IMPLEMENTING THE RACE-PREDOMINANT STANDARD FOR STATE AND LOCAL GOVERNMENT REDISTRICTING PLANS

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With the United States Census 2000 right around the corner, state and local government entities will soon grapple with new constitutional guidelines for the allocation of political power, just as our nation as a whole is coming to grips with whether and to what extent it can function as a multicultural, multi-ethnic, multiracial society.[1]

The future of the United States that will unfold after the dawn of January 1, 2000, is tied to race relations in an era when ethnic and racial lines are beginning to blur.

Those constitutional guidelines are rooted in and flow from race-predominant redistricting during the past decade that spawned many bizarrely shaped and racially segregated congressional, state legislative, and local voting districts. Dubbed "political apartheid,"[2] this balkanization process created not only unseemly districts, but also led to unbearable tension between the race-conscious require-

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1. *See* STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 490 (1997) [hereinafter THERNSTROM].

2. Holder v. Hall, 512 U.S. 874 (1994). The Court stated:

> Worse still, it is not only the courts that have taken up this project. In response to judicial decisions and the promptings of the Justice Department, the states themselves, in an attempt to avoid costly and disruptive Voting Rights Act litigation, have begun to gerrymander electoral districts according to race. That practice now promises to embroil the courts in a lengthy process of attempting to undo, or at least to minimize, the damage wrought by the system we have created.

Id.; *see also* NAACP v. City of Niagara Falls, 65 F.3d 1002, 1016 (2d Cir. 1995) (describing this segregated political system as "electoral apartheid").

ments of section 2 of the Voting Rights Act[3] ("VRA") and the constitutional constraints upon race-based official action under the Fourteenth Amendment to the United States Constitution.[4]

Those guidelines began to take shape with the Supreme Court's 1993 decision in *Shaw v. Reno*,[5] in which the Court, speaking through Justice Sandra Day O'Connor, suggested that drawing race-conscious districting lines may widen the racial divide rather than get us beyond race.[6] The Court's 1995 blockbuster, *Miller v. Johnson*,[7] brought into even sharper focus the inevitable tension that takes place when a state or local government entity simultaneously attempts to satisfy the race-conscious mandate of section 2 of the VRA, while not running afoul of the Fourteenth Amendment's prohibition against race-predominant decisionmaking. By the end of the Court's 1996 term, a coherent body of constitutional precedent was in place, centered on the Texas and North Carolina congressional district cases of *Bush v. Vera*[8] and *Shaw v. Hunt*,[9] respectively, coupled with the Court's summary affirmance in *DeWitt v. Wilson*.[10] That body of precedent has crystallized further with the Court's decisions in *Abrams v. Johnson*[11] and *Lawyer v. Department of Justice,*[12] handed down at the end of the 1997 term. Much of this constitutional precedent clarifying the race-predominant standard for redistricting is held together by a fragile, 5-4 majority. State and local government entities can nonetheless find a principled set of

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3. The Voting Rights Act of 1965, § 2, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-4 (1994)).

4. *See generally* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1500 (N.D. Cal. 1996) (stating the state may not "allocate governmental power nonneutrally by explicitly using the racial nature of a decision to determine the decisionmaking process") (citing Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 470 (1982)), *vacated by* 110 F.3d 1431 (9th Cir.), *amended*, 122 F.3d 692 (9th Cir. 1997).

5. 509 U.S. 630 (1993) [hereinafter *Shaw I*]. Thirty years before *Shaw*, Justice William O. Douglas warned against injecting racial stereotypes into our system of representative democracy. *See* Wright v. Rockefeller, 376 U.S. 52, 63–67 (1964) (Douglas, J., dissenting).

6. *See* THERNSTROM, *supra* note 1, at 478–79.

7. 515 U.S. 900 (1995); *see* Benjamin E. Griffith, *Proactive Defense Strategies in Voting Rights Litigation After* Miller v. Johnson, 65 MISS. L.J. 315 (1995).

8. 116 S. Ct. 1941 (1996).

9. 116 S. Ct. 1894 (1996) [hereinafter *Shaw II*].

10. 515 U.S. 1170 (1995), *aff'g in part, dismissing appeal in part*, 856 F. Supp. 1409 (E.D. Cal. 1994).

11. 117 S. Ct. 1925 (1997).

12. 117 S. Ct. 2186 (1997).

constitutional guidelines as they approach the daunting task of redistricting and reapportionment that will result from the population changes the next decennial census will show.[13] As used in this Article, "racial gerrymandering" refers to the creation of electoral districts on the state and local government level in which race predominates over traditional districting principles and, when subjected to strict scrutiny, are judicially determined not to be narrowly tailored to meet a compelling governmental interest. Racially gerrymandered districts referred to in this Article are those districts that were created under the race-predominant standard.

This Article will address the Supreme Court's post-*Shaw* racial gerrymandering decisions as well as those cases still being heard in the district courts and courts of appeal, many of which will flesh out such critical subissues as:

- the nature and role of legislative intent and legislative history in the redistricting process;[14]
- the impact and justification for racial splits in political

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13. *See* Jacquelin A. Berrien, *All Politics Are Local: The Extension of* Shaw v. Reno *to Local Election Systems*, VOTING RIGHTS REV. at ¶¶ 1, 13 (Summer 1997) <http://www.src.w1.com/vrrsum1997_berrien.htm> (article summary) (noting that *Shaw* claims "are now increasingly commonplace at the state and local level [but that] [j]udicial embrace of the *Shaw* theory has been a bit less zealous at the state and local level than at the congressional level").

14. *See, e.g.,* Moon v. Meadows, 952 F. Supp. 1141, 1148 (E.D. Va.) (a member of Virginia's Senate and House Committees on privileges and elections stating, in regard to a plan to create a majority-minority district, "a 66% plan does impact all the citizens of Virginia because, to reach that 66% plan, you can gerrymander to your heart's content and thus distort communities of interest throughout Virginia." In light of this and other legislative evidence reflecting on the predominance of race in creating the Third Congressional District, the Court concluded: "It was inevitable that race would have been a consideration in the mind of the Legislature during the redistricting process."), *aff'd*, 117 S. Ct. 2501 (1997); Hays v. Louisiana, 936 F. Supp. 360, 368 (W.D. La. 1996) (noting that legislators in enacting a plan containing a second majority-minority district "disregarded and subsequently subordinated traditional race-neutral districting principles" and that "even contiguity was honored only by cynical formalism," and finding that the testimony of numerous legislators and other evidence in the record provided ample direct evidence of the predominance of race alone in the design of the Fourth Congressional District. The Court stated: "the Legislature was justifiably convinced that the United States Department of Justice would preclear no redistricting plan for Louisiana that failed to include a second majority-minority district. Accordingly, by the legislators' own admissions, Act I was passed for the very reason that it was effective in separating black voters from whites."); Johnson v. Miller, 864 F. Supp. 1354, 1371 (S.D. Ga. 1994) (noting "some debate over the necessary prominence of race in legislative deliberations" before a redistricting plan is subject to strict scrutiny), *aff'd*, 515 U.S. 900 (1995).

subdivisions;[15]

- the role of shape (bizarre or otherwise) and other traditional districting principles in the redistricting process;[16]
- identification and proof of compelling state interests that may or may not justify a reapportionment or redistricting plan;[17]
- the analytical process by which a court determines that a district drawn predominantly on the basis of race is or is not narrowly tailored to satisfy that compelling state interest;[18] and
- the extent to which race may be used in defining a "community of interest" for purposes of developing a redistricting plan.[19]

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15. *See, e.g.*, Moon v. Meadows, 952 F. Supp. 1141 (E.D. Va. 1997), *appeal filed sub nom.* Harris v. Moon, 65 U.S.L.W. 3844 (U.S. May 29, 1997) (No. 96-1918), *aff'd*, 117 S. Ct. 2501 (1997). On appeal, one question presented was whether the district court ignored evidence that the district's configuration was the product of traditional districting principles such as partisan considerations, incumbency protection, and the state's "unique and long-standing policy of splitting [the] Tidewater area among several congressional districts." Harris v. Moon, 65 U.S.L.W. 3844, 3844.

16. *See, e.g.*, Lawyer v. Department of Justice, 117 S. Ct. 2186, 2194–95 (1997) (upholding the district court's finding that race did not predominate over the State of Florida's traditional districting principles in drawing a remedial districting plan proposed in a settlement agreement; noting that Senate District 21 was "demonstrably benign and satisfactorily tidy," and "located entirely in the Tampa Bay area, has an end-to-end distance no greater than that of most Florida Senate Districts, and in shape does not stand out as different from numerous other Florida House and Senate Districts," with physical features and common characteristics attributable to the state's geography); Reed v. Town of Babylon, 914 F. Supp. 843, 872–73 (E.D.N.Y. 1996) (holding convoluted majority-minority district with narrow corridors connecting pockets of minorities sprawled across the town precluded compliance with section 2's precondition of geographical compactness).

17. *See, e.g.*, Diaz v. Silver, 932 F. Supp. 462 (E.D.N.Y. 1997) (finding legal justification for creation of New York's Hispanic-majority Twelfth Congressional District lacking where the state's creation of seven majority-minority districts exceeded the six that were needed to avoid retrogression), *aff'd*, 118 S. Ct. 36 (1997).

18. *See, e.g.*, Dillard v. City of Greensboro, 946 F. Supp. 946, 953–56 (M.D. Ala. 1996) (delineating a three-stage procedure for drawing a remedial redistricting plan in compliance with strict scrutiny's narrow-tailoring requirement; noting that "with the exception of Section 2's requirement of compactness, traditional race-neutral principles can be subordinated or even sacrificed in favor of race considerations to the extent necessary to remedy the Section 2 violation").

19. *See, e.g.*, Goosby v. Town Bd., 956 F. Supp. 326, 349 (E.D.N.Y. 1997) (rejecting the characterization of proposed district boundary changes as effort to "scoop up more black citizens"); Smith v. Beasley, 946 F. Supp. 1174, 1194 (D.S.C. 1996) ("The boundaries of District 12 do not comply with traditional districting principles. The district is not compact; it does not respect county lines, city lines, or precinct lines; and it does not recognize any distinct communities of interest, other than race, among its resi-

RACE AND POLITICS — A VOLATILE MIX

Racism cannot be grounded on any high moral principle. For this reason democracy will not tolerate it, especially racism in its institutionalized form.[20] Our system of democracy could not tolerate the racial injustice of slavery any more than democracy today can tolerate racial apartheid, resegregation of minority and white voters and racial Rorschachism[21] through the mechanism of Voting Rights Act litigation.

To be sure, race can and always will be a legitimate *factor* in any decision that involves line-drawing and constitutional allocation of power in a pluralistic and diverse society.[22] On the other hand, race cannot trump other legitimate, race-neutral factors, which in the redistricting context are well known and include geographical compactness, contiguity, natural boundaries, preservation of com-

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dents. Therefore, this Court finds that race was the predominant factor in the drawing of District 12."); *Dillard*, 946 F. Supp. at 955 ("It would be expected that community boundaries and interests would be strongly influenced, if not defined, by race considerations, because racial considerations, in fact, influenced and defined community boundaries and interests.").

20. *See* JIM SLEEPER, LIBERAL RACISM 176 (1997) ("Liberals are rightly suspicious of conservatives who assail multiculturalism in the name of a transracial America they did precious little to open to blacks, but that suspicion cannot justify liberals' fatalistic acceptance of the racialist shams in our classrooms, courtrooms, workplaces and election districts."); THERNSTROM, *supra* note 1, at 29–32 (tracing the development of the Title VII concept of disparate impact and its purported protection of blacks against institutionalized racism).

21. Hays v. Louisiana, 936 F. Supp. 360, 370 (W.D. La. 1996) (noting that one of the reasons why the Louisiana Congressional District 4 meandered for about 250 miles northwest to southeast, dividing political subdivisions while "surgically agglomerating pockets of minority populations along the way," was that the black population of the state outside of New Orleans "is so widely and evenly dispersed that, to create a congressional district that meets the one-person, one-vote criterion and has even a simple majority black population, resort must be had to graphic design that constitutes racial Rorschach-ism.").

22. *See* Lawyer v. Department of Justice, 117 S. Ct. 2186, 2195 (1997) ("[W]e have never suggested that the percentage of black residents in a district may not exceed the percentage of black residents in any of the counties from which the district is created, and have never recognized similar racial composition of different political districts as being necessary to avoid an inference of racial gerrymandering in any one of them. Since districting can be difficult, after all, just because racial composition varies from place to place, and counties and voting districts do not depend on common principles of size and location, facts about the one do not as such necessarily entail conclusions about the other."); DeWitt v. Wilson, 856 F. Supp. 1409 (E.D. Cal. 1994), *aff'd in part and appeal dismissed in part*, 515 U.S. 1170 (1995).

munities of interest other than on a racial basis, and respect for political subdivisions.

Beginning with *Shaw v. Reno*,[23] the Supreme Court has "drawn the line" on line-drawing where the predominant motivating force is race. Indeed, there has been and remains a need for race-conscious efforts to make our public institutions more accountable, more accessible and more conducive of equal political opportunity and participation. Moreover, to the extent that a state or local government body *chooses* to engage in race-conscious redistricting, it may be able to do so through use of a more informed legislative process, and perhaps through judicious use of mediation and other means of alternative dispute resolution, as demonstrated in the mediated redistricting settlement agreement that was the subject of *Lawyer v. Department of Justice*. That process entails clear identification of compelling governmental interests justifying creation of a race-conscious district, and, when viewed through the lens of *Miller*,[24] *Bush*,[25] and *Shaw II*,[26] provides the necessary safeguards to assure that the district is narrowly tailored to achieve them. *Lawyer*, decided on the last day of the 1997 term, demonstrates that a district can be so narrowly tailored that it can achieve a compelling governmental interest and that the United States Supreme Court will approve such districts under strict scrutiny.[27]

At a minimum, this legislative process is one that should be developed in view of the fact that the entire legislative history may become "Exhibit A" in the event a racial gerrymandering challenge or an action under section 2 or section 5 of the VRA is mounted.[28] Relevant legislative evidence, at a minimum, should include the following with regard to the configuration and boundaries of a district, be it state, county, municipal, or special district:

- any narrative statements, exhibits, or evidentiary materials submitted to the Section 5 Unit of the Civil Rights Division

23. *See Shaw I*, 509 U.S. at 630.
24. 515 U.S. 900 (1995).
25. 116 S. Ct. 1941 (1996).
26. *Shaw II*, 116 S. Ct. at 1894 (1996).
27. *See* Lawyer v. Department of Justice, 117 S. Ct. 2186 (1997).
28. *See* Johnson v. Miller, 864 F. Supp. 1354, 1363–67 (S.D. Ga. 1994), *aff'd*, 515 U.S. 900 (1995). The court noted that statements of various legislative leaders "all reveal a legislature driven to satisfy the demands of DOJ, and contain no indication of efforts to suppress the black vote." *Id.* at 1363 n.7.

of the Justice Department, for covered jurisdictions, over the period of at least the preceding decade;

- correspondence to and from the Attorney General of the United States and the Voting Section attorneys during that same relevant time period, including informal telephone memoranda and summaries of contacts;
- express reference to traditional race-neutral criteria and standards such as compactness, contiguity, respect for political subdivision boundaries, and preservation of non-racial communities of interest in the redistricting process;
- relevant newspaper articles, television interviews and other forms of recorded media coverage, whether on the national, state, or local level, that identify or describe the principal goal and objective of the redistricting process, the balanced use of race along with other non-racial factors in making boundary line changes, and other public expressions of legislative purpose bearing on the issue of whether and to what extent race predominated or was merely one of many factors in the drawing of boundaries of a given district.

One suggestion is that a state or local legislative body could develop the requisite legislative history sufficient to satisfy the "strong showing" of necessity required for race-based remedial action through resort to a bona fide declaratory judgment action. The legislative body could thereby seek to establish a great likelihood of a section 2 violation in the absence of affirmative governmental race-conscious districting.[29]

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29. Professor Pamela S. Karlan, Comments at A.B.A. Pres. Showcase Program (Aug. 3, 1997). Anecdotal evidence documenting discrimination in the electoral process, combined with and buttressed by relevant statistical evidence of past denomination, may provide the "strong basis in evidence," Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986), that can justify a narrowly tailored race-conscious remedial plan. But such an evidential basis cannot rest on amorphous claims of general societal discrimination, *see* Engineering Contractors Ass'n v. Metro Dade County, 122 F.3d 895, 907, 925 (11th Cir. 1997), nor will it survive strict scrutiny if it is not narrowly tailored to serve a compelling governmental interest. One must not forget, moreover, that a race-conscious remedial plan

> is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of medicines, with many harmful side-effects, and must be reserved for those severe cases that are highly resistant to conventional treatment.

Id. at 927.

POST-SHAW *WORLD OF VRA LITIGATION*

In *Shaw v. Reno*, the Court addressed the inevitable tension between the VRA and the Fourteenth Amendment. Such tension had mounted during the preceding decade of VRA litigation, rendering state and local government entities potentially liable under either section 2 or section 5, or both, for failing to create majority-minority districts whenever racial bloc voting existed, unless the creation of such districts would amount to maximization of minority voting strength.[30] Prior to *Shaw*, state and local government entities often sought to minimize exposure to that liability by relying on computerized census data and maps that took race into account in determining where to draw boundary lines in redistricting plans. Computerized census data was used to avoid retrogression[31] or impermissible fragmentation of compact and cohesive minority populations. Failure to draw a majority-minority district gave rise to substantial liability exposure, even if such district manipulation had to be undertaken at the expense of dividing cities, counties, precincts, or other recognized and traditional political subdivision boundaries.[32] Likewise, state and local government entities likely would be exposed to liability if a majority-minority district was not drawn in order to protect an incumbent.[33]

By using computerized census data showing the racial breakdown of the population, or by using census maps showing the location of minority population concentrations, state and local government entities generated evidence that race was the predominant factor in the redistricting plan.[34] By dividing municipalities, counties, or precincts in order to avoid fragmenting minority populations, a state or local government entity generated evidence that it had subordinated traditional districting principles to race.[35] By failing to protect an incumbent when it drew a majority-minority district, the state or local government entity generated evidence that traditional

30. *See Shaw I*, 509 U.S. 630.

31. *See* Beer v. United States, 425 U.S. 130 (1976).

32. *See* Cane v. Worcester County, 35 F.3d 921 (4th Cir. 1994).

33. *See* Garza v. County of L.A., 918 F.2d 763 (9th Cir. 1990).

34. *See, e.g.*, Bush v. Vera, 116 S. Ct. 1941 (1996); Diaz v. Silver, 932 F. Supp. 449 (E.D.N.Y.), *aff'd*, 118 S. Ct. 36 (1997); Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd*, 515 U.S. 900 (1995).

35. *See Bush*, 116 S. Ct. 1941 (1996).

districting principles had been subordinated to race.[36]

BUSH v. VERA: *"DIFFICULT EXERCISES OF JUDGMENT"*

In her concurring opinion in *Bush v. Vera*, Justice Sandra Day O'Connor recognized that the process of reconciling the VRA's requirements with those of the Equal Protection Clause "sometimes requires difficult exercises of judgment."[37] Justice O'Connor outlined guidance for state and local government entities:

- First, as long as states do not subordinate traditional criteria to race, they may intentionally create majority-minority districts without coming under strict scrutiny.
- Second, a state may have to create majority-minority districts where the three *Gingles* preconditions (reasonable compactness, minority cohesion, and white bloc voting) are satisfied.
- Third, the state's interest in avoiding section 2 liability is a compelling governmental interest.
- Fourth, a district drawn to avoid section 2 liability is narrowly tailored so long as it does not deviate substantially, for predominantly racial reasons, from the sort of district a court would draw to remedy a section 2 violation.
- Fifth, districts that are bizarrely shaped and noncompact, and that otherwise neglect traditional principles and deviate substantially from the sort of district a court would draw are unconstitutional, if drawn for predominantly racial reasons.[38]

These bright line principles make it clear that a state or local government entity may intentionally draw majority-minority districts and that the VRA itself may constitute a compelling governmental interest justifying such action.[39] Further, Justice O'Connor's

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36. *See Diaz*, 832 F. Supp. at 462.

37. *Bush*, 116 S. Ct. at 1970 (O'Connor, J., concurring).

38. *See id*. at 1969–70; *cf. Dillard*, 946 F. Supp. at 953–56.

39. The Fifth Circuit has now made it clear, in *Clark v. Calhoun County*, 88 F.3d 1393, 1402–08 (5th Cir. 1996), that requiring a race-based remedy under section 2 of the VRA is consistent with *Miller*, *Shaw II*, and *Bush*, and that

> [t]aken together, these decisions establish a number of important propositions. First, race-based redistricting, even that done for remedial purposes, is subject to strict scrutiny. Second, compliance with § 2 of the Voting Rights Act constitutes a compelling governmental interest. Third, the state must have a strong basis in evidence for concluding that the three *Gingles* preconditions exist in

guidelines inject flexibility and much-needed discretion for a state or local government entity as it seeks to draw a constitutionally and statutorily sound district, even though it may not be a perfect one, the most compact one, or one as compact as a court would draw as a remedial district.

Justice O'Connor's guidelines in *Bush*, however, do not answer the question, first raised in *Shaw v. Reno*, of whether a district is necessarily unconstitutional if it looks "ugly" or if it does not measure up to certain concepts of geographical compactness — whether "functional compactness" as approved in *DeWitt v. Wilson*[40] or compactness determined through a mathematical measure.[41]

RACE-PREDOMINANT REDISTRICTING AFTER MILLER, SHAW *AND* BUSH

Direct and circumstantial evidence of race-predominance was recently considered in racial gerrymandering challenges to congressional districts in cases arising in Virginia and New York. In *Moon v. Meadows*,[42] the court held that the Third Congressional District of the Commonwealth of Virginia was unconstitutionally racially gerrymandered. The district in its present configuration was "an amalgamation principally of African-American citizens contained within the legislatively determined boundaries for the obvious purpose of establishing a safe black district."[43] The evidence was overwhelming, according to the court, that the desire to create a safe black district predominated in drawing this district.

> [T]he district . . . slices through the City of Hopewell, including only those areas where blacks predominate, before terminating some 30

> order to claim that its redistricting plan is reasonably necessary to comply with § 2. Fourth, a tailored response to a found violation must use race at the expense of traditional political concerns no more than is reasonably necessary to remedy the wrong.

Id. at 1405–06; Perez v. Pasadena Indep. Sch. Dist., 958 F. Supp. 1196, 1202 (S.D. Tex. 1997).

40. 856 F. Supp. 1409, 1414 (E.D. Cal. 1994), *aff'd in part, appeal dismissed in part*, 515 U.S. 1170 (1995).

41. Such a measure is described in Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts" and Voting Rights: Evaluating Election District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 554–56 (1993).

42. 952 F. Supp. 1141 (E.D. Va.), *aff'd*, 117 S. Ct. 2501 (1997).

43. *Id*. at 1144.

> miles away in the City of Petersburg, which it also divides racially. To the east, the District takes in part of rural southeastern Henrico County before reaching the more built up and heavily black eastern suburbs of Richmond, racially dividing the capital city nearly in half before terminating in a small black neighborhood in northern Henrico County.[44]

After reviewing the evidence and the legal principles applicable to this racial gerrymander challenge, the court struck down the district as unconstitutional because it relied upon racial classifications and reflected subordination of traditional districting principles to the goal of creating a "safe black district."[45]

New York's Twelfth Congressional District was declared unconstitutional in *Diaz v. Silver*.[46] Race was found to be the predominant factor in creating the district, and the Department of Justice's maximization interpretation of the VRA was once again the culprit.[47] The district plan segregated voters by race and subordinated incumbency protection to race.[48] The plan was found not to be narrowly tailored[49] to meet an arguably compelling interest in complying with sections 5 or 2 of the VRA, and the district also flunked *Gingles*' geographical compactness precondition.[50] The court then concluded:

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44. *Id*.

45. *Id*. at 1148. The Commonwealth of Virginia filed a petition for writ of certiorari on May 6, 1997, in which the questions presented included whether the district court erred in rejecting the Commonwealth's adopted hierarchy of districting principles when race was not given a quantitatively greater consideration in drawing the Third Congressional District than the Commonwealth's well-defined districting principles, and whether the district court erroneously found lack of narrow tailoring by failing to give deference to the state legislature's race-conscious effort to remedy vote dilution. *See* Meadows v. Moon, 65 U.S.L.W. 3788 (U.S. May 6, 1997) (No. 96-1779), *aff'd*, 117 S. Ct. 2501 (1997).

46. No. 95-CV-2591, 1997 WL 94175, at *38 (E.D.N.Y. Feb. 27, 1997), *aff'd*, 118 S. Ct. 36 (1997).

47. *See id*. at *25.

48. *See id*. at *29.

49. *See id*. at *38.

50. *See id*. The Fifth Circuit recently held that the citizen voting age population of the group challenging an electoral process must be considered when evaluating section 2 claims and in determining whether a minority group can satisfy the geographical compactness precondition, and rejected the section 2 plaintiffs' invitation to abandon examination of citizenship data as a factor for a vote dilution claim, even though "citizenship information is unavailable until several years after the release of general census data, which could hinder redistricting." Campos v. City of Houston, 113 F.3d 544, 548 (5th Cir. 1997).

> Prior to the 1992 redistricting, there were five majority-minority districts. Without the 12th CD, the 1992 plan had six such districts; thus there would have been no retrogression and no dilution — although a second Latino district, rather than a fifth African-American district, might have been required. Moreover, alternative districting plans that assure minority representation and non-retrogression and which avoid race-based districting are readily available and feasible.[51]

In *Smith v. Beasley*,[52] the three-judge court held that six House of Representatives districts and three Senate districts in the State of South Carolina were unconstitutional[53] under *Shaw II*, *Miller*, and *Bush*. The districts declared constitutionally deficient were drawn with race as the predominant factor,[54] according to the court, and failed to survive strict scrutiny. The court rejected the State's argument that it drew the districts to achieve a compelling state interest in remedying the effects of past or present discrimination,[55] stating:

> Furthermore, assuming that compliance with Section 2 for Section 5 of the VRA is a compelling state interest, the challenged districts were not narrowly tailored to remedy any potential Section 2 violation or to avoid retrogression as prohibited by Section 5. Thus, these electoral districts violate the Equal Protection Clause of the Fourteenth Amendment.[56]

According to the court, "overwhelming" evidence of racial gerrymandering was introduced, consisting of

- direct evidence of a legislative intent to draw "safe" majority-minority districts under a "dream plan";
- the lack of analysis of traditional race-neutral principles such as compactness, communities of interest or contiguity;
- legislators' admissions that race was the only factor for drawing the lines; and
- the insistence on minimum racial percentages in certain

51. *See Diaz*, 1997 WL 94175, at *38.
52. 946 F. Supp. 1174 (D.S.C. 1996).
53. *See id*. at 1224.
54. *See id*. at 1194, 1196–1200, 1210.
55. *See id*. at 1208.
56. *Id*. at 1211.

districts.[57]

In addition to this direct evidence was "a plethora of circumstantial evidence,"[58] which included the bizarre shape of many districts "which have appendages, tentacles and abnormal protrusions reaching out for the sole purpose of encircling areas of minority voters";[59] splitting of counties, cities, towns, and precincts to achieve the desired racial result for joining of minority areas by narrow land bridges to increase black population percentages;[60] and giving little concern to traditional factors such as compactness, contiguity and communities of interest.[61]

The court was critical of South Carolina's abandonment of normal redistricting principles in order to draw majority-minority districts and the state's evident assumption that "black population was considered to be fungible."[62]

> If a district needed more black citizens to reach the goal of fifty-five percent BVAP, it mattered little where they came from. This is the very evil condemned in *Shaw*, *Miller*, and *Bush*. The state may not assume that all members of a race think alike, have the same interest, or support the same political candidates.[63]

RACIAL RORSCHACHISM IN LOUISIANA

Following the Supreme Court's decision to vacate and remand the original three-judge panel decision that declared Louisiana's congressional redistricting scheme to be an unconstitutional racial gerrymander, the three-judge court was confronted with a new redistricting plan designed by the Louisiana legislature.[64] That new plan, according to the court, also constituted a racial gerrymander, which the court described as "racial Rorschach-ism," in violation of Equal Protection.[65] Citing both circumstantial and direct evidence of

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57. *See id*. at 1206–07.
58. *Smith*, 946 F. Supp. at 1207.
59. *Id*.
60. *See id*.
61. *See id*.
62. *Id*.
63. *Id*.
64. *See* Hays v. Louisiana, 839 F. Supp. 1188 (W.D. La. 1993), *vacated*, 512 U.S. 1230 (1994); *see also* United States v. Hays, 515 U.S. 737 (1995).
65. *See* Hays v. Louisiana, 936 F. Supp. 360, 370 (W.D. La. 1996).

race predominance and legislative disregard for and subordination of traditional race-neutral districting principles, the court was critical of the cartographer in creating a new design for the challenged congressional district, noting that he "concentrated virtually exclusively on racial demographics and considered essentially no other factor except the ubiquitous constitutional `one person-one vote' requirement."[66] The court described as "weak" the defendant's race-neutral explanations: "(1) the boundaries were intended to coincide with the lines of Louisiana's `Old Eighth' congressional district; (2) the District was designed to follow the Red River; and (3) that the District is actually majority-poor, rather than majority-black."[67] The court rejected the latter two explanations as "patently post-hoc rationalizations," and the first explanation as "equally spurious, albeit slightly less obvious," including a concession by the cartographer "that the Old Eighth itself was used as a guise for amassing a large percentage of minority voters into one district, not as a means of following traditional district boundaries."[68]

The court chastised the Legislature for persisting in "defending the indefensible," and "doggedly clinging to an obviously unconstitutional plan,"[69] leaving the court with "no basis for believing that, given yet another chance, it would produce a constitutional plan." The three-judge court accordingly directed[70] the State to implement a redistricting plan drawn by the court in *Hays II*.[71]

THE GEORGIA EXPERIENCE

In their recent comprehensive work in race relations and the status of African-Americans, Stephan and Abigail Thernstrom devoted one of the chapters of *America in Black and White: One Nation, Indivisible*, to voting rights.[72] In a section of that chapter entitled "Reluctant Swimmers in the Biracial Waters," the Thernstroms describe how Cynthia McKinney was re-elected in a newly configured 65% majority white Twelfth Congressional District of Georgia

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66. *Id*. at 368.
67. *Id*. at 369.
68. *Id*.
69. *Id*. at 372.
70. *See id*.
71. Hays v. Louisiana, 862 F. Supp. 119, 125 (W.D. La. 1995).
72. *See* THERNSTROM, *supra* note 1, at 462–92.

in 1996, yet black voters, following the "drumbeat of self-defeating pessimism,"[73] returned to the United States Supreme Court after *Miller v. Johnson* to urge restoration of one of the two invalidated majority black districts.[74]

> In winning handily in majority-white constituencies in that Deep South state, Cynthia McKinney and Sanford Bishop had made history; in insisting that they were still in need of electoral arrangements that protected black candidates from white competition, McKinney and Bishop were (in effect) asking the Court to ignore those significant victories. They had remained reluctant swimmers in the biracial waters that just a month earlier had proven so hospitable to them.[75]

In *Abrams v. Johnson*,[76] the United States Supreme Court rejected constitutional challenges to a redistricting plan for Georgia's congressional delegation drawn by the district court after the Georgia Legislature could not reach agreement on drawing a new plan, following remand in *Miller v. Johnson*.[77] Appellants, various minority organizations and the United States, challenged the district court's redistricting plan on several grounds, all of which were rejected by the Supreme Court.[78]

Appellants in *Abrams* argued that the court-ordered plan contravened section 2 of the VRA, a position the Supreme Court rejected as based on the premise the impermissible vote dilution resulted from the failure to create a second majority-black district.[79] The section 2 findings of the district court were entitled to deference, including its findings that the black population was not sufficiently compact for a second majority-black district, as well as its findings that minority political cohesion and white racial bloc voting had not been established in light of evidence of significant white crossover voting.[80] The district court's findings were upheld by the Supreme Court, which noted that the minority group failed to meet the

73. *Id*. at 485.
74. *See id*. at 486.
75. *Id*. at 485–86.
76. 117 S. Ct. 1925 (1997).
77. *See id*. at 1940.
78. *See id*. at 1929–40.
79. *See id*. at 1936.
80. *See id*. at 1937.

Gingles preconditions, and the mere fact that the district court did not hold a separate hearing on whether the remedial plan violated section 2 did not alter that result.[81] In affirming the district court's judgment, the Supreme Court concluded:

> The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies. Here, the legislative process was first distorted and then unable to reach a solution. The district court was left to embark on a delicate task with limited legislative guidance. The court was careful to take into account traditional state districting factors, and it remained sensitive to the constitutional requirement of equal protection of the law.[82]

ONCE MORE (ON REMAND) WITH FEELING

In the tumult and upheaval that followed *Shaw v. Reno* and a half-dozen voting rights decisions handed down by the United States Supreme Court after 1993, at least one district court[83] and one court of appeals[84] have made a somewhat graceful "about face" in their evaluation of local at-large electoral systems and the weight to be accorded minority electoral success.

In *Uno v. City of Holyoke*,[85] the district court initially declared the city's electoral system violated the VRA.[86] After reversal and remand by the First Circuit,[87] the district court considered supplemental electoral evidence of minority access and participation, and held that the at-large election system for the City Council did not violate section 2 of the Act.[88]

In its second substantive review and analysis of the Holyoke's electoral system, the district court acknowledged that applying the VRA to a particular political context "is one of the most difficult and

81. *See id.*
82. *Abrams*, 117 S. Ct. at 1937.
83. *See* Uno v. Holyoke, 960 F. Supp. 515 (D. Mass. 1997).
84. *See* Jenkins v. Manning, 116 F.3d 685 (3d Cir. 1997).
85. 960 F. Supp. 515 (D. Mass. 1997).
86. *See id.* at 516.
87. *See Uno*, 72 F.3d 973 (1st Cir. 1995).
88. *See Uno*, 960 F. Supp. at 516.

intricate responsibilities a District Court must shoulder,"[89] and likened its task to "attempting to write on water"[90] and "performing heart surgery with a butter knife."[91] While the first two *Gingles* preconditions of geographical compactness and minority political cohesion were found to be sufficiently proven, the district court held that the balance of proof on the third *Gingles* precondition of legally significant white racial bloc voting "was sufficiently precarious to tip the other way when the new evidence on remand was placed on the scales."[92] The record included evidence that a neophyte minority candidate dealing with a low Hispanic turnout enjoyed a 42% crossover vote from non-Hispanic voters, was the first choice among Hispanic voters, and received over 80% of his total votes from non-Hispanics.[93] This led the court to conclude that "racially polarized voting was not the cause of his loss,"[94] and that this minority candidate "or any energetic, qualified Hispanic candidate has a fair opportunity to run in 1997."[95] The court acknowledged that, while the success of a single minority-preferred candidate by itself is not dispositive, "[i]t is the evidence revealed by the election, not just the result, that weighs most strongly in the court's analysis."[96] The election in this case showed that "very large numbers of non-Hispanic voters in Holyoke are quite willing to support an attractive, energetic Hispanic candidate."[97]

Analyzing the totality of the circumstances, the court noted that in the two years since its initial opinion, there had been "some evolution in the evidence bearing on the mix of factors enumerated in the Senate report on the Voting Rights Act under the rubric of the `totality of the circumstances.'"[98] The "near miss" by the Hispanic candidate in the 1995 at-large City Council race "provided as clear a test of the fairness of the Holyoke election system" as perhaps any in the city's history.[99] This led the court to find that in the current

89. *Id*. at 517–18.
90. *Id*. at 518.
91. *Id*.
92. *Id*. at 524.
93. *See id*. at 525.
94. *Uno*, 960 F. Supp. at 525.
95. *Id*.
96. *Id*.
97. *Id*.
98. *Id*.
99. *Id*. at 527.

political reality of the city, Hispanic citizens were not being denied "`meaningful access to the political system on account of race.'"[100] It concluded with this strong affirmation of the city's maturing political structure:

> This Court has no illusions about what one writer has called "the lumpish, Jabba-the-Hutt immobility of racial prejudice in this country." Certainly it exists in Holyoke as elsewhere. Equally certainly, however, it is much less a factor now than in the past, at least in Holyoke's political life. Some percentage of non-Hispanic white voters will continue to oppose a candidate based merely on his or her ethnicity or surname, but many others are receptive to Hispanic candidates and willing to support them. This is good news for our democracy.[101]

The Third Circuit's second look at the Red Clay Consolidated School District's electoral system in *Jenkins v. Manning*[102] resulted in affirmance of the district court's conclusion that there was no violation of section 2 of the VRA, even in the face of racially polarized voting.[103] This result followed: first, the reversal by the Third Circuit[104] of the district court's initial ruling — that the section 2 plaintiffs had failed to establish the *Gingles* precondition of legally significant white bloc voting; and, second, the conclusion, on remand, by the district court that, although the plaintiffs had established the three *Gingles* preconditions, they nonetheless failed to show, under the totality of the circumstances, that there was a section 2 violation.[105] On its second journey to the Third Circuit, the defendant school district held onto its victory, and the Third Circuit did not disturb the district court's post-remand "overall evaluation of minority electoral success."[106] In affirming, the Third Circuit concluded that, while the district had only a thirteen percent black

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100. *Uno*, 960 F. Supp. at 527 (quoting *Uno*, 72 F.3d at 983).

101. *Id*. (quoting Roger Angell, *Box Score: Has Baseball Fulfilled Jackie Robinson's Promise?*, NEW YORKER, Apr. 14, 1996, at 6).

102. 116 F.3d 685 (3d Cir. 1997).

103. *See id*. at 688, 696.

104. *See* Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103 (3d Cir. 1993), *rev'g*, 780 F. Supp. 221 (D. Del. 1991).

105. *See* Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., No. 89-230, 1996 WL 172327, at *1 (D. Del. Apr. 10, 1996).

106. *See Jenkins*, 116 F.3d at 694.

voting age population, minority-preferred candidates nonetheless achieved substantial and impressive minority electoral success, even though that success was not persistent and did not reach "sustained levels of proportionality."[107]

Finding that the district court had followed its instructions on remand and had made a supportable, searching analysis of past and present political reality, the Third Circuit concluded that no section 2 violation was established:

> [W]e are convinced that this case falls into that category of unusual cases where the *Gingles* factors are proved, but under the totality of circumstances, no section 2 violation was established. Although racially polarized voting has characterized Red Clay elections, there has been substantial electoral success, and a change to a single-member system would not improve appreciably the level of such success.[108]

Alas, appeals after remand in section 2 cases do not always result in defense victories. In *Teague v. Attala County*,[109] the district court initially[110] and on remand[111] rejected a section 2 challenge to Attala County's single-member district plan. The Fifth Circuit vacated and remanded the district court's first non-liability determination for more specific findings regarding the section 2 plaintiffs' statistical evidence of racial polarization.[112] On the second appeal it reversed, rendered, and remanded, holding that a presumption of a section 2 violation arose when the plaintiffs offered statistical evidence that black and white voters preferred different candidates.[113] Supreme Court precedent[114] shows this does not suffice to establish a section 2 violation, and, moreover, directs courts to engage in a "comprehensive, not limited, canvassing of relevant facts."[115] The

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107. *Id*. at 696.

108. *Id*. at 700.

109. 807 F. Supp. 392 (N.D. Miss. 1992), *aff'd in part, vacated in part*, 17 F.3d 796 (5th Cir. 1994).

110. *See id*. at 405–06.

111. *See* Teague v. Attala County, No. 1:91CV209 (N.D. Miss. Mar. 20, 1995) (copy on file with Author).

112. *See* Teague v. Attala County, 17 F.3d 796, 798 (5th Cir. 1994).

113. *See* Teague v. Attala County, 92 F.3d 283, 290 (5th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997).

114. Johnson v. DeGrandy, 512 U.S. 997 (1994).

115. *Id*. at 1011.

Fifth Circuit further rejected the County's claim that black and white voters prefer different candidates for reasons other than race or partisan politics, holding:

> Plaintiffs are to present evidence of racial bias operating in the electoral system by proving up the *Gingles* factors. Defendants may then rebut the plaintiffs' evidence by showing that no such bias exists in the relevant voting community. The district court betrays its misunderstanding of this burden-shifting when it concludes that "factors other than race influence voters in Attala County, and, therefore, plaintiff has filed to prove racial polarization" on the basis of there being "no proof in the record that in any way compares the candidates on any base other than race." Such a showing is for the defendants to make. This lack of evidence in the record on this point favors the plaintiffs, not the defendants. By the district court's own reasoning, then, the plaintiffs have prevailed in demonstrating racial bloc voting.[116]

The Fifth Circuit's holding that the results of a single statistical analysis of racially polarized voting created "a strong presumption in favor of finding of black political cohesion and racial bloc voting,"[117] was followed by that court effectively collapsing the "totality of circumstances" inquiry, a multifactor analysis, into a single-factor analysis of whether the plaintiffs' experts had offered statistical evidence of racially polarized voting.[118] This holding conflicts with *Lewis v. Alamance County*,[119] wherein the Fourth Circuit held that even if the plaintiffs proved the *Gingles* preconditions, "the ultimate determination of vote dilution under the Voting Rights Act still must be made on the basis of the totality of the circumstances."[120]

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116. *Teague*, 92 F.3d at 290 (citations omitted). In the county's petition for writ of certiorari, the Fifth Circuit's decision was challenged as a dramatic and improper reduction of the burden of proof for plaintiffs in section 2 cases. *See* Teague v. Attala County, 65 U.S.L.W. 3741 (U.S. Apr. 22, 1997) (No. 96-1695). Under the view adopted by the Fifth Circuit, section 2 plaintiffs need to introduce little more than statistical evidence of racially polarized voting to satisfy their burden of proof. *See id*. Such statistical evidence will demonstrate both black political cohesion and white bloc voting, even if it is hotly disputed and even if defendants introduce unrebutted evidence that differences in black and white voting behavior result from causes other than racial animosity or partisan differences. *See id*.

117. *Teague*, 92 F.3d at 291.

118. *See id*. at 292.

119. 99 F.3d 600 (4th Cir. 1996).

120. *Id*. at 604.

RACE-CONSCIOUS REMEDIAL ACTION

Dillard v. City of Greensboro[121] demonstrates what may well be the outer limits of permissible race-conscious remedial redistricting, ostensibly based on one court's unusual and startling interpretation of *Shaw II*, *Bush*, and *Miller*. The City of Greensboro, pursuant to a 1987 consent decree, had conceded that its at-large system violated section 2 of the VRA.[122] The district court issued an injunction requiring that the city use the section 2 plaintiffs' redistricting plan.[123] The Eleventh Circuit vacated the injunction and remanded the case.[124] The district court drew on current racial gerrymandering precedent and required certain legal standards and criteria to be used by a special master in drawing up a districting plan for the city,[125] including certain constitutional constraints to "`completely' and `with certitude' cure the § 2 violation."[126]

First, traditional criteria could not be subordinated to race per se or as a proxy, but majority-minority districts could be intentionally created and race taken into consideration while avoiding strict scrutiny.[127] This task could be accomplished only by developing a narrowly tailored plan in pursuit of a compelling state interest.[128] That, in turn, could be shown by a sufficient evidentiary basis to establish that the plan was narrowly tailored to remedy past discrimination.[129]

Second, avoiding section 2 liability was a compelling state interest.[130]

Third, the proposed redistricting plan would be narrowly tailored if such an interest was pursued by creating a district substantially addressing section 2 liability, while not deviating substantially

121. 946 F. Supp. 946 (M.D. Ala. 1996).
122. *See id*. at 952.
123. *See id*. at 949.
124. *See id*.
125. *See id*.
126. *Id*. at 951 (quoting Dillard v. Crenshaw County, 831 F.2d 246, 249 (11th Cir. 1987)).
127. *See Dillard*, 946 F. Supp. at 951–52.
128. *See id*. at 952.
129. *See id*.
130. *See id*.

from a hypothetical district drawn mainly for race.[131]

Finally, the plan would not be required to have the minimum irregularity, allowing for traditional criteria, but need only be reasonably regular, allowing those same criteria.[132] This constraint constituted a limited leeway for the special master.

DILLARD *GUIDELINES FOR COMPLIANCE WITH* MILLER-SHAW-BUSH

The district court in *Dillard* also directed that the special master follow a three-stage procedure "in an effort to comply with both the letter and spirit of recent holdings from the Supreme Court"[133] in *Miller*, *Shaw*, and *Bush*.

First, the court directed that the electoral districts had to comply with the one-person, one-vote principal, with not more than a total ten percent population variation.[134] Further, "any redistricting plan must take into consideration `traditional race-neutral districting principles.' These principles `includ[e] but [are] not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests.'"[135] Such principles, the court stated, could be found in law and custom.[136] The court mentioned particularly Alabama's custom of running district boundaries along the centers of streets or "other well-defined boundaries."[137]

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131. *See id*.

132. *See id*.

133. *Dillard*, 946 F. Supp. at 953.

134. *See id*.

135. *Id*. (citations omitted).

136. *See id*. at 953.

137. *Id*. The court also gave this unique twist to *Miller*'s "race-neutral" districting principles:

> Therefore, by use of the term "traditional race-neutral principals," the court should not be understood to require that the Special Master ignore the social, political, and historical conditions brought about by race that exist currently and as a result of social and historical conditions in the community, and that are reflected in the neighborhoods, other natural boundaries, and the shared interest in the community. Rather, the applicable districting principles should be viewed as race-neutral, and followed as such, in the sense that the principles themselves have no racial content or bias, and thus to the extent racial features surface in the plan fashioned by the Special Master they would do so because of corresponding racial conditions in the community, and not because of any racial bias in the districting principles themselves. In other words, the

The court prescribed that in "Stage Two" of this process, if race were employed as a factor, the special master "may do so, but he should attempt to see if a plan can be drawn in which race is not the dominant factor."[138]

In "Stage Three" of the process, again deviating from *Bush*, the court stated: "[I]f in order to cure the § 2 violation the Special Master must not only consider race but must give it dominant consideration, the Special Master's plan must be narrowly tailored to cure the § 2 violation."[139] The court seemed to weaken the concept of strict scrutiny. It noted that the plan had to be narrowly tailored in pursuit of a compelling state interest.[140] Quoting *Bush*, the court stated a plan would be narrowly tailored if drawn to address section 2 liability — the compelling interest — and did not differ substantially from a hypothetical district based mainly on racial considerations.[141] The court itself acknowledged:

> At first blush, it might appear that the strict scrutiny concept is without real substance. . . . This would be true if strict scrutiny's narrow-tailoring requirement were equated to the requirement that a plan comply with, and not subordinate to race, all traditional race-neutral principles, for then the requirement that the plan failed to meet in triggering strict scrutiny (that the plan comply with all traditional race-neutral principles) would be the same as the requirement needed to satisfy that scrutiny (narrow tailoring).[142]

> principles are race-neutral because, although they may take note of and even reflect racial conditions, they are not racially biased themselves.

Id. at 955.

138. *Id*. Departing from *Bush* and the Supreme Court's clear prohibition against use of race-predominance in the redistricting process, the court continued:

> The term predominant is therefore a relative term, in that whether something is predominant depends on its position in relation to that of other considered factors. The court recognizes the determination of whether race is predominant or subordinate is easier said than done, but it must be done. Regrettably, in the meeting between § 2 and the equal protection clause, "bright-line rules are not available."

Id. (citing *Bush*, 116 S. Ct. at 1964).

139. *Dillard*, 946 F. Supp. at 955.

140. *See id*. at 956.

141. *See id*. (quoting *Bush*, 116 S. Ct. at 1970).

142. *Id*. Further deviating from the *Shaw, Miller, Shaw II*, and *Bush* precedent, the court stated:

> [I]t does not appear that the narrow-tailoring requirement means that the plan must satisfy all traditional race-neutral principles . . . . In other words, with

Armed with the above guidelines and multistage procedure, the special master was then called upon to fashion a districting plan for the City of Greensboro that would violate neither section 2 nor the Fourteenth Amendment despite its central feature of an intentionally created majority-minority district entailing an express use of racial classifications and created because of racial demographics.[143] Judge Myron Thompson, on February 26, 1997, approved the redistricting plan the special master developed pursuant to these guidelines, providing three majority-black districts out of a total of five districts.[144]

THE MORAL BANKRUPTCY OF RACE-PREDOMINANT REDISTRICTING

Today the combined forces of the Department of Justice and the once-indomitable VRA plaintiffs' bar are often consumed, not with a maximization agenda to create majority-minority districts wherever computerized Tiger files might suggest, but with defending those products of the last decade of race-predominant redistricting. Moreover, these same erstwhile activists in their public statements about racial progress in the political and electoral arena have generated an almost incessant drumbeat of pessimism in the wake of *Shaw* and *Miller*. For example:

- Minority members of Congress "could meet in the backseat of a taxicab" according to Theodore Shaw of the NAACP Legal Defense and Education Fund.[145]
- The structure of civil rights is being dismantled, resulting in a "return to the days of all-white government," according to ACLU voting rights specialist Laughlin McDonald.[146]
- "The Voting Rights Act may be finished," according to

> the exception of § 2's requirement of compactness, traditional race-neutral principles can be subordinated or even sacrificed in favor of race considerations to the extent necessary to remedy the § 2 violation.

Id.

143. *See id*.

144. *See* Dillard v. City of Greensboro, 956 F. Supp. 1576, 1576, 1581 (M.D. Ala. 1997).

145. THERNSTROM, *supra* note 1, at 482.

146. *Id*.

University of Virginia Law School Professor Pam Karlan.[147]

- The Supreme Court has turned "the intent and meaning of the Fourteenth Amendment on its head."[148]

Whence this race-predominant standard and its "confused and confusing" new rules, as some would claim? And has it suddenly emerged as the evil byproduct of racial animus from on high, as in the "High Court"? Moreover, has this new constitutional doctrine created a double standard for minority voters while setting the stage for the systematic ouster of black and Hispanic elected officials? As this Essay has attempted to show, the race-predominant standard developed and refined by the Court from *Shaw v. Reno* in 1993 to *Abrams v. Johnson* in 1997, while not completely free of doctrinal rough edges, has moved our multicultural and pluralistic society closer than ever to the ideals of *representative, colorblind democracy*. To be sure, the Court's invalidation of racially gerrymandered congressional districts in North Carolina, Florida, Texas, Georgia, and Louisiana has given rise to cries of "unprecedented judicial activism,"[149] disregard of historical discrimination,[150] "a return to the days of all-white government,"[151] and wholesale dismantling of majority-minority districts.[152] But those cries have been necessarily tempered by the fact that blacks and other minorities have achieved electoral success in growing numbers. For example:

- In Georgia, after Congresswoman Cynthia McKinney's Twelfth District was redrawn following *Miller*, McKinney complained of impending "extinction," but was re-elected with a solid crossover vote from white voters in her 65% white district.[153]
- In Georgia, Congressman Sanford Bishop ran and won in a

147. *Id*.

148. A. Leon Higginbotham, Jr., et al., Shaw v. Reno*: Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1645 (1994).

149. *See* Ellen Spears, *High Court Rules — Dismantling of Minority Districts to Continue* (visited Sept. 9, 1997) <http://www.src.s1.com/vrrsum1996_dismantling_nf.htm>.

150. *See id*.

151. SLEEPER, *supra* note 20, at 52 (quoting ACLU voting rights specialist Laughlin McDonald).

152. *See* Gil Klein, *Court OKs Lone Black-Majority District in Georgia*, TAMPA TRIB., June 20, 1997, at A1; Cynthia A. McKinney, *A Democracy Voters Can Be Proud of* (visited Oct. 7, 1997) <http://www.eden.com/~reporter/4.96.McKinney.html>.

153. *See* SLEEPER, *supra* note 20, at 53; THERNSTROM, *supra* note 1, at 485–86.

35% black district.[154]

- In Texas, Sheila Jackson Lee and Eddie Bernice Johnson were both elected to Congress from majority-white districts.[155]
- In Indiana, Democrat Julia Carson was elected to Congress from a 69% white district.[156]
- In Oklahoma, Congressman J.C. Watts, a Republican, was elected from an overwhelmingly white district, and before him, Andrew Young, Allan Wheat, Ron Dellums, Harold Ford and Gary Franks were elected to the House of Representatives from majority-white districts.[157]
- Illinois Senator Carol Moseley-Braun and Virginia Governor Douglas Wilder were both elected from majority-white state electorates.[158]
- Mississippi has witnessed the election of Reuben Anderson and Fred Banks to the Supreme Court, both receiving substantial support from white voters.[159]

Indeed, whether racial gerrymandering is done to exclude blacks from the city limits of Tuskegee, Alabama, as in *Gomillion v.*

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154. *See* SLEEPER, *supra* note 20, at 53; THERNSTROM, *supra* note 1, at 482, 485–86.

155. *See* SLEEPER, *supra* note 20, at 53; THERNSTROM, *supra* note 1, at 482–83 ("These victorious candidates — African-American members of Congress who won where they couldn't possible win — attributed their success to the power of incumbency. But prior to the election, none had mentioned incumbency as an advantage, and indeed they were not incumbents in the redrawn districts in which they were forced to run. The constituencies that sent them back to the House were those that had been (allegedly) `ethnically cleansed.'").

156. *See* SLEEPER, *supra* note 20, at 53; THERNSTROM, *supra* note 1, at 482, 485.

157. *See* SLEEPER, *supra* note 20, at 54; THERNSTROM, *supra* note 1, at 485.

158. *See* SLEEPER, *supra* note 20, at 54; THERNSTROM, *supra* note 1, at 293–98, 308, 490.

> "Blacks," Governor Wilder once said, "cannot wait until there is a majority in a district or region to dream of running for office. [They] cannot isolate [themselves] in enclaves and retreat, leaving vast areas totally untapped and unchallenged." Had [General Colin] Powell run for the presidency, he would of course have tested Wilder's implicit confidence in the potential for white support. Successful black candidates in statewide races and other majority-white settings have, it is true, been few in number. But African-Americans cannot win contests they do not enter. And scholars who attempt to assess white willingness to support black candidacies cannot settle the question on the basis of elections in which no black candidate has been in the race. Or on the basis of contests in which the political views of African-American candidates have been at odds with the majority of voters in their districts.

THERNSTROM, *supra* note 1, at 297.

159. *See* Magnolia Bar Ass'n v. Lee, 994 F.2d 1143, 1148 (5th Cir. 1993).

Lightfoot,[160] or to segregate races into "political homelands" for the purpose of voting, without regard to traditional districting principles and without sufficient compelling justification, as in *Shaw v. Reno* and its progeny, it is a morally bankrupt practice.

A RACIALLY DIVIDED NATION OR ONE NATION, INDIVISIBLE?

None of this is to say that race relations in the United States are at an all-time high.[161] But we are forthrightly confronting and constructively addressing race relations in a manner and with a tone that has no precedent in the bumper sticker society of the 1970s and 1980s. It seems only yesterday that we witnessed the Oakland, California, school district's proposal to confer serious linguistic value upon Ebonics,[162] only to hear critics slam it as "dumbing down" education by giving legitimate status to street slang.[163] It seems just a short while ago that the streets of south-central Los Angeles were a war zone in the wake of the state court acquittals of Rodney King's assailants by a suburban predominantly white jury,[164] only to be followed by what many deemed race-

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160. 364 U.S. 339, 340 (1960).

161. *See, e.g.,* CARL T. ROWAN, THE COMING RACE WAR IN AMERICA: A WAKE-UP CALL 282 (1996). Rowan states:

> I must say honestly that I doubt there is any way to prevent bloody racial strife in America. So many hate groups are at large that a few of them are bound to try to make good on their threats to make parts of America, or all of it, the exclusive home of superior Aryan whites. Too much rage has built up in the minds of young blacks who are trapped in the corridors of resentment and hopelessness for me to assume that they will not strike out with fire power, especially if provoked.

Id.; *see also* Benjamin Schwarz, *The Diversity Myth: America's Leading Export*, ATLANTIC MONTHLY, May 1995, at 67. ("Without the dominance that once dictated, however ethnocentrically, what it meant to be an American, we are left with only tolerance and pluralism to hold us together."); Elizabeth Wasserman, *Is America Falling Apart? Melting Pot Seems More Like Meltdown in Tense Times*, SAN JOSE MERCURY NEWS, Oct. 23, 1996, at 1A ("In a nation once called an ethnic melting pot, there is growing opposition to immigration. In a society that dreamed of being colorblind, a majority of Americans now say race relations are poor.").

162. *See* THERNSTROM, *supra* note 1, at 364.

163. *See* Alice A. Love, *Black Psychologists Hear Defense of Ebonics*, COMM. APPEAL, Aug. 10, 1997, at A10.

164. *See* THERNSTROM, *supra* note 1, at 269, 515.

> It was more organized than the sixties disorders, but the organization was the work of . . . criminal gangs. The conflict was not a simple black-white affair, but rather a confused melee that involved not only African-Americans and An-

based jury nullification in the O.J. Simpson acquittal.[165]

It seems as if members of President Clinton's Race Advisory Council had barely let the ink dry on their letters of appointment when the council's chairman, John Hope Franklin, was reminding us at the council's opening meeting that America had “cut its eyeteeth” on black-white problems, in response to which council member Angela Oh urged the Council to look beyond black-white tensions and “go beyond the black-white paradigm” since “the world is about much more than that.”[166] America fifty years from now may well be a nation in which one out of five citizens will have a racially mixed ethnic background; no more than fifty-one percent of the population will be white; the largest minority will be Hispanics, who will outnumber African-Americans by almost two to one; and eight percent will be of Asian descent.[167] Race relations by that time will either have moved in a more positive, healthier direction, and we will have laid the “groundwork for a fair and tranquil multiracial society”[168] or they will have deteriorated to the point that our nation will resemble an “over-sized Bosnia.”[169]

CONCLUSION

> glo-Whites but Koreans, Mexicans, and other Asian and Latino groups. Hispanic and Asian merchants, not whites, owned most of the businesses that were hit; more Hispanics than blacks were arrested during the turmoil, with many of them very recent immigrants.

Id. at 513.

165. *See* THERNSTROM, *supra* note 1, at 517–18.

166. Gerald F. Seib, *A New America Begins Its Quest for Racial Calm*, WALL ST. J., Aug. 6, 1997, at A16.

167. *See id*. (citing National Academy of Sciences report).

168. *See* THERNSTROM, *supra* note 1, at 539.

169. *See id*.

> Race-conscious policies make for more race-consciousness; they carry American society backward. We have a simple rule of thumb: that which brings the races together is good; that which divides us is bad. Of course, which policies have what effect is a matter of deed contention. To tear down affirmative action “could start a race war that would make Bosnia look like a kindergarten party,” Arthur Fletcher, a former assistant secretary for employment standards, said in 1995.

Id. at 539–40.

Far from the "ethnic cleansing" predicted by the Reverend Jesse Jackson following *Bush v. Vera*,[170] the proven results of even-handed application of the race-predominant standard for redistricting are racially fair, balanced and representative electoral districts, from the halls of Congress to the county courthouse to city hall.

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170. SLEEPER, *supra* note 20, at 52.