 liability” if the other two Gingles preconditions are also present. See Thornburg v. Gingles, 478 U.S. 30 (1986).
475. Alternatively, the standing issue can be solved by recognizing that the “neat district” is “race-based” and has in fact been created by subjugating the jurisdiction’s traditional districting criteria to race. “But for” the motivation to create the majority-minority district, the surrounding districts would not have violated districting standards. Any resident of the “neat” race-based district would have standing to challenge it. The standing issue arose in Hays when a resident of a bizarre, but not race-based, district attempted to challenge the race-base district, claiming as an injury the distortion its creation caused in his district. See Hays, 515 U.S. at 742–47.
based districting) is in the long run less disruptive of other representational interests than will likely result from creating a few "neat" race-based districts, and in the process distorting many other districts to accomplish non-racial representational objectives.

It is doubtful that compact minority districts that could be created only by violating traditional districting standards in order to create other districts is what Justice O'Connor had in mind when she voted to immunize "standard" race-based districts from strict scrutiny. Moreover, Justice Kennedy's position would subject such districts to strict scrutiny, even if the surrounding districts were not necessarily distorted by their creation. In *Vera*, Justice Kennedy wrote separately to explain that while he agreed that some intentionally created minority districts escaped strict scrutiny, he would apply strict scrutiny if the state foreordained that one race would be in the majority in a certain number of districts. Justice O'Connor's position on this potentially critical point is not clear.

3. How Much Will *Cromartie* Impact Plaintiffs' Burden to Prove that Race Predominated in a District's Creation?

In the initial racial gerrymandering cases, plaintiffs had little difficulty establishing that race was the predominant factor producing the bizarre challenged districts because the districts had been sold to opponents and the public as necessary to assure minority representation. As *Cromartie* demonstrates, without the state's concession that a district was race-based, a plaintiff will have more difficulty establishing that race, rather than some political factor correlated with race, is the predominate reason that a district violates traditional districting standards.

Unclear at this time is how much *Cromartie II* modifies or provides an easy dodge of *Vera's* limitation on the use of race as a proxy. It is difficult to discern a meaningful philosophical distinction between creating a Democratic district by artificially including black voters who can be demonstrated empirically to be the most loyal Democratic supporters and creating a black district by

477. See id. at 959.
artificially including precincts that have been most loyal in their support of Democrats, knowing that these precincts will contain a majority of black voters.

At a minimum, jurisdictions should not use racial data directly to manipulate the political makeup of a district, which was the situation in *Vera*. Moreover, using precinct-level voting behavior allegedly for political gerrymandering begins to look like a subterfuge for race-based districting if the draftsman picks as a basis to assign precincts to the putative Democratic district a level of support for Democratic candidates likely to exist only in majority black precincts. However, when the alternative explanation for what appears to be a race-based district is incumbency protection for a minority legislator, the state’s task should be easier. Incumbency protection is generally advanced by including the incumbent’s most faithful supporters in “his” district. Providing identical treatment to a minority incumbent will likely mean that the precincts are heavily minority.

Creation of a minority district by resort to some shared characteristics other than race will seldom be a viable option. One strategy proposed to avoid *Shaw* is that line drawers attempt to create minority districts by reference to shared socio-economic status. Strict scrutiny would not be triggered by a district genuinely created to accommodate a community of interest defined by shared socio-economic status, even if the result were a non-traditional district. However, it is unlikely that actually using socio-economic information from the census will produce a majority-minority district when simply building a district that incorporated identifiable minority communities would not. While African-American families are more likely than white families to be below the pov-

478. See id. at 961–63.
479. *Cromartie II* thus may provide an unexpected boost to the reelection of the numerous minority incumbents who were reelected in redrawn, more standard districts. Many of these districts will have lost significant population since the 1990 Census, motivating the incumbent to look for friendly population to add to her district. Incumbency protection seemingly would provide a non-racial explanation for adding precincts that were heavily supportive of the incumbent when he ran in the invalidated district. If, however, the incumbent’s present district was an unconstitutional, but heretofore unchallenged, racial gerrymander, perpetuating the district by political gerrymandering will not negate its predominate racial nature.
480. After *Cromartie II*, this strategy seems unnecessary. High levels of support for Democratic candidates are more reliable than socio-economic status as a marker for majority black precincts and, while political data is not available from the census, a correlation between precinct boundaries and census population is easily made.
ernity level, in absolute numbers, many more of the poor are white. Moreover, to avoid strict scrutiny, line drawers would have to use socio-economic data to select the population to be included in the district. It is unacceptable to create the district using racial data, and then later attempt to justify the district by reference to some other characteristics shared by residents of the district, as well as by many others who were not included in the district because they were white.\footnote{Cromartie II's heightened proof requirement to trigger strict scrutiny makes gerrymandering easier when it is accomplished by using partisan advancement and incumbency protection as markers for race. Remember, however, that in the 1990s jurisdictions supported their extreme departures from traditional districting criteria by insisting that race-based districting was required by the Voting Rights Act. The fact that gerrymandering for partisan and personal advancement is not prohibited by the Constitution will not immunize districts distorted for these purposes from scrutiny on state law grounds. A more satisfactory solution for voters, and one which avoids strict scrutiny, would be for legislators to comply with standard districting criteria.}

4. When Will Section 2 be Both Needed and Available to Survive Strict Scrutiny?

A careful analysis suggests that the answer is “only rarely.” Despite the Court’s recognition that the need to avoid section 2 liability can provide a compelling state interest,\footnote{When Will Section 2 be Both Needed and Available to Survive Strict Scrutiny?} in most cases where it might justify the creation of a race-based district, it will not be needed. In most cases where it will in fact be needed, it will not be available. The reason for this anomaly is that to be a potential response to threatened section 2 liability, a district must contain a group that satisfies the first Gingles precondition (a sufficiently large and geographically compact minority group).\footnote{When Will Section 2 be Both Needed and Available to Survive Strict Scrutiny?} If it does not, it will fail narrow tailoring. However, if

\footnote{Cromartie II's heightened proof requirement to trigger strict scrutiny makes gerrymandering easier when it is accomplished by using partisan advancement and incumbency protection as markers for race. Remember, however, that in the 1990s jurisdictions supported their extreme departures from traditional districting criteria by insisting that race-based districting was required by the Voting Rights Act. The fact that gerrymandering for partisan and personal advancement is not prohibited by the Constitution will not immunize districts distorted for these purposes from scrutiny on state law grounds. A more satisfactory solution for voters, and one which avoids strict scrutiny, would be for legislators to comply with standard districting criteria.}

\footnote{481. See, for example, Vera v. Richards, 861 F. Supp. 1304, 1322–23 (S.D. Tex. 1994), where the court refused to find that certain non-racial characteristics of a district meant the district could represent a “community of interest,” when these characteristics were a post hoc description of the district, rather than interests that actually influenced the district’s creation. Id.}

\footnote{482. See Bush v. Vera, 517 U.S. 952, 977 (1996).}

\footnote{483. See id. at 978 (citing Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986)).}
the district contains such a group and also complies with traditional districting criteria, it escapes strict scrutiny completely. If it contains such a group but violates traditional districting criteria for reasons other than race, it also escapes strict scrutiny. Thus, the only circumstance where a putative section 2 district would need to be justified is where, despite the fact that the district contains a compact minority group, inclusion of the group within the district could only be accomplished by ignoring traditional districting standards.

Only two circumstances come to mind when a district containing a compact minority group would violate traditional districting standards for racial reasons. First, a minority population may be "compact," meaning that all or a substantial part of the group could be placed in a non-distorted district, but that the population does not otherwise satisfy the traditional requirements for a community of interest. By this I mean that the area it occupies is not one with a single, recognized geographic identity, and the district is not otherwise a sensible one which might have been created for a non-racial reason. For example, suppose that a high-density urban African-American neighborhood, which happens to be near the city limits, were combined with a heavily African-American rural population from an adjacent county, to produce a majority African-American district. Rarely would these combined populations be seen as a "community of interests" based solely on their relative geographic proximity to one another. This non-standard, race-based district would trigger strict scrutiny. Section 2 is then potentially available to justify the district's creation.

484. Another example might be a district that was created by bringing together in a single district minority populations from, say, four sparsely populated rural counties. Absent some unifying connection other than race, this population would not satisfy traditional notions of a "community of interest," and, but for the race of the population, would not have been included in a single district. The district so created would violate traditional districting standards in that it cuts across many political subdivision lines, and furthermore might not have easily recognized boundaries.

485. Note, however, that when the district is one that must contain a substantial population—such as a congressional district—rural counties often will have to be combined with urban areas. Under this circumstance, placing majority black rural counties in a district dominated by an adjacent majority black urban population may be as reasonable an alignment as any.

486. This assumes, of course, that the first Gingles precondition is satisfied by the presence of a geographically compact minority group, even if the group is not one whose members would have been placed together in a district "but for" their racial characteris-
The second circumstance is the situation described above where the state begins its districting process by the creation of a fixed number (or sets out to maximize the number) of compact minority districts, and as a result is forced to ignore its traditional districting standards when drafting non-minority districts. Under these circumstances, the fact that the minority districts are compact does not make the decision to create them consistent with standard districting principles.

Distinguishing between a district that is standard, and thus escapes strict scrutiny even if racial concerns dominated its creation, and a district that contains a section 2 qualified minority group, but nevertheless is non-standard for racial reasons, is both legally and practically important. The former district will not raise Shaw problems and avoids liability under section 2, even if the second and third Gingles preconditions are present. On the other hand, creating the latter district raises Shaw problems if the remaining two Gingles preconditions are not present, but not creating the latter district raises the risk of section 2 liability if the other preconditions are present. Prudent resolution of the create/do not create issue thus requires a potentially time consuming analysis of whether the minority group is “politically cohesive” (the second Gingles precondition) and, if so, whether its electoral choices will be defeated if it is not a majority of a single-member district (the third precondition). As a part of my proposed redistricting procedures, I suggest a streamlined means to make these determinations.487

5. When Will Section 5 Be Both Needed and Available to Justify Race-Based Districting?

Section 5’s availability as a compelling state interest to justify...
race-based districting may also be limited.\textsuperscript{488} Section 5 clearly mandates that covered jurisdictions take race-based action if necessary to avoid retrogression.\textsuperscript{489} However, for compliance with section 5 to justify race-based action, the jurisdiction's actions actually must have been required under a proper interpretation of the law.\textsuperscript{490} Whether the state's obligation to avoid retrogression is limited to steps consistent with traditional districting standards is an open question. If it is, as the Court has suggested in dictum in \textit{Vera} and in \textit{Abrams v. Johnson}, there should never be an occasion when section 5 is needed to justify a race-based district. A jurisdiction would not be required to adopt a non-standard district to avoid retrogression, and a standard, even if race-based, district would not trigger strict scrutiny.

The Justice Department's seemingly contrary position is that all districting standards, except compactness, must yield if necessary to avoid or lessen retrogression, and compactness must give way to some degree.\textsuperscript{491} In the unlikely event that the Department's position is merely that "respect for communities of interest" must be elevated over all other criteria, the supposed conflict disappears because districts created for such communities are consistent with traditional districting standards. Despite dictum implying the contrary, I suspect that when confronted with an actual case, a majority of the Supreme Court will permit the community of interest concept to be stretched to cover a district created to protect any reasonably compact minority group from retrogression, even if the community has no physical definition and must be defined solely by reference to racial data in the census. However, the leeway recognized will not be unlimited and the state's conclusion that race-based action was necessary must still be based on a correct interpretation of the law.\textsuperscript{492}

\textsuperscript{488} Most of the issues discussed here are considered in greater detail in Part One. \textit{See} discussion supra Part One, I.E.


\textsuperscript{490} \textit{See} discussion supra Part One, II.C.1.

\textsuperscript{491} Guidelines, supra note 187, at 5412–13; \textit{see} discussion supra Part One, I.E.5.

\textsuperscript{492} The Court's decision affirming the court-ordered plan in \textit{Abrams} emphasizes the limitations. Abrams v. Johnson, 521 U.S. 74, 91–92 (1997). There the Court indicated that the need to avoid retrogression could not justify extreme racial gerrymandering. \textit{Id.} at 96; \textit{see} discussion supra Part One, II.C.3.
B. Issues Generated by the Justice Department's Unpredictable Administration of Section 5

Aside from its potential to justify race-based action, Section 5 plays a critical independent role in the districting process in covered jurisdictions. The Justice Department is by far the least predictable hazard to any redistricting plan in these jurisdictions. Moreover, unlike avoiding potential section 2 liability, the safe means to satisfy the Department, but avoid Shaw problems, is less clear.

As discussed in Part One, the Department's recently issued Guidelines hint that their past policy of "maximization" of the number of majority-minority districts will be modified to press jurisdictions to maximize minority "opportunity" districts.\footnote{493} This is a highly subjective concept which may or may not be limited to districts in which the minority group is a majority of the potential electorate. The Department presumably bases this new policy on what it sees as arguable uncertainty in the Supreme Court's decisions concerning what it is that must not be "retrogressed" in order for a redistricting plan to qualify for preclearance, and the degree to which traditional districting criteria must give way to the creation of "minority opportunity districts" to avoid retrogression. Depending on just how far beyond existing Supreme Court precedent the Department is prepared to push jurisdictions to create minority opportunity districts, covered jurisdictions may simply have to pick their poison—incur the economic and political cost of challenging the Department in the District of Columbia court, or acquiesce in the Department's demands and leave their districting plan's ultimate fate to would-be challengers. Below, I make more concrete suggestions for dealing with the Department.

C. Practical Problems in Accommodating Minorities Brought About by Demographic Changes

1. Maintaining Existing Minority Districts

Shaw notwithstanding, significant political pressure, backed to
some degree by the requirements of the Voting Rights Act, will be brought to bear on legislators to maintain existing minority districts and to create others—a task that will be more difficult than in the past. Over the past decade, many historically African-American neighborhoods have lost population. Distincts dependent on these neighborhoods for their majority-minority status now will be significantly underpopulated. If as anticipated, minority population from these districts has moved either to integrated areas or to new minority suburbs, line drawers may find it impossible to both restore them to population equality and maintain the minority's majority status.

Maintaining minorities' majority status will be most difficult in those districts with significantly geographically distorted boundaries. Because most of these districts were created by cobbled together geographically disparate minority population concentrations, they will be particularly susceptible to population movement. Moreover, the fact that a particular race-based district was not challenged in the last round of redistricting is no guarantee that its retention in a new plan will escape scrutiny. Section 5 jurisdictions quite predictably will find themselves caught between the Justice Department's insistence that these distorted districts be maintained and the Supreme Court's admonition that reliance on section 5 must be based on a correct inter-


495. It is possible that some of these districts will not be ones that will be deemed “minority districts” in the baseline plan for retrogression purposes under section 5. The Justice Department's Guidelines for the 2000 redistrictings specify that the baseline for effective minority participation will be determined by imposing new census data on existing district lines—seemingly eliminating as “minority districts” those districts that were majority-minority districts in 1990, but are no longer. See Guidelines, supra note 187, at 5413. Note, however, if a district has elected a minority candidate in recent years, I have suggested that it be deemed a “minority district” in the baseline plan. It is not clear that the Department's substitution of “opportunity districts” for majority-minority districts as the measure of the influence that must be preserved will be so limited. This would mean that decisions as to which districts and how many districts must be preserved can no longer be objectively determined.
preparation of the law and not on "whatever preclearance mandates the Justice Department issues."^496

2. Competing Minority Groups

In the last round of redistrictings, some jurisdictions had difficulty simultaneously creating a district "for" Hispanics and a district "for" blacks.^497 Politically, at least, that problem will be exacerbated today in jurisdictions where more than one minority group is sufficiently organized to have the political clout to insist upon its own district. However, because the Shaw doctrine significantly limits the circumstances in which deliberately race-based districts may be created—limits which include not using "race as a proxy" to protect incumbents—minority groups often will not be able to back up their political clout with credible threats of litigation. Now when minority groups argue that minority districts must be created in order to avoid section 2 liability, Shaw mandates that the Gingles compactness requirement be taken seriously. Even with today's apparently greater geographic dispersion of the black population, blacks are still likely to be more geographically compact than Hispanics,^498 which means that when both groups cannot be accommodated, blacks will be better situated to argue that they "must" get the district.^499

Section 5 continues to provide legal backup for minority political clout. In those jurisdictions where section 5 protection extends to both blacks and Hispanics, the Justice Department's veto power over the redistricting plans will complicate any resolution of these groups' competing claims to districts. The Department's recently released Guidelines offer no special guidance for addressing the problem of two compact minorities being located in a district, except to note that districting criteria other than compactness will have to "give way to some degree to avoid retrogres-

^498. LEWIS MUMFORD CENTER, supra note 494 (reporting that Hispanics are considerably less segregated than African-Americans).
^499. Justice Kennedy noted in Vera, "Section 2 does not require the State to create two noncompact majority-minority districts just because a compact district could be drawn for either minority independently." Vera, 517 U.S. at 998 (Kennedy, J., concurring). This observation, however, is not very helpful for a jurisdiction where a compact district can be created for either, but not both groups.
As with section 2, deciding which group's district to preserve, if both cannot be, may turn on which group is better situated to take advantage of a compact district. This is true because, in addition to *Shaw* concerns, the Guidelines indicate that "the geographic compactness of a jurisdiction's minority population will be a factor" in its assessment of whether a less retrogressive plan can be produced.  

A thorny issue that can arise in jurisdictions with only one protected minority group, but that is potentially even more of a problem when there are competing groups, concerns the number of minority districts that must be provided. A minority group can constitute a majority of a single-member district, even if its numbers do not equal a "seat's worth" of the electorate. For example, a compact minority group constituting just slightly more than ten percent of the citizen voting age population could easily constitute a majority of a single-member district in a jurisdiction that has a five member governing board. It should be clear that the jurisdiction cannot gerrymander to avoid creating a district dominated by this group. Equally clear is that the jurisdiction can voluntarily create a standard district for the group.

The more difficult question is, does the group qualify under the first *Gingles* precondition, so that the district is mandated by section 2, if the other elements of dilution are present? Suppose that there are two minority groups similarly situated. Must the jurisdiction then set aside forty percent of its seats for minority groups that constitute just twenty percent of the electorate? The closest analogy in a decided case arose in *Johnson v. De Grandy*. In *De Grandy*, the lower court concluded that because racially polarized voting was present, Florida was required to create additional Hispanic districts in its legislative redistricting plan, even though in the contested region of the state, Florida had already provided the group with a proportional number of seats. The Supreme Court disagreed, noting that it could not see how districts that had provided the group with proportional

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501. *Id.*
502. By a "seat's worth," I mean simply that the group's share of the electorate is equal to one vote on the governing body. To equal a seat's worth of a five-member board, the group must constitute twenty percent of the electorate.
504. *Id.* at 1002–03.
representation could deny the group equal political opportunity.\textsuperscript{505} The Court then described how a minority group constituting forty percent of the population could be made to be a majority in seventy percent of the districts and noted that it would be "absurd to suggest that the failure of a districting scheme to provide a minority group with effective political power seventy-five percent above its numerical strength indicates a denial of equal participation in the political process."\textsuperscript{506}

By analogy, one could argue that a group equal to only half a seat is not entitled to have seats set aside that would give it effective political power 100% above its numerical strength. The real difficulty with concluding that the group is entitled to a district in these circumstances is not that "whites" would then be underrepresented. Rather it is that setting aside a seat for the group reduces the seats available for accommodation of the multiplicity of other interests in the electorate as a whole—diluting all other interests.\textsuperscript{507} Obviously, as the number of undersized minority groups in a jurisdiction grows, the problem of diluting other interests becomes more severe.\textsuperscript{508}

D. Enforcing State Districting Standards

If line drawers in the post-Shaw era see the fact that gerrymandering for partisan advantage is not subject to strict scrutiny as an implied endorsement of this all too common practice, they may become more blatant than ever in their disregard for the state’s traditional districting standards. Thus, challenges to districting plans on state law grounds may become more common in

\begin{itemize}
\item \textsuperscript{505} Id. at 1014.
\item \textsuperscript{506} Id. at 1017.
\item \textsuperscript{507} Very little thought should be required to realize that "whites" as "whites" have no representational interests. They hardly can be seen as a politically cohesive group. Most would recognize that white voters’ interests are all over the map. No one has a basis to complain when a naturally occurring district, or one designed to accommodate a defined neighborhood, turns out to be dominated by a minority group. A section 2 or section 5 “remedy” however, says “this district is not available for general political competition, because we have designed it for minority group representation.” When the “set aside” districts exceed the group’s share of the electorate, the remaining interests—whatever they may be—are unfairly diluted.
\item \textsuperscript{508} The solution should be a somewhat flexible standard for satisfying the numerousness requirement. It is probably too dilutive of other interests to create a district for a group equal to half a seat’s worth of the electorate, but as the group’s numbers approach a seat’s worth, that should be sufficient.
\end{itemize}
the future. However, litigants in covered jurisdictions may be surprised to find that section 5 will effectively block their efforts to force their legislators to follow neutral districting principles—at least when the non-conforming districts are “minority districts.” Consider the following plausible scenario.

Legislators now educated by *Cromartie II* follow its formula for constructing minority districts under the guise of partisan or incumbency gerrymandering. In other words, when a minority district cannot be created in accordance with traditional standards, they employ political data, rather than racial data from the census, so as to include only the “most reliable” Democratic voters—knowing that they will be black—in a district, which I will dub a “Cromartie district.” The plan containing Cromartie districts, as well as many other non-traditional districts for which partisan gerrymandering was the sole objective, obtains preclearance. Relief from the federal court for purely political gerrymandering is all but impossible to obtain, and relief for the Cromartie districts is possible seemingly only if the challengers demonstrate that the state’s use of political data to create the district was a mere subterfuge for the use of race.

Assuming that the state permits its districting standards to be judicially enforced, a challenger may be able to invalidate non-conforming districts in the state court. However, unlike a plan produced by a federal court, a remedial districting plan produced by a state court must be submitted for preclearance before it may be implemented. The preclearance benchmark presumably would be the invalidated plan, which will present very interesting issues if the state court invalidated the plan precisely because some of its districts, including the minority districts, did not conform to the state’s districting standards. Redrawing the politically gerrymandered, non-minority districts should present no problem. However, the Attorney General will likely take the position that any redrawing that reduced the number of minority districts is retrogressive under section 5.

509.  A general consideration of the means to enforce state districting standards is beyond the scope of this article.
511.  *Id.*
An alternative for voters frustrated by distorted districts would be to bring suit in federal court on \textit{Shaw} grounds and add their allegations of violations of state districting standards as pendant state law claims.\footnote{\textit{See United Mine Workers of America v. Gibbs}, 383 U.S. 715 (1966). \textit{See generally} 28 U.S.C. § 1367 (2001) (extending the subject matter jurisdiction of federal courts to include a state law claim that is part of the same case or controversy as a claim independently cognizable in federal court).} Even if the \textit{Shaw} claim ultimately fails, so long as the claims were "substantial" when filed, the court can adjudicate the state law claims.\footnote{\textit{See} \textit{Gibbs}, 383 U.S. at 722.} To avoid re confronting the Justice Department, the jurisdiction would have to elect not to propose a replacement plan, therefore leaving it to the court.\footnote{The decision, of course, would be up to the very lawmakers who had been elected under the precleared gerrymandered plan. Their motivation to leave the redrawing up to the court probably would be low, but even if the Department were to preclear another gerrymandered plan, this plan would have to be approved by the court as a remedy for the violations of state law.} The federal court's replacement plan must not be retrogressive, but the court may be more inclined than the Justice Department to agree that avoiding retrogression is not necessary if it can only be accomplished by extreme gerrymandering.

\section*{II. The Proposal}

\subsection*{A. Consider the Virtues of Sound, Race-Neutral, Politically Neutral, Districting Standards}

\subsubsection*{1. Ugly Districts Undermine the Political Process}

In the 1990s, an observer new to the subject of redistricting would have concluded that the primary purpose of the process was to assure minority representation. Until the Court decided \textit{Shaw}, rarely did supporters of a proposed plan, defenders of adopted plans, or those commenting on the process discuss any other interest.\footnote{I was briefly involved in some of the 1990s-era litigation involving Florida's legislative apportionment plans. In terms of interests that should be represented in its legislature, Florida is an unusually diverse state, quite apart from the racial and ethnic make-up of its population. Yet, except for my client, every other participant's primary, if not sole, argument for why their particular plan should have been adopted was that theirs was the best plan for minorities. In many, perhaps most cases, these arguments were merely disguises for other interests, typically partisan ones.} Lost in the debate over justifying race-based districts was the fact that protecting insular minorities is but one of
the many legitimate concerns of a districting scheme. In an ironic turn of events, Shaw's restrictions on racial gerrymandering could result in redistricting plans which serve the self-interests of legislators to the serious detriment of the citizens' interest in fair and effective representation.

For the majority of citizens, traditional districting criteria provide the primary protection for sensible districts that contribute to fair elections and effective representation. There exists an inevitable tension between the goals of a fair representational system, which must permit genuine political competition, and the understandable desire of legislators to use redistricting as an opportunity to enhance their own, and their party's, competitive advantage. For as long as political bodies have had the final word, incumbency protection and partisan advancement have been the most powerful forces affecting the ultimate configuration of district lines. However, prior to the 1990s, neutral districting standards protected the electorate from excesses of legislative self-interest, primarily by mandating that districts be sensible geographic units for electing representatives. These standards provided sufficient limitations on the line drawers that unhappy voters who found themselves in skewed districts were nevertheless able to mobilize against incumbents.

In the 1990s, however, legislators used the "need" to create minority districts to satisfy the Voting Rights Act as an excuse to jettison many of these standards, producing the largest crop ever of really ugly districts. Cutting as they did across voting precincts, disregarding natural boundaries, and slicing up neighborhoods, these "bug splat" districts undermined the electorate's ultimate weapon against personal and partisan self-promotion by disrupting political activity ordinarily carried out by community organizations and other watch dogs of localized interests. These districts accomplish the ultimate objective of gerrymandering—insulating those in office from those who would organize to defeat them—far more effectively than distorted districts of the past.

While the Court in \textit{Shaw} and its progeny held that race-based districting violated the Constitution, it also reiterated that traditional districting standards are not mandated by the Constitution.\footnote{518} Consequently, districts that deviate from criteria such as compactness and respect for political subdivision lines for non-racial reasons are not unconstitutional. In an ironic turn of events, legislatures responded to \textit{Shaw} by immediately embracing incumbency protection and partisan gerrymandering—the very forces traditional districting criteria were designed to curb—as the true explanation for their bizarre districts!\footnote{519}

To be sure, the Court has not \textit{endorsed} gerrymandering for political reasons and has recognized that the Constitution protects a minority party from its prolonged effects.\footnote{520} Moreover, the Court has recognized that traditional districting criteria play a crucial role in the redistricting process, noting in \textit{Vera} that in response to \textit{Shaw}, legislators and courts nationwide had: “modified their practices—or, rather, reembraced the traditional districting practices that were almost universally followed before the 1990 census . . . . Those practices and our precedents, which acknowledge voters as more than mere racial statistics, play an important role in defining the political identity of the American voter.”\footnote{521}

Nevertheless, in legislative minds clouded by the desire for safe seats, it is a small step from “the Constitution does no prohibit ugly districts, except for racial reasons,” to “incumbency protection and partisan advancement are legitimate political goals, more important than creating sensible districts.” To them, those are legitimate political goals, more important than districting standards. For example, witness Texas’s claim in defense of its bizarre congressional districts that these were the state’s \textit{only} districting standards!\footnote{522} Commentators and judges eager to find a

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\footnote{518. \textit{See} Shaw \textit{v.} Reno, 509 U.S. 630, 647 (1993).}
\footnote{519. These alternative explanations were seldom accepted by the Court, no doubt in large part because the very same legislators had previously justified these districts to the public, the Justice Department, and sometimes to the courts, as necessary to provide the minority districts required by the Voting Rights Act. Legislators who redrew plans invalidated under \textit{Shaw} were no doubt more careful to put forth alternative non-racial justifications from the outset, making it more difficult to establish that racial concerns had driven the creation of distorted districts, as demonstrated by the outcome in \textit{Cromartie II}.}
\footnote{520. Davis \textit{v. Bandemer}, 478 U.S. 109 (1986); \textit{see also supra} notes 123–49 and accompanying text.}
means to create minority districts encourage this thinking when they argue that districting standards “have little inherent value in the districting process” and are “not necessary to ensure fair and effective representation.”

It will be tragic indeed if closing the door to racial gerrymandering, which was to some extent self-limiting in its impact on the electorate, becomes an endorsement of unrestrained political gerrymandering. The final result could be, in the words of Judge Edith Jones, not “one in which the people select their representatives, but [one] in which the representatives have selected the people.”

2. Traditional Districting Criteria Are Essential to an Open and Competitive Political Process

No one believes that adherence to traditional districting criteria will eliminate self-promotional districting. Indeed, most would view restrained self-promotion as legitimate; however, there is little support for removing the constraints traditional districting standards place on this wide-spread practice. Traditional districting criteria promote two functions in addition to restraining rampant self-promotion. First, by insisting that election districts be sensible geographic or territorial units, these criteria assure that elements within the electorate will be able to effectively organize for political activity—activity directed against the incumbent, if necessary. Judge Edith Jones eloquently captures this issue:

Traditional, objective districting criteria are a concomitant part of truly “representative” single member districting plans. Organized political activity takes place most effectively within neighborhoods

Vera 517 U.S. 952 (1996) (Texas “asserts that its districts cannot be unconstitutionally bizarre in shape because Texas does not have and never has used traditional redistricting principles such as natural geographical boundaries, contiguity, compactness, and conformity to political subdivisions.”).

523. Shaw v. Hunt, 861 F. Supp. 408, 451 (1996). The (Shaw remand) court goes on at some length to explain its views, which do in fact support the proposition that traditional districting criteria cannot guarantee fair and effective representation. Id. at 451–52. Equally clear, however, is that the court’s arguments do little to dispel the logic that districts that violate these criteria generally have been created precisely to undermine political competition and often are very effective in doing so. See also Cromartie II, 532 U.S. 234, 245 (2001) (Justice Breyer, writing for the majority, characterizes partisan advancement as a legitimate political interest).

and communities; on a larger scale, these organizing units may evolve into media markets and geographic regions. When natural geographic and political boundaries are arbitrarily cut, the influence of local organizations is seriously diminished. After the civic and veterans groups, labor unions, chambers of commerce, religious congregations, and school boards are subdivided among districts, they can no longer importune their Congressman and expect to wield the same degree of influence that they would if all their members were voters in his district. Similarly, local groups are disadvantaged from effectively organizing in an election campaign because their numbers, money, and neighborhoods are split. Another casualty... is likely to be voter participation.... A citizen will be discouraged from undertaking grass-roots activity if... she [cannot locate her congressman's district's boundaries].

[Als the influence of truly local organizations wanes, that of special interests waxes. Incumbents are no longer as likely to be held accountable by vigilant, organized local interests after those interests have been dispersed. The bedrock principle of self-government, the interdependency of representatives and their constituents, is thus undermined by ignoring traditional districting principles.]

Second, following traditional districting criteria increases the likelihood that legislators will be able to effectively represent their constituents. Obviously, whether a district functions well as a representational unit depends upon more than its shape and its boundaries. Nevertheless, many of the factors Judge Jones discusses are also important to the ability of the person elected from the district to represent her constituents. Moreover, while not all of a voter's representational interests correlate with the interests of others living in close proximity to him, many do and those that do not simply cannot be considered when designing geographic or territorial districts. Traditional districting standards are designed, in part, to produce districts that can be effectively represented in a system based on territorial—rather than interest group—representation. Gerrymandering is an attempt to selectively graft representation of group interests—be the interest

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525. Vera, 861 F. Supp. at 1334–35 n.43.
526. For example, districts should be constructed with an eye towards the governmental functions of the elected body involved. If a county council's chief function is to maintain county roads and parks, it is prudent to design districts so as to equalize road mileage and distribute the parks among the districts. If, as is typical, the council's primary authority is in the unincorporated areas of the county, but all county voters participate in council elections, districts should be designed with an awareness of the inherent conflict between the interests of those who need the county's services and those who do not, but whose taxes probably support county government.
partisan, racial, or simply those of the loyal supporters of an incumbent—onto what is otherwise a territorial representation system.  

While present federal law provides the electorate very little protection from unrestrained self-promotion, state law may offer relief. Realistically, however, self-restraint on the part of individual legislators is the only effective avenue by which to promote sensible districts.

527. A district in a territorial representation system would not be designed intentionally to include populations as diverse as residents of an area dominated by a rural agricultural economy and residents of a low income urban neighborhood. Supporters of North Carolina's congressional district, which contains just these kinds of diverse populations, would note that, if both sets of residents are African-Americans, they will perceive their shared racial heritage as more indicative of a shared political agenda than their geographic proximity to white neighbors. Similar arguments can be made by Republican (or Democratic) legislators who see nothing wrong with connecting the geographically dispersed party faithful into geographically distorted districts. To the extent that their argument is that race and party labels are more important indicators of overall political orientation than geographic proximity, they are almost certainly correct. What this argument really supports, however, is not racially or politically selective distortion of our existing territorial representation system, but rather abandoning that system in favor of direct interest group representation for everyone. In such a system, African-Americans and Republicans could be represented directly in accordance with their numbers in the electorate, and so could any other group with sufficient numbers to command a seat—environmentalists, gun-control advocates, abortion foes, and white supremacists alike. Note, however, that imposing interest group representation on a territorial representation system has additional drawbacks not found in systems designed for direct interest representation. In a proportional representation system, all sufficiently popular shared interests are represented in the elected body. Gerrymandering, however, results in representation of only selective interests and, equally significant, means that voters who do not share the selected interests, but are assigned to the district to bring it up to population equality, are simply filler. Indeed, the aim of a partisan gerrymander is to craft the district so as to have just enough partisans to carry the election, thereby “wasting” the votes of as many of the opposing party's supporters as possible. For further discussion of grafting interest group representation onto a territorial representation system, see Katharine Inglis Butler, *Affirmative Racial Gerrymandering: Rhetoric and Reality*, 26 CUMB. L. REV. 313, 357–62 (1996).

528. Thus far, the Supreme Court has given no indication that it would see a distinction between old-fashioned gerrymandering—which, given tools available at the time, was limited in its ability to craft districts that would be dysfunctional from voters' and challengers' perspectives—and new-age gerrymandering—which is virtually unlimited. If, however, gerrymandering for partisan advancement and incumbency protection are pushed to the extreme, the Court may eventually see that the “ins” are effectively shutting out the “outs” in a manner for which there is no political solution, much the same way that malapportioned districts permitted rural areas to keep urban areas underrepresented before *Baker v. Carr*, 369 U.S. 186 (1962).
B. Guiding Principles for the Redistricting Process

1. Adopt Standards in Advance of Drafting a Plan

The first official steps in the redistricting process should be: (1) to adopt the standards by which redistricting will take place (if none are mandated by statute); (2) to adopt rules for resolving conflicts among standards; and (3) to set out the procedures that will be followed. The goal of the standards should be to create sensible districts, taking into account the specific interests that should be represented in the body to be elected. The interests that should be accommodated in a districting scheme are highly specific to the jurisdiction involved, except that the interest must have a sufficient connection to definable geographic areas to be furthered by the creation of territorial or geographically based election districts. Technical standards—those setting out the rules for constructing individual districts—are more generic. For example, all districts should have easily recognized boundaries that, when possible, serve some function beyond merely defining who is in and who is out of the district.

When necessary, state interests must yield to the requirements of the Constitution and the Voting Rights Act, even if the result is that some districts are not optimally sensible. Generally, however, so long as sensible districts are produced, state standards should be tailored to the legislative body at issue and should be applied flexibly to accommodate the representational interest to be furthered. For example, respect for political subdivision lines may serve an important top priority interest in a congressional districting plan, but may be of virtually no consequence in a municipal plan. Equalizing road mileage among districts may be a

529. My proposal is directed toward legislatures and other entities that must redistrict. However, with very little modification, a court called upon to provide a plan of its own can follow the proposal and produce a redistricting plan that complies with the law and with the mandates for court-ordered plans, discussed supra at Part One, III.A. Indeed, I initially developed these procedures while acting as the Court's expert in Wilson v. Jones, 130 F. Supp. 2d 1315 (S.D. Ala. 2000). Similar modifications will permit the plan to be followed by litigants, who often are expected to provide alternative plans for the court's consideration. Proposals for modifications will be included in the footnotes.

530. For example, the population of a congressional district otherwise created out of whole counties may have to be supplemented by the addition of 100 people from a county outside the district in order to comply with the Constitution's stringent population equality standards. See discussion supra Part One, I.A.
very important interest from the standpoint of effective representation when the body is a county council charged with maintaining the roads, but of no interest at all for a state senate district.

Establishing in advance when one districting standard should yield to another is perhaps wise, but it should be done with the proviso that an established hierarchy should not override common sense. For example, a requirement that districts be compact ordinarily will contribute to sensible districts, but sensible districts, not compactness, should be the goal. Thus, in some circumstances, a well-known, easily recognized natural or man-made barrier, such as a body of water or an interstate highway, makes a better district boundary, even if the districts produced are less compact than they would have been had an obscure street or an invisible census division line been selected.

2. A Suggested List of Goals and Objectives

The following is a list of goals that should be furthered by a districting plan.

(1) The entity involved should enumerate the non-technical standards that incorporate representational interests to be furthered by the plan. These matters are necessarily specific to the elected body involved, but might include such things as: "every county shall be afforded at least one seat in the lower legislative house;" "efforts shall be made to equalize the potential electorate among districts by dividing the populations in prisons, military installations, and other non-, or under-, voting populations among as many districts as feasible;" and "regions in the state shall be assigned identifiable districts in accordance with their population." The desire to accommodate these representational objectives shall be tempered by the mandate to create sensible districts.

(2) The ultimate goal of the districting process is to create sensible districts that will serve as vehicles for fair elections and effective representation of all citizens, and which, when it can be

531. Modification for courts and litigants: because neither courts nor litigants have the political mandate to select from among the many possible interests competing for representation, they should adopt only those goals that are both lawful and actually manifested in the last plan adopted by the jurisdiction.
accomplished consistent with this principle, will further the spe-
cific representational objectives set out above.

(3) A sensible district is one in which voters can easily deter-
mine its boundaries, which is conducive to citizens' political par-
ticipation as voters and candidates, and which is capable of being
effectively represented by its elected representative.

(4) In recognition of the jurisdiction's many, often competing
interests, and the need for political compromise, the creation of
sensible districts is an aspirational goal, not a rigid rule. The
standards that follow are listed in order of priority, but with the
caveat that the ultimate goal of sensible districts, the realities of
the law, and practical political necessity may at times mean that
a lower priority standard is elevated over one above it in the hi-
erarchy.

3. A Suggested List of Standards to Guide the Construction of
Individual Districts

(1) To the extent possible, districts shall be of equal population.
Deviations within constitutional limits shall be permitted only
when necessary to create sensible districts, which may at times
include the preservation of communities of interest, or to comply
with the Voting Rights Act.  

(2) Districts shall comply with the Voting Rights Act, as de-
defined by the United States Supreme Court and the Department of
Justice, except when in the opinion of legal counsel, the Depart-
ment's definition is in clear conflict with decisions of the Supreme
Court or the United States District Court of the District of Co-
lumbia.

(3) Districts shall be created using the population cores of ex-
isting districts to the extent the resulting district is reasonably
consistent with the requirements for sensible districts.

(4) Districts shall contain only contiguous territory. Land
masses totally separated by a body of water shall be considered
continuous so long as the water-side of each mass is within [X] miles of a bridge connecting to the other land mass. Otherwise,

532. Courts and litigants preparing proposals for adoption by courts must adhere to
the stricter population standards for court-ordered plans.
two land masses that intersect for less than \( Y \) miles shall not be considered contiguous, unless unusual circumstances make the resulting districts a sensible one under the circumstances. The fact that a district is made up solely of contiguous territory does not, standing alone, assure that the district is a sensible one.

(5) Districts’ boundaries shall, when possible, correspond to well-recognized natural and man-made barriers or well-known highways, roads, and streets, or when well-known in the community, to a political boundary.

(6) Districts shall be compact. A district shall be considered compact, even if its boundary is irregular, if the boundary is a well recognized natural or man-made landmark. The reason for an irregular boundary must be independent of its having been designated a district boundary, and the district must otherwise be sensible. The fact that a district is compact does not, standing alone, assure that it is a sensible one. No formula or technical measure of compactness shall control whether a district is compact. Rather the objective is a common sense one, to be interpreted in light of the underlying purpose to create sensible, functioning districts.

(7) When consistent with the stated representational goals, and with the population equality requirements of the Constitution, districts shall respect political subdivision boundaries and shall include whole precincts when feasible.533

533. There are a number of “formulas” for measuring compactness. See Richard H. Pildes & Richard G. Niemi, Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno, 92 Mich. L. Rev. 483, 549–50, 553–59 (1993). See generally Polsby & Popper, Third Criterion, supra note 517. At some point, consulting these measures is an elevation of form over substance. Compactness, as with other standards, functions to keep partisan and personal interests in check and to aid the creation of sensible districts and is useful only to the extent that it accomplishes those objectives. One needs no measure of compactness to discern that the districts challenged in Shaw, Miller, Vera, and other racial gerrymandering cases were anything but compact—a fact obvious merely from looking at the districting maps. Bush v. Vera, 517 U.S. 952 App. A–C (1996); Miller v. Johnson, 515 U.S. 900 App. A & B (1995); Shaw v. Reno, 509 U.S. 630 App. (1993). Moreover, an absolutely compact district is not for that reason alone a sensible district. For example, a circle is the most compact geometric shape, but absent some truly unusual circumstance, a circular shaped district would not be a sensible one.

534. With the proliferation of single-member districts for county, school board, and municipal elections, this will be a difficult standard to follow. “Nesting” of districts—including all lesser political units within all greater ones (meaning a state senate district would contain \( x \) number of whole state house districts which would contain \( y \) number of whole county council districts, etc.)—usually cannot be accomplished within the
(8) Districts may be permitted to deviate modestly from these standards to accommodate communities of interest so long as the underlying community is one which is geographically identifiable, and the interest represented by the community arguably will not otherwise be adequately accommodated by the districting plan.

(9) When otherwise consistent with the creation of sensible districts, reasonable accommodation may be made to keep incumbents in districts containing the core populations of their existing districts and to accomplish other political objectives as may be necessary to secure adoption of the plan.

C. Procedures for the Production of a Challenge-Resistant Plan

Following are the steps that, if substantially followed, should limit the risk that the plan will be successfully challenged. In the event of a successful challenge, following these procedures should limit the degree to which the plan will have to be adjusted to eliminate the problem. These steps assume that the proposed standards have been made public and that any notice requirements have been satisfied.

1. Turn off the redistricting software's racial and political information and produce the first plan consistent with all of the enumerated standards except compliance with the Voting Rights Act. The objective here is to produce a plan based on the jurisdiction's enumerated standards, but without initially considering race-based steps that later may be needed to comply with federal law and without considering political data. If the plan that emerges without using race satisfies federal law and is politically acceptable, no further adjustment will be necessary, and a Shaw challenge will be virtually impossible. All incumbents, including those who are minorities, will be afforded some protection, first by including a specific districting standard designed to preserve the core of their existing districts, and second, by a later provision to reconnect incumbents severed from their core constituents. Ideally, this first step should be performed without knowledge of the location of incumbents residences. Otherwise, the focus inevitably will be on protecting the incumbent and not creating sensible districts. Even a tail-like adjustment to an other-

requirements of "one-person, one-vote." The ideal of having all the contests on the ballot in a particular precinct be identical may be impossible for the same reason.
wise sensible district to accommodate an incumbent is better than having the district’s entire makeup driven by the location of the incumbent’s residence. Make a permanent record of this first race-neutral, politically neutral plan.

2. Do a reality check—politics do matter, adjust accordingly. This step should also proceed with the racial information in the districting program turned off. Begin by reconnecting incumbents, where needed and feasible, with the core of their old districts. The justification for this step is that voters ought to be given the opportunity to return an incumbent with whom they have been pleased and turn out one who has not performed to their satisfaction. Next, partisan adjustments that will be necessary to achieve passage of the plan should be made utilizing such political data as may be available.

As a part of the reality check for the draft plan, line drawers should be receptive to information from incumbents and others that indicate that the draft plan has divided a neighborhood, political subdivision, or identifiable area containing an interest group for which a sensible district otherwise could have been constructed. Politically expedient accommodations for such a group should be made at this stage.

Make a permanent record of the second race-neutral, politically adjusted plan. This plan should to the extent possible represent the plan that would have been presented to the body for approval as a final plan but for the necessity of assuring that the plan complies with the Voting Rights Act. The entity producing the plan might want to consider actually putting this plan before the legislative body for a conditional vote. Such a measure would reveal any remaining non-racial political hurdles to the plan as drafted. Moreover, the body’s conditional approval of the plan would provide convincing evidence of the plan that would have been adopted without any consideration having been given to race. This provides a back-up plan should a court subsequently determine that race-based steps perceived to be necessary to comply with the Voting Rights Act went too far.

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535. The Supreme Court described the process as a policy aimed at maintaining existing relationships between incumbents and their constituents and preserving seniority. White v. Weiser, 412 U.S. 783, 791 (1973).

536. There are obvious obstacles to such action, not the least of which is the very likely resistance to spending the time, energy, and political capital necessary to pass a plan that
3. Using the available racial information, consider whether to reunite minority population concentrations inadvertently divided in the draft plan. Now turn on the racial information associated with the districting program. Check to see if district lines have divided minority population concentrations that, if left intact, could have formed a substantial percentage (approaching fifty percent) of a district's population. If so, determine whether the minority population concentration is one that could have been recognized as a "community of interest," consistent with the way similarly situated non-minority groups were treated. Unless all similarly situated non-minority groups were accommodated in the earlier draft, the decision as to whether this group should be reunited is a political one. A decision by the redistricting entity to create a district for this group should not trigger strict scrutiny. The fact that the interest group is a racial minority should not deprive it of the benefits other similarly situated groups have received. Preserve the plan produced by the changes made on this basis, noting the reasons for doing so.

4. Test for retrogression under section 5, making such race-based adjustments as may be needed. The first task here is to determine the number of minority districts in the baseline plan. The Justice Department's recently released Guidelines indicate that it views the baseline plan as being the last legally enforceable district lines, with the 2000 Census population superimposed. Thus, to compare the proposed plan with the baseline plan, the line drawers will have to come up with 2000 Census minority population and voting age population figures for, at a minimum, those districts in the old plan in which minorities were in the majority in 1990 and those in which the minority might have become a majority in 2000 by virtue of population growth.

537. See supra note 251 (discussing the appropriate use of the "community of interest" concept to create districts).
539. If the prior drafts did not make accommodations for any groups, it is perhaps questionable whether accommodating minority populations would be consistent with the jurisdiction's standards. However, unless the district so created would be obviously different from others in the plan, its creation is not likely to provoke a legal challenge.
540. The Guidelines state, “After the 'benchmark' districting plan is identified, the staff inputs the boundaries of the benchmark and proposed plans into the Civil Rights Division's geographic information system. Then, using the most recent decennial census data, population data are calculated for each of the districts in the benchmark and proposed plans.” Guidelines, supra note 187, at 5413.
The Guidelines are vague about how the Department will define a minority district for retrogression purposes. Absent further guidance from the either the Supreme Court or the district court of the District of Columbia, a section 5 jurisdiction’s wisest approach is to view minority districts in the baseline plan as being those in which either a single minority group is a majority of the citizen voting age population, or the district’s current office holder is a minority who was elected with the support of at least a majority of the relevant minority group. In balancing the risk of Shaw litigation against the risk of drawing a section 5 objection, the jurisdiction is on firmer ground initially to take a view of minority districts that appears to be consistent with decided cases. If the Justice Department ultimately pushes for some different definition, the jurisdiction can decide at that time whether to acquiesce and adjust the plan, or to bring suit in the District of Columbia court. If it acquiesces, the actual extent of its responsive race-based action will be easily documented, limiting the damage to the overall plan if a Shaw challenge is subsequently successful.

If there are fewer majority-minority districts in the proposed plan than in the baseline plan, or if a minority incumbent elected in a non-majority minority district, per the 2000 Census, is in a proposed district with a smaller minority population percentage than her existing district, the proposed plan is very likely retrogressive. Note, however, that the plan arguably is not retrogressive if the protected minority group’s overall percentage of the jurisdiction’s voting age population has dropped precipitously, and the number of “minority districts” in the proposed plan is in line with the group’s percentage of the electorate.

The action to be taken to avoid retrogression must obviously be based on the specific circumstances of the plan. If it is possible to

541. See discussion supra Part One, I.E.4.
542. Combining two minority groups to create a majority-minority district is seldom justified. However, African-Americans who are only a plurality of the voting age population of a district that also has a large Hispanic population may turn out to be a majority of the district’s potential electorate when non-citizens are removed from the calculation.
543. A district with a black Democratic incumbent likely would qualify, but not one in which a black incumbent was a Republican, who very likely was not the choice of the district’s black electorate.
544. In such circumstances, the inability to maintain the existing number of majority-minority districts is almost certainly a function of some of them being substantially underpopulated.
adjust the plan to avoid or reduce retrogression, this step should be taken unless the resulting districts can only be produced by subjugating traditional districting criteria to race. If accommodations have already been made for minority incumbents and minority groups that qualified as "communities of interest," retrogression may be unavoidable. Population shifts over the decade may make it impossible to retain the prior number of minority districts without the outrageous gerrymandering that the Court's Shaw line of cases indicated was unnecessary.545 If retrogression cannot be feasibly avoided without totally disrupting the remainder of the plan, the jurisdiction should attempt to establish that its plan nevertheless will provide the group "influence" in accordance with its numbers in the electorate. Regardless of whether the jurisdiction elects to violate districting standards to avoid retrogression, or to submit the plan as one which it deems to be unavoidably retrogressive, it should fully document every action taken, and every action considered but not taken, and include the reasons therefor.

5. Examine the plan for possible section 2 liability. If minority "communities of interests" have already been accommodated by the plan, genuine risk of section 2 liability should be slight. If for any reason there remain significant concentrations of minority population divided by district lines, the jurisdiction should undertake further analysis to decide if it should make race-based adjustments to the plan. In order to assure that the plan will survive future strict scrutiny, race-based adjustments should be made only if a reasonable examination of the available evidence indicates the likely presence of the Gingles preconditions.

a. The First Precondition

Is there a compact minority group with the potential to be a majority of a district's citizen voting age population, but which is not currently contained within a single district? If the answer is no, the analysis does not need to proceed any further because there is no risk of section 2 liability.

Shaw and its progeny make clear that only a group that could take advantage of a reasonably compact district satisfies the first

precondition, but as noted above, the case law is less clear as to whether a district for the group must also satisfy the jurisdiction's other districting standards. While the matter is certainly not free from doubt, the better view is to take a flexible approach. The question that should be answered is whether a district created for the group would be a sensible one that might have been created for some reason other than race—even if some reordering of priorities and stretching of the community of interest concept is necessary. If the answer is no, the putative group should not be seen as satisfying the first precondition. The rationale of section 2 is to provide the group with the same opportunities that others similarly situated might enjoy—not to provide it opportunities that a non-racial group never would have had.

If a sufficiently large compact minority group exists which, without regard to race qualifies for interest group status, the jurisdiction can, if it chooses, create a district for this group without further analysis. However, if it wishes to create the district only if necessary to avoid section 2 liability, or if it can create the district only by reordering and stretching some of its traditional districting standards, other than compactness, it must proceed to the next step in the analysis.

546. See supra Part One, II. Reading such a requirement into section 2 would be consistent with the original notion behind vote dilution litigation—that when minority voters were fenced out of the political process by discrimination and racism, it was a reasonable limitation on the state's choice of electoral schemes to insist that it replace the scheme that permitted dilution with another equally legitimate and equally recognized, electoral system. Section 2 would then be seen as a mandate that, when dilution is present, a state must utilize single-member districts and furthermore must elevate "communities of interests" above other districting criteria, even if it otherwise would not do so, if in so doing minorities will be placed on equal footing with others.

547. When the jurisdiction itself is producing districts, it has the discretion to create standard minority districts without any evidence that such districts are necessary to avoid section 2 liability. It also has the discretion as to whether to reorder its standards or ignore them to some degree to avoid section 2 liability, but when it does the latter, it must have a reasoned basis in evidence to believe that it otherwise faces that liability. The state merely needs to be reasonable in its analysis of the facts to avoid a Shaw violation. A court producing a plan is in a different position vis à vis section 2 than is the legislature. Because the burden of proof of a section 2 violation is upon the party alleging it, the court need not take steps to create minority districts except where following traditional districting standards would naturally produce them, or unless necessary to avoid retrogression. Any party seeking minority districts beyond that must carry its burden to establish that failure to include such districts will result in a section 2 violation. Unlike the state's voluntary adoption of race-based districts—which, to avoid Shaw liability, need be based only upon a reasonable assessment of its potential liability—the court must not impose a race-based remedy on the state absent actual proof of a race-based violation.
b. The Second and Third Preconditions

Short of a recent judicial determination that the other two preconditions have been satisfied, the legislator will confront difficult factual and legal issues in connection with what constitutes "political cohesiveness," and when "white bloc voting" is the "cause" of the defeat of candidates of choice of the minority group. In the context of actual section 2 litigation, these are issues that require an intensely local factual inquiry, as well as expert testimony subjected to careful scrutiny by the adversarial system. It is impractical to expect legislators to engage in the same exacting scrutiny. Yet, without some objective basis to determine whether legislators "had a strong basis in evidence" for their fears concerning section 2 liability, the holding in Shaw is easily subverted, and judicial scrutiny is likely reduced to a determination of whether the more objective first precondition exists.

Proponents of majority-minority districts are likely to produce evidence of racially polarized voting, but organized opposition to the creation of these districts on the grounds that they are unconstitutionally race-based is likely to arise only after the fact. Legislators therefore cannot safely rely on a one-sided presentation of evidence to decide whether fear of section 2 liability can support race-based action. For a jurisdiction with the resources to do so, hiring an expert to do a polarization analysis is the preferable course of action. When elections for the body to be redistricted are partisan elections, the polarization analysis should look at registration by party, by race, voting behavior by race in the Democratic Primary and the General election, and the election outcomes in each.

A simple short-cut to doing the full analysis may exist in some jurisdictions. If minority candidates have routinely been elected

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548. To adequately address the means to determine the presence of the second and particularly the third precondition requires more space than can be allocated to this issue here. A jurisdiction for which the "create/don't create a minority district" determination actually rests on the presence of the second, or more likely the third, precondition would be well advised to consult the section 2 cases for its federal circuit. All I can do here is address the most obvious situations.

549. Counsel for the redistricting body should be careful not to turn legal issues over to statisticians or even political scientists. The expert should provide the basic information of which candidates were supported at what level by majority and minority voters. Determining whether the results of the analysis support the existence of the second and third precondition should be the lawyer's job.
in the area that includes the putative section 2 group in districts that are not majority-minority in voter turnout, it cannot be said that polarized voting is defeating the group's candidates of choice. The consistent election of minorities to other offices involving the voters in the area should suffice to negate the existence of polarized voting, so long as the minority candidates have not been routinely defeated when running for the actual office that is the subject of the redistricting. Absent substantial minority success, further analysis will be necessary.\(^{550}\)

c. Political Cohesiveness

If seventy-five percent of the group's members have registered with the same party, the group passes the first cohesiveness hurdle.\(^{551}\) If fewer than seventy-five percent of voters are registered with one party, or consistently support the nominees of one party, the group is not politically cohesive.\(^{552}\) Most everywhere, black voters will be registered as Democrats and will support nominees of the Democratic Party at levels that exceed seventy-five percent.\(^{553}\)

Cohesiveness in support of Democrats, however, does not distinguish the minority group from other Democrats. The second step in the cohesiveness analysis is to determine if the group is cohesive without regard to the party label. If over the prior ten years, seventy-five percent or more of the group has supported

\(^{550}\) While there is disagreement as to the degree to which white candidates elected with overwhelming minority support "count" as the group's candidates of choice, a jurisdiction cannot assume that white candidates were supported by the group without further analysis. However, when black candidates have been routinely elected, this suggests that race is not a barrier to election, which would negate the existence of dilution even if these candidates were not the choices of the group.

\(^{551}\) If registration records by race are not available, a finding that seventy-five percent of the group supports the nominees of one party seventy-five percent of the time is an alternative means to determine that the group is cohesive in its party preference.

\(^{552}\) Some percentage greater than a simple majority must be selected because if, as is typical, there are, as a practical matter, only two party choices, a majority of the group would always be registered with one of them. I selected seventy-five percent because below that percentage, the group's inability to elect candidates of its choice is just as attributable to its failure to vote together as it is to the voting behavior of others.

\(^{553}\) For a summary of presidential elections showing black support for the Democratic nominee ranging between eighty-three and ninety percent, see HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 2001–2002 122–24 tbl. 3-5 (2001). See generally STEPHAN THERNSTROM & ABIGAIL M. THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE (1999).
the same candidate in the Democratic Primary at least seventy-five percent of the time, it is reasonable to conclude that group members are cohesive as minorities, and not merely as a subset of Democrats.

d. A Bloc-Voting White Majority That Defeats the Candidates of Choice of the Group

In a contested section 2 lawsuit, it is the third precondition that generally raises the most issues—particularly in those federal circuits that take the view that it is not satisfied if the group’s choices are defeated for political rather than racial reasons.\footnote{See, e.g., Vecinos de Barrio Uno v. City of Holyoke, 72 F.3d 973, 981 (1st Cir. 1995); Nipper v. Smith, 39 F.3d 1494, 1524–25 (11th Cir. 1994) (en banc); League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 850 (5th Cir. 1993) (en banc), cert. denied, 510 U.S. 1071 (1994); Baird v. Consol. City of Indianapolis, 976 F.2d 357, 361 (7th Cir. 1992).} Because the state merely needs to be reasonable in its determination of potential liability, its task is somewhat easier than a court’s. It probably will be sufficient to decide that this precondition has been established if candidates supported by at least seventy-five percent of the group have failed to secure the Democratic Party nomination for the offices at issue some high percentage of the time.\footnote{The determination as to how often the group should expect to prevail is subjective, but should be based on its cohesiveness and size. When the group is routinely ninety percent or greater cohesive in support of candidates in the Democratic Primary contests examined and is also a substantial part of the electorate, say, perhaps, forty percent or greater, it should be able to routinely elect its first choices. When it is less cohesive, or a smaller segment of the electorate in the districts analyzed, expectations for success should be adjusted downward.} If, in the Democratic Primary, the group has routinely nominated its choices who are then routinely defeated in the general election, the key inquiry is whether the Democratic Party nominees who were the group’s choices lost much more often than Democratic nominees generally. When white Democrats win but black Democrats lose under comparable conditions in the general election, it is reasonable for a jurisdiction that wishes to create a minority district to conclude that the third precondition is present. A jurisdiction that believes an additional minority district will mean that other legitimate districting goals must be abandoned can always just not create the district, and hope that
its decision is not subsequently challenged, or that the challengers will not carry their burden of proof.  

6. Present the proposed plan to the public, if required by state law, or if deemed desirable. Make desirable, politically expedient modifications based on feedback from this step. Document the changes and reasons therefor.

7. Submit the plan to the legislature and take all remaining steps necessary for the plan’s adoption. Changes to the plan at this stage should be discouraged. Those that are politically unavoidable should be carefully documented and should not be made using racial data or some highly suspicious substitute for race.

At this point, line drawers in jurisdictions not subject to section 5 can begin to relax. In section 5 jurisdictions, however, the battle, unfortunately, may be just beginning.

8. Submit the plan for preclearance. The Guidelines are clear about the procedures for submission. Thus, I address here strategies for a plan’s survival of the process.

First, decide whether to bypass the Justice Department by submitting the plan directly to the district court of the District of Columbia. In the past, this expensive and time consuming step was seldom advisable unless a jurisdiction was unable to obtain administrative preclearance. If, however, the Department has sent strong informal signals to the jurisdiction that an objection to its plan is likely, the court option may be a better choice. The Supreme Court’s section 5 decisions of the past decade should result in most preclearance decisions turning on legal issues, rather than on genuinely disputed facts. Because of the vast increase in the number of jurisdictions that adopted single-member districts during the past decade, and consequently must redistrict, the Department’s Voting Section will be pushed to new limits to process submissions and defend cases filed in the District of Columbia court. Thus, the Department may be less inclined to look for

556. There is seldom unanimity among legislators on this issue. Legislators in favor of more minority districts can of course take the analysis to yet another level in hopes of convincing their colleagues that section 2 liability looms.

factual disputes to avoid having the case decided on summary judgment.

Second, if the jurisdiction elects to seek administrative preclearance, one advisable strategic move is to supply absolutely every shred of evidence called for by the Guidelines for section 5 submission, even if it is difficult to imagine how the evidence requested could possibly aid the Department’s deliberations. This will reduce the Department’s opportunity to extend the statutory sixty-day period it has to respond to a submission by requesting additional information.\footnote{See id. §§ 51.26–28.} It may be advisable to seek a conference with the Department’s analyst at some point early in the sixty-day period. The conference permits the jurisdiction to address concerns early and also encourages the analyst to examine the submission earlier than he might otherwise have done.\footnote{Id. § 51.1(a)(2).}

Beyond the obviously good strategy of complying with the law as defined by the courts and the Department, if consistent with judicial precedent, a covered jurisdiction’s best preclearance strategy is to fully document its own districting standards, the steps involved in the creation of its districting plan, and the means by which it believes that it has complied with section 5’s non-retrogression standard. If the Department refuses preclearance on any basis that appears inconsistent with the case law, including a strained interpretation of retrogression, the jurisdiction’s chances for judicial preclearance should be good. If the jurisdiction elects to acquiesce to the Department’s position, it should very carefully document every race-based change it makes to its plan in order to obtain preclearance. If a Department motivated race-based change is later successfully challenged, a court-imposed remedy should do only minimal damage to the overall plan. However, as noted earlier, limitations on the court’s remedial options introduce a significant element of uncertainty as to how much of the jurisdiction’s original plan can be retained.\footnote{The only conference specifically mentioned by the Procedures for the Administration of Section 5 is one following a covered jurisdiction’s request that an objection be reconsidered. Id. § 51.47. However, I am aware that, at least in the past, informal conferences could be arranged while a submission was pending. Note that if for any reason the jurisdiction submits additional information it wishes to be considered in support of a submitted change, the sixty-day period for the Department’s response begins anew. Id. § 51.39.}

\footnote{See discussion Part One, III.B.}
Thus, any jurisdiction with a strong case for preclearance may conclude that it is better, and perhaps in the long run, less expensive, to seek judicial preclearance of its original plan.

CONCLUSION

The best protection against future challenges to a districting plan is to follow traditional districting standards interpreted in a manner likely to produce sensible, fair election districts that are consistent with identified representational goals. Only rarely, and perhaps never, does federal law require that jurisdictions violate these standards. Even constitutionally permissible accommodations for minorities generally can be made within the confines of these standards.

Redistricting is, of course, the quintessential political process, and is carried out most everywhere by individuals who have a vested interest in its outcome. Advice that fails to take account of this fact falls on deaf ears. Moreover, modest accommodations to keep an incumbent in a district with her prior constituents legitimately furthers the electorate's interest in keeping a responsive legislator in office, or alternatively, in "throwing the rascal out." That said, excessive gerrymandering—blatant disregard of traditional districting standards—to advance personal and partisan interests may become a political reality, but it will never be a virtue or a "state interest" to be furthered in a redistricting plan. It is not the self-interest of legislators, but rather the competing representational concerns of the people that the Supreme Court has in mind when it admonishes the federal courts to leave the balancing of political interests to the legislature. Legislators have a duty to select from competing interests that merit consideration in the redistricting process—a duty they breach if they permit their self-interests to be the only interests "balanced." Traditional districting criteria exist in part to help legislators do their duty.

Moreover, legislators will be well advised to remember that, while neutral standards prevent them from giving full vent to their self-protective urges, these standards have a similar impact on their opponents. The party controlling the redistricting process this year may be out of power when the next plan is produced, which in this litigation-prone era may be next year, rather than next decade!