Note

Navigating the Constitutional Minefield of Race-Conscious Redistricting

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I. Introduction

In 1993, the United States Supreme Court decision of *Shaw v. Reno*[1] brought national attention to race-conscious redistricting, the drawing of voting districts with attention to race. In *Shaw*, the Supreme Court held that a snake-like majority-minority district[2] in North Carolina may be challenged as so irrational on its face that it can be understood only as an effort to segregate voters on the basis of race, in violation of the Equal Protection clause of the United States Constitution.[3] Inspired by the harsh rhetoric in Justice O'Connor's opinion, many have sought to brand race-conscious redistricting as a form of race segregation, apartheid, and balkanization that is inconsistent with democratic ideals.[4] Others have viewed *Shaw* as decreasing the likelihood that racial minorities will be fairly represented in Congress or in state legislatures.[5] Still other groups perceived the decision as an assault upon the landmark Voting Rights Act of 1965.[6] After *Shaw*, challenges were mounted against majority-minority districts in Georgia, Louisiana, and Texas.[7] Because the opinion in *Shaw* was long on rhetoric

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1. 509 U.S. –, 113 S. Ct. 2816 (1993), *on remand*, Shaw v. Hunt, 861 F. Supp. 408 (1994), *prob. juris. noted*, 115 S. Ct. 2639 (1995), *motion granted*, 115 S. Ct. 415 (1995).

2. A district wherein ethnic or racial minorities constitute a majority. *See* United States v. Hays, 115 S. Ct. 2431, 2433 (1995); Shaw v. Hunt, F. Supp. 408, 417 (1994).

3. 113 S. Ct. at 2832. *See* U.S. CONST. amend. XIV.

4. *See, e.g., Odious Imprint of Apartheid*, WALL STREET JOURNAL, August 31, 1994, at A12; *Reapportionment: Court Questions Districts Drawn to Aid Minorities*, N.Y. TIMES, June 29, 1993, at A1.

5. *See* Elaine R. Jones, *In Peril: Black Lawmakers*, N.Y. TIMES, September 11, 1994, at E12; *Fairness or Racial Gerrymander?*, N.Y. TIMES, April 16, 1993, at B7.

6. *See* David G. Savage, *Minority-Based Gerrymandering Facing Backlash*, L.A. TIMES, October 8, 1994, at A1; Ronald Smothers, *Jackson Tours to Tell Blacks of New Threat*, N.Y. TIMES, June 5, 1994, § 1 (Abstract), at 1. *See generally, Court Lets Whites Challenge Bizarre Redistricting Plans*, WASH. POST, June 29, 1993, at A1; Voting Rights Act of 1965, 42 U.S.C. § 1973 (1995).

7. Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd and remanded*, 115 S.Ct. 2475 (1995); Vera v. Richards, 861 F. Supp. 1304 (1994), *prob. juris. noted*, 115 S. Ct. 2639 (1995); Hays v. Louisiana, 839 F. Supp. 1188 (W.D. La. 1993), *vacated*, 114 S. Ct. 2731 (1994), *on remand*, 862 F. Supp. 119 (W.D. La. 1994), *prob. juris. noted*, U.S. v. Hays, 115 S. Ct. 687 (1994), *vacated*, 115 S. Ct. 2431 (1995); Dewitt v. Wilson, 856 F. Supp. 1409 (E.D. Ca. 1994), *aff'd in part, dismissed in part*, 115 S. Ct. 2637 (1995); *see Bizarre Districts: Politics, Law Clash in Redistricting*, THE NATIONAL LAW

and short on doctrine,[8] courts subsequently interpreted it in very different ways. The Supreme Court this past term ruled on the Georgia redistricting case, *Miller v. Johnson,*[9] in an effort to clarify its position on race-conscious redistricting.

In *Miller*, the Supreme Court upheld the district court's finding that race was the predominant factor motivating the drawing of the Eleventh Congressional District of Georgia.[10] Questioning the Department of Justice's insistence on maximizing the number of majority-minority districts, the Supreme Court reasoned that this demand, in conjunction with the shape of the district and its racial and population densities, told a story of racial gerrymandering.[11]

Miller essentially applied a fundamental rule in equal protection analysis: because racial distinctions are inherently suspect, laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieve a compelling state interest.[12] In the context of redistricting plans that lack explicit racial classifications, the *Miller* Court explained that the rule operates to prohibit "redistricting legislation that is so bizarre on its face that it is unexplainable on grounds other than race."[13] The principle behind the rule applied in *Shaw* and *Miller* is that when a state assigns voters to a district on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike and share the same political interests.[14]

Though *Shaw* emphasized the district's appearance, *Miller* clarified that *Shaw* did not require a threshold showing of bizarreness to challenge a district.[15] Although a district's appearance, in combination with certain demographic evidence, is relevant, parties may rely on direct or circumstantial evidence other than bizarreness to establish that race for its

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JOURNAL, October 31, 1994, at A1.

8. *See* Shaw v. Reno, 113 S. Ct. at 2827 ("holding here makes it unnecessary to decide whether or how a reapportionment plan, that on its face, can be explained in nonracial terms successfully could be challenged . . ."); *Id.* at 2819 ("whether plan was necessary to avoid dilution in violation of Section 2 or whether the state's interpretation of Section 2 is unconstitutional are issues open for consideration on remand."); *Id.* at 2819 ("unnecessary to decide if eradicating the effects of past racial discrimination is a state interest distinct from the act.").

9. 115 S. Ct. 2475 (1995).

10. *Miller,* 115 S. Ct. at 2488.

11. *Id.*

12. *Id.* at 2482. Concerning the meaning of "compelling interest" and "narrowly tailored," the "compelling interest" prong tells a state *when* it may consider race, and the "narrowly tailored" prong tells a state *how* to use race in a way that is not offensive.

13. *Id.* at 2483.

14. *Shaw,* 113 S. Ct. at 2827; *Miller,* 115 S. Ct. at 2486.

15. *Id.*

own sake and not other districting principles was the legislature's dominant and controlling rationale in drawing its district lines.[16]

While *Miller* has shed some light on the application of equal protection to redistricting, unresolved issues remain. For example, the Supreme Court has not sufficiently explained how to increase the number of majority-minority districts without violating the Equal Protection clause. Without guidance and leadership from the Supreme Court, state legislatures at present are struggling to create districting plans that are not violative of the Equal Protection clause. Although any challenge to an increased number of majority-minority districts is likely to succeed under current law, two significant opportunities for increasing majority-minority districts without violating the Equal Protection clause are emerging. The purpose of this note is to assist state legislatures and practitioners in navigating through the constitutional minefield of redistricting and offer to two suggestions for possible avenues of change. Part II of this note focuses on the "compelling interest" prong of equal protection analysis, and Part III focuses on the "narrowly tailored" prong.

II. "Compelling Interest"

A. Background

Because racial distinctions are inherently suspect, laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieve a compelling state interest.[17] This section intends to shed light on courts' interpretations of the "compelling interest" element of that rule in the context of redistricting.

In 1965, the United States Congress enacted the Voting Rights Act[18] to provide direct federal action to prohibit the denial or abridgement of the "right of any citizen of the United States to vote on account of race or color."[19] In 1982, in response to *City of Mobile v. Bolden*,[20] which held the Fourteenth Amendment requires a showing of discriminatory purpose, Congress amended Section 2 of the Voting Rights Act to prohibit dilution of minority voting strength without requiring proof of purposeful discrimination.[21] This focus on dilution has been called the "results test"

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16. *Id.*

17. *Miller*, 115 S. Ct. at 2482.

18. 42 U.S.C. § 1973 (1995).

19. *Id.*; *see* Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING, at 17 (Bernard Groffman and Chandler Davidson, eds. 1992).

20. 446 U.S. 55 (1980).

21. 42 U.S.C. § 1973 (1995); S. REP. No. 97-417, 97th Cong., 2nd Sess. (1982), reprinted in 1982

of Section 2.[22]

Section 5 of the Voting Rights Act requires a state with a history of voting discrimination to receive federal approval from either a U.S. Attorney General or a three-judge panel of the U.S. District Court for the District of Columbia before making a change in "a standard, practice, or procedure with respect to voting."[23] This federal approval process has been commonly called the preclearance process.[24] Section 5 preclearance will be refused if the submitting authority cannot establish that the change will not have the "purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[25] Either retrogression[26] under Section 5 *or* dilution[27] of minority voting strength under Section 2 would constitute such an abridgement.[28] Since recent holdings of the Supreme Court preclude the likelihood that Section 2 might serve as a compelling interest,[29] this note will focus on Section 5.

In Shaw v. Reno, the Supreme Court expressed concern with states' attempts to use compliance with Section 5 of the Voting Rights Act, i.e. obtaining preclearance, as a compelling interest. The *Shaw* Court, recognizing that there is a "strong interest" in compliance with "federal anti-discrimination laws," held that compliance with Section 5 of the Voting Rights Act may constitute a compelling interest.[30] The Court, however, immediately qualified its holding by asserting that the scope of that interest depends upon the constitutional interpretation and application of those laws.[31] In particular, the Supreme Court has read Section 5 narrowly and distinguished between what the law permits and what the law requires.[32]

U.S.C.C.A.N. 177, 179.

22. *See* S. REP. NO. 97-417, *supra* note 21, at 205; Chisom v. Roemer, 501 U.S. 380, 398 (1991).

23. 42 U.S.C. § 1973c (1995).

24. *See Miller*, 115 S. Ct. at 2483.

25. *See* 42 U.S.C.A. § 1973c (1994) (West. Supp. 1994).

26. The Supreme Court narrowly defines retrogression in the context of redistricting as the decrease in the number of majority-minority districts. *See Miller*, 115 S. Ct. at 2492.

27. Vote dilution is an impairment in the voting strength of politically cohesive minority group members based on the totality of the circumstances. Vote dilution requires that three threshold conditions be met: (i) that a minority group be sufficiently large and geographically compact, (ii) that it be politically cohesive, and (iii) that there is racial bloc voting. Johnson v. Degrandy, 114 S. Ct. 2647, 2654-55 (1994). These conditions were first set out in Thornburg v. Gingles, 478 U.S. 30 (1986).

28. 28 C.F.R. § 51.55(b)(2) (1993).

29. The Supreme Court has restricted vote dilution claims under Section 2 by holding that a vote dilution inquiry must include use of a reasonable alternative practice as a benchmark for the existing practice, Holder v. Hall, 114 S. Ct. 2581, 2585 (1994), and by holding that failure to maximize the number of majority-minority districts is not vote dilution, *DeGrandy*, 114 S. Ct. at 2659.

30. *Shaw*, 113 S. Ct. at 2830.

31. *Id.*

32. *Id.*

By contrast, the Department of Justice ("DOJ") has urged an expansive reading of Section 5, namely that in this context, what the law permits and what the law requires are one and the same.

The Supreme Court has rejected this view[33] and in *Shaw*, relied on the principles in *Beer v. United States*[34] and *United Jewish Organizations of Williamsburgh, Inc. v. Carey* ("*UJO*")[35] to support its distinction.[36] In *Beer*, the Court stated that Section 5 compliance is not "carte blanche" for race-sensitive line drawing; rather, a plan must still be narrowly tailored to its goal.[37] In addition, the Supreme Court in *UJO* explained that a plan may be constitutionally challenged when a state does *more* than the Department of Justice or the Attorney General is authorized to *require* it to do. As expected, the Supreme Court turned this issue on its head in *Miller* by articulating a new policy of judicial review.

B. The Retrogression Principle

In *Miller*, the Supreme Court utilized Section 5 to shift the focus from the shape of a district to retrogression. The Supreme Court found that the Georgia districting plan could not have violated Section 5's non-retrogression principle.[38] Following the principles embodied in *Beer*,[39] the Court reasoned that a plan that increases the number of majority-minority districts, "even if the change falls short of what might be accomplished in terms of increasing representation" due to a state policy of adhering to other districting principles, cannot violate Section 5.[40] In light of the state's policy, the new apportionment does not "discriminat[e] on the basis of race or color as to violate the Constitution."[41] Under *Beer* and *Miller*, then, a redistricting plan is either retrogressive, meaning the plan decreases the number of majority-minority districts, or ameliorative, because it increases that number.[42] This reading of Section 5 clashes with the Department of Justice's reading and goal in *Miller* of maximizing the number of majority-minority districts.[43] For instance, if a jurisdiction contains no majority-

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33. *See id.*
34. 425 U.S. 130 (1976).
35. 430 U.S. 144 (1977).
36. *Shaw*, 113 S. Ct. at 2830.
37. *Id. at 2831.*
38. *Miller*, 115 S. Ct. at 2492.
39. *Id.* at 2493.
40. *Miller*, 115 S. Ct. at 2492.
41. *Id.* (quoting DREW DAYS, *Section 5 and the Role of the Justice Department*, in CONTROVERSIES IN MINORITY VOTING, at 56 (Bernard Grofman and Chandler Davidson eds., 1992)).
42. *See Miller*, 115 S. Ct. at 2492.
43. *Miller*, 115 S. Ct. at 2488.

minority districts, and one is created, where in fact two could have been created with minorities being the beneficiaries of the additional district, the Supreme Court would not find a violation of Section 5, because under its definition, the legislature has made an increase in the number of majority-minority districts. By contrast, the DOJ would find a violation: the legislature's failure to create the maximum practicable number of majority-minority districts means that the plan so discriminates on the basis of race as to violate the Constitution.

Rather than focusing on retrogression, the Department of Justice, relying on language from Section 5,[44] has advocated a purpose-and-effect approach to the section.[45] Under such an approach, a state must satisfy two prongs, by establishing that a plan does not have (1) a discriminatory purpose[46] or (2) an adverse effect upon minority voting strength.[47] While the Supreme Court acknowledges that this approach is consistent with its ruling in *Pleasant Grove v. United States*,[48] it criticizes the practice and enforcement of the purpose-and-effect approach.[49] Although the state has the burden of proving a nondiscriminatory purpose under Section 5,[50] the Supreme Court in *Miller* found that a "[s]tate's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference that a plan 'so discriminates on the basis of race or color as to violate the Constitution.'"[51] Therefore, the state of Georgia met its burden by proving a nondiscriminatory purpose.

The Supreme Court's position frustrates the construction of Section 5 by misinterpreting its "purpose" prong. Under the Court's reasoning, a state need only cry "other districting principles" and the Department of Justice is powerless. If the Department of Justice can not make an independent determination as to whether a State's excuse is pretextual, the "purpose" prong becomes strictly a formality. Another significant effect of the Supreme Court's interpretation of the "purpose" prong is that the DOJ must identify specific proof of discriminatory intent in the state's redistricting plan before a state can have a compelling interest under the "purpose" prong of Section 5, such that it can then increase the number of majority-minority districts in subsequent plans. Given that this same rationale was explicitly

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44. *See* 42 U.S.C. § 1973c (1995).
45. Chandler Davidson, *supra* note 18, at 40.
46. *Miller*, 115 S. Ct. at 2491.
47. *Beer*, 425 U.S. at 139.
48. 479 U.S. 462 (1987).
49. *Miller*, 115 S. Ct. at 2491.
50. *Id.* at 2492.
51. *Miller*, 115 S. Ct. at 2475 (quoting *Beer*, 425 U.S. at 141).

overridden in order to overcome the difficulty of proving discriminatory purpose in Section 2, interpreting "purpose" as requiring proof of discriminatory intent is equally unsound in Section 5.[52] Because Congress placed the burden of proof with the state rather than the Department of Justice, preclearance is workable only if failure of a state to come forward with a nondiscriminatory purpose for a redistricting plan constitutes non-compliance with Section 5. This non-compliance would then gives rise to a compelling interest. If a state has a compelling interest only when there is proof of discriminatory intent, it would be meaningless for Congress to require a state to demonstrate a nondiscriminatory purpose unless failure to do so creates an inference of discriminatory intent. Even though a proper construction of the "purpose" prong would not change the result in *Miller* since the state's excuse seems genuinely based on compliance with other districting principles,[53] the Supreme Court nevertheless utilizes the wrong lens of construction. Since a congressional provision may not be construed as to render itself meaningless, the Supreme Court should revisit the statutory construction of the "purpose" prong and find that failure to present a nondiscriminatory purpose purpose creates an inference of discriminatory intent.

Next, the Supreme Court itself has indicated in *Beer* that even if a redistricting plan passes a Section 5 retrogression test, a plan may still violate the Constitution by discriminating on the basis of race.[54] Even though this qualifying language in *Beer* certainly invites an inquiry into Section 2, the Department of Justice's position that a Section 5 inquiry requires a Section 2 inquiry is unlikely to prove useful. Although the Supreme Court recognizes in theory that a plan may violate the "purpose" prong,[55] it has yet to construe the "constitutional violation" language in *Beer* as also referring to Section 2. The Department of Justice, going one step further, interprets the qualifying language in *Beer* as incorporating a Section 2 inquiry into the Section 5 preclearance analysis.[56] In other words, the DOJ has taken the position that every redistricting plan must be subjected to the "results" test of Section 2. Nevertheless, given the strict requirements for vote dilution and the previously mentioned Supreme Court holdings,[57] Section 2 would be a difficult route to justify an increase in the number of

52. *See* S. REP. NO. 97-417, *supra* note 21.
53. *Miller*, 115 S. Ct. at 2492.
54. *Beer*, 425 U.S. at 132.
55. *Miller*, 115 S. Ct. at 2492.
56. 28 C.F.R. § 51.55(b)(2).
57. *See supra* note 29.

majority-minority districts.

Furthermore, *Beer*, the primary case the Supreme Court relies upon in *Miller*, is premised upon a wrongful assumption. While in *Beer* the Court recognized the purpose of Section 5 as protecting against "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise,"[58] the *Miller* Court assumes that as long as a districting plan is an improvement in the exercise of the franchise of minorities over its predecessor plan, there is no abridgement or denial of the right to vote on account of race.[59] The flaw in such reasoning is that the mere increase in the number of majority-minority districts, in and of itself, does not preclude the possibility that minority voting strength is adversely affected in light of the demographic and population changes that likely occurred since the previous districting plan. Although the assumption in *Beer* might yet seem necessary in order for courts to discern where Section 5 ends and Section 2 begins, there is no basis to presume that the sections are mutually exclusive.

C. A Strong Basis in Evidence

Another key issue unanswered by *Miller* is the meaning of a "strong basis in evidence"[60] for voting rights discrimination. In *Miller*, the Supreme Court declared that it would not accept a government's mere assertion that remedial action is required.[61] Instead, the Court reiterated its insistence on a "strong basis in evidence" that there is a harm that needs remedy.[62] Nevertheless, *Miller* is silent as to what will constitute a "strong basis in evidence." *Wygant v. Jackson Board of Education*[63] and *City of Richmond v. Croson*,[64] the Supreme Court cases that introduced this standard, offer some insight. Under *Wygant*, specific, present findings of discrimination would be the best example of adherence to the "strong basis in evidence" standard.[65] A governmental interest in remedying discrimination may also be triggered by an administrative, constitutional, or statutory violation.[66] Another alternative that was adopted by a North Carolina district court in the remanded North Carolina redistricting case,

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58. *Beer*, 425 U.S. at 140.
59. *Id.* at 142.
60. Wygant v. Jackson Board of Education, 474 U.S. 267, 277-78 (1985); *see* City of Richmond v. Croson, 488 U.S. 469 (1989).
61. *Miller*, 115 S. Ct. at 2491.
62. *Id.*
63. 474 U.S. 267 (1985).
64. 488 U.S. 469 (1989).
65. *Wygant*, 476 U.S. at 277-78.
66. *See Croson*, 488 U.S. at 500.

Shaw v. Hunt,[67] is that a state may have a strong basis in evidence if a state "reasonably concludes, after conducting its own independent reassessment, . . . that the Justice Department's conclusion is legally and factually supportable."[68] The *Shaw v. Hunt* Court's approach is based on the principle expressed in *Regents of the University of California v. Bakke*[69] that where there is an administrative finding of discrimination, there is a governmental interest in remedial action.[70] In *Miller*, though, the Supreme Court asserted its obligation to exercise judicial review whenever a state relies on the Department of Justice's determination that race-based districting is necessary to comply with the Voting Rights Act.[71] Even though the Supreme Court states that it has rejected agency findings that it would otherwise give deference where serious constitutional questions are raised,[72] *Miller* is a clear signal that the Supreme Court pendulum now sits with aggressive judicial review rather than deference to the findings of the Department of Justice.

Although *Miller* establishes that a mere objection or assertion by the Justice Department does not constitute a "strong basis in evidence," an independent determination by a state attorney general should bring a redistricting plan closer to meeting the "strong basis in evidence" standard. In *Miller*, the question of whether a state's independent determination that redistricting is necessary under the Voting Rights Act may constitute a "strong basis in evidence" was precluded because the Justice Department's maximization policy tainted the state's decision-making and the Georgia Attorney General objected to the Justice Department's demands.[73] In light of the Supreme Court's finding that the statement of the state attorney general was "powerful" evidence that the legislature subordinated traditional districting principles,[74] the converse should also be true. That is, a statement or determination by a state official such as the attorney general could provide powerful evidence that there is voting discrimination that needs to be remedied. Thus, if judicial review is necessary when a state relies on a DOJ determination, an independent determination by a state should warrant a degree of judicial deference and restraint.

Revamping the preclearance process, such that the DOJ could play a

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67. 861 F. Supp. 408 (1994).
68. *Id.* at 443.
69. 438 U.S. 265 (1978).
70. *See Bakke*, 438 U.S. at 305-07 (opinion of Powell, J.).
71. *Miller*, 115 S. Ct. at 2491.
72. *Id.*
73. *Id.* at 2492.
74. *Id.* at 2490.

minor advisory role, would create a practical means for a state to make an independent determination that a certain districting plan is necessary under the Voting Rights Act. Prior to the redistricting process, the DOJ could give an advisory opinion on minority voting strength. Such an opinion would offer a flexible range or goal concerning minority voting strength and thereby permit a state to operate using its traditional districting principles. Instead of being obligated to create a certain number of majority-minority districts that might jeopardize compactness, the state would have the freedom to develop both traditional-looking majority-minority districts and "influence districts"[75] where necessary to prevent an adverse effect upon minority voting strength. Since preclearance (if it can still be termed that) is isolated from the districting process, race is not the predominant factor motivating the drawing of the districting plan. Thus, with the DOJ playing an advisory rather than controlling role, a state is free to make an independent determination that a districting plan is necessary under the Voting Rights Act.

III. "Narrowly Tailored"

A. Background

This section attempts to explore the Supreme Court's interpretation of the requirement that laws classifying citizens on the basis of race be "narrowly tailored" to achieve a compelling state interest before they may be upheld. "Narrowly tailored" is the more difficult prong of the Equal Protection clause that has plagued government decision-making on the basis of race. In the context of redistricting, a constitutional harm arises from a district that is so irregular that on its face it could rationally be viewed only as an effort to segregate voters on the basis of race,[76] or when race is a predominant factor motivating a district's drawing.[77] Race is a predominant factor where a legislature subordinates traditional districting principles including but not limited to compactness, contiguity, and respect for political subdivisions or communities of interest.[78] Therefore, a claim of racial gerrymandering may be refuted by demonstrating a legislature's compliance

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75. An influence district is a district wherein minorities represent a substantial portion of the district but are not in the majority, such that with the help of cross-over votes from white voters, minority voters may elect the candidate of their choice. *See* Voinovich v. Quilter, 113 S. Ct. 1149, 1153 (1993); *see also* Stanley Pierre-Louis, *The Politics of Influence: Recognizing Influence Dilution Claims Under Section 2 of the Voting Rights Act*, 62 U. CHI. L. REV. 1215, 1226 (1995).

76. Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960); *Shaw*, 113 S. Ct. at 2816.

77. *Miller*, 115 S. Ct. at 2488.

78. *Id.*

with traditional districting principles.[79]

B. *Incumbency Protection and Party Interests*

New issues surface when minorities join forces with a political party to draw district lines. African-American legislators and Republican legislators have notably joined forces in some cities in creating districting plans.[80] This alliance raises the question of whether the tinkering of districts driven by a Republican-Minority coalition violates the Equal Protection clause. With respect to the Republican wing of the coalition, race is neither the vehicle nor the motivating factor behind the drawing of a districting plan. Republicans are purely interested in protecting their incumbents and drawing districts where Republicans are in the majority. Because most African-Americans are not Republicans, Republicans benefit from drawing a district or districts with a high concentration of African-Americans, provided that African-Americans are removed from districts where Democrats predominate. This method transforms districts with a Democratic majority into districts with a Republican majority. In addition, while all constituents have a racial classification and a party affiliation, the Republicans' only focus and concern is the party affiliation of a constituent. Since party interests and incumbency protection would be the predominant factor motivating a district or districting plan drawn by the Republican-Minority coalition, race would *not* be a predominant factor motivating the district's drawing.

The conclusion that the minority wing of the Republican-Minority coalition (assuming its motivation in drawing the district is race) constitutionally taints the districting plan would be contrary to redistricting jurisprudence. Under present doctrine, where a state has a compelling interest, it may use race as a factor provided that race is not the predominant factor and that the district's shape is not so irregular that it can only rationally be understood as voter segregation on the basis of race.[81] Thus, while the minority wing's purpose might render race a factor, that purpose is subordinated to the purpose of the Republican wing because the political power of the Republicans clearly outweighs the political weight of the minority wing. The significant political influence of the Republican wing

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79. *Id.* at 2488-89.

80. *See* Lucy Morgan, *New Map Deepens Rift for Democrats*, ST. PETERSBURG TIMES, October 21, 1995, at 1B (discussing Florida legislature); Kevin Sack, *Legislatures Letting Court Remap Georgia*, NEW YORK TIMES, September 13, 1995, at A14; Kathy Alexander and Mark Sherman, *Redrawing of State's Legislative Map Creating Some Strange New Alliances*, THE ATLANTA CONSTITUTION, August 16, 1995, at 1C.

81. *Miller*, 115 S. Ct. at 2487-88.

would necessarily translate into a greater input into a district's drawing.

A court might reason, however, that a Republican-Minority coalition is of dual purpose such that each purpose is a predominant factor motivating a district's drawing. The issue whether incumbency protection and race can both be predominant motivating factors would be a question of first impression, because the Supreme Court has not held that there can be only one predominant factor motivating a district's drawing. Given, however, the political reality that party interests and incumbency protection far outweigh consideration of race in redistricting, a court should conclude that incumbency protection, not race, is the predominant motivating factor.

The Supreme Court's theory of the redistricting process as revealed in *Miller* is incompatible with the political reality of redistricting. In *Miller,* the Supreme Court identifies "equal population, contiguous geography, nondilution of minority voting strength, fidelity to precinct lines where possible, and compliance with Sections 2 and 5 of the [Voting Rights] Act" as districting guidelines.[82] The Court then notes that only after these requirements are met do the guidelines permit drafters to pursue such ends as "maintaining the integrity of political subdivisions, preserving the core of existing districts, and avoiding contests between incumbents."[83] While the Court recognized that political incumbency is a legitimate districting principle, it apparently views political incumbency as a districting criterion of lower priority than most of the other criteria. This viewpoint contrasts the key role that political and incumbency interests actually play in redistricting.

Aside from the political reality of incumbency protection, the distinction that courts have made between political incumbency and race further supports the conclusion that political incumbency and race should be considered independently under the Equal Protection clause. For example, a political gerrymander is distinct from a racial gerrymander;[84] therefore, political motivations—even when coexisting with racial motivations—may not give rise to a racial gerrymander. Also, in *Davis v. Bandemer*, the Supreme Court took account of the district court's denial of the Indiana NAACP claim of dilution of the black vote and finding that "the voting efficacy of the NAACP plaintiffs was impinged upon because of their politics and not because of their race . . . ."[85] Since courts have traditionally dealt with politics and race independently rather than jointly in the context of the Equal Protection clause, courts should consider whether race was the predominant

82. *Id.* at 2483.
83. *Id.*
84. Davis v. Bandemer, 478 U.S. 109, 116-17 (1985).
85. *Id.* at 117 n.8.

factor and whether politics—namely, political incumbency—was a predominant factor as a separate matter.

C. *Community of Interest*

Further troubles emerge when attempting to determine what constitutes a "community of interest," a traditional districting principle approved by the Supreme Court. According to the Supreme Court, redistricting based solely on race is an affront to our sense of vote equality because it creates districts with residents who have little in common with each other except for the color of their skin.[86] A state, however, is free to recognize communities when the community's action is directed toward "some common thread of relevant interests."[87] In *Miller*, the Court found that in light of a comprehensive report revealing fractured political, social, and economic interests within the Eleventh District's African-American population, there were no tangible communities of interest.[88] Because no "common thread" could be found, Georgia's districting legislation could not be rescued by the "community of interest" districting principle.[89]

The *Miller* opinion suggests, however, that if there had been a credible report demonstrating shared political, social, and economic interests by a group of individuals in the district that happen to share the same race, then there would be a sound basis for applying the "community of interest" districting principle. While it is constitutionally offensive to presume and assume that people of the same racial group share similar interests, evidence that members of a particular group that happen to be of the same race share similar interests does not depend upon a constitutionally impermissible assumption. Even if a "community of interest" is established, though, contiguity, compactness, and other districting principles must still be taken into account.

IV. Conclusion

The Supreme Court's misconstruction of the "purpose" prong of Section 5 considerably restricts the prospects of defeating a Section 5 challenge to a districting plan that increases the number of majority-minority districts. Not only does the retrogressive/ameliorative approach to redistricting limit an inquiry under Section 5 to whether there is an increase in the number of majority-minority districts rather than a comprehensive

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86. Shaw v. Reno, 113 S. Ct. at 2827.
87. *Miller*, 115 S. Ct. at 2490.
88. *Id.*
89. *Id.*

inquiry into minority voting strength, but it also reverses the inertia created by Section 5 by requiring the Department of Justice to sit back and wait until a constitutional infirmity gives rise to a Section 2 vote dilution claim before taking action.

Likewise, the "strong basis in evidence" standard is a significant obstacle in defending a districting plan under Section 5. While it is unclear what evidence will satisfy this standard, it is clear that the Department of Justice's mere assertion that remedial action is required is insufficient. Because the serious constitutional questions at stake supposedly prevent the Supreme Court from deferring to the Department of Justice, the better candidate for a "strong basis in evidence" is a state's independent determination that redistricting is necessary under the Voting Rights Act. Without a revamping of the Department of Justice's preclearance process, however, such evidence may be purely theoretical.

As to the "narrowly tailored" prong of Equal Protection analysis, the Supreme Court has yet to consider the constitutionality of a plan wherein both incumbency protection and race are clearly responsible for the plan's drawing. Both the remanded *Shaw* case, *Shaw v. Hunt*,[90] and the Texas redistricting case, *Vera v. Richards*,[91] which are before the Court this term, raise this issue. In light of the Republican-Minority coalitions that may continue to develop in state legislatures and the issue of political incumbency as raised in the Texas and North Carolina redistricting cases, legislatures, practitioners, and courts should consider whether tinkering with voting districts based on political incumbency and race would violate the Equal Protection clause. Unless courts are prepared to recognize that there are multiple predominant factors that influence the drawing of a district, empirical evidence should support the conclusion that incumbency protection outweighs considerations of race and therefore prevents race from being the predominant factor in redistricting.

Aside from the role of incumbency protection in redistricting, the "community of interest" principle, in theory, may serve as a constitutional means for drawing a majority-minority district, provided the group of individuals has common political, social, or economic interests. For instance, one of the issues in the remanded *Shaw* case is whether the district's design is explained by the goal of preserving communities of

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90. 861 F. Supp. 408 (1994), *prob. juris. noted*, 115 S. Ct. 2639 (1995), *motion granted*, 116 S. Ct. 415 (1995).

91. 861 F. Supp. 1304 (1994), *prob. juris. noted*, 115 S. Ct. 2639 (1995), *motion granted in part*, 116 S. Ct. 295 (1995).

interest.[92] Given the absence of a formula that exclusively equates certain political, social, and economic interests with most African-Americans, though, the prospects for using "community of interest" as a proxy for race seem limited.

After *Miller*, courts now have the challenge of determining when there is a "strong basis in evidence" that justifies invoking Section 5 and when race is responsible for subordinating traditional districting principles. Since the Supreme Court has not articulated an objective benchmark for determining compliance with a state's districting principles, *Miller* offers little guidance as to what extent race may permissibly be a factor or when a state has a "strong basis in evidence" for its use of race. Until the Supreme Court clarifies *Miller*, the Department of Justice should serve a minor advisory role with respect to Section 5, and legislatures should utilize Republican-Minority coalitions, identify communities of interest, and seek to balance their traditional districting principles such that race is one of many factors.

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92. *Hunt*, 861 F. Supp. at 473.