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RACE IPSA: VOTE DILUTION, RACIAL GERRYMANDERING, AND THE PRESUMPTION OF RACIAL DISCRIMINATION

Stephen Wolf*

I. INTRODUCTION

It is frequently asserted that race "matters," and all too frequently it is demonstrated that racial discrimination continues to persist. But in a society "dedicated to the proposition that all men are created equal," the important issue is not the fact that race sometimes matters but the question of how should race matter. How do we move toward a society where individuals are "judged [not] by the color of their skin but by the content of their character." In our focus upon remedying the present effects of past and present discrimination, we should not lose

* B.A., 1976 University of Delaware; Ph.D. Candidate, University of Dallas; J.D. Candidate, 1997 Notre Dame Law School; Thos. J. White Scholar 1995-97. I would like to thank Thomas Steinke for suggesting the title that eventually became the organizing principle of this Note. I would also like to thank Colleen Wolf of Wolf Prints, Inc. for producing the maps which appear in the appendices to this Note. I would especially like to thank Profs. John Robinson, Jay Tidmarsh, and William Kelley of the Notre Dame Law School for their patient encouragement of this project and their thoughtful comments on earlier drafts of this Note. Finally, I would like to dedicate this Note to my father, S. Allen Wolf, who gave up the opportunity to attend law school in order to support his young family. I hope that through my achievements in the legal profession I can return some of the love and inspiration he has provided for me.

sight of the goal of a "color-blind" society—we must not set our eyes on the wrong prize. 4

In 1993, the U.S. Supreme Court in Shaw v. Reno 5 held that the deliberate creation of voting districts in which minority voters formed a majority of the members of the district—so-called "majority-minority districts" 6—needs to be subject to the strictest judicial scrutiny. Writing for the majority of the Court, Justice Sandra Day O'Connor argued that "appearances do matter" in the creation of voting districts:

A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. . . . By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of

4. Dr. King's "I Have A Dream" Speech is curiously absent from The Eyes on the Prize reader developed in conjunction with the fourteen-part PBS television series of the same title. See The Eyes on the Prize Civil Rights Reader (David Garrow et al. eds., 1991). The editors acknowledge that the speech is perhaps King's most famous oration, and was the climax of the march that represented the "new high-water mark in the struggle for Black freedom." Id. at 409, 138. They chose instead to include the original text of John Lewis' speech which was later revised at the request of the NAACP and the National Urban League to retain President Kennedy's support for new civil rights legislation. Id. at 137-38.
6. Throughout this article I will use the term "race-conscious districting" to refer to both "majority-minority" districts and "minority-influence" districts. A "majority-minority" district is a district in which a particular racial or ethnic minority group constitutes a majority of the voters of the district—usually 60-65% of the voting age population. The purpose of creating a majority-minority district is to design a "safe" district from which a minority representative will usually be elected. A "minority-influence" district is a district in which a particular racial or ethnic minority group constitutes a significant minority of the voters (usually 30-50%), or several racial or ethnic groups constitute a significant minority or even a majority of the voters. The purpose of creating a minority-influence district is to design a district in which racial or ethnic minority groups have a significant influence in the election of the district's representative. Minority-influence districts are usually created when a particular racial or ethnic group is not sufficiently numerous or geographically compact to support the creation of a majority-minority district.
racial bloc voting that majority-minority districting is sometimes said to counteract.

The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.7

With Shaw, the Court called into question three decades of vote dilution jurisprudence which transformed the way we elect our federal, state, and local officials, and culminated in the creation of majority-minority districts.

This paper will explore the tension between the Supreme Court's older vote dilution jurisprudence and its newer racial gerrymandering jurisprudence. In Part II, I will analyze the political effects of race-conscious districting which has increased the number of minority representatives in Congress and, ironically, helped to increase the number of Republican representatives as well. In Part III, I will discuss the doctrine of res ipsa loquitur to illustrate the process of reasoning which the Court has used to create a presumption that some voting practices are racially discriminatory because they have produced racially disproportionate results. In Part IV, I will analyze the Court's older vote dilution jurisprudence. In Part V, I will analyze the Court's newer racial gerrymandering jurisprudence. Finally, in Part VI, I will offer some conclusions about the tension between the Court's vote dilution jurisprudence and racial gerrymandering jurisprudence.

II. The Political Effects of Race-Conscious Districting

During the reapportionment of congressional districts following the 1990 decennial census, the Justice Department used its power under the Voting Rights Act8 to force states to create seventeen new black and hispanic "majority-minority" congressional districts.9 States covered by the special provisions of the Voting Rights Act must submit their congressional districting

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7. Shaw, 509 U.S. at 647-48 (citations omitted).
plans to the Justice Department for preclearance. The Justice Department refused to preclear state congressional districting plans which did not maximize the concentration of minority voters into majority-minority districts.

Georgia’s experience in attempting to gain preclearance for its congressional districting plan typifies the Justice Department’s approach. Georgia’s congressional delegation was increased from ten to eleven representatives by the 1990 apportionment. In September, 1991, the Georgia General Assembly enacted a congressional districting plan which contained two black majority-minority districts and one black minority-influence district. Under the previous apportionment only one of Georgia’s ten congressional districts was a black majority-minority district. The Attorney General refused to preclear the state’s congressional districting plan because it only created two black majority-minority districts.

The General Assembly enacted a second congressional districting plan which also had two black majority-minority districts and one black minority-influence district, but increased the percentage of the black voting age population in each district. The Attorney General again refused to preclear the plan because the General Assembly did not adopt a congressional districting plan modeled after a “max-black” plan, drafted by the American Civil Liberties Union for the General Assembly’s Black Caucus, which contained three black majority-minority districts. The General Assembly reluctantly adopted a third congressional districting plan which contained three black majority-minority districts, including the Eleventh Congressional District which brought together the black voters of Atlanta, Augusta, and

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12. Id.
13. Id.
14. Id.
15. Id. at 2484.
16. Id.
Savannah. The Attorney General finally precleared this plan.

Some Republicans advocated the creation of majority-minority districts to deprive white urban Democrats of their predominant black urban base and force them to run in more predominantly white suburban districts where they would be vulnerable to Republican challengers. Republicans also hoped to win a number of the Hispanic majority-minority districts. Minority interest groups supported the creation of majority-minority districts to encourage minority participation in the electoral process, and increase the number of minority representatives in Congress. White incumbent Democrats did not publicly oppose the creation of majority-minority districts for fear of alienating black and Hispanic voters, but privately they pressured state legislators to design congressional districts to preserve their minority constituency.

As a result of the Justice Department's efforts, there were thirty-two black and twenty Hispanic majority-minority districts for the 1992 congressional elections. The expectations of minority interest groups that supported the creation of majority-minority districts were partially realized as twenty new minority representatives were elected in 1992.

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17. *Id.* The district court noted that "[t]he populations of the Eleventh [District] are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties and narrow swamp corridors." *Johnson v. Miller*, 864 F. Supp. 1354, 1389 (S.D. Ga. 1994). The cities of Atlanta, Augusta, and Savannah, which comprised three of the four corners of the bizarrely-shaped district, "were all majority black, all at the periphery of the district, and ... all tied to a sparsely populated rural core by even less populated land bridges." *Id.* at 1367. The Eleventh District "covered 6,784.2 square miles, splitting eight counties and five municipalities along the way." *Id.*


21. See, e.g., *Vera v. Richards*, 861 F. Supp. 1304, 1319-26 (S.D. Tex. 1994) for the efforts of the incumbents to preserve their minority constituencies in the Eighteenth, Twenty-Eighth, Twenty-Ninth, and Thirtieth Congressional Districts of Texas. When three of these districts were challenged as racially gerrymandered districts, the State of Texas argued unsuccessfully before the Supreme Court that the bizarre shape of the districts could be explained by the effort to protect incumbents. *Bush v. Vera*, 116 S. Ct. 1941, 1953-54 (1996).


resentatives increased from twenty-six to thirty-nine, and the number of hispanic representatives increased from twelve to nineteen, for a total of fifty-eight minority representatives. **24**

Thirty-one of the thirty-two black majority districts elected black representatives, and sixteen of the twenty hispanic majority-minority districts elected hispanic representatives. **25** The remaining eight of the thirty-nine black representatives and three of the nineteen hispanic representatives were elected from non-majority-minority districts. Six states elected black representatives for the first time since the turn of the century. **26**

Republican hopes and Democratic fears that the creation of majority-minority districts would unseat Democratic incumbents were initially frustrated. Only three Democratic incumbents were defeated as the result of the new majority-minority districts, and all but two of the twenty new black and hispanic representatives were Democrats. **27** Expectations that the creation of majority-minority districts would increase minority voter participation in the electoral process were unfulfilled. The voter turnout rate in most majority-minority districts was the lowest of any district in the particular state. **28**

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24. Id.

25. Redrawn Minority Districts, supra note 22, at 22-A. The First District of Pennsylvania (a black majority-minority district), and the Twentieth, Twenty-Sixth, and Forty-Sixth Districts of California, and Twenty-Ninth District of Texas (all hispanic majority-minority districts) elected white representatives.

26. Gruenwald, supra note 9, at 1947. The six states were Alabama, Florida, North Carolina, South Carolina, and Virginia, all of which are subject to the special provisions of the Voting Rights Act.


28. Phil Duncan, Minority Districts Fail To Enhance Turnout, Cong. Q. Wkly. Rep., Mar. 27, 1993, at 798. For example, the two new majority-minority districts in Georgia had the lowest voter turnout of any district in the state. In the Second District, approximately 158,000 votes were cast, and in the Eleventh District approximately 164,000 votes were cast. (Figures are rounded to the nearest thousand.) The average for the other nine districts was 212,000 votes cast; the next lowest district had 180,000 votes cast. In the Sixth District which elected Newt Gingrich, 275,000 votes were cast. Election ’92 Results, supra note 27, at 37-A.

The majority-minority districts that would later be found unconstitutional were also among the lowest voter turnout districts in their state. The First and Twelfth Districts of North Carolina were the second and third lowest districts, respectively, in the state. The Eighteenth, Twenty-Nine, and Thirtyighth Districts of Texas were the fifth, first, and eighth lowest districts, respectively, accompanied by the other majority-minority districts of the state. The Third District of Florida was the second lowest district of the state; the lowest was the Twenty-Third District, a majority-minority won by impeached former federal district court judge Alcee Hastings. The Fourth District of Illinois, the Third
In 1993, the U.S. Supreme Court held that voters could challenge the creation of majority-minority districts as racial gerrymandering under the Equal Protection Clause of the Fourteenth Amendment. Before the 1996 elections, seven majority-minority districts in four states were redrawn by federal district courts or state legislatures in response to successful racial gerrymandering litigation. As a result of this litigation, the total number of


30. North Carolina's First and Twelfth Districts (see Appendix A) were held to be constitutional by the district court in Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994), but found unconstitutional by the Supreme Court in Shaw v. Hunt, 116 S. Ct. 1894 (1996). The districts were not redrawn for the 1996 elections.

Louisiana's Fourth District (see Appendix B) was found unconstitutional by a district court in Hays v. Louisiana, 839 F. Supp. 1188 (W.D. La. 1993). The state legislature enacted a revised congressional districting plan which contained two majority-minority districts whose boundaries were more consistent with traditional districting principles, and the Attorney General precleared the plan. (See Appendix C.) The district court also found the state legislature's revised plan unconstitutional and substituted its own plan for the 1994 elections. (See Appendix D.) Hays v. Louisiana, 862 F. Supp. 119 (W.D. La. 1994). The Supreme Court reinstated the state legislature's revised plan for the 1994 elections, Louisiana v. Hays, 115 S. Ct. 687 (1994), and later determined that the plaintiffs lacked standing to challenge the state legislature's revised plan, U.S. v. Hays, 115 S. Ct. 2431 (1995). On remand, the district court again found the state legislature's revised plan unconstitutional and substituted its own plan for the 1996 elections. Hays v. Louisiana, 936 F. Supp. 360 (W.D. La. 1996). The district court's plan, which contained only one majority-minority district, was used during the 1996 elections. A motion to appeal is currently pending before the Supreme Court. Louisiana Black Legislative Caucus v. Hays, 117 S. Ct. 44 (1996).

Georgia's Eleventh District (see Appendix E) was found unconstitutional by a district court in Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994). The Supreme Court affirmed the district court's finding in Miller v. Johnson, 115 S. Ct. 2475 (1995). The district court later found the Second District unconstitutional. Johnson v. Miller, 922 F. Supp. 1552 (S.D. Ga. 1995). The district court initially deferred to the state legislature to devise a new congressional districting plan, but when a special session was unable to devise a new plan, the district court fashioned its own remedial plan. (See Appendix F.) Johnson v. Miller, 922 F. Supp. 1556 (S.D. Ga. 1995). The district court's plan, which contained only one majority-minority district, was used during the 1996 elections. The Supreme Court affirmed the district court's plan in Abrams v. Johnson, 1997 WL 331802 (U.S. Ga.).

Texas' Eighteenth, Twenty-Ninth, and Thirtieth Districts (see Appendices G, H, and I) were found unconstitutional by a district court in Vera v. Richards,
majority-minority districts was reduced from fifty-two to forty-five: the number of black majority-minority districts was reduced from thirty-two to twenty-six, and number of hispanic majority-minority districts was reduced from twenty to nineteen.

In the 1996 congressional elections, the number of black representatives decreased from thirty-nine to thirty-seven, and the number of hispanic representatives remained at nineteen, for a total of fifty-six minority representatives.31 Twenty-five of the twenty-six black majority districts elected black representatives, and seventeen of the nineteen hispanic majority-minority


districts elected hispanic representatives.\textsuperscript{32} Twelve of the thirty-seven black representatives and two of the nineteen hispanic representatives were elected from non-majority-minority districts. All of the incumbents from the majority-minority districts redrawn as the result of racial gerrymandering litigation were re-elected.\textsuperscript{33} The voter turnout rate in the majority-minority districts continued to frustrate expectations.\textsuperscript{34}

Republican hopes for regaining control of the Congress were realized in 1994 (and sustained in 1996) as they won a majority of Southern congressional seats for the first time since Reconstruction.\textsuperscript{35} After the 1990 elections, Democrats held a 267–167 majority; but after the 1996 elections, Republicans maintained a 227–207 majority—a net gain for the Republicans of sixty seats.\textsuperscript{36} The eight Southern states covered by the Voting Rights Act provided 40% of that net gain.\textsuperscript{37} Republicans won fifty-one of these eighty-two Southern seats in the 1996 election, up from twenty-seven of the seventy-six Southern seats in the 1990 election.\textsuperscript{38}

Georgia's experience illustrates this emerging Republican trend. After the 1990 election, Newt Gingrich was the only Republican representative and John Lewis was the only black representative in Georgia's congressional delegation; the other eight representatives were white Democrats. Today, there are eight white Republican representatives, including House Speaker Gingrich, and three black Democratic representatives.\textsuperscript{39} The turnover in Georgia's Eighth District illustrates the political effect which the creation of majority-minority districts may have.

\begin{itemize}
\item \textsuperscript{32} The First District of Pennsylvania and the Twentieth and Twenty-Sixth Districts of California elected white representatives.
\item \textsuperscript{33} Juliana Gruenwald, \textit{Incumbents Survive Redistricting}, \textit{Cong. Q. Wkly. Rep.}, Nov. 9, 1996, at 3229. Cleo Fields, a black Democrat from the Fourth District of Louisiana, retired when his district was redrawn, and Jim McCrery, a white Republican, was elected. Craig Washington, a black Democrat from the Eighteenth District of Texas, also retired and Sheila Jackson-Lee, another a black Democrat, was elected. Gene Green, a white Democrat from the Twenty-Nine District of Texas, was also re-elected.
\item \textsuperscript{34} \textit{Election Results}, supra note 31, at 447-55.
\item \textsuperscript{35} Gruenwald, \textit{supra} note 9, at 1947.
\item \textsuperscript{36} \textit{House Membership in the 102nd Congress}, 1990 \textit{Cong. Q. Almanac} 920-21; \textit{Election Results}, supra note 31, at 447-55; \textit{Special Election Is Just That For Texas Democrats}, \textit{supra} note 30, at 3402. The remaining member of the House, Bernard Sanders, is an Independent elected from Vermont.
\item \textsuperscript{37} Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia.
\item \textsuperscript{38} \textit{House Membership in the 102nd Congress}, \textit{supra} note 36, at 920; \textit{Election Results}, \textit{supra} note 31, at 447-55.
\item \textsuperscript{39} Gruenwald, \textit{supra} note 9, at 1948.
\end{itemize}
The creation of a black majority-minority district in the Eleventh District reduced the black voting age population of the Eighth District from 35% to 21%. J. Roy Rowland, the white Democratic incumbent of the Eighth District received only 56% of the vote in the 1992 election after receiving no less than 69% of the vote in the previous elections. Rowland retired before the 1994 election, and Saxby Chambliss, a white Republican, won the seat with 63% of the vote. Chambliss retained the seat in the 1996 election with 53% of the vote.

The narrow and partisan political effects of race-conscious districting at the national level are mixed. The creation of majority-minority districts has increased the number of minority representatives in Congress, but it has also contributed to the decline in the number of Democratic representatives in Congress. It remains an open question whether minority political interests are better served by concentrating minority voters into a small number of majority-minority districts or by dispersing them into a larger number of minority-influence districts. Furthermore, the creation of majority-minority districts has not increased minority voter participation in the electoral process. Majority-minority districts consistently have the lowest voter turnout rates of any districts in the nation.

The larger political effects of race-conscious districting are more diffuse but also more troubling. As Justice O'Connor suggested in her majority opinion in Shaw, race-conscious districting tends to reinforce racial stereotypes, exacerbate racial divisions, and increase racial isolation. More than that, race-conscious districting is a palpable reminder that we continue to endorse the principle that "race matters." Before I examine the Supreme Court's vote dilution jurisprudence which has led to the adoption of race-conscious districting, and later the Supreme Court's racial gerrymandering jurisprudence which has led to the questioning of race-conscious districting, I will first examine the procedural devices which have led to the presumption that some voting practices are racially discriminatory because they produce racially disproportionate results.

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40. Id. at 1947.
41. Id. at 1947-48.
42. Id. at 1948.
43. Election Results, supra note 31, at 449.
44. See text at fn. 7 supra.
III. THE DOCTRINE OF RES IPSA LOQUITUR AND THE PRESUMPTION OF RACIAL DISCRIMINATION

Procedural devices analogous to those found in the doctrine of res ipsa loquitur have been developed by the Congress and the Supreme Court in the voting rights context, and have created the presumption that some voting practices are racially discriminatory because they produce racially disproportionate voting results. These procedural devices have led to the transformation of the way states and localities elect their legislative, executive, and judicial officials, and are largely responsible for the creation of majority-minority districts. For that reason, some explanation of the doctrine of res ipsa loquitur is in order here.

The doctrine of res ipsa loquitur developed from a nineteenth century English tort case in which a barrel of flour rolled out of a warehouse and injured a pedestrian. The victim was unable to provide evidence that the warehouser was negligent in handling the barrel, and the question arose whether negligence could be presumed from the mere fact that the barrel had struck him. Baron Pollock of the Court of Exchequer argued that negligence could be presumed in such circumstances:

[T]here are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford prima facia evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses

from the warehouse to prove negligence seems to me preposterous.... The present case upon the evidence comes to this, a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had control of it; and in my opinion the fact of it falling is prima facia evidence of negligence, and the plaintiff who was injured by it is not bound to show that it could not fall without negligence, but if there are facts inconsistent with negligence it is for the defendant to prove them.46

Normally the victim would have had to prove that the warehouser had not handled the barrel with reasonable care, but in this case the need for such individual proof was diminished so the victim would be compensated for his injury. It was inferred that the warehouser had not handled the barrel with reasonable care because: (1) the warehouser had control over the barrel; (2) barrels do not roll out of warehouses without negligence; and (3) the warehouser was in a better position than the victim to provide evidence concerning the handling of the barrel. These assumptions provided sufficient ground to infer that the warehouser was negligent, and to shift to the warehouser the burden of producing evidence that he was not negligent.

Dean Prosser explains the significance of this argument, and the development of the doctrine of res ipsa loquitur:

The Latin phrase, which means nothing more than "the thing speaks for itself," is the offspring of a casual word of Baron Pollock during argument with counsel in a case in 1863 in which a barrel of flour rolled out of a warehouse and fell upon a passing pedestrian. In its inception the principle was nothing more than a reasonable conclusion, from the circumstances of an unusual accident, that it was probably the defendant's fault. It soon became involved, however, in cases of injuries to passengers at the hands of carriers, with the aftermath of an older decision which had held that the carrier had the burden of proving that it had not been negligent. The two principles, one concerned with the sufficiency of circumstantial evidence, the other with the burden of proof, gradually became confused and intermingled; and from this fusion there developed an

uncertain “doctrine” of res ipsa loquitur, which has been the source of some considerable trouble to the courts.\(^4^7\)

The doctrine of res ipsa loquitur is concerned with the sufficiency of circumstantial evidence and with the allocation of the burden of proof. Several different procedural devices have been employed to permit a plaintiff to prove negligence from circumstantial evidence: the permissive inference, the rebuttable presumption, the shift of the burden of production to the defendant, and the shift of the burden of persuasion to the defendant. These devices may be illustrated by using the case of the pedestrian injured by the barrel that rolled out of the warehouse:

1. A permissive inference without a shift in the burden of production or persuasion. The injured pedestrian offers circumstantial evidence that the barrel that struck him rolled out of the warehouse's building. The inference to be drawn from this evidence is left to the factfinder who may or may not conclude that the warehouse was negligent. At all times the burden of producing evidence and proving negligence rests with the injured pedestrian.

2. A rebuttable presumption with a shift in the burden of production. The injured pedestrian offers circumstantial evidence that the barrel that struck him rolled out of the warehouse's building. This evidence creates the legal presumption\(^4^8\) that the warehouse was negligent. This pre-

\(^4^7\) W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39, at 243-44 (5th ed. 1984) (hereinafter PROSSER AND KEETON ON THE LAW OF TORTS). The most frequently quoted statement of the doctrine of res ipsa loquitur is that of Chief Justice Earle: "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such that as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." Id. § 39, at 244 (quoting Scott v. The London & St. Katherine Docks Co., 159 Eng. Rep. 665, 667 (1865)). In America, the conditions usually stated as necessary for the application of the doctrine of res ipsa loquitur are as follows: "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." Id.

\(^4^8\) Dean Prosser explains legal presumptions as follows:

The party having the burden of proof may be aided by the procedural devices known as presumptions. A presumption has been defined as "an assumption of the existence of one fact which the law requires the trier of fact to make on account of the existence of another fact or group of facts, standing alone." It is, in other words, a
sumption shifts to the warehouser the burden of producing evidence that he was not negligent. If the warehouser produces evidence that he was not negligent, the presumption is rebutted. The burden of proving negligence remains with the injured pedestrian, and with the rebuttal of the presumption, there is disputed evidence concerning the warehouser's negligence. The factfinder may or may not conclude that the warehouser was negligent.

3. A rebuttable presumption with a shift in the burden of persuasion. The injured pedestrian offers circumstantial evidence that the barrel that struck him rolled out of the warehouser's building. This evidence creates the legal presumption that the warehouser was negligent. This presumption shifts to the warehouser the burden of producing evidence and proving that he was not negligent.

rule of law for the determination of a question of fact, in the absence of sufficient evidence to prove the fact itself. The classic illustration of a presumption is the rule which calls for the conclusion that a person is dead when it is shown that the person has disappeared for seven years without explanation.

PROSSER AND KEETON ON THE LAW OF TORTS, supra note 47, § 38, at 240 (emphasis added).

49. For the sake of clarity I have oversimplified the effect of the rebuttal of the presumption. Dean Prosser explains that there are two types of rebuttable presumptions:

[Most] presumptions are created for the purpose of giving effect, as a settled rule, to the normal inference or conclusion which most people would draw, if permitted from a given set of facts, in the absence of satisfactory definite evidence as to the conclusion itself. . . . [Such presumptions] place upon the adverse party the "burden" of going forward and offering further evidence, . . . but they do not affect the ultimate burden of proof . . . once all the evidence is in. When persuasive evidence to the contrary is introduced, the occasion for the presumptions, as rules of law, is gone, and they simply cease to exist . . . . All that remains is whatever inference from ordinary experience is to be drawn from the facts, which has whatever probative value the facts may justify.

There are, however, other presumptions which obviously are imposed in part as a matter of policy, to compel persons in a position of special responsibility to disclose evidence within their control, under a penalty of a procedural disadvantage in the case they do not. They are, in other words, "smoking out" presumptions, designed to bring about a result rather than to give effect to probabilities.

PROSSER AND KEETON ON THE LAW OF TORTS, supra note 47, § 38, at 240-41 (emphasis added). Because the first type of rebuttable presumption is similar in effect to a permissive inference, I will consider it to be part of the permissive inference device throughout this article, and will reserve the rebuttable presumption (with a shift in the burden of production) device for the second type of rebuttable presumption described by Prosser.
If the warehouser produces evidence that he was not negligent, there is disputed evidence concerning the warehouser's negligence. The factfinder may or may not conclude that the warehouser was negligent.

The purpose of these procedural devices is to permit a plaintiff to prove negligence from circumstantial evidence so that the plaintiff may be compensated for the injury he suffered. These procedural devices rely upon the same circumstantial evidence to hold a defendant liable, however, and there is the danger that a defendant may be held liable for an injury he did not cause. At the heart of the doctrine of res ipsa loquitur, therefore, there is a question about the sufficiency of circumstantial evidence for the proof of negligence. Dean Prosser notes:

It is often said that negligence must be proved, and never will be presumed. The mere fact that an accident or an injury occurred, with nothing more, is not evidence of negligence on the part of anyone. . . . What is required is evidence, which means some form of proof; and it must be evidence from which reasonable persons may conclude that, upon the whole, it is more likely that the event was caused by negligence than that it was not. . . .

This does not mean, however, that there must be in every case eyewitnesses of the defendant's conduct. Negligence, like any other fact, may be proved by circumstantial evidence. This is the evidence of one fact, or of a set of facts, from which the existence of the fact to be determined may reasonably be inferred. It involves, in addition to the assertion of the witnesses as to what they have observed, a process of reasoning, or inference, by which a conclusion is drawn. . . .

. . . Like all other evidence, [circumstantial evidence] may be strong or weak; it may be so unconvincing as to be quite worthless, or it may be irresistible and overwhelming. The gist of it, and the key to it, is the inference, or the process of reasoning by which the conclusion is reached. This must be based upon the evidence given, together with a sufficient background of human experience to justify the conclusion.50

The conclusion of negligence is only as sound as the inference upon which it is based, or as the process of reasoning by which the conclusion is reached.

The connection between the doctrine of res ipsa loquitur and the procedural devices that the courts have developed to prove racial discrimination is recognized by Don Welch:

One attempt to make sense of 'intent' in a discrimination context has drawn an analogy to the tort doctrine of res ipsa loquitur. Under res ipsa loquitur, an event which does not normally occur without negligence allows the factfinder to infer negligence from mere proof of the event itself. This principle allows a plaintiff to create an inference of intent through, e.g., the racially disproportionate impact of an act. Following this line of reasoning, mere proof of disproportionate impact would allow the factfinder to infer intent to discriminate.51

Welch notes that the courts have overcome the evidentiary difficulties plaintiffs frequently experience in proving racially discriminatory intent or purpose by allowing plaintiffs to present evidence of racially disproportionate effects or results, from which the factfinder may find racial discrimination.

It is argued that evidence of racially disproportionate results may be used to prove racial discrimination because racially disproportionate results do not usually occur in the absence of racially discriminatory purposes, and the defendant is in a better position than the plaintiff to provide evidence concerning his purpose. However, evidence of racially disproportionate results may be used not simply to prove racially discriminatory purpose through circumstantial evidence, but to presume racial discrimination in the absence of any evidence of racially discriminatory purpose. For example, in an early employment discrimination case, the Supreme Court explained that the rebuttable presumption with a shift in the burden of production device serves to eliminate the non-discriminatory reasons for an employer's decision thereby enabling the factfinder to conclude that in the absence of a non-discriminatory purpose, the employer acted with a discriminatory purpose:

A prima facia case [of disparate treatment] raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are

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51. D. Don Welch, Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent, 60 S. CAL. L. Rev. 733, 774-74 (1987) (advocating the use of the res ipsa loquitur approach to create an inference of motive: "[I]t may be more appropriate to infer the cause of an act from an act's results, rather than to infer the state of mind of the actor." Id. at 775.)
willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer’s actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.\(^52\)

When a presumption of racial discrimination is created and the burden of production or persuasion is shifted to the defendant, it is important to examine carefully the presumption of racial discrimination lest the defendant be held liable for racial discrimination that he did not cause. As Deborah Malamud says, “it is by no means certain that any particular unexplained adverse act toward a woman or a member of a minority group is the result of discrimination. The question is whether, in the face of uncertainty, the legal system should use a mandatory presumption instead of requiring individualized proof.”\(^55\)

It is also important to examine the standard used to provide the evidence of racially disproportionate results from which racially discriminatory purpose may be inferred or racial discrimination is presumed. Randall Kennedy explains the significance of that standard as follows:

The legitimacy of a given standard, however, cannot properly be determined wholly by reference to consequences

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52. Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). See also Jessie Allen, A Possible Remedy For Unthinking Discrimination, 61 BROOK. L. REV. 1299 (1995) (advocating strict liability for unconscious discrimination: “Like a res ipsa inference, the burden shift in a disparate treatment case can be seen as a different way to prove an old standard of liability—i.e, the res ipsa case, negligence, in the disparate treatment case, subjective intent. The burden shift may also be seen, though, as a way to shift the standard of what is to be proved. Because it allows liability to attach for the lack of an explanation, reasons other than the conventional liability standard may actually be behind the action. Thus, the doctrine of res ipsa in tort cases involving consumers injured by mass-manufactured products functioned as a bridge from traditional negligence liability to strict liability for manufacturing defects. Eventually, the allowance of indirect proof for res ipsa cases was recognized as a new doctrine of liability for injury due to defect.” Id. at 1332 (emphasis added)).

measured by bare statistics . . . . The statistics generated by a given standard may well provide a predicate for question-
ing it. Results indicating that a given standard disadvan-
tages the members of one group relative to others may indicate that the standard itself needs reform. On the other hand, statistics may indicate that those who failed to satisfy the criteria in question are themselves in need of reform. Ascertaining which conclusion to reach in a particular context always requires more than statistics. It requires recourse to a complex set of normative and descriptive assumptions. A statistic, after all, is never self-
exploratory; it always requires interpretation.54

A "fact" which purports to show racial discrimination rarely "speaks for itself." Whether a purportedly racially disproporti-
ionate result evidences a racially discriminatory purpose or estab-
lishes racial discrimination depends upon 'a complex set of normative and descriptive assumptions.'55

Should we infer a racially discriminatory purpose, or pre-
sume racial discrimination, from the disproportionately large number of blacks who are punished for possession of crack cocaine, and receive disproportionately longer sentences for the possession of crack cocaine than their white counterparts receive for the possession of powder cocaine?56 Should we infer a


55. See, e.g., Rhonda Magee, The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse, 79 VA. L. REV. 863 (1993) (asserting that the injuries which African-Americans have suffered as the result of slavery and segregation present an ideal res ipsa loquitur case for racial reparations, but "the subconscious persistence of white supremacy as a normative principle" has prevented "mainstream academics and politicians" from giving the proposal for racial reparations the attention and respect it deserves. Id. at 2254-55.)

56. See Randall L. Kennedy, The State, Criminal Law, and Racial Discrimination: A Comment, 107 HARV. L. REV. 1255 (1994) ("[I]n the absence of discriminatory purpose or discriminatory administration, a facially race neutral state policy will advantage some African-Americans and disadvantage others, which precludes the conclusion that such a policy discriminates against African-Americans as a class. . . . [W]hat is really at stake [in controversies in which it is claimed that a facially race neutral state policy disproportionately burdens some racial minority group] is not simply an inter-racial dispute but an actual or incipient intra-racial conflict. Although blacks subject to relatively heavy punishment for crack possession are burdened by it, their black law-abiding neighbors are presumably helped by it (insofar as the statute deters and punishes drug trafficking that typically takes place in their midst) . . . . [This] actual or potential intra-racial conflict[ ] over what policies are good or bad for a given racial minority group suggests why courts, in the absence of a finding of discriminatory purpose, should refrain from condemning a state criminal
racially discriminatory purpose, or presume racial discrimination, from the disproportionately small number of minority elected officials? The debate over these matters is usually framed in terms of whether we should look for evidence of discriminatory intent or purpose, or whether we may rely upon evidence of discriminatory effects or results. Our examination of the different procedural devices employed under the doctrine of res ipsa loquitur provides a more nuanced understanding of the problem, however. The issue is not whether evidence of racially disproportionate results may be used to show racially discriminatory purpose or racial discrimination—it may. The issue is the process of reasoning by which we conclude that there is evidence of racially disproportionate results, and by which we infer racially discriminatory purpose or presume the fact of racial discrimination. The procedural devices we employ shape this process of reasoning and influence the conclusions we reach.

As I turn to examine the Supreme Court's vote dilution jurisprudence which has led to the adoption of race-conscious districting, and later to examine the Supreme Court's racial gerrymandering jurisprudence which has led to the questioning of race-conscious districting, we need to be attentive to the different procedural devices the Supreme Court uses in these areas, and the different conclusions which these procedural devices influence the Court to draw.

IV. THE DEVELOPMENT OF THE VOTE DILUTION CLAIM

A. Introduction

There have been three different attempts since the 1960s to prevent racial discrimination in voting. First, the Voting Rights Act of 1965 was enacted to ensure voters equal access to registration and voting. The Act applied a series of special provisions to any state or locality that used a voting test or device (such as a literacy test or poll tax) to restrict access to registration and voting, and in which less than fifty percent of the eligible black citi-

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zens registered and voted in the previous presidential election. Second, the principle of "one person, one vote" was developed by the Supreme Court in *Reynolds v. Sims* to ensure that voters would be assigned to voting districts with substantially equal population, and would not suffer a "dilution" in the "weight" of their votes on the basis of where they lived. This had the effect of increasing the voting power of urban districts where many minority voters lived. Finally, the concept of vote dilution was expanded by the Congress in an amendment to the Voting Rights Act in 1982, and by the Supreme Court in *Thornburg v. Gingles* to ensure that voters would have an equal "opportunity to participate in the political process and to elect the representatives of their choice," and would not suffer a dilution in the weight of their vote on the basis of race, color, or national origin.

All three of these attempts to prevent racial discrimination in voting have employed an "effects test" to establish racially disproportionate results, not racially discriminatory purpose. As the discussion of the doctrine of res ipsa loquitur has indicated, it is important to examine the evidence upon which the conclusion of racial discrimination is founded. In this section, I will examine the standards used to establish racially disproportionate results.

**B. Analysis**

1. Equal Access to Registration and Voting

Congress enacted the Voting Rights Act of 1965 to provide an entirely new approach for combating widespread and persistent voting discrimination. Instead of litigating individual incidents of voting discrimination, Congress adopted "a complex scheme of stringent remedies aimed at areas where voting discrimination [was] most flagrant." Like the Fifteenth Amendment, the Voting Rights Act prohibited states and localities from using any voting practice to deny or abridge the right of any citizen to vote on account of race or color. But unlike previous

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60. 478 U.S. 30 (1986).
62. The Fifteenth Amendment provides in relevant part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.
63. Sec. 2 of the Voting Rights Act of 1965 provided in relevant part: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account
efforts to enforce the provisions of the Fifteenth Amendment, the Act devised a formula under which the Attorney General could designate particular states and localities which used literacy tests and other devices to deny or abridge the right to vote on account of race or color; the Act then applied a series of special provisions to these designated states and localities.

The Act suspended the use of all existing literacy tests and other devices in these designated states and localities for a period of five years. The Act also suspended the use of any new voting practices until the designated state or locality could prove to the Attorney General or a three-judge panel of the U.S. District Court for the District of Columbia that the new voting practice "[did] not have the purpose and [would] not have the effect of denying or abridging the right to vote on account of race or color." The Act excused voters in the designated states and localities from paying past accumulated poll taxes, and authorized the Attorney General to institute litigation to challenge the constitutionality of all poll taxes. Finally, the Act assigned federal examiners to the designated states and localities to register qualified voters, and federal poll-watchers to determine that the newly registered voters were permitted to vote, and their votes were properly tabulated.

The special provisions of the Voting Rights Act were quickly upheld by the Supreme Court, and the new approach adopted by the Act successfully removed significant obstacles to the registration of black voters. This new approach incorporated the use of a discriminatory effects standard for determining voting discrimination. Any state or locality employing a voting test or

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64. 42 U.S.C. § 1973b(b) (1994).
71. "[T]he large jump in the number and percentage of blacks registered to vote from just prior to the passage of the 1965 Act to just after it [is striking]. The number of registered blacks in the eleven southern states in this period jumped from approximately 2 million to 2.9 million, an increase of nearly 900,000, or 45 percent. In the first few months after the passage of the Act more than 300,000 blacks were registered. . . . Nearly three-quarters as many blacks registered to vote merely in the two years after passage of the Act as had been registered in all the years prior to 1957." Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 60-61 (1991).
device\textsuperscript{72} which had the result that less than fifty percent of the residents either registered or voted in the previous presidential election was presumed to have engaged in voting discrimination, and was subjected to the special provisions of the Act.\textsuperscript{73} Although the Attorney General and private individuals could continue to challenge in court particular racially discriminatory voting practices,\textsuperscript{74} the Attorney General could also simply determine that the state or locality had engaged in voting discrimination under the formula provided by the Act, and the state or locality's racially discriminatory voting practices would automatically be suspended. Furthermore, the Attorney General's determination was not subject to judicial review.\textsuperscript{75}

The Voting Rights Act of 1965 used a rebuttable presumption with a shift in the burden of persuasion device to establish that certain states and localities maintained racially discriminatory voting practices. Under this original version of the Act, the injury was the denial or abridgment of the opportunity to register and vote. The injury was assumed to be caused by the use of racially discriminatory voting tests or devices, such as a literacy test or poll tax. The remedy was the suspension of the voting tests or devices. The standard which was used to provide the evidence from which the presumption was raised that the state maintained a racially discriminatory voting practice was the use of voting tests or devices, and the registration and voting in the

\textsuperscript{72} The Act defined a voting test or device as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters of members of any other class." 42 U.S.C. § 1973b(c) (1994).

\textsuperscript{73} The special provisions of the Act applied to any state or locality which the Attorney General determined had maintained a voting test or device on November 1, 1964, and in which less than fifty percent of the voting age residents were registered to vote or voted in the 1964 presidential election. 42 U.S.C. § 1973b(b) (1994).

\textsuperscript{74} 42 U.S.C. § 1973a (1994).

\textsuperscript{75} The Attorney General's determination that a state or locality was subject to the special provisions of the Act was not subject to judicial review. 42 U.S.C. § 1973b(b) (1994). But a state or locality could seek a declaratory judgment from a three-judge panel of the U.S. District Court for the District of Columbia that the state or locality had not used a test or device to prevent a citizen from voting on account of race or color in the previous five years. 42 U.S.C. § 1973b(a) (1994). The special provisions of the Act could not be applied to any state or locality which had only a few voting discrimination incidents, and the voting tests or devices which caused the incidents had been eliminated and were unlikely to recur. 42 U.S.C. § 1973b(d) (1994).
previous presidential election of less than fifty percent of eligible black citizens.

In the context of the times, it was clear that many voting tests and devices had a racially disproportionate impact, and it was reasonable to presume that states and localities maintained such tests and devices for racially discriminatory purposes. Thanks in large part to the success of the Voting Rights Act and other civil rights measures designed to end racial discrimination, it is not clear that it would be reasonable to presume such a purpose today. Because the Act was adopted by Congress, and focused on the narrow issue of providing access to registration and voting, it avoided many of the problems associated with judicially-created remedies. The discriminatory effects tests that the Supreme Court developed in Reynolds v. Sims and Thornburg v. Gingles would not be so fortunate.

2. Vote Dilution I: The Principle of “One Person, One Vote”

During the early 1960s, the Supreme Court also developed a separate constitutional voting rights claim under the Equal Protection Clause of the Fourteenth Amendment to address the malapportionment of voting strength between rural and urban districts. In Baker v. Carr, the Court held for the first time that a complaint alleging that a state legislative apportionment plan unconstitutionally deprived voters of the equal protection of the laws was a claim suitable for adjudication by the federal courts. The Court did not discuss the proper constitutional standards for evaluating the validity of a state legislative apportionment plan, or the appropriate remedy for redressing an unconstitutional apportionment plan. The Court simply asserted that “[j]udicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.”

76. See, e.g., Morse v. Republican Party of Virginia, 116 S. Ct. 1186 (1996) (Court held that a private right of action exists under the Voting Rights Act to challenge the requirement that persons desiring to become delegates to a state political party’s nominating convention pay a registration fee to cover the cost of the convention.)
77. 377 U.S. 533 (1964). For a discussion of this case see Sec. IV.B.2 infra.
78. 478 U.S. 30 (1986). For a discussion of this case see Sec. IV.B.6 infra.
80. Id. at 226.
Although in *Gray v. Sanders* the Supreme Court again declined to specify the standards for evaluating or the remedy for redressing an unconstitutional apportionment, the Court announced the principle of "one person, one vote." The Court held that Georgia's use of a county unit system for tabulating votes in statewide primary elections was unconstitutional because it resulted in the dilution of the weight of the vote of certain voters merely based on where they lived:


82. The county unit system is similar to the Electoral College system used to elect the President of the United States. Each county has a number of county unit votes equivalent to the number of representatives it elects to the state legislature. Any candidate who receives a plurality of the popular vote in a county would receive all of that county's unit votes. The candidate who receives the most county unit votes would become the party's nominee for a particular statewide office, such as Governor. *Gray*, 372 U.S. at 370-71.

For the purpose of deciding this case, the Court found the analogy between Georgia's county unit system and the Electoral College system inapposite:

The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a statewide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued.

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Passage of the Fifteenth, Seventeenth, and Nineteenth Amendments shows that this conception of political equality belongs to a bygone day, and should not be considered in determining what the Equal Protection Clause of the Fourteenth Amendment requires in statewide elections.

*Id.* at 378, 377 n. 8.

However, the county unit system is not unconstitutional *per se*; it is unconstitutional only if the apportionment of representatives to the state legislature upon which the county unit system is based is itself unconstitutional. For example, under the Georgia state constitution the state's eight most populous counties sent three representatives to the lower chamber of the state legislature, the next thirty most populous counties sent two representatives, and the remaining counties sent one representative. This system resulted in tremendous disparity between the most populous and least populous counties. Fulton County, the most populous county in Georgia, had 14.11% of Georgia's total population but only 1.46% of Georgia's total unit votes (or a voting strength equivalent to one-tenth of the County's percentage of statewide population). But Echols County, the least populous county in Georgia, had 0.05% of Georgia's total population but 0.48% of Georgia's total unit votes (or a voting strength equivalent to ten times the County's percentage of statewide population). A unit vote in Fulton County represented 92,721 residents, whereas a unit vote in Echols County represented 938 residents. Thus, the weight of the vote of a resident in Fulton County was only 1% of the weight of the vote of a resident in Echols County. *Id.* at 371.
How then can one person be given twice or ten times the voting power of another person in a state-wide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.

The conception of political liberty from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.

The Supreme Court finally determined the standards for evaluating the apportionment of state legislative districts under the Equal Protection Clause in Reynolds v. Sims. Reasserting the principle it had first articulated in Gray, the Court argued that diluting the weight of votes on the basis of where the voter lived impaired a fundamental right under the Fourteenth Amendment just as much as invidious discrimination based on race:

The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debase ment or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

The Court found the analogy between the Alabama state legislature and the scheme of representation followed by the United States Congress to be inapposite, and held that the Equal Protection Clause required the state to reapportion the districts for both chambers of its legislature on an equal population basis:

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[T]he Equal Protection Clause requires that a state make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population
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as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.

So long as divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible ....

Among the considerations a state might use to justify deviation from the equal-population principle, the Court indicated that making districts compact, respecting municipal boundaries, and preventing political gerrymandering might qualify as legitimate state interests. The Court also noted that multi-member dis-

87. Id.
88. Id. at 578. Earlier, the Supreme Court had determined the standards for evaluating the apportionment of congressional districts under Art. I, sec. 2 of the Constitution in Wesberry v. Sanders, 376 U.S. 1 (1964). The Court held that a complaint alleging that a state congressional apportionment plan unconstitutionally diluted the weight of the vote of certain voters presented a justiciable claim. The Court determined that one person's vote in a congressional election should be worth as much as another person's "as nearly as is practicable." Id. at 7-8. "While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." Id. at 18.

Despite its disclaimer, the Court pursued the objective of equal representation for equal numbers of people to the point of mathematical precision—at least for the House of Representatives. In Kirkpatrick v. Preisler, 394 U.S. 526 (1964), the Court rejected a Missouri congressional districting plan that deviated from absolute population equality by 3%. The Court insisted that deviations from absolute population equality would not be justified on de minimus grounds, nor by a desire to avoid fragmenting political subdivisions, nor even to deter political gerrymandering. "[T]he 'as nearly as practicable' standard requires the State to make a good faith effort to achieve precise mathematical equality." Id. at 530-31. Later, in Karcher v. Daggett, 462 U.S. 725 (1983), the Court rejected a New Jersey congressional districting plan that deviated from absolute population equality by less than 0.7%. The Court again refused to acknowledge a de minimus exception unless the state could show that more precise results could not be achieved with the best available census data. However, the Court indicated that consistently applied legislative policies (such as making districts compact, respecting municipal boundaries, preserving core areas of prior districts, or avoiding contests between incumbents) might justify some deviation from absolute population equality. Id. at 740.

The Court has declined to pursue precise mathematical equality for state legislative districts. In Brown v Thomson, 462 U.S. 835 (1983), handed down
districts—which would become the next focus of the Court’s vote dilution jurisprudence—might be justified by these legitimate state interests. 89

Like the Voting Rights Act of 1965, the Court’s vote dilution jurisprudence used a rebuttable presumption with a shift in the burden of persuasion device to establish that states diluted the weight of the vote of certain voters based on where they lived. The injury was the dilution of the weight of the vote of certain voters. The injury was assumed to be caused by the assignment of voters to districts of unequal population. The remedy was the assignment of voters to districts of substantially equal population. The standard which was used to provide the evidence from which the presumption was raised that a state diluted the weight of the vote of certain voters was the principle of “one person, one vote” and the assignment of voters to districts of unequal population. The presumption that a state diluted the weight of the vote of certain voters shifted to the state the burden of producing evidence that the assignment of voters to districts of unequal population was rationally related to the achievement of some legitimate state interest.

The standard that the Court used to provide the evidence from which the presumption was raised that a state diluted the weight of the vote of certain voters—the principle of “one person, one vote”—was designed to detect the disparity between rural districts and urban or suburban districts, not the disparity between white voters and minority voters. It is not a standard derived from the text or history of the Constitution, or from the text of a statute. In fact, the standard is inconsistent with the principles of representation used to elect the Senate and the President. The standard may provide evidence from which the presumption of an “injury” may properly be drawn, but such an “injury” is not recognized by the Constitution, and does not authorize the Court to devise a remedy. Nevertheless, this standard has been used to transform how states and localities elect their legislative, executive, and judicial officials, and the use of this standard has called into question the Court’s authority and competence to affect such a transformation.

Several members of the Court were clearly troubled by the direction of the Court’s vote dilution jurisprudence, and ques-

89. Reynolds, 377 U.S. at 579.
tioned the Court's authority and competence to develop a vote dilution standard and impose a vote dilution remedy. Justice Frankfurter argued that vote dilution claims presented a non-justiciable political question, and criticized the Court's "hypothetical claim resting on abstract assumptions."

What, then, is this question of legislative apportionment? Appellants invoke the right to vote and to have their votes counted. But they are permitted to vote and their votes are counted. They go to the polls, they cast their ballots, they send their representatives to the state councils. Their complaint is simply that the representatives are not sufficiently numerous or powerful—in short, that Tennessee has adopted a basis of representation with which they are dissatisfied. Talk of "debase[ment]" or "dilution" is circular talk. One cannot speak of "debase[ment]" or "dilution" of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union.

Justice Harlan argued that federal jurisdiction over vote dilution claims under the Equal Protection Clause of the Fourteenth Amendment was explicitly denied by § 2 of the Fourteenth Amendment. And like Justice Frankfurter, he criticized the Court for entering into an area for which there were no judicially manageable standards:

Generalities cannot obscure the cold truth that cases of this type are not amenable to the development of judicial standards. No set of standards can guide a court which has to decide how many legislative districts a State shall have, or what the shape of the districts shall be, or where to draw a particular district line. No judicially manageable standard can determine whether a State should have single-member districts or multimember districts or some combination of both. No such standard can control the balance between keeping up with population shifts and having stable districts. In all these respects, the courts will be called upon to make particular decisions with respect to

90. Baker, 369 U.S. at 267 (Frankfurter, J., dissenting).
91. Id. at 299-300.
92. Reynolds, 377 U.S. at 593-608 (Harlan, J., dissenting).
which a principle of equally populated districts will be of no assistance whatsoever.93

Justices O'Connor and Thomas would later return to these criticisms when they questioned the direction of the Court's vote dilution jurisprudence,94 but during the initial phase in the development of that vote dilution jurisprudence, the Court merely acknowledged the warning and asserted its power:

We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.95

3. Vote Dilution II: “The Opportunity to Participate in the Political Process and Elect the Representatives of One’s Choice”

Ignoring the warning of Justices Frankfurter and Harlan, the Supreme Court soon expanded the scope of its vote dilution claim in a series of cases challenging the constitutionality of multi-member districts under the Equal Protection Clause. The Court had noted in Reynolds v. Sims that multi-member districts were not unconstitutional per se.96 However, the Court now began to entertain claims that multi-member districts “operate to minimize or cancel out the voting strength of racial or political elements of the voting population.”97 To sustain such claims the racial or political group allegedly discriminated against had to do more than show that it had not elected representatives in proportion to its numbers:

93. Id. at 621.
95. Reynolds, 377 U.S. at 566.
96. Id. at 579.
The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.98

The plaintiffs could establish vote dilution by proving the existence of a number of factors:

[W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions, and the lack of provision for at-large candidates running from particular geographical subdistricts.99

The existence of an aggregation of these factors was sufficient to establish the fact of vote dilution; the plaintiff did not need to prove the existence of all of the factors.100

In these cases, the Court attempted to use a permissive inference device to expand the scope of its vote dilution jurisprudence to cover these claims that particular state voting practices diminished the opportunity of certain voters to participate in the political processes and to elect legislators of their choice. The injury was the diminished opportunity of certain voters to participate in the political processes and to elect legislators of their choice. The cause of the injury and the remedy for the injury were unclear. The standard which was used to provide the evidence from which the inference was drawn that a state had diminished the opportunity of certain voters to participate in the political processes and to elect legislators of their choice was a multiple-factor "totality of the circumstances" test. The inference that a state had diminished the opportunity of certain voters to

100. Zimmer, 485 F.2d at 1305.
participate in the political processes and to elect legislators of their choice did not shift the burden of production or persuasion to the state.

The totality of the circumstances standard which was used to provide the evidence from which the inference was drawn that a state had diminished the opportunity of certain voters to participate in the political processes and to elect legislators of their choice was too imprecise to support such an inference: too many factors extraneous to the state’s voting practice could explain the voters' inability to achieve the degree of political success they expected. The lack of a more specific and objective standard hampered the progress of such claims, and the Court ultimately abandoned the use of the discriminatory effects test for establishing vote dilution in *City of Mobile v. Bolden.* When the Congress amended the Voting Rights Act in 1982 to incorporate the discriminatory effects test, the Court was forced to wrestle with this problem once again in *Thornburg v. Gingles.*

4. The Rejection of the Discriminatory Effects Test for Determining Vote Dilution

In the fifteen years that followed the enactment of the Voting Right Act, the Court sustained only one claim that multi-member districts unconstitutionally diluted the voting strength of racial or political minority groups. Then, the Court attempted to reconcile its vote dilution jurisprudence with other aspects of its equal protection jurisprudence, and abandoned

102. 478 U.S. 30 (1986). For a discussion of this case see Sec. IV.B.6 infra.
103. *See White v. Regester,* 412 U.S. 755 (1973) (multi-member districts in Dallas and Bexar Counties of Texas invidiously excluded blacks and hispanics from effective participation in political processes.)
104. *See Washington v. Davis,* 426 U.S. 229 (1976) and *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977). Note that the discriminatory purpose test in *Washington v. Davis* employs a permissive inference device which allows the factfinder to infer discriminatory purpose from circumstantial evidence of discriminatory results:

[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that discriminatory impact ... may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under [the Equal Protection Clause] simply because it may affect a greater proportion of one race than another. Disproportionate impact is not irrelevant, but it is not the touchstone of an
the use of the discriminatory effects test for establishing vote dilution. In *City of Mobile v. Bolden*, the appellees brought a class action suit on behalf of the black residents of Mobile, Alabama alleging that the practice of electing the city's three commissioners at-large diluted the voting strength of the city's black residents in violation of § 2 of the Voting Rights Act, the Fourteenth Amendment, and the Fifteenth Amendment. The district court found that the at-large election of the city commissioners diluted the voting strength of the city's black residents and ordered the city to establish a mayor-council plan of government with council members elected from single-member districts. The court of appeals affirmed the district court's findings and order.

The Supreme Court reversed the district court's finding and order, with a plurality of the Court rejecting the use of a discriminatory effects test for establishing vote dilution. First, the plurality found that § 2 of the Voting Rights Act simply restated the prohibitions contained in the Fifteenth Amendment and did not create a separate statutory vote dilution claim. "[T]he language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." Second, the plurality stated that plaintiffs had to prove that the voting practice was motivated by a discriminatory purpose in order to sustain a constitutional vote dilution claim under either the Fourteenth or Fifteenth Amendments:

Although dicta may be drawn from a few of the Court's earlier opinions suggesting that disproportionate effects alone may establish a claim of unconstitutional racial vote dilution, the fact is that such a view is not supported by any decision of this Court. More importantly, such a view is not consistent with the meaning of the Equal Protection

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*invidious racial discrimination forbidden by the Constitution.* Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

*Id.* at 229, 242 (1976) (emphasis added).


Clause as it has been understood in a variety of other contexts involving alleged racial discrimination.\textsuperscript{110}

The plurality pointed to a passage in \textit{Whitcomb} which stated that the plaintiffs had failed to prove that the multi-member districts at issue in the case "were conceived or operated as purposeful devices to further racial or economic discrimination."\textsuperscript{111} The plurality also noted that in \textit{White v. Regester} the district court had relied upon "evidence in the record which included a long history of racial discrimination against minorities as well as indifference to their needs and interests on the part of white elected officials"\textsuperscript{112}—evidence which would support a finding of purposeful discrimination. Finally, the plurality distinguished \textit{Zimmer} by noting that it was decided before \textit{Washington v. Davis}\textsuperscript{113} and therefore "was quite evidently decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause—that proof of a discriminatory effect is sufficient."\textsuperscript{114}

In a dissenting opinion, Justice Marshall contended that a plaintiff did not have to prove discriminatory purpose to sustain a constitutional vote dilution claim under either the Fourteenth or Fifteenth Amendments. Justice Marshall argued that the Court had failed to distinguish between vote dilution claims premised upon the "suspect classification" branch of equal protection cases, and vote dilution claims premised upon the "fundamental rights" branch.\textsuperscript{115} Vote dilution claims premised on the use of a suspect classification, such as race, do require proof of discriminatory purpose.\textsuperscript{116} However, vote dilution claims premised on the interference with a fundamental right, such as the right to vote, are not premised on racial discrimination and merely require proof of discriminatory effects.\textsuperscript{117} Furthermore, vote dilution claims involving the abridgment of the fundamental right to vote could be brought under the Four-

\begin{itemize}
  \item \textsuperscript{110} \textit{Id.} at 67-68.
  \item \textsuperscript{111} \textit{Whitcomb}, 403 U.S. at 149.
  \item \textsuperscript{112} \textit{Bolden}, 446 U.S. at 69.
  \item \textsuperscript{113} 426 U.S. 229 (1976).
  \item \textsuperscript{114} \textit{Bolden}, 446 U.S. at 71.
  \item \textsuperscript{115} \textit{Id.} at 113 (Marshall, J., dissenting).
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} \textit{Id.} at 113-14, 120-21. In Justice Marshall's view, \textit{Reynolds v. Sims} and \textit{White v. Regester} would be examples of vote dilution claims involving the abridgment of the fundamental right to vote; \textit{Gomillion v. Lightfoot} would be an example of a vote dilution claim involving the use of a suspect racial classification. For a discussion of \textit{Gomillion v. Lightfoot}, see Sec. V.B.1 infra.
\end{itemize}
The Return of the Discriminatory Effects Test for Determining Vote Dilution

In 1982, the Congress amended § 2 of the Voting Rights Act to incorporate a discriminatory effects test for determining whether a state had denied or abridged a citizen's right to vote on account of race, color, or membership in a language minority group. The amended § 2 provides as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or

118. Id. at 128.

119. The Voting Rights Act had been amended in 1975 to include language minority groups. The term "language minority group" refers to persons who are American Indian, Asian American, Alaska Natives, or of Spanish heritage. 42 U.S.C. § 1973l (c) (3) (1994).
applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color [or membership in a language minority group].

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.\(^{120}\)

The amendment was clearly designed to overrule the plurality's holding in \textit{Bolden} that § 2 of the Voting Rights Act simply restated the prohibitions contained in the Fifteenth Amendment and did not create a separate statutory vote dilution claim.\(^{121}\) The Congress rejected the plurality's discriminatory purpose standard, and endorsed Justice Marshall's discriminatory effects standard. The Congress used the language of \textit{White v. Regester} to define vote dilution: vote dilution occurs when "members [of a protected class] have less opportunity than other members of the electorate to influence the political process and to elect the representatives of their choice."\(^{122}\) The Congress also used the totality of circumstances test to establish vote dilution, but the text of the amendment only specified one factor which could be used to establish vote dilution—lack of electoral success—and provided that that factor could not be used to establish a right to proportional representation. The Congress did not resolve the tension between these two statements: if a group is not entitled to receive proportional representation, how much representation is it entitled to receive? How much representation must a group be denied before it has a valid vote dilution claim?\(^{123}\)

\(^{120}\) See 42 U.S.C. § 1973(a) & (b) (1994) (emphasis added).
\(^{121}\) See \textit{Bolden}, 446 U.S. at 60-61.
\(^{122}\) Compare \textit{White}, 412 U.S. at 766, quoted in the text at fn. 98 supra.
The Congress also did not resolve the question of its authority for amending the Act to incorporate the discriminatory effects test. The plurality of the Court in *Bolden* had held that constitutional vote dilution claims under the Fourteenth and Fifteenth Amendments required proof of discriminatory purpose. How could the Congress, then, in the exercise of its powers to enforce the Fourteenth and Fifteenth Amendments, establish a statutory vote dilution claim which required a lesser standard of proof?

6. The Implementation of the Discriminatory Effects Test for Determining Vote Dilution

The Supreme Court attempted to resolve these problems in *Thornburg v. Gingles.* In *Thornburg,* several black registered voters had challenged one single-member and six multi-member state legislative districts, alleging that the districting plan impaired the ability of black citizens to elect representatives of their choice in violation of § 2 of the Voting Rights Act, the Fourteenth Amendment, and the Fifteenth Amendment. After the complaint was filed, but before the case reached trial, Congress amended the Voting Rights Act to adopt a discriminatory effects standard for determining vote dilution. The district court applied a totality of the circumstances test using the factors outlined in the Senate Report on the Voting Rights Act of 1982, and held that the districting plan resulted in the dilution of black citizens' votes in all seven challenged districts.

The Supreme Court affirmed the judgment of the district court with respect to all but one of the multi-member districts. Like the district court, the Supreme Court first looked to the Senate Report for guidance as to the nature of this vote-dilution claim:

> Although the Senate Report espouses a flexible, fact-intensive test for § 2 violations, it limits the circumstances under which § 2 violations may be proved in three ways.

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but [does not] give minorities an affirmative entitlement to proportional representation." *Id.* at 636. Although I agree with much of Blumstein's analysis, his article was written before the Supreme Court’s decision in *Thornburg v. Gingles,* and therefore does not account for the court’s use of § 2 "as an engine of destruction for at-large elections and as a vehicle for bringing about the court-ordered adoption of districting systems." *Id.* at 711.

124. For the Court’s most recent discussion of Congress’s enforcement powers under § 5 of the Fourteenth Amendment, see City of Boerne v. Flores, 1997 WL 345322 (U.S. Tex.).


First, electoral devices, such as at-large elections, may not be considered *per se* violative of § 2. Plaintiffs must demonstrate that, under the totality of circumstances, the devices result in unequal access to the electoral process. Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it.128

The Senate Report indicated that the new discriminatory effects test was designed to employ the same permissive inference device with the same totality of the circumstances standard the Court had developed in *White v. Regester*. Unlike the denial of access to registration and voting under the original Act, vote dilution would not be presumed from a lack of proportional representation: plaintiffs would retain the burden of proving vote dilution. But the Court rejected this approach and developed three preconditions for establishing a prima facia case of vote dilution and shifting the burden of production to the state:

These circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice for the following reasons. *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.* If it is not, as would be the case in a substantially integrated district, the multimember form of the district cannot be responsible for minority voters' inability to elect its candidates. *Second, the minority group must be able to show that it is politically cohesive.* If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. *Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.* In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impeded its ability to elect its chosen representatives.129

The Court expected these three preconditions—(1) a large and geographically compact minority; (2) a politically cohesive

128. *Id.* at 46 (citations omitted).
129. *Id.* at 50-51 (emphasis added & citations omitted).
minority; and (3) racial bloc voting by the majority—to provide a more effective standard for determining vote dilution. The key to this standard is the relationship between the minority group’s opportunity to elect the representatives of its choice and the white majority’s propensity to elect the representatives of its choice. Minority groups tend to lose elections unless they are able to forge coalitions and effectively become a part of a majority. However, if a minority group is able to identify a voting practice that could give it a better opportunity to win elections, it could use the vote dilution provision of the Voting Rights Act to compel a state or locality to adopt such a practice. Single-member majority-minority districts were the voting practice selected to give minority group a better opportunity to win elections.

After selecting the single-member majority-minority district as the benchmark for determining vote dilution under §2 of the Voting Rights Act, the Court needed to address five questions to clarify this new standard: First, is the failure to concentrate minority voters into majority-minority districts vote dilution? Second, is the concentration of minority voters into majority-minority districts vote dilution? Third, how many majority-minority districts must a state or locality create to avoid vote dilution? Fourth, are single-member majority-minority districts the appropriate benchmark for determining vote dilution? Finally, does the Equal Protection Clause of the Fourteenth Amendment place a constitutional limit on the creation of majority-minority districts?

7. The Failure to Create Majority-Minority Districts May Cause Vote Dilution

The Supreme Court first considered the application of the Gingles vote dilution test to single-member districts in Growe v. Emison. In Growe, the appellees had challenged an existing state legislative districting plan under §2 of the Voting Rights Act, alleging that the plan unnecessarily fragmented two Indian reservations and the minority population of the city of Minneapolis. The appellees had sought declaratory relief from the districting plan and continued judicial supervision of any legislative effort to design a new districting plan. A three-judge panel of

131. Growe also consolidated two other suits: Cotlow v. Growe, No. C8-91-985, a state action in which the parties stipulated that the existing 1983 congressional and legislative districting plans were unconstitutionally malapportioned in light of the 1990 census; and Benson v. Growe, No. 4-91-603, a federal action in which the Republican minority leaders of the state house and senate alleged that the state legislature’s proposed legislative
the district court determined that any state legislative districting plan which did not include a majority-minority district for the city of Minneapolis necessarily violated § 2.132 The district court imposed congressional and legislative districting plans developed by its own special masters, and enjoined the state legislature and state supreme court from developing their own districting plans.133

The Supreme Court, in a unanimous opinion written by Justice Scalia, reversed the decision of the district court. The Court was clearly troubled by the district court's remedy for an assumed vote dilution. The district court, having found that the minority population of Minneapolis was unconstitutionally fragmented, interfered with the state's responsibility for apportioning its congressional and legislative districts, and devised an oddly-shaped majority-minority district that stretched from southern part of the city, around the downtown area, into the northern part of the city, to link at least three separately identifiable minority groups.134 But instead of anticipating the type of claim it would soon develop in Shaw, the Supreme Court chose to focus on the district court's finding of vote dilution rather than on its remedy for the assumed vote dilution. The Court noted that the district court had failed to identify the particular legislative districting plan which produced the vote dilution,135 and had failed to apply the three Gingles threshold factors in determining that vote dilution had occurred.136 "Unless these points are established, there neither has been a wrong nor can be remedy."137 The Court found that the Gingles preconditions "were not only ignored but were unattainable."138 The Court argued that the combination of distinct ethnic and language minority groups to create a geographically compact 'majority' (the first Gingles factor) was a dubious undertaking, and acknowledged that statistical or anec-
dotal evidence of minority political cohesion or majority bloc voting in Minneapolis (the second and third Gingles factors) was lacking.\footnote{139}

In Growe, the Court addressed the first of the questions about the use of race-conscious districting: is the failure to concentrate minority voters into race-conscious districts vote dilution? Although the Court found that the district court had not demonstrated that the minority groups in this case were sufficiently geographically compact or politically cohesive to warrant the creation of race-conscious districts, the Court implied that in the proper circumstances the failure to create race-conscious districts could constitute vote dilution. The Court reminded the district courts to defer to the states for the development of congressional and legislative districting plans, and warned the district courts to order the creation of race-conscious districts only after finding vote dilution under the Gingles test.

Although the Court determined that district courts could not create race-conscious districts without first finding vote dilution under the Gingles test, the Court did not address whether states could create race-conscious districts without first finding vote dilution under the Gingles test. The Court also declined to address the benchmark question of whether it is better to concentrate minority voters into majority-minority districts to ensure the election of a few minority representatives, or to disperse minority voters into minority-influence districts to influence the election of several non-minority representatives.\footnote{140} The Court would confront both of these questions in Voinovich v. Quilter, which it decided a week after Growe.

8. The Creation of Majority-Minority Districts May Also Cause Vote Dilution

The Supreme Court refined the application of the Gingles vote dilution test to single-member districts in Voinovich v. Quilter.\footnote{141} In Voinovich, two Democratic members of the Ohio state reapportionment board challenged a state legislative districting plan adopted by the board's three Republican members which created several majority-minority districts. The appellees argued that plan diluted minority voting strength because it concentrated black voters into majority-minority districts instead of dispersing them into minority-influence districts, thereby minimizing the number of districts in which black voters could elect

\footnote{139. \textit{Id.}}\footnote{140. \textit{Id.} at 41 n.5.}\footnote{141. 507 U.S. 146 (1993).}
the candidates of their choice. The appellants contended that the plan actually enhanced minority voting strength because it provided "safe" majority-minority districts in which black voters could be assured of electing the candidates of their choice.

A three-judge panel of the district court rejected the appellant's contention that § 2 of the Voting Rights Act required the creation of majority-minority districts "whenever possible," and held that § 2 prohibited the creation of such districts unless necessary to remedy a violation of § 2.\(^{142}\) When the state apportionment board was unable to prove that the majority-minority districts in its plan were necessary to remedy vote dilution, the district court ordered the state to reschedule its primary elections for the general assembly,\(^{143}\) and appointed a special master to prepare a legislative districting plan.\(^{144}\)

The Supreme Court first stayed the district court's order,\(^{145}\) and then reversed the district court's decision.\(^{146}\) In another unanimous opinion, written by Justice O'Connor, the Court declined to decide whether the failure to create minority-influence districts constituted a cognizable vote dilution claim under § 2.\(^{147}\) The Court determined that § 2 did not contain a \textit{per se} prohibition against the creation of majority-minority districts, and rejected the district court's contention that the use of such districts was limited to those circumstances where they were needed to remedy a violation of § 2.\(^{148}\) The Court acknowledged that the creation of majority-minority districts could raise a vote dilution claim, but the burden of proof rested with the plaintiff to demonstrate that the creation of majority-minority districts constituted vote dilution, not with the state to demonstrate that the creation of such districts was necessary to remedy vote dilution.\(^{149}\)

In \textit{Voinovich} the Court addressed the second of the questions about the use of race-conscious districting: is the concentration of minority voters into race-conscious districts vote dilution? Although the Court avoided a direct answer to this question by declining to decide whether the failure to create minority-influence districts constituted vote dilution, the Court acknowledged that in the proper circumstances the creation of race-conscious

\begin{itemize}
  \item \(^{145}\) Voinovich v. Quilter, 503 U.S. 979 (1992).
  \item \(^{146}\) Voinovich, 507 U.S. at 152.
  \item \(^{147}\) \textit{Id.} at 154.
  \item \(^{148}\) \textit{Id.} at 155.
  \item \(^{149}\) \textit{Id.} at 155-56.
\end{itemize}
districts could constitute vote dilution. As we shall see, this is an issue of some importance in the development of the racial gerrymandering claim in *Shaw v. Reno*. The dissenters in *Shaw* would argue that a vote dilution violation is the only limit upon the states' authority to create race-conscious districts. One part of the majority in *Shaw* would argue that a vote dilution violation is a separate and subordinate statutory limit upon the states' authority to create race-conscious districts. The principal limit is a racial gerrymandering violation under the Equal Protection Clause of the Fourteenth Amendment. Another part of the majority in *Shaw* would reject the entire vote dilution enterprise, and would argue that the Equal Protection Clause raises a significant constitutional barrier to the creation of race-conscious districts for any purpose.

The Court also addressed an issue left unresolved in *Growe*. The Court determined that states could create race-conscious districts without first finding vote dilution under the *Gingles* test. The scope of this authority would not be determined until the dimensions of the racial gerrymandering claim, recognized in *Shaw*, were finalized in *Shaw v. Hunt* and *Bush v. Vera*. Finally, the Court did not address whether states may create race-conscious districts wherever possible, even where minority voters do not reside in geographically compact districts. The Court would confront this issue in *Shaw v. Reno*, but it would not resolve the issue until *Johnson v. DeGrandy*.

9. The Rejection of the Maximization Principle

The Supreme Court addressed the Justice Department's policy of requiring states to maximize the concentration of minority voters into majority-minority districts in *Johnson v. De Grandy*. The convoluted factual circumstances of this case give a taste of the difficulties states now encounter when they redesign voting districts. On the opening day of the 1992 regular state legislative session, Miguel De Grandy, an Hispanic state representative, and several registered voters filed a complaint alleging that Florida's existing congressional and legislative districts were unconstitutionally malapportioned in light of the 1990 census. A three-judge panel of the U.S. District Court for the Northern District of Florida initially dismissed the complaint for lack of subject-matter jurisdiction. However, when the state legislature adjourned

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152. Justice Thomas with Justice Scalia.
its regular session without adopting new congressional or legislative districting plans, the panel consolidated an amended complaint by De Grandy with a similar complaint filed by the Florida Conference of NAACP Branches, and established an expedited schedule for adopting new districting plans before the July deadline for candidate qualification.

The Governor convened a special legislative session which drafted a new legislative districting plan but was unable to agree on a new congressional districting plan. The Florida Supreme Court issued a declaratory judgment validating the state legislative districting plans.\textsuperscript{154} The plan for the 120 house districts included thirteen black majority-minority districts, nine hispanic majority-minority districts, three black minority-influence districts, and seven hispanic minority-influence districts. The plan for the forty senate districts included two black majority-minority districts, three hispanic majority-minority districts, and three black minority-influence districts.

The Attorney General refused to pre-clear the districting plan for the senate because it failed to create a third black majority-minority district. The Governor, the President of the Senate, and the Speaker of the House all refused to convene another special legislative session to revise the senate redistricting plan. The Florida Supreme Court adopted a revised senate redistricting plan which created a third black majority-minority district by placing virtually all of the black residents of a four-county area into the district.\textsuperscript{155}

The De Grandy and NAACP plaintiffs, together with the Department of Justice, renewed their challenge to the legislative districting plans in the U.S. District Court for the Northern District of Florida.\textsuperscript{156} The three-judge panel found that the senate

\textsuperscript{154}. In re Constitutionality of Senate Joint Resolution 2G, 597 So. 276 (Fla. 1992).

\textsuperscript{155}. In re Constitutionality of Senate Joint Resolution 2G, 601 So. 543 (Fla. 1992).

\textsuperscript{156}. The district court panel bifurcated its hearings on the congressional and legislative districting plans. The parties stipulated that the existing congressional districting plan was unconstitutional. (Florida's congressional delegation was increased from nineteen to twenty-three representatives by the 1990 reapportionment.) The court appointed a special master to develop and recommend a new congressional districting plan. The special master appointed an independent expert to evaluate the twelve districting proposals which various parties had submitted to the court. The independent expert created a new plan, based upon four of the submitted proposals, which contained two hispanic majority-minority districts, two black majority-minority districts, and one black minority-influence district. The district court declared the existing congressional districting plan unconstitutional, and ordered the
redistricting plan unconstitutionally diluted black and hispanic voting strength, but nonetheless adopted the redistricting plan as the remedy for the vote dilution violation because it best accommodated the competing interests of black and hispanic voters. The panel also found that the house redistricting plan unconstitutionally diluted black and hispanic voting strength, and adopted a modified redistricting plan developed by the De Grandy plaintiffs which created two additional hispanic majority-minority districts and one additional black minority-influence district.\footnote{157}

De Grandy, the State of Florida, and the United States appealed the decision to the U.S. Supreme Court, which stayed the judgment of the District Court.\footnote{158} The Supreme Court found that § 2 required "substantial proportionality" between minority voting age population and the number of minority districts, not "maximization," and reversed the District Court’s holding that the Senate and House legislative redistricting plans unconstitutionally diluted minority voting strength, thereby sustaining the plans adopted by the state legislature.\footnote{159}

In a majority opinion written by Justice Souter, the Court explicitly rejected the Justice Department’s policy of denying preclearance to any redistricting plan that did not maximize the number of majority-minority districts:

"[R]eading § 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to state to conduct the 1992 and subsequent congressional elections under the plan developed by the independent expert. De Grandy v. Wetherell, 794 F. Supp. 1076 (N.D. Fla. 1992). The state legislature repealed the old congressional districting plan and took no further steps to create its own districting plan. In January, 1994, Andrew Johnson, an unsuccessful 1992 congressional candidate for one of the black majority-minority districts, and several non-black residents of that district filed a complaint in the U.S. District Court for the Northern District of Florida alleging that the district was a racially gerrymandered district under Shaw. A new three-judge panel denied their motion for a preliminary injunction because enjoining the use the district court’s 1992 redistricting plan would have disrupted the 1994 elections. The new panel found that the previous three-judge panel in De Grandy lacked the constitutional authority to adopt a permanent congressional redistricting plan, and that the district constituted a racial gerrymander. Johnson v. Mortham, 915 F. Supp. 1529 (N.D. Fla. 1995). The new panel later found that the district was not narrowly tailored to achieve a compelling state interest, Johnson v. Mortham, 926 F. Supp. 1460 (N.D. Fla. 1996), and adopted an interim congressional districting plan devised by the state legislature for the 1996 elections, Johnson v. Mortham, 1996 WL 297280 (N.D. Fla.).

run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast. . . . Failure to maximize cannot be the measure of § 2.\textsuperscript{160}

The Court also rejected the state’s attempt to use proportionality between the percentage of majority-minority districts and the percentage of the minority population as a “safe harbor” against a vote dilution claim: “[A safe harbor rule would] promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity.”\textsuperscript{161} Finally, the Court reminded those involved in designing congressional and legislative districts of the limited remedial purposes of majority-minority districts:

If the lesson of \textit{Gingles} is that society’s racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.\textsuperscript{162}

In a concurring opinion, Justice O’Connor praised the majority’s “carefully crafted approach”: “The opinion’s central teaching is that proportionality—defined as the relationship between the number of majority-minority voting districts and the minority group’s share of the relevant population—is\textit{ always} relevant evidence in determining vote dilution, but is\textit{ never} itself dispositive.”\textsuperscript{163} In another concurring opinion, Justice Kennedy reminded those involved in designing congressional and legislative districts of the constitutional limits on the remedial use of majority-minority districts:

Given our decision in \textit{Shaw}, there is good reason for state and federal officials with responsibilities related to redis-

\textsuperscript{160} \textit{Id.} at 1016-17.
\textsuperscript{161} \textit{Id.} at 1019-20.
\textsuperscript{162} \textit{Id.} at 1020.
\textsuperscript{163} \textit{Id.} at 1025 (O’Connor, J., concurring).
stricting, as well as reviewing courts, to recognize that explicit race-based districting embarks us on a most dangerous course. It is necessary to bear in mind that redistricting must comply with the overriding demands of the Equal Protection Clause.\textsuperscript{164} In a dissenting opinion, Justice Thomas, joined by Justice Scalia, argued as he would in \textit{Holder v. Hall}\textsuperscript{165} that a districting plan is not a voting "standard, practice, or procedure" under § 2 of the Voting Rights Act.\textsuperscript{166}

In \textit{De Grandy}, the Court addressed the third question about the use of race-conscious districting: what is the appropriate proportion of race-conscious districts? This question arises in the aftermath of the two previous case: \textit{Growe} determined that the failure to create race-conscious districts could be vote dilution, and \textit{Voinnovich} determined that the creation of race-conscious districts could also be vote dilution. How many race-conscious districts must a state create to avoid vote dilution? The Court adopted a "substantial proportionality" standard and rejected both a maximization standard and a proportionality (or safe harbor) standard. Justice O'Connor praised the Court's "carefully crafted approach"—an approach she castigated eight years earlier in \textit{Gingles}. Like \textit{Holder v. Hall}, which was handed down the same day, \textit{De Grandy} illustrates the Court's increasing frustration with its vote dilution jurisprudence, and its inability to develop a principled standard for determining vote dilution.

10. The Benchmark Problem in Determining Vote Dilution

The Supreme Court acknowledged the limits of its vote dilution jurisprudence in \textit{Holder v. Hall}.\textsuperscript{167} In \textit{Holder}, several black registered voters from Bleckley County, Georgia challenged the county's single-commissioner form of government under § 2 of the Voting Rights Act. In Bleckley County (like ten other counties in Georgia and numerous counties throughout America) a single commissioner performed all of the legislative and executive functions of the county government. In 1985, the state legislature had authorized the county to adopt a multi-member commission form of government, with the chairperson elected at large and five commissioners elected from single-member districts. Four years earlier the county voters had approved a five-

\textsuperscript{164} \textit{Id}. at 1031 (Kennedy, J., concurring in part and concurring in the judgment).
\textsuperscript{165} 512 U.S. 874, 891 (Thomas, J., concurring in the judgment) (1994).
\textsuperscript{166} \textit{De Grandy}, 512 U.S. at 1033 (Thomas, J., dissenting).
\textsuperscript{167} 512 U.S. 874 (1994).
member districting plan for the election of the county school board, and the adoption of a similar districting plan for the county government would have enabled the county to create a black majority-minority district. But in a 1986 referendum, the county voters rejected the multi-member commission plan for the county government.

The U.S. District Court for the Middle District of Georgia found that the respondents had failed to satisfy the second and third Gingles preconditions. The U.S. Court of Appeals for the Eleventh Circuit reversed the district court, found that the respondents had proved vote dilution, and remanded the case back to the district court for the formulation of a remedy modeled after the five-member districting plan for the election of the county school board. The U.S. Supreme Court reversed the court of appeals, and held that the size of a county commission could not be subject to a vote dilution claim.

In deciding a vote dilution claim under § 2, the Court must find a reasonable alternative voting practice to use as a benchmark to evaluate the existing voting practice. The respondents in Holder argued that a five-member commission was an appropriate benchmark in the case because the five-member commission was a common form of county government in Georgia, the state legislature had authorized Bleckley County to adopt a five-member commission, and Bleckley County had earlier adopted a five-member school board. But the Supreme Court concluded, by a badly fractured five to four majority, that there was no principled benchmark for determining the appropriate size of such a governmental body. Both Justice Kennedy writing for the Court with Chief Justice Rehnquist, and Justice O'Connor writing a separate concurring opinion, argued that the size of a governing body constituted a "standard, practice, or procedure" under §§ 2 and 5. In a § 5 claim, finding an alternative voting practice to use as a benchmark is not a problem—the benchmark is the former voting practice employed by the jurisdiction seeking preclearance for a new voting practice. However, in a § 2 claim, finding a benchmark is "extremely problematic"—"the wide range of possibilities makes the choice inherently standardless."

Justice Thomas, in a separate concurring opinion joined by Justice Scalia, argued that the size of a governing body is not a "standard, practice, or procedure" under § 2, and that a "system-

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atic reassessment" of the Court's interpretation of the Voting Rights Act was required:

A review of the current state of our cases shows that by construing the Act to cover potentially dilutive electoral mechanisms, we have immersed the federal courts in the hopeless project of weighing questions of political theory—questions judges must confront to establish a benchmark concept of an "undiluted" vote. Worse, in pursuing the ideal measure of voting strength, we have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success. In doing so, we have collaborated in what may aptly be termed the racial "balkaniz[ation]" of the Nation.

I can no longer adhere to a reading of the Act that does not comport with the terms of the statute and that has produced such a disastrous misadventure in judicial policymaking. I would hold that the size of a government body is not a "standard, practice, or procedure" because, properly understood, those terms reach only state enactments that limit a citizen's access to the ballot.\textsuperscript{171} Justices Thomas and Scalia would read the Voting Rights Act in light of its original purpose of providing access to registration and voting, and would abandon the Court's entire vote dilution jurisprudence because there is no judicially manageable standard for determining the 'weight' of an undiluted vote.

C. Conclusion

In the introduction to this section, I indicated that there have been three different attempts since the 1960s to prevent racial discrimination in voting. Each of these attempts employed a procedural device—a rebuttable presumption with a shift in the burden of production—to establish a conclusion of racial discrimination from purported evidence of racially disproportionate results (not racially discriminatory purpose). This purported evidence of racially disproportionate results was produced by using certain standards to determine what racially proportionate results would be.

In the Voting Rights Act of 1965, the Congress determined that black citizens were denied the opportunity to register and vote when states or localities used a voting test or device that

\textsuperscript{171} Id. at 892-93 (Thomas, J., concurring in the judgment) (citations omitted).
resulted in less than fifty percent of the eligible black citizens registering or voting in a presidential election. In the context of the times, it was clear that many voting tests and devices had a racially disproportionate impact, and it was reasonable to presume that states and localities maintained such tests and devices for racially discriminatory purposes. Thanks in large part to the success of the Voting Rights Act and other civil rights measures, it would not be reasonable to presume such a purpose today. For example, the low voter turnout rates in majority-minority districts cannot readily be traced to discriminatory voting tests or devices—unless the majority-minority districts themselves are discriminatory voting devices!

In *Reynolds v. Sims*, the Supreme Court determined that citizens were denied the opportunity to cast an “undiluted” vote when they were assigned to voting districts that were not substantially equal in population. This standard was originally designed to detect the disparity between rural districts and urban or suburban districts, not the disparity between white voters and minority voters. Although this standard may provide evidence from which the presumption of an “injury” may properly be drawn, the text of the Constitution does not recognize such an “injury” and does not authorize the Court to devise a remedy. Nevertheless, this standard has been used to transform how states and localities elect their public officials, and has called into question the Court’s authority and competence to affect such a transformation.

Finally, in *Thornburg v. Gingles*, the Supreme Court determined that minority groups were denied the opportunity to participate in the political process when the preferred candidates of sufficiently large, geographically compact, and politically cohesive minority groups were usually defeated by purported racial bloc-voting by the white majority. Lack of electoral success became evidence of racial discrimination, and race-conscious districts were soon designed to ensure the electoral success of certain minority groups.

V. THE DEVELOPMENT OF THE RACIAL GERRYMANDERING CLAIM

A. Introduction.

In *Shaw v. Reno*, the Supreme Court addressed the final question from *Thornburg v. Gingles*: whether the Equal Protection Clause of the Fourteenth Amendment placed any constitutional limits on the creation of race-conscious districts. The case called
into question the three decades of vote dilution jurisprudence which had transformed the way we elect our federal, state, and local officials and had culminated in the creation of majority-minority districts. The Court distinguished its earlier decision in *United Jewish Organizations v. Carey*\(^\text{173}\) which had appeared to repudiate the racial gerrymandering claim, and brought the use of race-conscious districts within the confines of its emerging Equal Protection jurisprudence.\(^\text{174}\)

B. Analysis

1. The Origins of the Racial Gerrymandering Claim

The racial gerrymandering claim was first articulated in *Gomillion v. Lightfoot*.\(^\text{175}\) In *Gomillion*, black residents of Tuskegee, Alabama alleged that the state legislature had redrawn the municipal boundaries of the city to deprive black voters of the opportunity to vote in municipal elections. The state legislature had transformed the shape of the municipal boundaries from a square to a strangely irregular twenty-eight-sided figure which placed all but four or five of the city's 400 black residents outside the city's boundaries. The district court dismissed the residents' suit because they had failed to state a claim upon which the court could grant relief,\(^\text{176}\) and the court of appeals affirmed the district court's judgment.\(^\text{177}\) The Supreme Court reversed the district court's judgment, and remanded the residents' claim back to the district court.\(^\text{178}\) The Supreme Court held that the Fifteenth Amendment limits a state legislature's authority to draw municipal election districts.

When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment. In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens. Apart from all else, these considerations lift this con-

\(^{173}\) 430 U.S. 144 (1977)
\(^{175}\) 364 U.S. 389 (1960).
\(^{177}\) *Gomillion v. Lightfoot*, 270 F.2d 594 (5th Cir. 1959).
\(^{178}\) *Gomillion*, 364 U.S. at 348.
troversy out of the so-called "political" arena and into the conventional sphere of constitutional litigation.179

In a concurring opinion, Justice Whitaker argued that the Court's opinion should have been based upon the Equal Protection Clause of the Fourteenth Amendment, not the Fifteenth Amendment.180

_Gomillion_ embodies the tension between the Court's vote dilution jurisprudence and racial gerrymandering jurisprudence. It clearly anticipates the type of vote dilution claim the Court would soon develop under the Equal Protection Clause. At this point, however, the Court was unwilling to hurdle the obstacle posed by the political question doctrine. Instead, the Court chose to base its decision on the Fifteenth Amendment because the manner in which the state had redrawn the municipal boundaries of Tuskegee had denied blacks the opportunity to vote in municipal elections, and not merely diluted the weight of their votes. It is important to notice, however, that the Court used the way the municipal boundaries were drawn as indirect evidence of the state's racially discriminatory purpose—rejecting the discriminatory effects test upon which the Court would base its vote dilution jurisprudence, and establishing the racial gerrymandering claim to which the Court would return in _Shaw._

The use of a permissive inference device for proving racial gerrymandering was first articulated in _Wright v. Rockefeller._181 In _Wright_, several registered voters of the four congressional districts encompassing the borough of Manhattan alleged that a congressional districting plan intentionally segregated white voters into one district, and black and Puerto Rican voters into another district (represented by Adam Clayton Powell, Jr.) in violation of the Fourteenth and Fifteenth Amendments.182 Two members of the three-judge panel of the district court found that the voters had failed to prove that the legislature was motivated by a racially dis-

179. _Id._ at 346-47.
180. _Id._ at 349 (Whitaker, J., concurring).
182. Counsel for the appellants explained that this was "a case of ghettoizing the Island of Manhattan" so as "to create a white Congressional district and a non-white Congressional district." "I think," counsel said, "the only province of the Court in this area is to determine whether or not these districts have been created with racial considerations in mind, and, if they have, or if the results of this districting, the effect of the statute is to create racially segregated areas, we maintain that it violates the Fourteenth and Fifteenth Amendments."

_Id._ at 54.
A dissenting member of the panel argued that the voters had presented evidence sufficient to establish "per se a prima facia case of a legislative intent to draw congressional district lines . . . on the basis of race and national origin."\(^{184}\)

The Supreme Court accepted the findings of the majority of the district court panel that the voters had failed to prove that the legislature was "either motivated by racial considerations or in fact drew the districts on racial lines,"\(^{185}\) and affirmed the district court's judgment to dismiss the voters' claim. The Court noted that the parties were divided over the issue of whether minority voters should be concentrated into a single district or dispersed among the four districts.\(^{186}\) The Court contrasted the case with the Fifteenth Amendment claim in *Gomillion* (where the districting scheme deprived minority voters of the opportunity to vote in municipal elections) and the newly-created Fourteenth Amendment vote dilution claim in *Wesberry v. Sanders*\(^{187}\) (where the districting scheme failed to create districts based as nearly as practicable on equal population).

In a dissenting opinion, Justice Douglas found that the voters had presented unrebutted evidence that the state had drawn districts along racial lines.\(^{188}\) Justice Douglas objected to the state's segregation of voters into separate districts, and noted that the state supported this segregation on a theory of "separate but better off" which had been used by attorneys for the defendant states in *Brown v. Board of Education*.\(^{189}\) "The fact that Negro political leaders find advantage in this nearly solid Negro and Puerto Rican district is irrelevant to our problem. Rotten boroughs were long a curse of democratic processes. Racial boroughs are also at war with democratic standards."\(^{190}\)

In another dissenting opinion, Justice Goldberg found that the voters had presented evidence concerning the shape of the district sufficient to create the inference that the state had drawn districts along racial lines:

> What more need the appellants have proved? . . . [B]y their evidence [the appellants] established a pattern of segregation not adequately explained on a geometric, geo-

\(^{184}\) *Id.* at 472-73.
\(^{185}\) *Wright*, 376 U.S. at 56.
\(^{186}\) *Id.* at 57-58.
\(^{187}\) 376 U.S. 1 (1964).
\(^{188}\) *Id.* at 62 (Douglas, J., dissenting).
\(^{189}\) *Id.*
\(^{190}\) *Id.*
graphic, [population] equalization, party-compromise, neighborhood or other basis. To require a showing of racial motivation in the legislature would place an impossible burden on the [appellants].... No public hearings were had on the [districting] bill and no statements by the bill's managers or published debates were available. Under these circumstances, appellants' evidence, showing the factual pattern of segregation ..., was sufficient to establish a prima facia case of unconstitutional racial districting. Once this had been done, appellees should have introduced evidence negating the inference that racial segregation was a purpose of the districting. In the absence of such proof by the State, [the finder of fact was] compelled to conclude that racial segregation was a criterion in—or a purpose of—the districting ....

This permissive inference device would form the basis of the racial gerrymandering claim outlined a generation later in *Shaw*.

2. The Apparent Repudiation of the Racial Gerrymandering Claim

The Supreme Court appeared to repudiate the racial gerrymandering claim in *United Jewish Organizations v. Carey (UJO)*. In *UJO*, the New York state legislature redesigned its state legislative districts to create several majority-minority districts and thereby gain preclearance for its plan from the Justice Department. Under the previous legislative districting plan, a 30,000 member Hasidic Jewish community was located entirely within a single legislative district with a 61% non-white population. To increase the non-white population to 65%, a portion of the

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191. *Id.* at 73-74 (Goldberg, J., dissenting).


193. States and localities covered by the special provisions of the Voting Rights Act must gain preclearance from the Attorney General or a three-judge panel of the U.S. District Court for the District of Columbia for any new voting practice, including a new districting plan. 42 U.S.C. § 1973c (1994). In these proceedings, the state or locality has the burden of proving that the new voting practice "does not have the purpose and will not have the effect of denying or abridging the right to vote" on account of race, color, or national origin. *Id.* To prove that the new voting practice does not have the effect of denying or abridging the right to vote on account of race, color, or national origin, the state or locality must establish that the new voting practice does not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). The state may meet this burden of proof, and gain preclearance for its districting plan, by demonstrating that the plan increases the number of majority-minority districts. *Id.*
Hasidic community was placed in a separate district. The Attorney General precleared the new districting plan.

United Jewish Organizations (U.J.O.) filed suit on behalf of the members of the Hasidic community, alleging that the plan diluted the weight of the community members' votes in order to achieve a racial quota in violation of the Fourteenth Amendment. U.J.O. also alleged that the members of the community were assigned to voting districts solely on the basis of race which diluted the weight of their votes in violation of the Fifteenth Amendment. U.J.O. sought an injunction to prevent the state from conducting elections under the new districting plan, and a declaratory judgment that the Justice Department had used an improper and unconstitutional standard to preclear the plan.

The district court found that the members of the Hasidic community did not have a constitutional right to recognition as a separate community and dismissed their suit. The court held that racial factors could be used to remedy past racial discrimination, and that the districting plan did not disenfranchise the Hasidic voters. The court of appeals affirmed the district court's dismissal of the suit. The court also held that the Hasidic voters did not suffer a vote dilution under the standards developed by the Supreme Court.

A deeply divided Supreme Court also affirmed the dismissal of the suit. A four-member plurality (consisting of Justices White, Stevens, Brennan, and Blackmun) found that states may

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194. *Id.* at 152.
195. *Id.* at 152-53.
196. *Id.* at 153.
198. *Id.* at 1166.
199. United Jewish Organizations v. Wilson, 510 F.2d 512 (2d Cir. 1975).
200. *Id.* at 520.
201. *Id.* at 523. For the vote dilution standards developed by the Supreme Court, see the discussion in Sec. IV.B.3 *supra*.
202. United Jewish Organizations v. Carey, 430 U.S. 144 (1977) (White, J., plurality opinion). Seven members of the Court voted to affirm the district court's dismissal of the suit. Justices White and Stevens were joined by Justices Brennan and Blackmun to sustain the districting plan under the Voting Rights Act. *Id.* at 155-162. Justices White and Stevens were also joined by Justice Rehnquist to sustain the districting plan under the Fourteenth and Fifteenth Amendments. *Id.* at 162-68. Justices Stewart and Powell concurred in the judgment and concluded that the districting plan did not have the purpose or effect of discriminating against the petitioners on the basis of their race in violation of the Fourteenth Amendment. *Id.* at 179-181. Chief Justice Burger
create majority-minority districts to comply with § 5 of the Voting Rights Act:

[T]he Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5. . . . Section 5 and its authorization for racial redistricting where appropriate to avoid abridging the right to vote on account of race or color are constitutional. . . . [N]either the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment. . . . The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment.203

This plurality held that states may use racial criteria, including racial quotas,204 to design voting districts, and that the use of racial criteria to design voting districts is not limited to the purpose of remedying the present effects of past discrimination.205

A three-member plurality (consisting of Justices White, Stevens, and Rehnquist) found that the use of racial criteria to design voting districts did not present the type of invidious racial discrimination prohibited by the Fourteenth and Fifteenth Amendments:

There is no doubt that in [designing the legislative districts] the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment nor any abridgment of the right to vote on account of race within the meaning of the Fifteenth Amendment.206

This plurality held that states may create majority-minority districts which respect traditional districting principles such as equal population and compactness.207 Two other members of the Court (Justices Stewart and Powell) argued that the state did not act with a racially discriminatory purpose because it acted in response to a position taken by the Justice Department under the

dissent. Id. at 180-187. Justice Marshall did not participate in the consideration or decision of the case. Id. at 168.

203. UJO, 430 U.S. at 161.
204. See id. at 162 ("[A] reapportionment cannot violate the Fourteenth or Fifteenth Amendment merely because a State uses specific numerical quotas in establishing a certain number of black majority districts.").
205. Id. at 161.
206. Id. at 165.
207. Id. at 168.
Voting Rights Act. These members declined to consider whether the position taken by the Justice Department was authorized or required by the Voting Rights Act.

One member of the plurality (Justice Brennan) argued that the participation of the Justice Department through the preclearance mechanism of the Voting Rights Act helped to ensure that the state did not use racial criteria for an invidious purpose, and "largely relieve[d]" the Court of the responsibility for distinguishing benign from invidious purposes. "[T]he application of the Voting Rights Act substantially minimizes the objections to preferential treatment, and legitimates the use of even overt, numerical racial devices in electoral redistricting." Although he was aware that the use of racial criteria for allegedly benign purposes "raise[d] particularly sensitive issues of doctrine and policy," and troubled that racial criteria were used in this case to burden a group peculiarly vulnerable to racial discrimination, Justice Brennan had no doubt that the Hasidic voters did not suffer invidious racial discrimination:

[T]he obvious remedial nature of the Act and its enactment by an elected Congress that hardly can be viewed as dominated by non-white representatives belie the possibility that the decisionmaker intended a racial insult or injury to those whites who are adversely affected by the operation of the Act's provisions.

The lone dissenting member of the Court, Chief Justice Burger, would later be vindicated by the majority in Shaw:

Manipulating the racial composition of electoral districts to assure one minority or another its "deserved" representation will not promote the goal of a racially neutral legislature. On the contrary, such racial gerrymandering puts the imprimatur of the State on the concept that race is a proper consideration in the electoral process. . . .

The result reached by the Court today in the name of the Voting Rights Act is ironic. The use of [majority-minority districts] tends to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshaling particular racial, ethnic, or

208. Id. at 180 (Stewart, J., concurring in the judgment).
209. Id. at 180 n.
210. Id. at 175 (Brennan, J., concurring in part).
211. Id.
212. Id.
213. Id.
214. Id. at 178.
religious groups in enclaves. It suggests to the voter that only a candidate of the same race, religion, or ethnic origin can properly represent that voter's interests, and that such a candidate can be elected only from a district with a sufficient minority concentration.\footnote{215}{Id. at 186 (Burger, C.J., dissenting).}

The Court in \textit{UJO} drew a distinction between "malignant" discrimination that sought to stigmatize members of particular racial or ethnic groups, and "benign" discrimination that sought to help particular racial or ethnic groups overcome the effects of malignant discrimination. "Benign" discrimination would not be subject to strict scrutiny analysis under the Equal Protection Clause.\footnote{216}{See also Regents of the University of California v. Bakke, 438 U.S. 265 (1978); and Fullilove v. Klutznick, 448 U.S. 448 (1980).} Racial criteria, including racial quotas, could be used to design voting districts, and their use would not be limited to ameliorating previous vote dilution. Race-conscious districts could be created simply to give racial and ethnic minorities a better opportunity to participate in the political process and to elect the representatives of their choice. A plurality of the Court sought to use traditional districting principles as a restriction upon the creation of race-conscious districts, but the Justice Department which administered the creation of race-conscious districts under the Voting Rights Act did not recognize such a restriction. After the reapportionment of congressional districts following the 1990 decennial census, the Court would be forced to revisit its handiwork.

3. The Re-establishment of the Racial Gerrymandering Claim

The Supreme Court resurrected the racial gerrymandering claim in \textit{Shaw v. Reno}\footnote{217}{509 U.S. 630 (1993).} to undo the damage its vote dilution jurisprudence, including its decision in \textit{UJO}, had caused. North Carolina's congressional delegation was increased from eleven to twelve representatives as a result of the round of apportionment following the 1990 decennial census.\footnote{218}{Id. at 633.} In July, 1991, the state legislature enacted a congressional districting plan which contained one black majority-minority district.\footnote{219}{Id. at 633, 634.} Because the state is subject to the special provisions of § 5 of the Voting Rights Act, the state submitted the plan to the Attorney General for pre-clearance.\footnote{220}{Id.} The Attorney General refused to pre-clear the state's plan because it failed to create a second black majority-
minority district in the south-central to south-eastern counties of the state.\footnote{221}

In response to the Attorney General’s objection to the proposed congressional districting plan, the state legislature enacted a second plan in January, 1992.\footnote{222} The new plan contained two black majority-minority districts. (See Appendix A.) The second majority-minority district was an unusually shaped district that stretched 160 miles from Durham to Gastonia along I-85 with extensions into the historic black sections of the five major cities which it connected. Of the ten different counties through which the district passed, five counties were cut into three different districts. The district was often no wider than the lanes of I-85 whose course it followed. Northbound and southbound drivers on I-85 could find themselves in separate districts in one county, only to switch districts when they entered the next county. At one point the district remained contiguous only because it intersected at a single point with two other districts before crossing over them.\footnote{223} The Attorney General pre-cleared this revised plan.\footnote{224}

Several white registered voters challenged the congressional districting plan as an unconstitutional racial gerrymander.\footnote{225} They alleged that the two majority-minority districts concentrated black voters without regard for compactness, contiguity, geographical boundaries, or political subdivisions, and for the sole purpose of creating districts along racial lines to ensure the election of two black representatives to Congress. A three-judge panel of district court dismissed the voters’ suit for failing to state a claim upon which the court could grant relief.\footnote{226}

The Supreme Court reversed and remanded the case back to the district court for consideration of the voters’ claim.\footnote{227} The Court held that

\begin{quote}
 a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, ration-
\end{quote}

\footnote{221. \textit{Id.} at 633, 635.}
\footnote{222. \textit{Id.} at 633.}
\footnote{223. \textit{Id.} at 635-36.}
\footnote{224. \textit{Id.} at 636.}
\footnote{225. In a separate action, the North Carolina Republican Party and individual voters alleged that the congressional districting plan was an unconstitutional political gerrymander under \textit{Davis v. Bandemer}. The district court dismissed the claim. \textit{See Pope v. Blue}, 809 F. Supp. 392 (W.D.N.C. 1992), \textit{aff’d} 506 U.S. 801 (1992).}
\footnote{227. \textit{Id.} at 658.}
ally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.228

The Court relied upon Justice Whitaker's concurrence in Gomillion v. Lightfoot229 for the proposition that the segregation of citizens into different voting districts on the basis of race, regardless of the motivation for the segregation, requires careful judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment. The Court stated that a racial gerrymandering claim was "analytically distinct" from a vote dilution claim,230 and was not foreclosed by the Court's decision in UJO.231

The Court also relied upon Wright v. Rockefeller to illustrate the difficulty of determining from the face of a districting plan that "it purposefully distinguishes between voters on the basis of race."232 Examining the districting plan for unlawful discriminatory purposes poses unique problems for a reviewing court because "the legislature is always aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors."233 "That sort of race consciousness," the Court observed, "does not lead to impermissible race discrimination."234 To distinguish between mere awareness of race and the discriminatory use of racial criteria, the Court suggested that reviewing courts should determine whether the districting plan observed traditional districting principles such as compactness, contiguity, and respect for political subdivisions. Traditional districting principles are important "not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines."235 As later cases would make clear, states may create majority-minority districts which conform to traditional districting principles without being subjected to strict scrutiny.236

228. Shaw, 509 U.S. at 649.
230. Shaw, 509 U.S. at 652.
231. Id. at 651.
232. Id. at 646.
233. Id.
234. Id.
235. Id. at 647 (citations omitted).
5. The Refinement of the Elements of the Racial Gerrymandering Claim

The elements of a racial gerrymandering claim have been articulated in a series of cases decided after Shaw.\textsuperscript{237} I discuss these elements more thoroughly in the two subsections below, but the structure of the claim is as follows: The plaintiffs have the burden of proving that voters were assigned to voting districts on the basis of race. The plaintiffs must prove that race was the predominant factor in assigning voters to voting districts, and that traditional districting principles were subordinated to racial considerations in assigning voters to voting districts. To prove that race was the predominant factor, plaintiffs may use either direct evidence of legislative purpose or circumstantial evidence of a district's shape and demographic characteristics. If the plaintiffs demonstrate that voters were assigned to voting districts on the basis of race, they have met their burden of proving their prima facia case and have established a racial gerrymander. The burden of proof then shifts to the defendant to provide an affirmative defense—that the racially-gerrymandered district is narrowly tailored to achieve a compelling state interest. Compliance with the vote dilution provision of §2 of the Voting Rights Act may be the only compelling state interest which can survive strict scrutiny. Any race-conscious district created to avoid vote dilution under §2 must remedy the vote dilution and must also respect traditional districting principles.

\textit{a. The Plaintiff's Prima Facia Case}

In a racial gerrymandering case, the plaintiffs must demonstrate that voters have been assigned to voting districts on the basis of race. Plaintiffs typically allege racial gerrymandering in one of two situations: (1) a new districting plan creates more majority-minority districts than the prior districting plan, and direct evidence indicates that the legislature created the additional majority-minority districts in response to a private suit under the Voting Rights Act or a denial of preclearance by the Justice Department under §5; or (2) a new districting plan creates districts in which members of a particular racial group are concentrated in numbers disproportionate to their representation in the state's population as a whole, and the shape of the districts is so highly irregular that this circumstantial evidence

may give rise to an inference that the legislature deliberately attempted to achieve such a disproportionate concentration.238

As the Court noted in Shaw v. Reno, it may be difficult for plaintiffs to demonstrate that voters have been assigned to voting districts on the basis of race because the legislature is always aware of race when it designs voting districts, but the mere awareness of race does not constitute impermissible racial discrimination.239 The Court therefore devised the following standard for


239. The problem of distinguishing between awareness of race in the design of voting districts and assigning voters to voting districts on the basis of race has several dimensions. First, the problem makes it difficult for the plaintiffs to establish standing to sue. It is often impossible to ascertain why a particular voter was placed in a particular district. The Court, therefore, has adopted a test for determining standing that depends upon the district in which the plaintiff resides:

Where a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has been denied equal treatment because of the legislature’s reliance on racial criteria, and therefore has standing to challenge the legislature’s action . . . . Voters in such districts may suffer the special representational harms racial classifications can cause in the voting context. On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to the racial classification would not be justified absent specific evidence tending to support that inference. Unless such evidence is present, that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve.

United States v. Hays, 115 S. Ct. 2431, 2436 (1995). If the plaintiff lives in the district which he alleges is a racially-gerrymandered district, he automatically has standing to challenge the plan which created the district because he has been the victim of an alleged racial classification. If the plaintiff does not live in the district which he alleges is a racially-gerrymandered district, he does not have standing to challenge the plan which created the district unless he can demonstrate with specific evidence that he was assigned to his district on the
proving that voters have been assigned to voting districts on the basis of race:

The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plain-

basis of his race, and therefore has been the victim of an alleged racial classification.

Second, the problem makes it difficult for plaintiffs to prove racial gerrymandering. As I discuss below, see text accompanying fn. 241 infra, the Court has adopted the standard that plaintiffs must prove that race was the predominant factor in assigning voters to voting districts, and that traditional districting principles were subordinated to racial considerations. Miller v. Johnson, 115 S. Ct. 2475, 2488 (1995).

Finally, the problem implicates the constitutional question of whether all race-conscious districting is subject to strict scrutiny. The Court expressly declined to address this question in Shaw v. Reno. "[W]e express no view as to whether 'the intentional creation of a majority-minority districts, without more' always gives rise to an equal protection claim." Shaw v. Reno, 509 U.S. 630, 649 (1993). Since then, Justice O'Connor has indicated that some race-conscious districting is not subject to strict scrutiny: "Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. See Shaw v. Reno . . . . Nor does it apply to all cases of intentional creation of majority minority districts. See DeWitt v. Wilson . . . ." Bush v. Vera, 116 S. Ct. 1941, 1951 (1996) (citations omitted). Justice Thomas has indicated that all race-conscious districting is subject to strict scrutiny:

We have said that impermissible racial classifications do not follow inevitably from a legislature's mere awareness of racial demographics. . . . But the intentional creation of a majority-minority district certainly means more than mere awareness that the application of traditional, race-neutral districting principles will result in the creation of a district in which a majority of the district's residents are members of a particular minority group. . . . In my view, it means that the legislature affirmatively undertakes to create a majority-minority district that would not have existed but for the express use of racial classifications—in other words, that a majority-minority district is created "because of," and not merely "in spite of," racial demographics. . . . When that occurs, traditional race-neutral districting principles are necessarily subordinated (and race necessarily predominates), and the legislature has classified persons on the basis of race. The resulting redistricting must be viewed as a racial gerrymander. Id. at 1973 (Thomas, J., concurring in the judgment) (citations omitted). Justice Kennedy wrote a separate concurring opinion to distinguish himself from Justice O'Connor position and reserve the question: "I do not consider these dicta to commit me to any position on the question whether race is predominant whenever a State, in redistricting, foreordains that one race be the majority in a certain number of districts or in a certain part of the State. Id. at 1971 (Kennedy, J., concurring).
RACE/IPSA

Tiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.\(^{240}\)

This standard has a number of significant components. First and foremost, unlike a vote dilution claim, the plaintiffs must prove that the districting plan had a racially discriminatory purpose, and not simply a racially disproportionate result. Second, the plaintiffs must prove that race was the predominant factor motivating the design of the districts, and not simply one factor or the only factor.\(^{241}\)

Third, in order to prove that race was the predominant factor, the plaintiffs must prove that traditional districting principles were subordinated to racial considerations. If the design of the district was subordinated to other considerations but not to racial considerations, then the district may be a political gerrymander but it is not a racial gerrymander. Political gerrymandering is not subject to strict scrutiny analysis.\(^{242}\) If the design of the district merely correlates with race but is not subordinated to racial considerations, then the district is not a racial gerrymander.\(^{243}\) If race is used as a proxy for political affiliation in the design of the district, however, the district is a racial gerrymander.\(^{244}\)


\(^{241}\) In Bush v. Vera, 116 S. Ct. 1941, the Court held that incumbency protection was a factor in the design of the challenged districts, but both the protection of incumbents and traditional districting principles were subordinated to racial considerations. Compare Vera ("We thus differ from Justice Thomas, who would apparently hold that it suffices that racial considerations be a motivation for the drawing of a majority-minority district." Id. at 1952 (emphasis added)) with DeWitt v. Wilson, 856 F. Supp. 1409 (E.D. Cal. 1994), summarily aff'd in part and dism'd in part, 115 S. Ct. 2637 (1995) ("[The Special] Masters did not redistrict based solely on race, but showed depth and insight in considering race as a component of traditional districting principles." Id. at 1415 (emphasis added)).

\(^{242}\) Vera, 116 S. Ct. at 1954 (noting Davis v. Bandemer, 478 U.S. 109 (1986)).

\(^{243}\) See Vera, 116 S. Ct. at 1956 ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify, just as racial disproportions in the level of prosecutions for a particular crime may be unobjectionable if they merely reflect racial disproportions in the commission of that crime . . . ." (referring to United States v. Armstrong, 116 S. Ct. 1480 (1996)). See also Brown, supra note 56.

\(^{244}\) See Vera, 116 S. Ct. at 1956 ("[T]o the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation." (referring to Powers v. Ohio, 499 U.S. 400 (1991) ("Race cannot
Fourth, the plaintiffs may prove that traditional districting principles were subordinated to racial considerations, either by presenting direct evidence of legislative purpose, or circumstantial evidence of a district's shape and demographic factors. Direct evidence would include reports by special masters appointed to develop districting plans, committee reports and legislative debates, documents submitted to the Justice Department to obtain preclearance, and concessions made during litigation. During the 1990 cycle of redistricting, there was ample direct evidence available for plaintiffs to prove that traditional districting principles were subordinated to racial considerations. The shape of a district is circumstantial evidence that may give rise to an inference that traditional districting principles were subordinated to race:

Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.

This is consistent with Gomillion where the shape of the city annexation was circumstantial evidence of legislative purpose. This is slightly different from Justice Goldberg's dissent in Wright because the evidence of the district's shape must be used to prove purpose, not result, and must prove predominant motive, not mere motive.

Fifth, the districting plan must involve the assignment of a "significant number" of voters to districts on the basis of race. Finally, the districting plan must involve the inclusion of voters into, or the exclusion of voters from, a particular district on the basis of race. This component would cover the group of Hasidic voters in United Jewish Organizations v. Carey who were divided from other Hasidic voters and placed in a separate district to pre-
serve a 65% minority voter population quota in the other district.\footnote{249}

\textit{b. The Defendant's Rebuttal}

Once the plaintiffs have proven their prima facia case of racial gerrymandering (i.e., that race was the predominant factor in assigning voters to voting districts, and that traditional districting principles were subordinated to racial considerations in designing the voting districts), the burden then shifts to the defendant to produce evidence that the race-conscious districts were narrowly tailored to achieve a compelling governmental interest.\footnote{250} States have offered four compelling governmental interests to justify the creation of race-conscious districts: (1) compliance with the preclearance objections of the Justice Department pursuant to § 5 of the Voting Rights Act; (2) compliance with the preclearance provisions of § 5 of the Voting Rights Act; (3) compliance with the vote dilution provisions of § 2 of the Voting Rights Act; and (4) amelioration of the effects of racial discrimination under the Fourteenth and Fifteenth Amendments.

At the heart of the preclearance objections of the Justice Department is an interpretation of the Voting Rights Act through which the Department used its preclearance authority to compel states to adopt race-conscious districting plans and maximize the number of majority-minority districts at the expense of traditional districting principles. The Justice Department has interpreted the amendment of § 2 of the Voting Rights Act in 1982 as incorporating a vote dilution requirement or “results test” into the “effects” prong of § 5:

In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended section

\footnote{249. United Jewish Organizations v. Carey, 430 U.S. 144 (1977). For a discussion of this case see Sec. V.B.2 \textit{supra}.}

2, the Attorney General shall withhold a section 5 preclearance.\textsuperscript{251}

The consequence of this interpretation is to shift from the plaintiffs to the defendant the burden of proving that any change in a state’s voting practices, including a new districting plan, does not result in a dilution of minority voting strength. The Justice Department also adopted the position that a failure to maximize the number of majority-minority districts constituted a vote dilution.

The Supreme Court has repudiated the position of the plurality in \textit{United Jewish Organizations v. Carey}\textsuperscript{252} and held that federal courts need not defer to the Justice Department’s conclusion that the creation of race-conscious districts is required under the Voting Rights Act:

Where a State relies on the Department’s determination that race-based districting is necessary to comply with the Voting Rights Act, the judiciary retains an independent obligation in adjudicating subsequent equal protection challenges to ensure that the State’s actions are narrowly tailored to achieve a compelling interest. ... Were we to accept the Justice Department’s objection itself as a compelling interest adequate to insulate racial districting from constitutional review, we would be surrendering to the Executive Branch our role in enforcing the constitutional limits on race-based official action.\textsuperscript{253}

When the Justice Department’s interpretation of the Voting Rights Act compels states to adopt race-conscious districting, a significant constitutional question is raised and the federal courts need not defer to the Department’s interpretation of the Act.\textsuperscript{254}

The Supreme Court has also found that the Justice Department’s interpretation of the scope of its preclearance authority is “insupportable.”\textsuperscript{255} The Court has held that the vote dilution provision of § 2 does not require states to maximize the number of majority-minority districts at the expense of traditional districting principles,\textsuperscript{256} and therefore the retrogression provision of § 5 does not require maximization either. In using § 5 to compel states to create majority-minority districts wherever possible, the

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\textsuperscript{251} 28 C.F.R. § 51.55(b)(2) (1994). For the relevant provisions of the Voting Rights Act as amended, see text accompanying fn. 120 supra.
\textsuperscript{252} 430 U.S. 144 (1977).
\textsuperscript{253} Miller, 115 S. Ct. at 2491 (citations omitted).
\textsuperscript{254} Id. at 2491-92.
\textsuperscript{255} Id. at 2492.
\end{flushright}
Justice Department "expanded its authority under the statute beyond what Congress intended," and brought the Act into tension with the Fourteenth Amendment.257 The Court has rejected the Justice Department's interpretation of §§ 2 and 5, and avoided the constitutional problems such an interpretation raised, including whether § 2 is itself constitutional.258

The Supreme Court has determined that compliance with the retrogression provision of § 5, properly interpreted, is a compelling governmental interest. But the Court has cautioned that the states may not use § 5 as a license to do whatever they deem "necessary to insure continued electoral success" for minority groups.259 "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the state went beyond what was reasonably necessary to avoid retrogression."260

The Supreme Court has never decided the constitutionality of § 2 of the Voting Rights Act.261 The Court, therefore, has assumed arguendo that compliance with the vote dilution provision of § 2 could be a compelling governmental interest.262 However, any race-conscious district created to avoid vote dilution under § 2 "must, at a minimum, remedy the anticipated vio-

257. Id.; Miller, 115 S. Ct. at 2493.


261. "In the 14 years since the enactment of § 2(b), we have interpreted and enforced the obligations that it places on States in a succession of cases [including Thornburg v. Gingles, Grove v. Emison, Voinovich v. Quillen, Johnson v. De Grandy, and Holder v. Hall ], assuming but never directly addressing its constitutionality." Vera, 116 S. Ct. at 1968 (O'Connor, J., concurring). Justice O'Connor argues that it would be irresponsible for a state to disregard the vote dilution provision of § 2, and therefore the Court should allow states to assume its constitutionality. Id. at 1969.

lation or achieve compliance to be narrowly tailored."\textsuperscript{263} The state must have a "strong basis in evidence" for assuming that the minority group is sufficiently large, geographically compact, and politically cohesive to constitute a majority in a single member district, and that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority group's preferred candidate.\textsuperscript{264}

In most of the districts challenged by racial gerrymandering suits, the minority population was too dispersed to support a geographically compact district, and therefore the district was not narrowly tailored to achieve the compelling governmental interest of complying with the vote dilution provision of § 2:

These characteristics defeat any claim that the districts are narrowly tailored to serve the State's interest in avoiding liability under § 2, because § 2 does not require a State to create, on predominantly racial lines, a district that is not "reasonably compact." ... If, because of the dispersion of the minority population, a reasonably compact district cannot be created, § 2 does not require a majority-minority district; if a reasonably compact district can be created, nothing in § 2 requires the race-based creation of a district that is far from compact.\textsuperscript{265}

A state may not create a majority-minority district just anywhere in the state. The remedy must "substantially address" the injury: if the minority group is not sufficiently geographically compact to support the creation of a majority-minority district using traditional districting principles, then it hasn't suffered a vote dilution under § 2; if it is sufficiently geographically compact, then the creation of a majority-minority district elsewhere in the state doesn't remedy the vote dilution injury. "To accept that the district may be placed anywhere implies the claim, and hence the coordinate right to an undiluted vote (to cast an equal ballot equal among voters), belongs to the minority as a group and not to its individual members. It does not."\textsuperscript{266} Even if vote dilution is proven, minority voters do not have a right to be placed in a majority-minority district.\textsuperscript{267} A state may not sacrifice traditional

\begin{itemize}
  \item \textsuperscript{263} \textit{Shaw II}, 116 S. Ct. at 1905-06.
  \item \textsuperscript{264} \textit{Thornburg v. Gingles}, 470 U.S. 30, 50-51 (1986).
  \item \textsuperscript{265} \textit{Vera}, 116 S. Ct. at 1961 (citations omitted). See also \textit{Shaw II}, 116 S. Ct. at 1905.
  \item \textsuperscript{266} \textit{Shaw II}, 116 S. Ct. at 1906.
  \item \textsuperscript{267} \textit{Id.} at 1906 n.9.
\end{itemize}
districting principles, such as geographical compactness, to racial considerations.\textsuperscript{268}

Finally, the Supreme Court has said that a state may have an interest in ameliorating the effects of past or present discrimination, but for that interest to rise to the level of a compelling governmental interest it must satisfy two conditions. First, the discrimination the state seeks to ameliorate must be identified with some specificity before the race-conscious remedy is employed.\textsuperscript{269} A generalized assertion of societal discrimination is not adequate because it "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."\textsuperscript{270} Second, the state must have a "strong basis in evidence" to conclude that remedial action is necessary before it employs a race-conscious remedy.\textsuperscript{271} The amelioration of alleged vote dilution as a consequence of alleged racial bloc voting does not justify race-conscious districting unless the state employs sound districting principles and the minority group is sufficiently geographically compact to create a majority-minority district.\textsuperscript{272} The Court has noted that only three Justices in \textit{United Jewish Organizations v. Carey} were prepared to say that states have a compelling governmental interest in ameliorating the consequences of racial bloc voting outside the requirements of the Voting Rights Act.\textsuperscript{273}

\textbf{C. Conclusion}

Unlike the Court's older vote dilution jurisprudence, which relied upon a rebuttable presumption device to create a presumption of racial discrimination from purported evidence of racially disproportional results and to shift the burden of production to the defendant, the Court's new racial gerrymandering jurisprudence uses a permissive inference device. The plaintiff must prove racially discriminatory purpose, not racially disproportional results, and the burden of production and persuasion shifts to the defendant only after the plaintiff has established racially discriminatory purpose.

The injury in a racial gerrymandering claim is not vote dilution, but the use of a racial classification in violation of the Equal

\begin{itemize}
\item \textsuperscript{268} The shape of a district is relevant not only as circumstantial evidence of improper purpose, but as evidence of respect for traditional districting principles. \textit{Vera}, 116 S. Ct. at 1961.
\item \textsuperscript{269} \textit{Shaw II}, 116 S. Ct. at 1902; \textit{Vera}, 116 S. Ct. at 1962.
\item \textsuperscript{270} \textit{Id.} at 1903 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989)).
\item \textsuperscript{271} \textit{Shaw II}, 116 S. Ct. at 1903; \textit{Vera}, 116 S. Ct. at 1962-63.
\item \textsuperscript{272} \textit{Shaw v. Reno}, 509 U.S. 630, 657 (1993); \textit{Shaw II}, 116 S. Ct. at 1963.
\item \textsuperscript{273} \textit{Shaw}, 509 U.S. at 657.
\end{itemize}
Protection Clause. The injury is caused by the assignment of voters to voting districts on the basis of racial criteria. The remedy is the reassignment of voters to voting districts on the basis of non-racial criteria. The evidence which may be used to establish racially discriminatory purpose is direct evidence of legislative purpose and circumstantial evidence of a district's shape and demographic characteristics.

VI. Conclusion

The larger question, which has received the most focus from commentators, is whether race-conscious remedies may be used to ameliorate race-conscious injuries without violating the Equal Protection Clause of the Fourteenth Amendment. Justices Thomas and Scalia have indicated that race-conscious remedies always violate the Equal Protection Clause. Justice O'Connor, frequently joined by Chief Justice Rehnquist and Justice Kennedy, have endorsed the idea that race-conscious remedies may be used if they are truly narrowly tailored to achieve a compelling governmental interest. Her framework for the use of race-conscious districting, outlined in a separate concurring opinion to her plurality opinion in Bush v. Vera, provides an indication of her thinking:

First, 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. . . . Only if traditional districting criteria are neglected and that neglect is predominantly due to the misuse of race does strict scrutiny apply.

Second, where voting is racially polarized, § 2 prohibits States from adopting districting schemes that would have the effect that minority voters "have less opportunity than other members of the electorate to . . . elect representatives of their choice." . . . That principle may require a State to create a majority-minority district where the three Gingles factors are present . . . .

Third, the state interest in avoiding liability under VRA § 2 is compelling . . . . If a State has a strong basis in evidence for concluding that the Gingles factors are pres-

ent, it may create a majority-minority district without awaiting judicial findings. . . .

Fourth, if a State pursues that compelling interest by creating a district that "substantially addresses" the potential liability, . . . and does not deviate substantially from a hypothetical court-drawn § 2 district for predominantly racial reasons, . . . its districting plan will be deemed narrowly tailored. . . .

Finally, . . . districts that are bizarrely shaped and non-compact, and that otherwise neglect traditional districting principles and deviate substantially from the hypothetical court-drawn district, for predominantly racial reasons, are unconstitutional.275

This framework for preserving a narrowly tailored use for race-conscious districting gives effect to Justice O'Connor's statement in *Adarand Constructors, Inc. v. Pena* that she wanted to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"276

However, the proponents of a broader use of race-conscious remedies lack only one vote to constitute a majority. It is therefore important for the public debate that we clarify the grounds upon which we conclude that racial discrimination persists. The framework developed in *Shaw*, whereby a plaintiff may use circumstantial evidence to raise an inference of racially discriminatory purpose, represents the appropriate balance between relying upon racially disproportionate results to presume racial discrimination (which may impose a remedy upon a defendant who did not cause the racial discrimination) and requiring direct evidence of racially discriminatory purpose (which may leave the victim of racial discrimination without a remedy). More importantly, the *Shaw* framework properly teaches citizens how race should matter in a society "dedicated to the proposition that all men are created equal.”


This map highlights the First and Twelfth Congressional Districts of North Carolina, part of a districting plan enacted by the North Carolina state legislature. This plan was used for the 1992, 1994, and 1996 elections. The First and Twelfth Districts were held to be racially gerrymandered districts by the U.S. Supreme Court in Shaw v. Hunt, 116 S. Ct. 1894 (1996).
This map highlights the Fourth Congressional District of Louisiana, part of a districting plan enacted by the Louisiana state legislature. This plan was used for the 1992 election. The Fourth District was held to be a racially gerrymandered district by the U.S. District Court for the Western District of Louisiana in Hays v. Louisiana, 839 F. Supp. 1188 (W.D. La. 1993).
This map highlights the Sixth Congressional District of Louisiana, part of a districting plan enacted by the Louisiana state legislature after the previous plan was found unconstitutional. This plan was used for the 1994 election. The Sixth District was held to be a racially gerrymandered district by the U.S. District Court for the Western District of Louisiana in Hays v. Louisiana, 936 F. Supp. 360 (W.D. La. 1996).
This map illustrates the congressional districting plan devised by the U.S. District Court for the Western District of Louisiana after it found the previous plan unconstitutional in Hays v. Louisiana, 936 F. Supp. 360 (W.D. La. 1996). This plan was used for the 1996 election.
This map highlights the Eleventh Congressional District of Georgia, part of a districting plan enacted by the Georgia state legislature. This plan was used for the 1992 and 1994 elections. The Eleventh District was held to be a racially gerrymandered district by the U.S. District Court for the Southern District of Georgia in Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994), aff'd 115 S. Ct. 2475 (1995). The Second District was also held to be a racially gerrymandered district by the U.S. District Court for the Southern District of Georgia in Johnson v. Miller, 922 F. Supp. 1552 (S.D. Ga. 1995).
This map illustrates the congressional districting plan adopted by the U.S. District Court for the Southern District of Georgia in Johnson v. Miller, 922 F. Supp. 1556 (S.D. Ga. 1995) after it found the previous plan unconstitutional. This plan was used for the 1996 election.
The figure at the top illustrates the Twenty-Ninth Congressional District of Texas, part of a districting plan enacted by the Texas state legislature. This district was used for the 1992 and 1994 elections. The Twenty-Ninth District was held to be a racially gerrymandered district in Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994), aff'd sub nom. Bush v. Vera, 116 S. Ct. 1941 (1996). The figure at the bottom illustrates the same district after it was redrawn by the district court in Vera v. Bush, 933 F. Supp. 1341 (S.D. Tex. 1996). This district was used for the 1996 election.
The figure at the top illustrates the Thirtieth Congressional District of Texas. This district was used for the 1992 and 1994 elections. The figure at the bottom illustrates the same district after it was redrawn by the district court in *Vera v. Bush*. This district was used for the 1996 election.
The figure at the top illustrates the Eighteenth Congressional District of Texas. This district was used for the 1992 and 1994 elections. The figure at the bottom illustrates the same district after it was redrawn by the district court in Vera v. Bush. This district was used for the 1996 election.
This map highlights the Third Congressional District of Florida, part of a districting plan adopted by the U.S. District Court for the Northern District of Florida in De Grandy v. Wetherell, 794 F. Supp. 1076 (N.D. Fla. 1992). This plan was used for the 1992 and 1994 elections. The Third District was held to be a racially gerrymandered district by the U.S. District Court for the Northern District of Florida in Johnson v. Mortham, 926 F. Supp. 1460 (N.D. Fla. 1996).
This figure illustrates the Fourth Congressional District of Illinois, part of a districting plan adopted by the U.S. District Court for the Northern District of Illinois in Hastert v. State Bd. of Elections, 777 F. Supp. 634 (N.D. Ill. 1991). This plan was used for the 1992, 1994, and 1996 elections. The Fourth District was found constitutional by the U.S. District Court for the Northern District of Illinois in King v. State Bd. of Elections, 1996 WL 130439 (N.D. Ill.), but the Supreme Court vacated the district court's judgment and remanded the case back for reconsideration, King v. State Bd. of Elections, 117 S. Ct. 429 (1996).