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Richard Briffault

Richard.Briffault@chicagounbound.edu

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Race and Representation After *Miller v Johnson*

Richard Briffault†

For three decades, the Supreme Court's principal concern with respect to the role of race in representation has been vote dilution, that is, the use of electoral structures or apportionment schemes that "operate to minimize or cancel out the voting strength of racial or political elements of the voting population."¹ The Court has held that a state or local government's intentional use of an electoral system to dilute minority votes violates the Equal Protection Clause of the Fourteenth Amendment.² It has also interpreted Section 2 of the Voting Rights Act (the "Act"), as amended in 1982,³ to invalidate electoral schemes that dilute the votes of minorities protected by the Act, even without proof of discriminatory intent.⁴

Vote dilution functions as a doctrine of politically constrained proportional representation. Prohibiting the dilution of minority votes pushes toward proportional representation for the minorities protected from dilution. The vote-dilution doctrine has led to the invalidation of numerous instances of majority-reinforcing political structures, such as at-large elections and multimember districts, and has enabled racial minorities to elect their preferred candidates in closer proportion to their shares of the population in many states and localities.⁵ However, the impetus toward proportional representation has been constrained by the Court's respect for political values, such as centrist policies, a jurisdiction-wide perspective, the representation of territorially based interests, and other concerns at odds with proportionality.

† Professor of Law, Columbia University School of Law. Research for the Article was supported by the Walter E. Meyer Research in Law and Social Problems Fund.

¹ *Fortson v Dorsey*, 379 US 433, 439 (1965).

² *Rogers v Lodge*, 458 US 613, 617 (1982); *White v Regester*, 412 US 755, 765-70 (1973).

³ 42 USC § 1973(b) (1988).

⁴ *Thornburg v Gingles*, 478 US 30 (1986).

⁵ See Chandler Davidson and Bernard Grofman, eds, *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton University Press, 1994); Richard H. Pildes, *The Politics of Race*, 108 Harv L Rev 1359 (1995)(book review of Chandler Davidson and Bernard Grofman, eds, *Quiet Revolution in the South*).

The Court has rejected the claim that the Constitution mandates proportional representation⁶ and has applied the vote-dilution doctrine to only those electoral arrangements that purposefully and significantly impair the ability of minority voters to influence the political process.⁷

With the recent decisions in *Shaw v Reno*⁸ and *Miller v Johnson*,⁹ the Supreme Court has begun to develop a second, "analytically distinct,"¹⁰ approach to race and representation. In these cases, the Court held that racially motivated districting may be invalid even though vote dilution was not intended and did not occur. *Johnson* established that strict judicial scrutiny is required "whenever race is the 'overriding, predominant force' in the redistricting process."¹¹ The Court indicated that racially motivated districting is permissible to remedy past racial discrimination and, possibly, when strictly necessary under the Voting Rights Act, but not voluntarily to promote greater minority representation.¹²

This Article considers the Supreme Court's two approaches to race and representation: the constrained proportionality of the vote-dilution cases and the strict scrutiny of racially motivated districting. Part I traces the development of these two doctrines, examines their conceptual underpinnings, and considers some of the questions the Court will have to answer as it elaborates its new approach to the use of race in the design of electoral systems.

Part II explores the tension between the Court's two approaches. The concern with racial motivation proceeds from an underlying normative assumption about the place of race in

⁶ See *Whitcomb v Chavis*, 403 US 124, 153-57 (1971). See also *Davis v Bandemer*, 478 US 109, 132 (1986)(plurality opinion)(stating that "a failure of proportional representation alone does not constitute impermissible discrimination"); *City of Mobile v Bolden*, 446 US 55, 75-80 (1982)(plurality opinion)(stating that "[t]he Equal Protection Clause . . . does not require proportional representation").

⁷ *Bandemer*, 478 US at 132; *Chavis*, 403 US at 155. Although the Voting Rights Act eliminates the requirement that, to be actionable, minority vote dilution must be intentional, the Act continues to look to whether "on the totality of circumstances, . . . the political processes leading to nomination or election . . . are not equally open to participation" by the minority groups protected by the Act, and whether such minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 USC § 1973(b).

⁸ 113 S Ct 2816 (1993).

⁹ 115 S Ct 2475 (1995).

¹⁰ *Shaw*, 113 S Ct at 2830; *Johnson*, 115 S Ct at 2485.

¹¹ *Johnson*, 115 S Ct at 2485.

¹² *Id* at 2490-93.

politics that is profoundly at odds with vote dilution's empirical premises about the significance of race in voting behavior. Thus, *Johnson's* lofty and laudable aspiration to take race out of politics conflicts with the finding in many vote-dilution cases that race already plays a role in politics through the decisions of voters. By forcing governments to be color-blind even when voters are not, *Johnson* may severely limit voluntary state and local actions to increase the representation of racial minorities in political institutions.

Part III attempts to reconcile these two divergent doctrines. *Johnson* reflects a normative determination that government ought not to act on racial stereotypes—on the easy assumption that racial groups constitute political groups—when it makes decisions concerning the structure of representation. The vote-dilution doctrine, however, is predicated on empirical findings that, in particular jurisdictions, racial groups are in fact politically cohesive and racial divisions are actually salient to politics. Color blindness and vote dilution, then, can be reconciled by enabling a government unit to take race-conscious action to promote minority representation when that unit can demonstrate that it is acting based, not on proscribed stereotypes, but on a finding that race plays a role in voting behavior, that racial groups in practice function as cohesive political groups, and that race is, thus, an important factor in its politics. Such action ought to be treated as politically motivated, and thus permissible in the absence of vote dilution, rather than racially motivated within the meaning of the nascent color-blindness doctrine. Just as the vote-dilution doctrine was shaped by the Court's acceptance of political values other than minority representation in the design of electoral structures, the color-blindness approach can permit governments to take race into account when race is actually a significant consideration in local politics. Not only would this hold together the Court's increasingly divergent approaches to race and representation, but, by allowing states and localities to respond to their particular political conditions and their own appraisals of political fairness, this approach would also advance the value of state and local self-determination that is at the heart of federalism.

I. THE SUPREME COURT'S TWO APPROACHES TO RACE AND REPRESENTATION

The Supreme Court currently embraces two approaches to race and representation under the Equal Protection Clause.¹³ First, under the older vote-dilution doctrine, states and localities may not intentionally design political institutions, particularly practices and procedures for the election of legislative representatives, in order to impair the political effectiveness of racial and ethnic minorities. Second, under the doctrine the Court has begun to articulate in *Shaw v Reno*¹⁴ and *Miller v Johnson*,¹⁵ a state or local districting plan will be subject to strict scrutiny if it is predominantly motivated by racial considerations, even if vote dilution is neither intended nor produced. These two approaches are not necessarily logically inconsistent; a jurisdiction could comply with both doctrines by strictly avoiding the consideration of race in districting and other political decisions. Nor has the Court treated the more recent doctrine as undermining the older one. At least in the two-year interval between *Shaw* and *Johnson*, the Court continued to adhere to the vote-dilution doctrine.¹⁶

¹³ It is curious that the Supreme Court has developed these conflicting approaches to race and representation primarily through interpretations of the Equal Protection Clause of the Fourteenth Amendment rather than by construction of the Fifteenth Amendment, which explicitly provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." US Const, Amend XV. The preference for the Fourteenth rather than the Fifteenth Amendment may be due, in part, to the genesis of the vote-dilution doctrine as an extension of the one-person, one-vote requirement of the Equal Protection Clause rather than as a construction of the right to vote protected by the Fifteenth Amendment. Moreover, although a number of vote-dilution cases combined references to both the Fourteenth and Fifteenth Amendments, in *City of Mobile v Bolden*, 446 US 55, 65 (1980), a four-member plurality of the Supreme Court, over the objections of three other justices, arguably limited the Fifteenth Amendment to the protection of the right to "register and vote without hindrance," *tout court* excluding vote dilution from the Fifteenth Amendment's purview. See *Rogers v Lodge*, 458 US 613, 619 n 6 (1982).

Whether or not the right to vote vindicated by the Fifteenth Amendment includes a protection against dilution, there is little textual basis for an argument that the Fifteenth Amendment also supports a general color-blindness standard, as opposed to a proscription of denials or abridgments of the vote on account of race. Color blindness is solely a Fourteenth Amendment doctrine. Thus, even if the protection against racial vote dilution were grounded in the Fifteenth Amendment instead of the Fourteenth Amendment, the conflict discussed in this Article would still persist, albeit as one between two different constitutional provisions rather than as a conflict between interpretations of the same provision.

¹⁴ 113 S Ct 2816 (1993).

¹⁵ 115 S Ct 2475 (1995).

¹⁶ See *Johnson v De Grandy*, 114 S Ct 2647 (1994). See also *DeWitt v Wilson*, 115 S Ct 2637 (1995) (affirming district court decision upholding California redistricting plan

However, the two approaches proceed from very different underlying concerns, reflect different visions about the role of race in representation, and ultimately, are likely to come into conflict. The vote-dilution doctrine addresses government actions that harm racial minorities by reducing the representation that minority groups would otherwise receive. It focuses on the concrete harm of reduced representation and assumes that racial minorities may be treated as politically salient groups. Although the constitutional vote-dilution doctrine is triggered only by intentional state action, today most vote-dilution litigation proceeds under Section 2 of the Voting Rights Act, which dispenses with the requirement of discriminatory intent and focuses on discriminatory effects.

By contrast, *Shaw* and *Johnson* found that the use of race in districting is harmful *per se*, even when racially motivated districting does not reduce the representation of any racial group. Indeed, unlike the vote-dilution cases, *Shaw*, and especially *Johnson*, display considerable hostility toward the very idea of conceptualizing representation in terms of racial groups. Thus, not only may this new approach lead to the invalidation of state actions that do not dilute a racial group's representation, but it considers racially motivated actions that *increase* the representation of racial minorities to be as problematic as actions that would decrease minority political strength.

A. Vote Dilution as Politically Constrained Proportionality

The vote-dilution doctrine emerged out of the interplay of two conflicting constitutional imperatives: equal representation of voters on the one hand and deference to state and local control over the design of their representative institutions on the other. The concern that equal numbers of voters receive equal representation in legislatures tends to call into question electoral systems that produce a significant disparity between popular votes and legislative seats, and tends to push the political system in the direction of proportional representation. Yet, American legislative elections have traditionally been designed to advance values in addition to equal representation.

that took race into account, in part, to withstand challenges under Section 2 of the Voting Rights Act).

The "one person, one vote" doctrine¹⁷ firmly established the primacy of equality over other political values when electoral schemes are evaluated from the perspective of their impact on the rights of individuals. However, the vote-dilution doctrine, which addresses the representation of groups, is more of a hybrid: it attempts to synthesize equality's push toward proportional representation with federalism's respect for state and local autonomy to adopt electoral systems that may reinforce the power of political majorities or promote a territorial approach to politics, thereby undermining the prospects of providing minorities with proportional representation.

1. *Vote dilution as proportionality.*

Equality first became central to the Supreme Court's thinking about representation with the determination in *Reynolds v Sims*¹⁸ that the Constitution requires "one person, one vote." *Reynolds* held that the right to cast a ballot entails the right to an equally weighted vote.¹⁹ As the Court later observed, "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."²⁰

Reynolds was concerned with majority rule and individual rights. One person, one vote was intended to assure that a majority of the voters would be able to elect a majority of the legislature.²¹ The guarantee of an equally weighted vote was seen as protecting an individual's right to vote.²² However, *Reynolds* also had implications for the representation of groups. As Justice Powell later observed, "[w]hile population disparities do dilute the weight of individual votes, their discriminatory effect is felt only when those individual votes are combined."²³ Thus, representational structures necessarily affect voters in groups. If each voter participated directly in the legislature, there would be no representation. Rather, the representative process requires that groups of voters elect representatives.

Implicit in the command that all votes be weighed equally is a norm of proportionality, that is, that people ought to be repre-

¹⁷ *Gray v Sanders*, 372 US 368 (1963).

¹⁸ 377 US 533 (1964).

¹⁹ *Id.* at 568.

²⁰ *Allen v State Bd. of Elections*, 393 US 544, 569 (1969).

²¹ *Reynolds*, 377 US at 565.

²² *Id.* at 565-66.

²³ *Davis v Bandemer*, 478 US 109, 167 (1986) (Powell concurring in part and dissenting in part).

sented in a legislature in proportion to their numbers. One person, one vote is, in a sense, a rule of proportional representation. It gives each individual voter the same proportionate impact on the election of representatives²⁴ as the voter's proportion of the jurisdiction's population.

The vote-dilution doctrine applies *Reynolds's* implicit requirement of proportional representation of individual voters to the context of discrimination against groups of voters. The first vote-dilution cases involved electoral structures that provided one person, one vote but burdened minority groups.²⁵ Although the most certain way to achieve one person, one vote is to use jurisdiction-wide at-large or multimember elections, these electoral structures "tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district."²⁶ Similarly, single-member-district systems can also be used to minimize the ability of a group to elect representatives. District lines may be intentionally manipulated to fragment a group into several districts, thereby precluding a group from attaining electoral success in any one district.²⁷ Alternatively, districting can be used to "pack" a group into a single district, thereby minimizing the group's ability to influence the elections in other districts.²⁸

Drawing on *Reynolds's* concern with fair representation, the Court held that electoral structures that abide by the one-person, one-vote requirement can nevertheless be challenged under the Equal Protection Clause when they are used to undermine a minority group's ability to elect representatives.²⁹ Moreover, al-

²⁴ One person, one vote does not bar supermajority- or concurrent-majority-vote requirements on ballot propositions, even though these rules tend to give greater weight to the votes of those in the jurisdiction-wide minority. See *Town of Lockport v Citizens for Community Action at the Local Level, Inc.*, 430 US 259 (1977)(allowing concurrent-majority requirement for referendum on county-government reorganization); *Gordon v Lance*, 403 US 1 (1971)(validating 60-percent-majority requirement for bond-issue referendum).

²⁵ See *Lodge*, 458 US at 616-17; *White v Regester*, 412 US 755, 765-70 (1973). See also *Allen*, 393 US at 569 (holding that Section 5 of the Voting Rights Act applies to vote dilution).

²⁶ *Lodge*, 458 US at 616 (emphasis in original).

²⁷ See *Wright v Rockefeller*, 376 US 52, 54-55 (1964).

²⁸ See *Voinovich v Quilter*, 113 S Ct 1149, 1153 (1993).

²⁹ In addition, the Court has indicated that when a federal court imposes a reapportionment plan, it should "prefer single-member districts over multimember districts, absent persuasive justification to the contrary." *Wise v Lipscomb*, 437 US 535, 540 (1978).

though the initial vote-dilution cases involved racial and ethnic minorities, the Court subsequently held that the intentional minimization of the voting power of partisan minorities can also violate the Equal Protection Clause.³⁰

The vote-dilution doctrine implicitly relies on—indeed, it requires—a notion of proportional representation.³¹ Whether an electoral structure is dilutive can be assessed only by reference to some measure or “benchmark” of “undiluted” representation.³² That measure is what the Court has referred to as “a preference for a level of parity between votes and representation,”³³ that is, proportionality.³⁴ Deviation from proportionality has been treated as a necessary, albeit not a sufficient, condition for establishing vote dilution. Thus, electoral schemes that provide proportionality are likely to withstand a charge of vote dilution.³⁵ Conversely, representational systems that consistently and significantly deny electoral success to minority groups raise a red flag and are subject to the charge of vote dilution.

2. *The political constraints on proportionality.*

The Supreme Court, however, has held repeatedly that the Constitution does not require proportional representation, just as Congress expressly abjured any commitment to proportionality in the 1982 Voting Rights Act Amendments.³⁶ At-large elections and multimember districts are not unconstitutional *per se*,³⁷ and a mere absence of “parity between votes and representation” is not sufficient to make a gerrymandered districting plan an un-

³⁰ *Bandemer*, 478 US at 109.

³¹ See *Thornburg v Gingles*, 478 US 30, 84 (1986)(O'Connor concurring)(stating that “any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large”).

³² See *Holder v Hall*, 114 S Ct 2581, 2585-86 (1994).

³³ *Bandemer*, 478 US at 126 n 9.

³⁴ See *Gingles*, 478 US at 93 (O'Connor concurring)(stating that “the elements of a vote dilution claim create an entitlement to roughly proportional representation within the framework of single-member districts”); *Bandemer*, 478 US at 157 (O'Connor concurring)(stating that “[i]mplicit in the plurality's opinion today is at least some use of simple proportionality as the standard for measuring the normal representational entitlements of a political party”).

³⁵ See *De Grandy*, 114 S Ct at 2658; *Gingles*, 478 US at 77; *United Jewish Organizations of Williamsburgh, Inc. v Carey*, 430 US 144, 165-68 (1977)(“UJO”)(plurality opinion); *Gaffney v Cummings*, 412 US 735, 751-54 (1973).

³⁶ 42 USC § 1973(b)(1988)(“Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” (Emphasis in original)).

³⁷ See *Lipscomb*, 437 US at 535; *Whitcomb v Chavis*, 403 US 124, 142 (1971).

constitutionally vote-dilutive one.³⁸ The vote-dilution doctrine's push toward proportionality has been constrained by the Court's and Congress's recognition that states and localities may design their representative institutions to advance political values other than—and potentially in conflict with—minority representation. These other values include: effective governance; the promotion of centrist parties and policies that address the interests of the jurisdiction as a whole, rather than as discrete subparts; the representation of territorial interests; and the acknowledgement that some political jockeying is inherent when political actors exercise control over the structure of political institutions. Political structures that incorporate these values will often provide much less than proportional representation for minorities.

For example, by increasing the diversity of interests within a legislative body, proportional representation may hinder the legislature's ability to reach agreement, take action, and govern.³⁹ A polity might prefer an electoral structure that favors groups that enjoy broad support and, presumably, pursues centrist policies, to one that facilitates the election of representatives of a wide range of political points of view. At-large elections and multimember districts enable the majority to elect all the legislators in a jurisdiction. This arguably promotes centrist, jurisdiction-wide-oriented policies and enhances the prospects for legislative action, albeit at the price of reduced representation of minorities.

Proportional representation also tends to promote an ideological or partisan approach to politics. A polity may instead prefer to consider representation in territorial terms. The traditional districting norms of compactness, contiguity, and respect for political subdivision lines encourage thinking of the polity as composed of neighborhoods or other territorial communities, rather than of parties, ideological groups, or other types of interests. The longstanding and widespread use of single-member legislative districts reflects the hold of the territorial vision on representation and the place-based approach to government in the American political imagination.

Single-member territorial districts, however, are frequently at odds with proportional representation.⁴⁰ Single-member dis-

³⁸ *Bandemer*, 478 US at 131-34.

³⁹ See Kenneth A. Shepsle, *Representation and Governance: The Great Legislative Trade-off*, 105 Pol Sci Q 461 (1988).

⁴⁰ See, for example, Bernard Grofman, *For Single-Member Districts Random Is Not*

tricts discount the votes of minorities within particular districts and provide a "victory bonus" to district majorities.⁴¹ District systems predictably inhibit the representation of residually scattered groups, which are likely to experience difficulties in obtaining majorities within particular districts and may be unable to convert their popular votes into legislative seats.⁴² Single-member districts, thus, tend to limit the range of interests represented within the legislature and promote two-party systems.⁴³

Decisions concerning the structure of government are necessarily political in both the best and worst senses of the term. They reflect local judgments concerning the balance and adjustment of a variety of contending principles: majority rule and minority influence; effective governance and the representation of diverse interests; centrist politics and a voice for political extremes; and place-based or territorial, as opposed to partisan or ideological, issues and concerns. There is no one right answer or principled formula that establishes the proper mix of representational concerns.

Further, when politicians control the apportionments that affect their own electoral prospects, or the prospects of their political allies, a considerable amount of self-interested political jockeying is inevitable. District lines "are rarely neutral phenomena,"⁴⁴ and when politicians design electoral systems they are

Equal, in Bernard Grofman, et al, eds, *Representation and Redistricting Issues* 55 (Lexington Books, 1982); Daniel H. Lowenstein and Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L Rev 1, 53 (1985).

⁴¹ See Gordon E. Baker, *The "Totality of the Circumstances" Approach*, in Bernard Grofman, ed, *Political Gerrymandering and the Courts* 203, 209 (Agathon Press, 1990)(stating that, in a single-member district system, "[o]rdinarily, the party winning a majority of statewide votes will capture a disproportionately larger percentage of seats"); Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts*, in Grofman, et al, eds, *Representation and Redistricting Issues* at 7 (stating that "even under ideal circumstances a district system of electing legislative representatives always tends to overrepresent the dominant party in a given election year")(cited in note 40).

⁴² See Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L Rev 77, 145 (1985).

⁴³ According to "Duverger's Law," a proposition advanced by French political scientist Maurice Duverger, plurality voting favors the two-party system. See William H. Riker, *Duverger's Law Revisited*, in Bernard Grofman and Arend Lijphart, eds, *Electoral Laws and Their Political Consequences* 19 (Agathon Press, 1986). Single-member districts necessarily entail plurality voting within a district. Of course, at-large or multimember jurisdiction-wide elections without cumulative voting, or any proportionality rule, would favor the two-party system or the largest interests even more strongly.

⁴⁴ *Gaffney*, 412 US at 753.

likely to do so with the probable political effects in mind. The Supreme Court has repeatedly affirmed the propriety of political control over the structure of politics,⁴⁵ even though that means some political groups will be able to promote their own electoral fortunes at the expense of others.⁴⁶ In the Court's view, the determination of how legislators are to be elected is "a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls."⁴⁷

Thus, respect for state and local political self-determination and a commitment to treating apportionment and districting as "essentially political processes of the sovereign States"⁴⁸ constrains the proportionality value implicit in the vote-dilution doctrine. The constitutional vote-dilution doctrine requires both governmental intent to disfavor minority representation and a significant and persistent impact on the minority group's ability to participate in and influence the local political process. The judicial assessment of an electoral mechanism's impact on minority representation requires "an intensely local appraisal of the design and impact" of the particular electoral scheme "in the light of past and present reality, political and otherwise."⁴⁹ This includes an evaluation of the minority group's ability to achieve representation without the election of its own candidates to the legislature and the burdens that the minority group faces when it seeks to participate in local politics. Thus, states and localities may conduct elections in a manner that limits the likelihood that minorities will attain proportional representation, provided that the electoral mechanisms are not "conceived or operated as purposeful devices"⁵⁰ for "minimizing, cancelling out or diluting the voting strength"⁵¹ of minorities, and that the deviation from proportional representation of minorities is not too severe and protracted.

Consistent with the inherently political nature of decisions regarding representation, the Court has indicated that the politi-

⁴⁵ See *Voinovich*, 113 S Ct at 1156-57; *Grove v Emison*, 113 S Ct 1075, 1081 (1993); *Gaffney*, 412 US at 752-54.

⁴⁶ *Bandemer*, 478 US at 129 (plurality opinion) ("As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.").

⁴⁷ *Id* at 133.

⁴⁸ *Gaffney*, 412 US at 754.

⁴⁹ *Regester*, 412 US at 769-70.

⁵⁰ *Chavis*, 403 US at 149.

⁵¹ *Lodge*, 458 US at 617.

cal branches may reset the constitutional balance to promote the proportional representation of minorities.⁵² The 1982 amendments to Section 2 of the Voting Rights Act provide that an electoral mechanism may unlawfully dilute the votes of minorities protected by the Act even if it was not adopted with invidious intent. As interpreted in *Thornburg v Gingles*,⁵³ plaintiffs may establish unlawful vote dilution under Section 2 in jurisdictions in which there is a "politically cohesive" minority group, an electoral structure that favors the majority over the minority, and a pattern of racially polarized voting that interacts with the majority-reinforcing electoral structure effectively to deny the minority political representation.⁵⁴

The Voting Rights Act requires an appraisal of the "totality of the circumstances" of the state or locality whose electoral structure is under challenge.⁵⁵ The statute expressly denies that it creates an entitlement to proportional representation.⁵⁶ However, with the elimination of the constitutional requirement of invidious intent, amended Section 2 reduces the weight given to other political constraints and pushes the racial vote-dilution doctrine towards the norm of proportionality.

B. Strict Scrutiny of Racially Motivated Districting

Although constrained by respect for other political values, the vote-dilution doctrine itself constrains states and localities from ignoring the impact of their political institutions on minority representation. However, the vote-dilution doctrine, both in its constitutional and statutory forms, has never precluded states and localities from going further and adopting structures and systems that facilitate the election of minority representatives. For example, a jurisdiction could voluntarily switch from at-large elections to single-member districts, or from single-member districts to jurisdiction-wide elections with cumulative or limited voting, even if its preexisting electoral structure did not violate constitutional or statutory bans on vote dilution. Vote dilution's politically constrained proportionality is a floor for minority representation, not a ceiling.

⁵² See *Gingles*, 478 US at 85-86 (O'Connor concurring). See also *South Carolina v Katzenbach*, 383 US 301, 323-27 (1966).

⁵³ *Gingles*, 478 US at 30.

⁵⁴ *Id.* at 48-51.

⁵⁵ 42 USC § 1973(b).

⁵⁶ *Id.*

Or so it seemed until two years ago when, in *Shaw v Reno*,⁵⁷ the Supreme Court first indicated that certain state actions that increase racial minority representation could be unconstitutional even if they did not dilute the white majority's votes. Although *Shaw* focused on a reapportionment that created a bizarrely shaped district, this year the Court went further in *Miller v Johnson*⁵⁸ by holding that all legislative districting decisions predominantly motivated by race are subject to strict judicial scrutiny even if the legislature's action enhanced minority representation. These two decisions, and their concern with the purposeful use of race in districting, may very well limit the ability of states and localities to go beyond the requirements of the vote-dilution doctrine to voluntarily adopt representation systems that enhance minority electoral success. Indeed, the Court's latest doctrinal approach to race and representation may ultimately be subversive of the vote-dilution doctrine itself, at least when applied to the representation of minority racial groups.

1. *Shaw v Reno and district shape.*

In *Shaw v Reno*, the Supreme Court held for the first time that a legislative apportionment may be unconstitutional even absent a showing of vote dilution.⁵⁹ *Shaw* addressed a claim that a North Carolina congressional redistricting plan violated the Equal Protection Clause.⁶⁰ The plaintiffs alleged that the plan created two African-American majority districts of very unusual shape, that were drawn "without regard to any other considerations, such as compactness, contiguosity, geographical boundaries, or political subdivisions,"⁶¹ simply to assure that African-American voters, who accounted for 20 percent of the population of the state, would be able to elect two of North Carolina's twelve members of the United States House of Representatives.⁶² The Court held that the allegation that the districting plan could be understood only as a racial classification stated a claim under the Equal Protection Clause, and that such a plan would be subject to strict judicial scrutiny.⁶³

⁵⁷ 113 S Ct at 2816.

⁵⁸ 115 S Ct at 2475.

⁵⁹ *Shaw*, 113 S Ct at 2816.

⁶⁰ *Id.*

⁶¹ *Id.* at 2821.

⁶² *Id.* at 2820.

⁶³ *Shaw*, 113 S Ct at 2828.

Although *Shaw* cited *Gomillion v Lightfoot*⁶⁴ and *Wright v Rockefeller*⁶⁵ as precedents, neither case involved arguable race-conscious action without something more—either the outright disenfranchisement of minority voters or irregular district lines that diluted minority political power. *Gomillion* involved outright disenfranchisement. Alabama's redrawing of the Tuskegee city line denied the African-American plaintiffs in *Gomillion* the right to vote in Tuskegee municipal elections.⁶⁶ As a municipality, Tuskegee provided basic public services, enacted laws, engaged in regulation, and wielded the police power on behalf of, and with respect to, its residents. Alabama's line drawing excluded the African-American residents of Tuskegee from municipal elections and thereby denied them all voice in the community's political processes. The new boundary in *Gomillion* did not simply separate whites and African-Americans—it effectively evicted African-Americans from their local polity.⁶⁷

In *Shaw*, by contrast, the individual congressional districts had no service provision, legislative, regulatory, or police authority. The relevant unit of government was not the individual district but the state congressional delegation as a whole, if not the entire House of Representatives. The North Carolina districting plan did not deny anyone the right to vote for the state's delegation to the House of Representatives. Thus, changing district lines did not leave anyone without representation.

Wright v Rockefeller involved the additional element of arguable vote dilution. Although the plaintiffs alleged that specific district boundaries were "drawn on racial lines" or were "motivated by considerations of race,"⁶⁸ the districting plan apparently minimized the number of districts in which African-Americans and Puerto Ricans could wield political influence in New York City's congressional delegation.⁶⁹

⁶⁴ 364 US 339 (1960). *Gomillion* is cited and discussed in *Shaw*, 113 S Ct at 2823, 2825-26.

⁶⁵ 376 US at 52. *Wright* is cited and discussed in *Shaw*, 113 S Ct at 2825-28.

⁶⁶ *Gomillion*, 364 US at 341.

⁶⁷ This reading of *Gomillion* as a disenfranchisement case is consistent with Justice Felix Frankfurter's majority opinion, which grounded the Court's decision in the Fifteenth Amendment, "which forbids a State from passing any law which deprives a citizen of his vote because of his race." Id at 345. Only Justice Charles Whittaker, concurring separately, interpreted the case as presenting a question of racial classification under the Fourteenth Amendment rather than disenfranchisement in violation of the Fifteenth Amendment. Id at 349.

⁶⁸ *Wright*, 376 US at 55.

⁶⁹ Id at 54-55.

By contrast, *Shaw* presented no claim of vote dilution.⁷⁰ The number of North Carolina congressional districts in which both African-Americans and whites had effective majorities was closely proportionate to their share of the North Carolina population.⁷¹ Instead, the *Shaw* plaintiffs raised an "analytically distinct claim,"⁷² that the boundaries of the challenged districts "cannot be understood as anything other than an effort to segregate . . . [voters] on the basis of race,"⁷³ and that alone was sufficient to trigger strict judicial scrutiny.

a. *Race as a districting factor.*

The *Shaw* opinion was marked by an uncertain mix of concerns over the use of race and North Carolina's drastic departure from traditional territorial districting factors, such as compactness and respect for political subdivision lines. The *Shaw* Court focused on the claim that North Carolina had intentionally relied on race in designing its African-American majority Congressional districts. With considerable hyperbole, the Court referred to such districts as segregated and suggested that the purposeful creation of African-American majority districts "bears an uncomfortable resemblance to political apartheid."⁷⁴ The districts in question, however, were only 57 percent and 56 percent African-American (with African-Americans accounting for only 50.5 percent and 53.5 percent of the registered voters respectively)⁷⁵, and were thus far more integrated than most congressional districts in the United States. In addition, unlike segregation, the districting plans did not physically separate state residents into distinct self-governing entities; rather, it drew lines solely for the purpose of electing a state delegation to Congress. Hence, the Court's heated language grossly exaggerated both the extent and the significance of the racial separation in the North Carolina apportionment plan. The hyperbolic rhetoric, however, under-

⁷⁰ *Shaw*, 113 S Ct at 2824. See also *Johnson v Miller*, 864 F Supp 1354, 1370 (S D Ga 1994) ("In both *Shaw* and the instant case, the plaintiffs suffered no individual harm; the 1992 congressional redistricting plans had no adverse consequences for these white voters."), *aff'd*, 115 S Ct 2475 (1995).

⁷¹ African-Americans constituted approximately 20 percent of the population; the challenged districting provided two majority-minority districts out of a total of twelve districts. *Shaw*, 113 S Ct at 2819-20.

⁷² *Id* at 2830.

⁷³ *Id*.

⁷⁴ *Id* at 2827.

⁷⁵ *Shaw v Hunt*, 861 F Supp 408, 472 (E D NC 1994), *prob jur noted*, 115 S Ct 2639 (1995).

scored the Court's notion that race-conscious districting is a problem even in the absence of vote dilution.

Shaw extended the Court's growing general concern with racial classifications⁷⁶ to include the use of race in designing systems of representation, even in systems that are intended to benefit racial minorities. Racial classifications, the *Shaw* Court observed, generally "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility."⁷⁷ When used by the state in the allocation of legislative seats, such a classification "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which [they] live—think alike, share the same political interests, and will prefer the same candidates at the polls."⁷⁸ Moreover, such a plan sends an "equally pernicious" message to the representatives elected from districts "obviously . . . created solely to effectuate the perceived common interests of one racial group" that "their primary obligation is to represent only the members of that group, rather than their constituency as a whole."⁷⁹ According to the *Shaw* Court, these representational harms—the reinforcement of the stereotype that voters of the same race tend to think and vote alike, and the signal that elected officials should represent only the racial majority—are of constitutional magnitude, even in the absence of vote dilution.⁸⁰

Although any use of race in the design of representative institutions would appear to trigger these representational harms, the Court retreated from an absolute color-blindness requirement. As the Court acknowledged, it had "never . . . held that race-conscious state decision making is impermissible in *all* circumstances."⁸¹ Indeed, in *United Jewish Organizations of Williamsburgh, Inc. v Carey* ("UJO")⁸² the Court had upheld New York's intentional use of race to enhance minority represen-

⁷⁶ See *City of Richmond v J.A. Croson Co.*, 488 US 469 (1989); *Wygant v Jackson Bd. of Educ.*, 476 US 267 (1986). Similarly, *Johnson*, 115 S Ct at 2475, was decided within a few weeks of *Adarand Constructors, Inc. v Peña*, 115 S Ct 2097 (1995), in which the Court overruled *Metro Broadcasting, Inc. v FCC*, 497 US 547 (1990), and held that all racial classifications, including those imposed by the Federal Government as well as those imposed by states and localities, are subject to strict judicial scrutiny.

⁷⁷ *Shaw*, 113 S Ct at 2824.

⁷⁸ *Id* at 2827.

⁷⁹ *Id.*

⁸⁰ *Id* at 2827-28.

⁸¹ *Shaw*, 113 S Ct at 2824 (emphasis in original).

⁸² 430 US at 144.

tation in the state legislature. Three of the eight Justices who participated in *UJO* found that the intentional use of race was not unconstitutional if the state neither intended nor accomplished vote dilution.⁸³ Furthermore, the *UJO* majority held that a state could consider race when districting in order to satisfy the requirements of the Voting Rights Act.⁸⁴

The *Shaw* Court also acknowledged the inevitability of some attention to race, given the political nature of the districting process:

[R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.⁸⁵

b. *The role of district shape.*

Despite, or perhaps, because of its recognition that race may, and inevitably will, play some role in districting, the *Shaw* Court did not directly address the question of when, and to what extent, race might properly be a districting factor. Instead, much of *Shaw* focused on the issue of district shape.⁸⁶ The Court's description of the North Carolina African-American majority district under attack dwelt on its "bizarre" shape. The Court indicated that a state commits unconstitutional racial gerrymandering when it "concentrate[s] a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivi-

⁸³ Id at 166 (opinion of Justice White, joined by then-Justice Rehnquist and Justice Stevens)(stating that "as long as whites in Kings County, as a group, were provided with fair representation, we cannot conclude that there was a cognizable discrimination against whites or an abridgment of their right to vote on the grounds of race"). See also id at 179-80 (Justice Stewart, joined by Justice Powell, concurring)(noting that "the record here does not support a finding that the redistricting plan undervalued the political power of white voters," but appearing to rest their determination that the New York plan was not unconstitutional on the fact that "[t]he clear purpose with which the New York Legislature acted" was to obtain Department of Justice preclearance, which "forecloses any finding that [New York] acted with the invidious purpose of discriminating against white voters").

⁸⁴ Id at 155-65 (opinion of Justice White, joined by Justices Brennan, Blackmun, and Stevens); *UJO*, 430 US at 179-80 (opinion of Justice Stewart, joined by Justice Powell).

⁸⁵ *Shaw*, 113 S Ct at 2826 (emphasis in original).

⁸⁶ Id at 2825, 2826, 2831.

sions.”⁸⁷ The significance of “bizarre” shape to the proof of the excessive or inappropriate use of race in districting was highlighted by the Court’s treatment of *UJO*. According to the *Shaw* Court, a critical distinction between New York’s permissible use of race in *UJO* and North Carolina’s illegitimate use of race in *Shaw* was that the districts in *UJO* “adhered to traditional districting principles” while those in *Shaw* did not.⁸⁸

Thus, bizarre shape appeared to provide a means of applying a doctrine, premised on the belief that any use of race is inherently harmful, to a political setting in which some use of race to safeguard minority representation may be permissible and some awareness of race is inevitable. If the gravamen of the harm from excessively race-conscious districting is the “pernicious”⁸⁹ message it sends to the public and public officials about the role of race in politics, then a focus on shape might be appropriate. Districts that depart considerably from traditional districting principles would be subject to strict judicial scrutiny because, given their “extremely irregular”⁹⁰ shapes, they would clearly announce that they were drawn with race in mind—causing all the attendant representational harms of reinforcing stereotypes and racial signalling to elected representatives. By contrast, smoothly shaped districts would not send the same message about the centrality of race to the districting process and, thus, might not communicate the same message about the role of race in voting. Presumably, when a not “extremely irregular” majority-minority district elects members of the minority to office, the voters will “read” the election results, not as a message about the role of race in politics, but as the judgment of a distinctive *geographically* defined community. Only when the legislature departs from territoriality is the message about the role of race in politics likely to be decoded by the public.

c. The problems with district shape as a constitutional standard.

Shaw’s use of shape as a means of holding together the Court’s conflicting commitments to permitting some use of race in apportionment, while generally proscribing race-conscious districting, was highly problematic. First, even as it dwelt on the

⁸⁷ Id at 2827.

⁸⁸ Id at 2829.

⁸⁹ *Shaw*, 113 S Ct at 2827.

⁹⁰ Id at 2824.

bizarre shape of the North Carolina districts, *Shaw* disclaimed any reliance on shape or traditional districting principles in its new doctrine. Adherence to the traditional districting criteria of compactness, contiguity, and respect for political subdivision lines was not constitutionally required.⁹¹

Second, although there are significant prudential reasons for utilizing territorial factors in the election of representatives, such as the representation of place-based interests or the asserted connection between territorial districts and popular political participation, they do not provide a constitutional basis for compelling states and localities to abide by the traditional territorial districting criteria.

Certainly, "[g]eographic boundaries have served traditionally, and perhaps intuitively, as the most common basis" for political representation, because "there is a spatial dimension to human organization."⁹² Many of the most important interests and concerns people have relate to their homes, their neighbors, the adjacent streets and roads, and their immediate geographic environment.⁹³ Attention to territory—to the interests of people in compact and contiguous areas, and to the interests of people living in preexisting geographically defined neighborhoods or within local political subdivisions—can, thus, advance the political interests of residents that are linked to territory.⁹⁴

But, former Speaker of the House Tip O'Neill notwithstanding, not all politics is local; that is, not all voter interests with respect to government are tied to place of residence. Other political interests might be more effectively represented through nonterritorial modes of selecting representatives. As John Stuart Mill once contended, "the feelings and interests which arrange mankind according to localities . . . [are not the only ones] worthy of being represented."⁹⁵ Some people "have other feelings and interests, which they value more than they do their geo-

⁹¹ *Id.* at 2827.

⁹² Elaine Spitz, *Majority Rule* 56 (Chatham House, 1984).

⁹³ People have an interest, in particular, in local government, since many taxes are imposed and services provided on a local basis, and people may choose to settle, or remain, in areas because of the mix of local public services, regulatory programs, and taxes. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J Pol Econ 416 (1956).

⁹⁴ See *Hays v Louisiana*, 839 F Supp 1188, 1200 (W D La 1993) ("[T]here is no more fundamental unit of societal organization in the history of Louisiana than the parish."), vacated and remanded, 114 S Ct 2731 (1994).

⁹⁵ John Stuart Mill, *Considerations on Representative Government* 167 (Harper & Brothers, 1867).

graphical ones."⁹⁶ There is no reason for territory to be "the sole principle of their political classification."⁹⁷

The appropriate role for place-based factors in the election of representatives may vary according to what the representative body in question does, or, more normatively, what we wish it would do. Where the principal function of the government in question is to address place-specific interests—garbage collection, street repair, and local recreation—then close attention to territoriality may be appropriate. Where, however, the representative body in question is not involved in providing services to particular places, in allocating limited resources to the conflicting demands of territorial communities, or in granting powers to, or overseeing the activities of, subordinate governments, there is less need to attend to place-based factors in framing the mechanism for the election of representatives. The differences among people in a state with respect to the actions the United States Congress ought to take on such federal matters as international-trade policy, health-care reform, welfare policy, deficit reduction, or the Internal Revenue Code, may have less to do with place within the state than with ideology, ethnicity, partisanship, or other nonterritorial interests. Indeed, there might be a positive value in reducing the role of territoriality in congressional elections if we thought Congress ought to devote less time to place-specific pork-barrel projects and meddling in local affairs and more effort to setting policy on matters of national significance.

Besides representing interests that are connected to specific areas, territorial districting may promote popular political participation and facilitate citizen oversight of elected representatives. Voters may be more likely to engage with their neighbors in the discussion, debate, and deliberative interaction so necessary to democratic life than with people who are physically distant from them.⁹⁸ Political campaigns may be easier to organize, candidacies easier to finance, and get-out-the-vote drives easier to mount in territorial districts.

Whether the use of territorial districts and attention to contiguity, compactness, and subdivision lines in the crafting of districting plans actually promote political participation and oversight of elected representatives is an unresolved empirical

⁹⁶ Id.

⁹⁷ Id.

⁹⁸ See Nancy L. Schwartz, *The Blue Guitar: Political Representation and Community* 12-13 (University of Chicago Press, 1988).

question.⁹⁹ Many important civic associations are territorially based, and there is some evidence that recognition of congressional candidates by their constituents is enhanced when districts are composed of meaningful political units.¹⁰⁰

On the other hand, as the Supreme Court observed thirty years ago, "[m]odern developments and improvements in transportation and communications make rather hollow, in the mid-1960s, most claims that deviations from population-based representation can validly be based solely on geographical considerations."¹⁰¹ Three decades later, with the rise of direct mail, community-access cable television, talk radio, the Internet, and the information superhighway, the necessity of physical proximity for political communications and the oversight of incumbents seems less certain than ever.¹⁰² In addition, not all organizations and associations engage in political activity structured along political subdivision or geographic lines. Professional, business, religious, ethnic, ideological, environmental, and other organizations may transcend territorial lines within a state. Democratic participation is a vitally important goal for any system of representation, but it is unclear just how necessary territorial districting is to attain that goal.

Moreover, the one-person, one-vote doctrine's stringent requirement of population equality inevitably constrains the role territorial factors may play in districting. Indeed, one person, one vote exemplifies the primacy of the value of voter equality over the representation of discrete territories. The one-person, one-vote doctrine has downgraded compactness and congruence of district lines with political subdivision borders to a distant second place, behind population equality, in the criteria for legislative districting. This is particularly true for congressional districts.¹⁰³ Taken together, the requirements of population equality

⁹⁹ See *Shaw*, 861 F Supp at 471-72 (comparing anecdotal evidence of low name recognition of congressional representatives and "supposed inattentiveness" of representatives to particular events or localities in their noncompact districts with higher voter participation in North Carolina congressional elections following the creation of the irregular districts).

¹⁰⁰ See Richard G. Niemi, *The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering*, 33 UCLA L Rev 185, 189 (1985).

¹⁰¹ *Reynolds*, 377 US at 580.

¹⁰² See Lowenstein & Steinberg, 33 UCLA L Rev at 22 ("Given modern methods of transportation and communication, the size or shape of a district has little effect on the ability of the legislator to represent his or her constituents.")(cited in note 40); Niemi, 33 UCLA L Rev at 189 (cited in note 100).

¹⁰³ See *Karcher v Daggett*, 462 US 725 (1983).

ty, decennial redistricting, and the use of increasingly sophisticated computer technologies that allow redistricting bodies swiftly to shift wards and census tracts across an array of potential apportionment schemes, have over the past three decades eroded the significance of traditional districting criteria.¹⁰⁴

Not only do traditional territorial districts lack constitutional warrant, but the notion of bizarre shape is difficult to reduce to a determinate test or a judicially manageable standard. As Professors Richard Pildes and Richard Niemi have reported, political scientists have developed three different criteria for assessing district shape: dispersion, or how spread out a district is; regularity, or whether a district's boundaries are smooth or contorted; and distribution of population, or whether the district encapsulates most of the population in its area.¹⁰⁵ A district can be highly irregular on one dimension of shape, but not another—it can be long and narrow but with smooth borders, concentrated in one area but with sharply irregular borders, or have irregular borders yet include most of the area's population.¹⁰⁶ Thus, we lack not only a basis for constitutional concern with district shape but also a constitutional definition of what a proper district shape ought to be.

Finally, the focus on shape tends to define constitutional harm in terms of public perception rather than legislative action. The harm is not that the legislature is taking race into account in the apportionment of districts, but that it is *seen* to do so by

¹⁰⁴ A significant element in the connection between territoriality and participation is not the shape of a political unit's borders but their relative stability. Irregular borders, *per se*, do not prevent an area from functioning as a political community. Many states and localities have jagged edges and odd shapes. Given that municipal, county, and state borders are relatively fixed, over time, even irregular borders can become known so that even oddly shaped states and localities develop settled existences whose territorial contours are understood by their residents. Ultimately, mental geography is more important than physical geography. Grass-roots democracy can take hold in any community, regardless of shape, so long as the community's dimensions are known to its members.

However, legislative district lines, especially congressional district lines, rarely will have a settled existence. With the advent of the one-person, one-vote doctrine, district lines must be redrawn every decade in light of population changes. Given the Supreme Court's stringent requirement of population equality, congressional district borders will be particularly sensitive to population fluctuations, although all legislative districts are subject to revision with each decennial census. The unsettled state of district lines, then, limits voters' potential understanding of the scope of their political community and the identities of their fellow constituents.

¹⁰⁵ Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich L Rev 483, 536-59 (1993).

¹⁰⁶ *Id.*

the public. If shape is the crucial factor, the legislature may engage in race-conscious districting, rely on its own stereotypes concerning racial voting behavior, and create districts dominated by one race or another—and surely an elected politician will understand his or her district's racial demographics even if the general public is less informed—so long as the legislature uses traditionally shaped districts that leave the public blissfully ignorant of the legislature's intentional use of race.

Political camouflage is an unusual judicial directive to a legislative body and an uncertain normative foundation for a constitutional mandate. It is a rare constitutional principle that gives greater scope to legislative action when the legislature is able to hide what it is doing from the public. A doctrine based on appearances seems quite cynical. If appearance matters, it is presumably because a deeper value is offended by the appearance. If the value vindicated by *Shaw* is racial neutrality, then it is difficult to see why, given the Court's own principles, the concern with racially "segregated" districts should be cabined to irregularly shaped districts and not expanded to invalidate any intentional use of race in districting not narrowly tailored to remedy unconstitutional racial vote dilution. Although *Shaw* refused to go that far, *Miller v Johnson* took a large step in that direction. Indeed, *Johnson* suggests that *Shaw*'s use of shape may have been just a way station on the road to a direct attack on the intentional use of race in the design of electoral systems.

2. *Miller v Johnson and predominant racial motivation.*

With *Miller v Johnson*,¹⁰⁷ the Supreme Court shifted its attention from district shape to legislative motive. The Court held that evidence that race is the "predominant" determinant of the configuration of district lines is sufficient to trigger strict scrutiny of a legislative districting plan, even if the plan did not produce districts of bizarre or irregular shape.¹⁰⁸ Under *Johnson*, bizarre shape may be sufficient to state a claim of unconstitutional racial motivation because it may serve as evidence that the legislature was predominantly motivated by race rather than other districting principles. However, a claim of bizarre shape is

¹⁰⁷ 115 S Ct at 2475.

¹⁰⁸ Id at 2488-93.

not necessary.¹⁰⁹ Rather, racial motivation, not the deviation from traditional districting principles, is the gravamen of the Court's racial gerrymandering doctrine.¹¹⁰

Although shifting the focus from shape to "predominant racial motive," avoids the problems of indeterminacy and the lack of constitutional warrant for a district-shape test, *Johnson* does raise a host of new questions. To what extent may a legislature intentionally use race in districting in order to comply with the requirements of the Voting Rights Act? What does "predominant" racial motivation mean? In the many political settings in which race is intertwined with partisanship, ideology, and other electoral factors, how can racial motivation be distinguished from otherwise constitutional legislative efforts to use districting plans to benefit particular parties or candidates, regardless of race?

a. *From shape to motive.*

*Miller v Johnson*¹¹¹ involved a challenge to Georgia's congressional districting plan that, under Department of Justice prodding, produced three African-American majority districts out of a total of eleven districts. As in *Shaw*, there was no claim that white votes had been diluted on a statewide basis. With African-Americans accounting for 27 percent of the state's population, three African-American majority districts provided roughly proportional representation for both whites and African-Americans.¹¹² Moreover, although the brunt of the plaintiffs' attack targeted the Eleventh Congressional District, that district was not bizarre or highly irregular compared to other districts in Georgia or to congressional districts in other states.¹¹³

Nevertheless, the Court affirmed the district court's conclusion that "race was the predominant factor motivating the drawing of the Eleventh District,"¹¹⁴ and held that predominant racial motive alone was sufficient to trigger strict judicial scrutiny, even without proof that the district had a bizarre or irregular shape. Factors other than shape, including the history of the redistricting process and statements by participants in that process, provided the proof of racial motivation.¹¹⁵ *Johnson* thus

¹⁰⁹ Id at 2485-88.

¹¹⁰ Id at 2486.

¹¹¹ 115 S Ct at 2475.

¹¹² Id at 2483.

¹¹³ *Johnson*, 864 F Supp at 1396-97 (Edmondson dissenting).

¹¹⁴ *Johnson*, 115 S Ct at 2488.

¹¹⁵ Id at 2489-90.

permits opponents of race-conscious districting to challenge both bizarrely shaped and smoothly shaped, but racially motivated, district boundaries.

As in *Shaw*, the *Johnson* Court emphasized that the harm from racially motivated districting is not injury to the voting power of any particular group of voters, but the racial stereotyping that necessarily underlies the purposeful use of race. "When the State assigns voters 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, share the same political interests, and will prefer the same candidates at the polls.'"¹¹⁶ Consistent with *Johnson*'s shift in emphasis from district shape to legislative motive, the Court found the harm of racially motivated districts is not the message they send to the public or to elected officials—since the public might not get the message when a nonbizarrely shaped district is created—but the legislature's own reliance on racial stereotypes. Stereotypical thinking is thus harmful by definition, regardless of whether there is a demoralizing impact on the general public or any other representational harm.

Like *Shaw*, the *Johnson* decision does not resolve the extent to which legislatures may base districting decisions on race. The Court indicated that race might be used in districting if it were narrowly tailored to achieve a compelling state interest.¹¹⁷ The Court did not state that an apportionment plan would be subject to strict scrutiny anytime race influenced legislative judgment; rather, only decisions in which race was the "predominant" or "overriding" motive would require searching judicial review.¹¹⁸ Yet, *Johnson* suggests that color blindness is the standard in districting, with consideration of race permitted only when strictly necessary to remedy unconstitutional vote dilution, or, perhaps, to meet the requirements of the Voting Rights Act.

b. *The remedial use of race.*

Johnson significantly limited the availability of a remedial defense for the intentional use of race. Carefully avoiding the question of whether "compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of

¹¹⁶ Id. at 2486, quoting *Shaw*, 113 S Ct at 2827.

¹¹⁷ *Johnson*, 115 S Ct at 2490.

¹¹⁸ Id.

any interest in remedying past discrimination,"¹¹⁹ the Court indicated that even if compliance with the Act is a compelling interest, a jurisdiction could not use the Act as a shield for racially motivated districting if such districting was not strictly necessary to avoid Voting Rights Act liability.

Georgia's principal defense in *Johnson* was that it used race in order to satisfy the Department of Justice's preclearance requirements.¹²⁰ As a "covered jurisdiction" under the Voting Rights Act,¹²¹ Georgia cannot implement a new congressional districting plan without the prior approval, or preclearance, of the United States Department of Justice.¹²² The Justice Department refused to preclear Georgia's first two districting plans, which had proposed two—but not three—African-American majority districts.¹²³ Georgia argued that satisfying the Department of Justice provided the state with a compelling interest to intentionally create a third African-American majority district.¹²⁴

A similar contention had succeeded in *UJO*, in which New York relied on the Justice Department's refusal to preclear its initial legislative districting plan to justify its use of race in drawing subsequent district boundaries.¹²⁵ The *UJO* Court placed the burden on the plaintiffs attacking New York's districting plan to demonstrate that the state's race-based

¹¹⁹ Id at 2490-91.

¹²⁰ Id at 2490.

¹²¹ *Johnson*, 115 S Ct at 2483.

¹²² 42 USC § 1973c (1988). The Voting Rights Act also provides that a covered jurisdiction may implement a change in a "standard, practice, or procedure with respect to voting" by obtaining a declaratory judgment from the United States District Court for the District of Columbia approving the proposed change. Id. In practice, however, administrative review by the Justice Department is the more common method of seeking preclearance, with declaratory judgments being the exception. See Abigail M. Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* 158 (Harvard University Press, 1987). Justice Department review is generally cheaper and faster. Id. Speed is particularly important when review of a decennial redistricting is at stake. The one-person, one-vote requirement means that if approval of a legislatively proposed districting plan is delayed, politicians "run the risk that redistricting lines will be drawn by a court—a very high-risk situation, especially for incumbents." Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: "When it Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 Cardozo L Rev 1237, 1264 (1993).

¹²³ *Johnson*, 115 S Ct at 2483-84.

¹²⁴ Id at 2491.

¹²⁵ *UJO*, 430 US at 149-52.

districting was not necessary to satisfy the requirements of Section 5,¹²⁶ the Court then found that the plaintiffs had failed to carry their burden.¹²⁷

In *Johnson*, however, the Court rejected the contention that a state "has a compelling interest in complying with whatever preclearance mandates the Justice Department issues."¹²⁸ Departing from *UJO*, the *Johnson* Court placed the burden on the state to demonstrate that compliance with Section 5 requires racially motivated districts,¹²⁹ and the Court refused to defer to the Justice Department's application of Section 5 in determining whether the state's action was actually necessary to satisfy Section 5.¹³⁰

Under *Beer v United States*,¹³¹ Section 5 permits the Department of Justice to reject a change in voting standards, practices, or procedures if the change was adopted for a discriminatory purpose or has a "retrogressive" effect, that is, if it makes the minority groups protected by the Act worse off. Although Section 5 cases typically involve claims of retrogression, *Johnson* did not. The two Georgia plans denied preclearance would not have reduced the representation of African-Americans compared to Georgia's preexisting congressional apportionment. Both plans increased the number of African-American majority districts, from one out of ten to two out of eleven. Therefore, these plans were "ameliorative" and not retrogressive.¹³² Moreover, the Court agreed with the district court's finding that the Justice Department had failed to demonstrate that the state's initial failure to enact a districting plan with three African-American majority districts evinced discriminatory intent.¹³³ Thus, Georgia's intentional creation of a third African-American majority district to satisfy the Department of Justice was not necessary to comply with Section 5 and could not satisfy strict scrutiny.

¹²⁶ Id at 161 n 19.

¹²⁷ Id at 163-64 (opinion of Justice White, joined by Justices Brennan, Blackmun, and Stevens). Two Justices went further, determining that the fact that "[t]he clear purpose with which the New York Legislature acted"—to obtain Department of Justice preclearance—"forecloses any finding that it acted with the invidious purpose of discriminating against white voters." Id at 180 (Justice Stewart, joined by Justice Powell, concurring).

¹²⁸ *Johnson*, 115 S Ct at 2491.

¹²⁹ Id.

¹³⁰ Id at 2491-92.

¹³¹ 425 US 130 (1975).

¹³² *Johnson*, 115 S Ct at 2492.

¹³³ Id.

Johnson's restrictive treatment of a Section 5 defense for race-based districting would appear to require a similarly narrow approach to a Section 2 defense, that is, to a claim that a jurisdiction may use race in apportionment in order to avoid liability for vote dilution under Section 2 of the Voting Rights Act. Presumably, the jurisdiction could rely on Section 2 only if its electoral structure actually diluted minority votes in violation of the Act. Thus, the good-faith desire to avoid or settle a vote-dilution suit would not suffice; the jurisdiction would have to demonstrate that its electoral system was actually unlawful under the Act. In effect, it would have to bring, and prevail in, a vote-dilution suit against itself in order to demonstrate that its use of race was narrowly tailored to avoiding Section 2 liability.

c. *The definition of "predominant" motive.*

With respect to the role of racial motivation in triggering strict judicial review, it is unclear what work the adjectives "predominant" and "overriding" do in the Supreme Court's test. To be sure, *Johnson*, like *Shaw*, acknowledged the inevitability of legislative awareness of "racial demographics" in its "redistricting calculus."¹³⁴ The *Johnson* Court placed the burden on plaintiffs to demonstrate that a legislature was not simply aware of racial considerations but actually motivated by them in making a districting decision.¹³⁵ Evidentiary difficulties aside, if a plaintiff could prove that the legislature drew a district's boundary lines in one location rather than another "in part 'because of,' not merely 'in spite of'"¹³⁶ the race of the voters affected thereby, then the legislature would be engaged in the sort of racially motivated decision making that would trigger strict scrutiny. Even a district with smooth lines tightly focused on a central core would trigger strict judicial scrutiny if plaintiffs could demonstrate that the legislature drew those particular boundaries in order to maximize the number of voters of one race within the district. If a legislature was considering two alternative districting plans, both of which created districts that satisfied traditional districting criteria, but one created a African-American majority district and the other did not, and if the legislature adopted the former plan in order to create that African-American majority district, then the legislature's action would appear to be racially motivated.

¹³⁴ *Id.* at 2488.

¹³⁵ *Id.*

¹³⁶ *Johnson*, 115 S Ct at 2488.

It is not clear, then, what it means for race to be a “predominant” or “overriding” motive. Perhaps if race was one of a number of reasons behind a particular district configuration, so that the plan with the African-American majority district also created more compact districts or districts more congruent with political subdivision lines, then race would not be a “predominant” or “overriding” factor.¹³⁷ Yet *Johnson’s* implication is that if putting people of a particular race in a particular district was the but-for cause of the boundaries in a particular plan, then the enactment of that plan is subject to strict scrutiny.

d. *Racial and political motives.*

The real difficulty in applying *Johnson’s* racial-motivation test will be determining what counts as a *racial* motive. Both *Shaw* and *Johnson* concerned districting intended to enhance the ability of minority-group voters to elect their preferred candidates. What if the legislature takes the race of the voter into account in districting in order to enhance the electoral prospects of a particular party? Is that *racially* motivated districting? Or is it partisan gerrymandering? In *Davis v Bandemer*,¹³⁸ the Court determined that manipulating district lines in order to assure that one party has a majority in a particular district is not unconstitutional. Even if bizarre districts result, the practice is constitutional unless it significantly dilutes the votes of the injured party in the jurisdiction as a whole. Indeed, the very districting plan at issue in *Shaw* withstood a claim of partisan gerrymandering—even though the districts were the same “bizarre” and “distorted” shapes—because the Republican plaintiffs failed to show that the plan significantly diluted their ability to influence the political process in North Carolina.¹³⁹

Thus, the distinction between racially motivated and partisan districting is central to the Court’s new approach to equal protection challenges to districting. A close review of the recent racial districting cases, including the Texas and North Carolina cases that the Supreme Court has agreed to hear in the 1995 Term,¹⁴⁰ demonstrates the difficulty of disentangling the tightly woven racial, partisan, incumbent-protective, and particular-can-

¹³⁷ See *DeWitt v Wilson*, 856 F Supp 1409 (E D Cal 1994), aff’d 115 S Ct 2637 (1995).

¹³⁸ 478 US 109 (1986).

¹³⁹ *Pope v Blue*, 809 F Supp 392 (W D NC 1992), aff’d mem, 113 S Ct 30 (1992).

¹⁴⁰ *Vera v Richards*, 861 F Supp 1304 (S D Tex 1994), prob jur noted as *Bush v Vera*, 115 S Ct 2639 (1995); *Shaw*, 861 F Supp at 408.

didate-favoring threads that are woven together in a districting plan.

The Texas redistricting plan challenged in *Vera v Richards*¹⁴¹ strikingly illustrates the fusion of racial, partisan, and candidate-specific concerns in the districting process. The *Vera* court concluded that three of the thirty congressional districts created by the Texas legislature in 1991 were "unconstitutionally segregated" products of intentional racial districting.¹⁴² As it happened, all three were majority-minority districts—an African-American district in Dallas, and an African-American district and a Hispanic-American district in Harris County (Houston). But many of the most irregular boundaries of these districts resulted from legislative efforts to protect the political interests of white incumbents in adjacent districts and of particular state legislators who were considering running for Congress.¹⁴³

In both Dallas and Harris Counties, more compact majority-minority districts could have been created. However, white Democratic incumbents "were quite interested in keeping African-American voters in their newly configured districts," because these voters were viewed as Democrats needed by the incumbents to repel Republican challengers.¹⁴⁴ In Dallas County, the African-American majority district was shaped by the conflict between two white Democratic incumbents and an African-American state legislator who was "the principal architect of," and the presumptive Democratic candidate for, the new district.¹⁴⁵ The incumbency-protection concerns of the white Democratic representatives from adjacent districts strongly influenced the configuration of the district.¹⁴⁶ One particular irregularity resulted from the efforts of a white incumbent to keep his own neighborhood in his old district.¹⁴⁷ Indeed, white incumbents' residences were a noticeable determinant of district lines and a major source of irregularities, "indentations," and "appendages" throughout the Texas redistricting plan.¹⁴⁸

¹⁴¹ 861 F Supp at 1304.

¹⁴² Id at 1309.

¹⁴³ Id at 1321-22, 1325.

¹⁴⁴ Id at 1322. See also *Vera*, 861 F Supp at 1340 (stating that "Congressman Andrews desired to maintain as many minority constituents as possible in his Democratic district.").

¹⁴⁵ Id at 1320.

¹⁴⁶ Id at 1322 n 23.

¹⁴⁷ Id at 1322.

¹⁴⁸ *Vera*, 861 F Supp at 1318, 1334.

In Harris County, the districting process exhibited two central features: the legislature's effort to keep a white incumbent's district "intact and Democratic,"¹⁴⁹ and the struggle between the two state legislators planning to run for Congress to make the new Hispanic-American district as congruent as possible with their own respective state legislative districts.¹⁵⁰ This battle involved the "primarily Anglo 'home' precincts" of one of the contenders as well as minority neighborhoods.¹⁵¹ As in Dallas, white Democrats sought to protect their congressional seats by retaining as many of their minority constituents as possible. In the court's view "[i]ncumbent [white] Democrats were fencing minorities into their districts or into the new majority-minority districts, while those same minorities were effectively being removed from Republicans incumbents' districts."¹⁵² Although the district court emphasized the centrality of racial considerations, the court's own words suggest that race, partisanship, and incumbency protection were inextricably intertwined.

Moreover, although *Vera* invalidated only the three new majority-minority districts, the same unholy amalgam of racial, partisan, and incumbency-protective motivations influenced the shaping of many of the state's districts. The *Vera* court discussed the impact of congressional redistricting on nearly two dozen Texas counties other than Dallas and Harris. The court found that by splitting those counties, the legislature had consistently placed predominantly African- and Hispanic-American areas into districts represented by white Democratic incumbents, and predominantly white areas into districts represented by white Republican incumbents.¹⁵³ None of these counties needed to be split because its population exceeded the maximum number of persons required for a single district.¹⁵⁴ Yet, despite the "extremely high correlation between the irregular features of many of these districts and the racial populations they are drawn to include or exclude,"¹⁵⁵ the court invalidated only the three majority-minority districts in Dallas and Harris counties.

¹⁴⁹ Id at 1325.

¹⁵⁰ Id at 1324 n 27.

¹⁵¹ Id at 1325.

¹⁵² *Vera*, 861 F Supp at 1341.

¹⁵³ Id at 1326-28 n 34.

¹⁵⁴ Id at 1334 n 41 (noting that only six counties needed to be split because of large populations; except for Harris and Dallas, these counties were not among the list of counties in which the court traced the splitting of the population according to race).

¹⁵⁵ Id at 1345.

According to the *Vera* court, when the mix of racial, partisan, and incumbent-protective concerns generates a new majority-minority district, that district is a specimen of racial gerrymandering. However, when the same mix of factors produces a white-majority district—including one that shares common, presumptively irregular borders with an unlawful majority-minority district or one that has “racially distinct appendages”¹⁵⁶—then no racial gerrymandering has occurred, and there is no constitutional violation, regardless of how subversive of “traditional districting criteria”¹⁵⁷ the result may be. Invalidating only majority-minority districts may be one way of distinguishing racial gerrymandering from its partisan counterpart, but this hardly seems an appealing—let alone a constitutional—principle.

In North Carolina, partisanship and incumbency also played major roles in shaping the redistricting map and the configuration of particular districts.¹⁵⁸ The impetus for creating two new majority-minority districts originated with the state’s Republicans who believed “they could derive partisan political advantage”¹⁵⁹ thereby. Conversely, portions of the Democratic leadership initially resisted the creation of any majority-minority districts.¹⁶⁰ The Democrat-controlled legislature passed a districting plan with only one majority-minority district; the Department of Justice denied preclearance.¹⁶¹ Republican legislators continued to push for two majority-minority districts—a plan that would have threatened the seats of two incumbent white Democrats.¹⁶²

Concerned about Justice Department preclearance and Voting Rights Act liability, the Democrats ultimately opted for the creation of two majority-minority districts.¹⁶³ As the panel in *Shaw v Hunt* noted, “[a] final factor may well have tipped the decision of the Democratic leadership to accept the Attorney General’s refusal to preclear” the original Democratic plan and to enact an alternative scheme: the realization that they could create two majority-minority districts while minimizing the threat to

¹⁵⁶ *Vera*, 861 F Supp at 1345.

¹⁵⁷ *Id* at 1334.

¹⁵⁸ *Shaw*, 861 F Supp at 458-60.

¹⁵⁹ *Id* at 458.

¹⁶⁰ See *id* at 460.

¹⁶¹ *Id* at 461.

¹⁶² *Shaw*, 861 F Supp at 465.

¹⁶³ *Id* at 466-67.

incumbent white Democrats.¹⁶⁴ Instead of drawing both majority-minority districts on the coastal plain, the Democrats developed a plan that located one district in the "Republican-leaning Piedmont Crescent [thus] insur[ing] that its traditionally African-American [and thus presumptively Democratic] vote, now a potential majority, would no longer be diffused . . . in a Republican (hence, under present circumstances, white) majority voting population."¹⁶⁵

Within this basic design, many "detailed oddities and irregularities of shape" could also "be traced in whole or part to concerns for incumbent protection"¹⁶⁶—and the only incumbents so protected were white Democrats. The Democratic state legislature struggled "to preserve politically-critical core areas in the districts of three politically-affected incumbent Congressmen and to avoid pairing any of them in realigned districts."¹⁶⁷ For example, although the heavily African-American "home precincts" of two incumbent white Democratic Congressmen "were geographically situated for ready inclusion" in one of the newly created majority-minority districts, "they were retained, as were their entire counties, in their existing districts."¹⁶⁸ Consequently, the shape of the new majority-minority district was further distorted to incorporate additional African-American populations. Even the judge dissenting from the *Shaw v Hunt* panel's decision to uphold the North Carolina districting scheme acknowledged that, whatever role racial motivation played, it was "consistent with an intent to maximize the incumbency of all congresspersons affiliated with the controlling political party."¹⁶⁹

Disentangling race from party poses a formidable task beyond the specific redistricting plans at issue in *Shaw* and its progeny.¹⁷⁰ Race is closely correlated with partisan affiliation

¹⁶⁴ Id at 465.

¹⁶⁵ Id at 466.

¹⁶⁶ *Shaw*, 861 F Supp at 469.

¹⁶⁷ Id at 468.

¹⁶⁸ Id.

¹⁶⁹ Id at 496 (Voorhees dissenting).

¹⁷⁰ The combination of racial, partisan, and incumbent factors marked the post-1990 congressional redistricting process in states other than North Carolina and Texas. For example, in *Hays*, 839 F Supp at 1205 n 54, the court treated the Louisiana legislature's plan as a racial gerrymander, and acknowledged that "[t]estimony at the trial revealed that the [plan was enacted] . . . by a legislative alliance between the Black and the Republican Caucuses," thus suggesting that partisan motivation played at least some role in the districting plan as well.

and attitudes about race play a crucial role in structuring beliefs about politics and public policy in many jurisdictions. Currently, African-Americans are disproportionately associated with the Democratic Party,¹⁷¹ while the Republican Party is overwhelmingly white.¹⁷² As African-Americans have come to play a more significant role in the Democratic Party, the percentage of whites voting Republican has risen sharply.¹⁷³ According to Thomas and Mary Edsall, "[r]acial divisions have become ingrained in partisan politics in the deep South and, increasingly, across the urban and suburban wards of all major metropolitan areas."¹⁷⁴ They contend that "in the South, race has increasingly become the defining characteristic of partisanship," so that, although "the South has produced more examples of biracial coalition than any other region, the general thrust in the South is a steady movement toward a politics of black and white."¹⁷⁵

Indeed, in two recent cases, federal appellate courts relied on just this congruence of racial and partisan divisions to reject vote-dilution claims.¹⁷⁶ The panels found that although minority-preferred candidates were regularly defeated at the polls, "divergent voting patterns among white and minority voters [were] best explained by partisan affiliation,"¹⁷⁷ not by race. According to Judge Frank Easterbrook, "losses by the candidates black voters prefer may have more to do with politics than with race."¹⁷⁸

Where there is such a close correlation of racial and partisan voting patterns, it will be difficult to determine if a particular gerrymander is racial or partisan.¹⁷⁹ In deciding whether inter-

¹⁷¹ See Katherine Tate, *From Protest to Politics: The New Black Voters in American Elections* 62-65 (The Russell Sage Foundation, 1994).

¹⁷² See Grofman, 14 Cardozo L Rev at 1268 n 120 (noting that the vast majority of African-American officeholders have been Democrats, and that, while African-Americans accounted for over 20 percent of the delegates to the 1988 Democratic National Convention, only 2 percent of the delegates to the Republican National Convention were African-American)(cited in note 122).

¹⁷³ Thomas Byrne Edsall with Mary D. Edsall, *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics* 41-44 (W.W. Norton & Co., 1991).

¹⁷⁴ *Id* at 284-85.

¹⁷⁵ *Id* at 259.

¹⁷⁶ *League of United Latin American Citizens, Council No. 4434 v Clements*, 999 F2d 831 (5th Cir 1993), cert denied, 114 S Ct 878 (1994)("LULAC"); *Baird v Consolidated City of Indianapolis*, 976 F2d 357 (7th Cir 1992), cert denied, 113 S Ct 2334 (1993).

¹⁷⁷ *LULAC*, 999 F2d at 861.

¹⁷⁸ *Baird*, 976 F2d at 361. Accord, *Whitcomb v Chavis*, 403 US 124 (1971).

¹⁷⁹ The distinction becomes even more difficult if, as some African-American activists have urged, an avowedly African-American political party were to gain the electoral support of a substantial portion of the African-American community. See Michael K. Frisby,

twined race-party (or race-party-incumbency) cases are to be treated as "predominantly" racial or not, the Court faces two options. It can limit the *Johnson* doctrine to redistricting plans in which the legislature's "predominant" motive was to make it easier for one race to elect members of that race to office; or it can apply *Johnson* to any situation in which a legislature "sorted" voters by race—that is, placed people of different races in different districts—even if the legislature's motive was to elect members of a particular party to office from a particular district.

The first option is consistent with the Court's frequently invoked goal of limiting judicial intervention into the inherently political realm of redistricting. However, as the review of the cases currently pending before the Supreme Court illustrates, it may prove difficult in practice to disentangle race and party. Moreover, this approach may conflict with the Court's underlying hostility toward legislative stereotypes regarding race. If it is "offensive and demeaning"¹⁸⁰ to assume that African-Americans will vote for African-Americans, or whites for whites, simply because of their race, why is it not equally "offensive and demeaning" to assume that African-Americans are more likely to vote for Democrats and whites for Republicans?

On the other hand, applying *Johnson* to racial districting that has partisan purposes could lead to close judicial scrutiny of many more apportionment plans. When race and party overlap, how will the Court square its opposition to racially motivated line drawing with its well-established acceptance of nondilutive partisan line drawing, and its preference for political control of the districting process? A broad application of *Johnson* could very well involve the Court in the close review of partisan gerrymandering, and of redistricting in general, that the Court strained to avoid in *Davis v Bandemer*.¹⁸¹

Ultimately, the sorting of racial and partisan motivation will turn on a further consideration of the meaning of constitutionally proscribed racial motivation. That is the subject of part III of this Article. But that analysis first requires a closer examination of the relationship between *Johnson's* approach to racial motivation and the older vote-dilution doctrine.

Seeking a Voice: Blacks Are Searching for New Ways to Make Voting Strength Count, Wall St J A1 (Feb 6, 1995)(noting African-American dissatisfaction with the Democratic Party and consideration of a predominantly African-American third party).

¹⁸⁰ *Johnson*, 115 S Ct at 2486.

¹⁸¹ 478 US at 109.

II. THE CONFLICT BETWEEN VOTE DILUTION AND COLOR BLINDNESS

*Shaw v Reno*¹⁸² and *Miller v Johnson*¹⁸³ do not directly challenge the vote-dilution doctrine. Both permit the use of race to eradicate the effects of past racial discrimination, and both leave open the possibility that a jurisdiction may use race in order to comply with the Voting Rights Act.¹⁸⁴ *Johnson's* rejection of Georgia's Voting Rights Act defense may reflect only a new insistence that the redistricting jurisdiction bear the burden of demonstrating that compliance with the Voting Rights Act actually necessitates the use of race. Mere invocation of the Act, or of Department of Justice threats to deny preclearance, is now insufficient unless the Voting Rights Act, properly interpreted, mandates race-conscious districting.¹⁸⁵

To be sure, *Johnson* forces states and localities to walk a tightrope. Either the jurisdiction's preexisting plan, or its proposed new plan, actually runs afoul of the Voting Rights Act, in which case the jurisdiction is exposed to liability but may be able to use that potential liability as a shield against a charge of unconstitutional racially motivated districting. Or, the jurisdiction has not violated the Act, in which case it is not liable for retrogression or vote dilution, and its purposeful use of race would be unconstitutional.¹⁸⁶ But *Johnson* does not subject a jurisdiction to inconsistent commands, and its preference for color blindness does not expressly conflict with the constitutional and statutory proscriptions of vote dilution.

Yet, on closer inspection, *Johnson* is in considerable tension with the vote-dilution doctrine. In leaving open the possibility

¹⁸² 113 S Ct 2816 (1993).

¹⁸³ 115 S Ct 2475 (1995).

¹⁸⁴ *Johnson*, 115 S Ct at 2490-91; *Shaw*, 113 S Ct at 2830-31.

¹⁸⁵ In *United Jewish Organizations, Inc. v Carey*, 430 US 144, 180 (1977) ("UJO") (Stewart and Powell concurring in the judgment), Justices Potter Stewart and Lewis Powell concluded that Department of Justice pressure, whether or not authorized by the Voting Rights Act, provided districting jurisdictions with a defense against equal protection claims, because the fact of such pressure "forecloses any finding" that the jurisdiction acted with discriminatory intent.

¹⁸⁶ *Shaw* and *Johnson* may narrow the availability of the statutory vote-dilution defense. Under *Thornburg v Gingles*, 478 US 30, 50 (1986), one of the preconditions to a valid vote-dilution claim is that the minority group is large and compact enough to constitute a majority in a properly drawn district. *Shaw's* concern with district shape may lead lower courts to require stronger proof of compactness. And *Johnson's* hostility to assumptions about the role of race in politics could lead judges to require greater proof that a jurisdiction is politically polarized by race.

that compliance with the Voting Rights Act is a compelling interest, the Court also left open the possibility that the Act does *not* "provide a compelling interest independent of any interest in remedying past discrimination."¹⁸⁷ In other words, a jurisdiction whose system of representation was adopted without discriminatory intent but which, nevertheless, has a dilutive effect in violation of the Voting Rights Act, may not have recourse to the "remedying past discrimination" defense. By leaving open the question of whether compliance with the Voting Rights Act constitutes a compelling interest, *Johnson* suggests that it may be unconstitutional to engage in race-based districting to eliminate statutory vote dilution when, due to the absence of invidious intent, the statutory dilution is not unconstitutional.

Similarly, a jurisdiction may move district lines to prevent a retrogression in the percentage of majority-minority districts and thereby obtain Department of Justice preclearance under Section 5 of the Voting Rights Act. The retrogression thereby avoided, however, might not have been the result of any intentional governmental discrimination but might, instead, have been due to demographic changes, such as the deconcentration of the minority population. Race-conscious districting to avoid retrogression that would have occurred without intentional governmental action might not be considered necessary to remedy past discrimination. If compliance with the Voting Rights Act does not "provide a compelling interest independent of any interest in remedying past discrimination,"¹⁸⁸ then such race-conscious action might very well be unconstitutional under *Johnson*. In other words, if compliance with the Voting Rights Act is not a compelling interest, redistricting to *maintain* a certain percentage of majority-minority districts could be as unconstitutional as Georgia's use of race in *Johnson* to *increase* the percentage of majority-minority districts.

The uncertainty over the availability of a Voting Rights Act defense is symptomatic of the basic conflict between the Court's new focus on racial motivation and the older vote-dilution doctrine. The vote-dilution and color-blindness doctrines rest on fundamentally opposed premises. The color-blindness doctrine insists that race has no place in politics; the vote-dilution doctrine assumes that, in practice, race is politically significant.

¹⁸⁷ *Johnson*, 115 S Ct at 2490-91.

¹⁸⁸ *Id.*

The color-blindness doctrine "derive[s] from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*."¹⁸⁹ It draws power from the normative claim that it is "offensive and demeaning" to assume that "voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"¹⁹⁰ From the color-blindness perspective, race-based districting is wrong because it reflects the assumption that racial groups act as political groups and because it reifies racial stereotyping in legislative districts. On this view, government must move beyond stereotypes and treat voters as individuals, not as members of racial or ethnic groups.

By contrast, the vote-dilution doctrine assumes that in some places and at some times voters do participate in politics as members of groups, and that race and ethnicity can be a significant factor in political behavior. As Justice Clarence Thomas pointed out critically in *Holder v Hall*,¹⁹¹ "the one underlying premise that must inform every minority vote dilution claim [is] the assumption that the group asserting dilution is not merely a racial or ethnic group, but a group having distinct political interests as well."

Vote dilution is necessarily about groups. In vote-dilution cases there is no claim that an individual has been denied the right to cast a ballot, to have it counted, or to have that ballot given the same nominal weight as all other ballots cast. Individuals are affected by vote dilution only insofar as they are members of politically cohesive groups.

By the same token, unlike affirmative-action remedies in government contracting, school admissions, employment or other settings, individuals *per se* are not harmed by vote-dilution remedies. The shift from at-large elections to single-member districts or the reapportionment of a single-member district system does not disenfranchise any voter and, as long as one person, one vote is respected, it does not deny any individual voter a fair opportunity to influence the outcome of an election. To be sure, a voter who is intentionally shifted from a district in which she is clearly a part of the political majority to a district in which she is in the minority may have reduced political influence, but that is due to

¹⁸⁹ *Adarand Constructors, Inc. v Peña*, 115 S Ct 2097, 2112 (1995)(emphasis in original).

¹⁹⁰ *Johnson*, 115 S Ct at 2486, quoting *Shaw*, 113 S Ct at 2827.

¹⁹¹ 114 S Ct 2581, 2597 (1994)(Thomas concurring in the judgment).

the salience of groups to politics within the districts, not to any reduction in the weight of her individual vote. As a member of a group, a voter's interests are protected as long as her group gets its fair share of seats in the jurisdiction as a whole. But as an individual, a voter "has no constitutional complaint merely because his candidate has lost out at the polls and his district is represented by a person for whom he did not vote."¹⁹²

Vote dilution can be established only when: (1) people participate in politics in groups, with one group that regularly prefers and votes for one set of candidates, parties, or policies, and another group that regularly prefers and votes for a different set of candidates, parties or policies; and (2) the electoral institutions affect the relationship between popular votes and legislative seats such that one group can win a greater percentage of legislative seats than its share of the vote would warrant, while other groups win less. Unless political preferences and voting behavior have strong patterns, electoral structures will not have predictable effects on electoral outcomes. There would be no reason for a legislature to favor at-large elections over single-member districts or vice versa unless electoral and demographic data indicate that a particular electoral structure would benefit a particular set of interests. Nor would the remedies for vote dilution work unless voters voted in predictable patterns.

There could be no such thing as the dilution of the votes of racial or ethnic minorities unless those minorities constituted politically distinctive groups. Indeed, minority vote dilution requires at least *two* racial groups that act as political groups—a minority group that is politically cohesive and regularly prefers certain candidates, parties, or policies, and a majority group that is also cohesive but generally prefers different candidates, parties, and policies. It is the interaction of a politically cohesive minority, a politically cohesive majority, and a significant cleavage between the two groups that makes vote dilution possible. Vote dilution actually occurs when these political conditions are combined with electoral systems that reinforce the jurisdiction-wide majority by making it a majority in more than its fair share of contests for legislative seats.

When racial groups function as distinctive majority and minority political groups with significantly divergent preferences, the candidates backed by the majority do not need the electoral

¹⁹² *UJO*, 430 US at 166 (plurality opinion). See also *Whitcomb v Chavis*, 403 US 124, 153-55 (1971).

support of members of the minority in order to win office. Thus, majority-backed candidates are less likely to seek minority votes and less likely to support the policies and programs put forward by the minority group, while candidates backed by the minority group receive relatively little electoral support from members of the majority. When relatively few voters cast ballots across group lines and relatively few candidates of the majority seek the support of the minority, the interests of the minority may receive less representation in the legislature than their numbers would otherwise suggest.

The vote-dilution doctrine is a response to the behavior of voters who regularly vote for candidates of their own racial or ethnic group and avoid voting for candidates preferred by the other group. When there is a sufficiently broad chasm between the two groups, racial-bloc voting denies the minority electoral success. Courts and legislatures cannot change the way people vote. Unlike private discrimination in education, housing or employment, ballot-box discrimination by voters is not actionable. Instead, the vote-dilution doctrine seeks to mitigate the political consequences of such private voting-booth decisions by dismantling electoral mechanisms that, in racially polarized settings, reinforce and extend the power of majorities and translate voters' discriminatory decisions into the reduction of minority representation in the legislature.

Whereas the vote-dilution doctrine is an empirically based approach to race and representation, *Johnson's* preference for color blindness is normative. For *Johnson*, government action based on the idea that racial groups are political groups is intrinsically harmful even if the government's action does not reduce the political power of any racial group. The harm is that the government is acting on the stereotype that people of the same race, because they are the same race, have common political interests and preferences. Such government action reinforces racial stereotypes and thus "retards [] progress [towards a multi-racial democracy] . . . and causes continued hurt and injury."¹⁹³

The two doctrines can come into direct conflict whenever a polity acts to promote the representation of a racial minority by altering a majority-reinforcing electoral structure which, although not adopted with discriminatory intent, interacts with racially polarized voting to reduce the ability of minority voters

¹⁹³ *Johnson*, 115 S Ct at 2494, quoting *Edmondson v Leesville Concrete Co.*, 500 US 614, 630-31 (1991).

to win legislative seats. If compliance with the Voting Rights Act is not a compelling interest, the color-blindness doctrine would limit permissible race-conscious action concerning representation to violations of the constitutional vote-dilution doctrine, that is, to intentional vote dilution. That would effectively undo the 1982 amendment to Section 2 of the Voting Rights Act which applies an "effects," and not an "intent," test.¹⁹⁴ If compliance with the Act is not a compelling interest then many instances of vote dilution proscribed by the statute could not, consistent with the Equal Protection Clause, be remedied.

Even if compliance with the Voting Rights Act is held to be constitutionally compelling, *Johnson* would still cast a shadow over state or local efforts to increase minority representation in situations where they are not required to do so by the Act. For example, in order to prove statutory vote dilution "[a] minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."¹⁹⁵ A minority group that is too small or too territorially dispersed to constitute a majority in a district has no statutory vote-dilution claim. A jurisdiction that acts to enhance the electoral prospects of such a small or scattered racial minority could run afoul of *Johnson*'s color-blindness norm and would not be able to avail itself of a Section 2 defense.¹⁹⁶

To be sure, voluntary efforts to enhance minority representation may be uncommon in racially polarized jurisdictions. Indeed, one of the reasons racially polarized voting is so troublesome is that it gives majority representatives relatively little incentive to take the interests of minorities into account. However, action to increase minority political power may occur, particularly when a polity is engaged in a debate over its constitution or in places where authority over electoral institutions is vested in groups other than the legislature—such as districting commissions, charter commissions, or constitutional conventions—whose members may be able to transcend group self-interest and focus on the representation of all groups in the community.

¹⁹⁴ 42 USC § 1973(b); Voting Rights Act Extension, S Rep No 97-417, 97th Cong, 2d Sess 2 (1982).

¹⁹⁵ *Gingles*, 478 US at 50 n 17.

¹⁹⁶ Similarly, as *Johnson* demonstrated, a Section 5 defense is available, if at all, only to those jurisdictions that use race to avoid a reduction in minority representation. *Johnson*, 115 S Ct at 1490-91. If a redistricting authority intentionally uses race in drawing district lines to improve or even maintain the electoral prospects of a minority, that may be unconstitutional under the color-blindness doctrine.

The extent to which the color-blindness doctrine limits discretion purposefully to facilitate more proportionate representation for racial and ethnic minorities will depend on the doctrine's domain. Both *Shaw* and *Johnson*, with their hyperbolic rhetoric of "political apartheid"¹⁹⁷ and "segregation,"¹⁹⁸ address the intentional creation of majority-minority districts. *Shaw* and *Johnson* plainly limit the ability of jurisdictions to draw district lines with the purpose of making people of one race the majority in a particular district. But the rationale of the color-blindness doctrine, its focus on legislative motive, and its premise that legislative action based on racial stereotypes is intrinsically harmful may have applications beyond majority-minority districts.

Certainly the intentional creation of minority-influence districts—districts in which a minority group does not constitute a majority but can wield political influence—could be vulnerable to constitutional challenge. The failure to provide an influence district for a minority that cannot meet the *Gingles* threshold requirement that it constitute a majority in a single-member district may not violate Section 2.¹⁹⁹ Under *Johnson*'s logic, if the failure to create an influence district does not violate Section 2, then the intentional creation of an influence district may actually be unconstitutional.

Nor is it clear that the color-blindness doctrine is limited to districting. As *Johnson* observed, "outside the districting context, statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object."²⁰⁰ In deemphasizing the significance of district shape, *Johnson* stressed that "it was the presumed racial purpose of state action, not its stark manifestation, that was the constitutional violation."²⁰¹ Could not *Johnson* apply to other changes in electoral systems, not obviously racial, if they were adopted by legislators who believe race is a powerful factor in politics and who acted for the express purpose of increasing racial minority representation?

What if, for example, a city with a relatively small local legislature, concerned about the inability of a small or residen-

¹⁹⁷ See *Shaw*, 113 S Ct at 2827.

¹⁹⁸ See *id.* at 2830; *Johnson*, 115 S Ct at 2487, quoting *Shaw*, 113 S Ct at 2830.

¹⁹⁹ The Supreme Court has not yet decided this issue. See *Gingles*, 478 US at 46-47 n 12; *Grove v Emison*, 113 S Ct 1075, 1084-85 n 5 (1993).

²⁰⁰ *Johnson*, 115 S Ct at 2487.

²⁰¹ *Id.*

tially dispersed minority group to elect its preferred candidates, expands its legislature to create more and smaller districts to enable the minority group to constitute a majority in one or more of the new districts? There is some evidence that a principal reason—perhaps even the “predominant, overriding” purpose—for the New York City Charter Revision Commission’s successful proposal in 1989 to expand the size of the City Council from thirty-five to fifty-one was to increase the number of Council seats controlled by racial minorities.²⁰² If an increase in the size of the legislature was motivated by the desire to increase minority representation, and therefore necessarily reflected the “offensive and demeaning” assumption that voters of the same racial group share political preferences, would it be subject to an equal protection challenge as “motivated by a racial purpose or object?” In this particular example, a Voting Rights Act defense would not be available since the Supreme Court has held that the size of an elected body cannot be treated as a standard, practice, or procedure dilutive of voting rights under Section 2.²⁰³

Or, suppose a jurisdiction were to switch its method of electing representatives from single-member districts to at-large elections with some form of proportional representation, such as cumulative voting, limited voting, or single-transferrable voting, in order to increase minority representation. Voting-rights activists have increasingly advocated such alternative electoral systems to improve minority representation.²⁰⁴ These alternative systems may be of particular benefit to residually dispersed minorities that are unable to benefit from single-member districts.²⁰⁵ They are also useful in situations involving multiple minority groups in close residential proximity to each other, where single-member districting invites political infighting

²⁰² See Frank J. Macchiarola and Joseph G. Diaz, *The 1990 New York City Districting Commission: Renewed Opportunity for Participation in Local Government or Race-Based Gerrymandering?*, 14 *Cardozo L Rev* 1175, 1186-87 (1993).

²⁰³ *Hall*, 114 S Ct at 2581. A change in the size of an elected government body will be treated as the sort of change in standards, practice, or procedures that triggers the requirement of Justice Department preclearance in covered jurisdictions under Section 5 of the Act, see *id* at 2586-87, but since the change in the example in the text would increase minority representation, it would be “ameliorative,” not “retrogressive,” and could not be justified as necessary to obtain the preclearance required by the Act.

²⁰⁴ See, for example, Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* (The Free Press, 1994).

²⁰⁵ See Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 *Colum L Rev* 418, 433-34 (1995).

among the different groups over the boundaries of, and thus the political control of, particular districts.²⁰⁶

If the legislative record disclosed that a jurisdiction was persuaded to change its form of legislative election for the principal purpose of enabling residually dispersed minorities to elect more representatives, would that not, under *Johnson's* rationale, trigger strict judicial scrutiny? Such an electoral shift, if undertaken for the "predominant" purpose of making it easier for racial or ethnic minority groups to elect their preferred candidates, might be unconstitutionally racially motivated since it arguably reflects the underlying assumption, denounced in *Johnson*, that race is an important factor in electoral behavior.²⁰⁷ Moreover, given that a single-member district system is not considered to be vote dilutive *per se*,²⁰⁸ and that courts have been reluctant to order alternative voting systems as remedies for vote dilution,²⁰⁹ a jurisdiction that changed its voting system in order to enhance minority representation would be unable to claim that its action is required by the Voting Rights Act and, thus, necessary to a compelling government interest.

It may seem farfetched to suggest that *Johnson* casts a shadow over changes to electoral systems other than redistricting. *Johnson*, like *Shaw*, was concerned only with a districting plan; the Court repeatedly referred to districting, redistricting, and a legislature's use of race "in drawing its district lines."²¹⁰ In both

²⁰⁶ For a review of the conflicts among minority groups in the recent redistricting of the New York City Council, see Macchiarola & Diaz, 14 Cardozo L Rev at 1225-31 (noting that "the most vexing decisions—indeed the decisions that caused the plan to be initially rejected by the Department of Justice—concerned the division of political power among the protected classes themselves.") (cited in note 202). See also *Johnson v De Grandy*, 114 S Ct 2647 (1994) (addressing conflict between African- and Hispanic-Americans in redistricting of Florida legislature).

²⁰⁷ See, for example, Temporary New York State Commission on Constitutional Revision, *The Delegate Selection Process: The Interim Report of the Temporary New York State Commission on Constitutional Revision* 5-12 (1994) (recommending that most delegates to New York State Constitutional Convention be elected by limited voting in order to promote equity in representation).²⁰⁷

²⁰⁸ See *Davis v Bandemer*, 478 US 109, 130 (1986) (stating that the tendency to give the party with a jurisdiction-wide majority more than its proportionate share of seats is "inherent in winner-take-all, district-based elections, and we cannot hold that such a reapportionment law would violate the Equal Protection Clause because the voters in the losing party do not have representation in the legislature in proportion to the state-wide vote received by their party candidates.").

²⁰⁹ See, for example, *Cane v Worcester County*, 35 F3d 921, 927-29 (4th Cir 1994); *McGhee v Granville County*, 860 F2d 110, 114-15, 120 (4th Cir 1988).

²¹⁰ *Johnson*, 115 S Ct at 2486. See also *DeWitt v Wilson*, 115 S Ct 2637 (affirming the district court's decision that reapportionment plan created by special masters, who considered race in drawing districts, did not constitute racial gerrymandering actionable under

cases, the Court brandished the image of racially motivated districting as segregation or balkanization that "carv[ed] electorates into racial blocs."²¹¹ Changing the size of an elected body or shifting from a district system to an alternative electoral scheme does not involve the separation of voters into distinct units. Nevertheless, the Court's focus on stereotyping—its concern with the "racial purpose of state action, not its stark manifestation"²¹² in bizarre districts—and its denunciation of government action based on the assumption that race constitutes a politically salient group certainly raises the possibility that a broad range of decisions concerning the structure of political institutions could be vulnerable to constitutional attack if they were made for the purpose of enhancing minority representation.

Johnson's underlying logic is that government may not act on the assumption that people of one race share particular preferences and beliefs. That implicitly challenges government actions taken to increase minority representation which rely on the assumption that racial minorities constitute politically salient groups, just as it challenges the provisions of the Voting Rights Act and the Court's own vote-dilution cases that are based on the same assumption.

Even if limited to districting, color blindness is in tension with the vote-dilution doctrine, which incorporates both attention to deviation from the norm of proportionate representation for racial minorities and respect for state and local discretion over the structure of political institutions. Holding together these two opposed approaches to the role of race in representation is likely to be a considerable challenge to the Supreme Court in the years ahead.

III. HOLDING THE TWO DOCTRINES TOGETHER

The basic premise of the color-blindness doctrine is that when government adopts a system of representation, as when government takes any other action, it must treat people as individuals, and not as members of racial or ethnic groups. Color blindness is an injunction against race essentialism, that is, the automatic assumption, recently denounced by Justice Thomas, "that members of the racial group must think alike."²¹³ Certain-

the Equal Protection Clause).

²¹¹ *Johnson*, 115 S Ct at 2494.

²¹² *Id* at 2487.

²¹³ *Holder v Hall*, 114 S Ct 2581, 2599 (1994)(Thomas concurring in the judgment).

ly, race is an ambiguous category, and racial groups are not hard and fast. Race does not determine policy preferences, political affiliations, or programmatic beliefs. People of one race disagree with each other sharply and agree with people of other races. Voters of one race do "cross lines" and vote for candidates of another race even in preference to candidates of their own race.²¹⁴

The color-blindness cases also may be treated as a warning about the potentially negative consequences of the most prominent form of race-based action concerning representation today—the manipulation of district lines to create "safe" majority-minority districts. These districts may retard rather than advance the process of providing greater inclusion of minorities' interests in representative government. As the Supreme Court has observed, these districts may "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin."²¹⁵ By underscoring the role of race in defining political interests, they pose the danger of exacerbating racial division, of causing people to think more in terms of race than they otherwise would. That is unlikely to benefit the interests of racial minorities.

Moreover, even if these districts do not reinforce race-conscious thinking among voters or elected officials, increasing the number of majority-minority districts may not be the best way to enhance minority representation. The creative cartography used to make a minority group the majority in one district necessarily reduces the number of minority voters in other districts. Depending on a variety of local political factors—the extent of racially polarized voting, if any, the size of the minority electorate remaining in the adjacent nonminority districts, and the partisan and other divisions among white voters in the white-majority districts—"packing" minority voters into majority-minority districts could, perversely, reduce minority influence in other districts and thus reduce minority representation overall.²¹⁶ Cer-

²¹⁴ For example, in late October 1995, a Wall Street Journal/NBC News poll presenting General Colin Powell as the Republican presidential nominee and President Clinton as the Democratic nominee found that a majority of white voters preferred General Powell to President Clinton, while an even larger majority of African-American voters preferred the President Clinton to General Powell. Gerald F. Seib, *More Conservatives Take Aim at Colin Powell, But Poll Shows Him With Presidential Firepower*, Wall St J A16 (Nov 2, 1995).

²¹⁵ *Shaw v Reno*, 113 S Ct 2816, 2832 (1993).

²¹⁶ For an insightful discussion of the variety of consequences for the overall representation of the interests of African-Americans that can result from the creation of African-American-majority districts, see Richard H Pildes, *The Politics of Race*, 108 Harv L

tainly, an increase in the number of minority representatives does not necessarily increase the substantive representation the minority's interests receive in the legislature. Whatever benefit the record number of African-Americans elected to Congress as a result of the post-1990 redistricting may have had for the advancement of any distinct African-American political agenda was surely swamped when the Democratic Party—the party which received the votes of most African-Americans—was ousted from power in the 1994 elections. And if, as some commentators contend but others vehemently deny, the creation of African-American majority districts led to Republican victories in the adjacent “whitened” districts from which African-American voters had been withdrawn, then the majority-minority district strategy may have harmed, rather than helped, minority interests.²¹⁷

But in rejecting the essentialist assumption that all people of the same race necessarily vote alike, the Court's color-blindness doctrine risks going too far in the other direction—of ignoring the proven evidence that in some jurisdictions and at some times, race is a crucial basis of interest-group formation, with racial differences forming significant lines of political division. Indeed, one of the reasons for the difficulty in disentangling racial from partisan districting is the central role that race and attitudes about the government's role in addressing racial discrimination have played in shaping the structure of contemporary American politics.

According to Edward Carmines and James Stimson, when “[r]acial concerns gained a prominent foothold on the national political agenda [in the 1960s], . . . they took on a clear partisan meaning” as “the Democratic party came to represent racial liberalism and the Republican party racial conservatism.”²¹⁸ Moreover, they contend, the centrality of race affected attitudes about public policy more generally. “[R]esponses to racial issues became associated with a set of liberal and conservative positions on a variety of policy issues.”²¹⁹ Differences among whites concerning

Rev 1359, 1376-89 (1995)(book review of Chandler Davidson and Bernard Grofman, eds, *Quiet Revolution in the South*)(cited in note 5).

²¹⁷ See id at 1380-81.

²¹⁸ Edward G. Carmines and James A. Stimson, *Issue Evolution: Race and the Transformation of American Politics* 116, 117 (Princeton University Press, 1989)(internal citations omitted). Carmines and Stimson define “racial conservatism” as “opposition to activist [F]ederal [G]overnment involvement in programs to ameliorate the effects of racism.” Id at 117.

²¹⁹ Id.

the appropriateness of an activist effort by the Federal Government to ameliorate the effects of racism came to be intertwined with attitudes toward government social-welfare programs and toward the New Deal state itself.²²⁰

Whereas in the 1950s and early 1960s attitudes about government social-welfare programs and about race were highly variable and largely uncorrelated, the two had become closely linked by the late 1960s and remained so through the 1980s.²²¹ Through this process, individual voter attitudes about a range of political issues have become increasingly internally consistent with "[r]acial issues . . . [which seemed to be] at the core of the increase in mass issue consistency" and which "provided a significant and stable element in the meaning of liberal/conservative political beliefs."²²² Today, Carmines and Stimson suggest that "racial matters are central to the apparent connotation of the terms of left/right discourse," and "nearly all the increase in the structure of political beliefs" over the last three decades "can be attributed to race."²²³

Not only is there some congruence of race and party, but race is often correlated with political beliefs and ideological divisions. As Katherine Tate found, African-Americans and whites tend to have significantly different views across a broad range of domestic issues, particularly those relating to race, social-welfare spending, job creation, and government involvement in the economy.²²⁴ Particularly with respect to issues that involve race, "Blacks and Whites are still widely divided."²²⁵ Moreover, although there is increasing division among African-Americans over policy positions and more African-Americans identify themselves as conservatives than did so in the 1960s, African-Americans in general are far more liberal than whites.²²⁶ Similarly, most African-Americans tend to have a strong sense of racial identity that transcends growing education, income, and economic class differentiation.²²⁷

²²⁰ Id. But see Paul M. Sniderman and Thomas Piazza, *The Scar of Race* 19-34, 175-76 (Belknap Press, 1993)(arguing that attitudes about racial policies are affected by ideological beliefs about activist government).

²²¹ Carmines & Stimson, *Issue Evolution* at 134-35, 137 (cited in note 218).

²²² Id. at 134.

²²³ Id. at 135.

²²⁴ Katherine Tate, *From Protest to Politics: The New Black Voters in American Elections* 33-38 (Russell Sage Foundation, 1994)(cited in note 171).

²²⁵ Id. at 38.

²²⁶ Id. at 29-30, 32-38.

²²⁷ Id. at 27 ("Of the few empirical studies . . . , most have found that it is not the poor

In attempting to disaggregate the distinct roles played by race, ideology, party, and social class in influencing African-Americans' views on policy questions, Tate found a "strong effect of racial identification on Blacks' party and ideological identifications" which compounded the direct effect of racial identification on policy views.²²⁸ Thus, although the Supreme Court was certainly right to condemn "the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live"²²⁹—necessarily share the same policy views or support the same candidates, the Court should be prepared to acknowledge that in some places and at some times there may be considerable congruence of racial group with political belief and deep division between different racial groups over political questions.

Beyond the linkages of race, party, and politics at the national level, numerous statutory vote-dilution cases have established that in many states and localities racial groups function as political groups, with significant political differences between white majorities and racial minorities. Under *Thornburg v Gingles*, plaintiffs belonging to a minority group must prove that their group is "politically cohesive" and there is white bloc voting in the jurisdiction.²³⁰ According to Professor Samuel Issacharoff, "the case law throughout the 1980s established with dismaying regularity,"²³¹ the widespread existence of "politically cohesive" racial minorities and politically distinct majorities.²³² Similarly, Chandler Davidson and Bernard Grofman's examination of the application of the Voting Rights Act in the South found racial polarization to be pervasive.²³³

A. Reconciling the Normative and the Empirical

Although fundamentally in tension, *Johnson's* preference for color blindness and the vote-dilution doctrine can be reconciled

and working-class Blacks but the higher-status Blacks who possess the stronger racial consciousness and identities.").

²²⁸ Tate, *From Protest to Politics* at 45 (cited in note 171).

²²⁹ *Shaw*, 113 S Ct at 2827.

²³⁰ *Thornburg v Gingles*, 478 US 30, 51 (1986). See also *Grove v Emison*, 113 S Ct 1075, 1085 (1993) ("[A] court may not presume bloc voting within even a single minority group.").

²³¹ Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 Mich L Rev 1833, 1855 (1992).

²³² *Id.*

²³³ See Pildes, 108 Harv L Rev at 1366-70 (cited in note 5).

by combining the normative power of the former with respect for the empirical basis of the latter. *Johnson* is a directive against stereotypical thinking and an injunction against whatever tendency elected officials may have of too easily lapsing into racial essentialism. But the vote-dilution doctrine reminds us that in some places and at some times, racial groups can be politically cohesive and that racial divisions are significant in the political life of a particular jurisdiction. When there is empirical evidence that race is salient to local politics and that there is a considerable chasm between the preferences of the majority and the minority, then government actions that take these differences into account need not be the products of stereotypical thinking but may instead be a response to an "intensely local appraisal"²³⁴ of facts critical to understanding the local political situation. This, indeed, is how vote-dilution litigation typically proceeds, with private plaintiffs or the Department of Justice demonstrating both that minorities are "politically cohesive" and that racially polarized voting has had the effect of "submerging" the candidates preferred by the minority.

A finding of "political cohesion" or racial polarization does not mean that *all* members of the same race think or vote alike. Much as the politics of representation is necessarily the politics of groups, the determination of whether a number of voters are a politically salient group is necessarily probabilistic or statistical. Each person has individual, idiosyncratic preferences with respect to politics and policies, and each voter votes as an individual. But if enough voters of the same race vote the same way often enough, then race is an important factor in explaining the outcome of past elections and in predicting the results of future elections.

Nor does finding a linkage between race and political behavior mean that race determines political belief in any mechanical way. As the *Gingles* Court noted, members of racial or ethnic groups

frequently share socioeconomic characteristics, such as income level, employment status, amount of education, housing and other living conditions Where such

²³⁴ *White v Regester*, 412 US 755, 769-70 (1973).

characteristics are shared, race or ethnic group not only denotes color or place of origin, it also functions as a short-hand notation for common social and economic characteristics.²³⁵

When a statistically significant portion of a racial group votes one way, and a comparably significant segment of another group votes another way, the electoral outcomes are not a consequence of biology but a fact of politics.

Where racial groups are politically cohesive and racial division is salient to politics, it is not a violation of the color-blindness ban on stereotyping for a jurisdiction to take race into account in the design of its representative institutions. Governments often purposefully organize the election of representative bodies to provide for the representation of politically salient groups in rough proportion to their percentage of the population. Districting plans, by definition, are instituted to provide representation for different territorial areas within the jurisdiction, subject to the one-person, one-vote requirement that territorial representation be proportionate to population. Similarly, election systems may be designed—and district lines drawn—to provide proportionate representation for political parties.

The Supreme Court endorsed just such a bipartisan gerrymander in *Gaffney v Cummings*,²³⁶ when it reviewed a reapportionment of the Connecticut state legislature in which

virtually every Senate and House district line was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties, the only two parties in the State large enough to elect legislators from discernible geographic areas.

The Court determined that there was no constitutional objection to a “politically fair” plan that intentionally manipulated district lines “not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.”²³⁷

²³⁵ *Gingles*, 478 US at 64 (plurality opinion)(internal citation omitted).

²³⁶ 412 US 735, 752 (1973).

²³⁷ *Id.* at 753-54.

Unlike other areas of government action, like school admissions or employment decisions, legislative elections necessarily involve the representation of groups. Individuals are admitted to public colleges or receive government contracts, but due to the size of most American polities, only groups can effectively influence the outcome of most elections. To acknowledge that representative institutions may be designed with a concern for their impact on political groups, and to assure the fair representation of the interests of important groups, is not to disparage the dignity or autonomy of the individual voter, but to recognize the empirical fact that groups play a central role in representative government.

To be sure, the history of racial discrimination in this country counsels a special wariness about racially motivated government actions. Actions based purely on racial stereotypes or unsubstantiated assumptions about the place of race in politics are highly problematic. But if race is in fact a critical factor in describing the groups and divisions in a particular community, and the government's action is not dilutive in intent or effect, then there is no reason why the government should be constitutionally barred from designing its institutions to assure fair representation of different racial groups. Although a politics of race is normatively undesirable, when politics is about race, it may be appropriate for jurisdictions to be able to take race into account in structuring their politics.

Racial, partisan, and incumbency-protective considerations are often closely intertwined.²³⁸ Racial motivation may be difficult to distinguish from other political purposes where race functions like politics or ideology as a means of organizing voters and dividing the electorate. The Supreme Court has held that "politically fair" plans that purposely take partisanship into account in order to assure rough proportionate representation for the major political parties are constitutionally permissible.²³⁹ It is difficult to see why, in places in which a racial divide is politically central and race functions like party in organizing electoral groups and dividing political opinion, a jurisdiction ought to be barred from using a "politically fair" plan to assure appropriate representation of racial minorities. Indeed, as Justice Sandra Day O'Connor pointed out in *Davis v Bandemer*²⁴⁰ in arguing against the ex-

²³⁸ See notes 170-75, 218-27 and accompanying text.

²³⁹ *Gaffney*, 412 US at 752-54.

²⁴⁰ 478 US 109, 151 (1986)(O'Connor concurring).

pansion of the vote-dilution doctrine to encompass political parties as well as racial minorities, "[a]s a matter of past history and present reality, there is a direct and immediate relationship between the racial minority's group voting strength in a particular community and the individual rights of its members to vote and to participate in the political process." Thus, there is a "stronger nexus between individual rights and group interests" for race than for party.²⁴¹ Given this nexus, the case for permitting politics to use race in a nondilutive way when race is, in fact, politically salient is at least as strong as the case for *Gaffney's* voluntary bipartisan gerrymandering.

The color-blindness doctrine ought to be limited to cases in which jurisdictions acted from race-based stereotypes unsupported by empirical evidence of actual political practices. A jurisdiction charged with unconstitutional racially motivated districting ought to be able to rebut that claim by showing that it acted based on an informed understanding of its politics which demonstrates that race is politically salient within that jurisdiction. Only decisions based on the automatic assumption that people of a certain racial group or ethnicity vote the same way would be treated as racially motivated action. But reapportionments or alterations of the structure of representative institutions intended to provide fair representation to actual political groups in the community—whether or not defined in terms of race or ethnicity—should be treated as *politically* motivated decisions, not racially motivated decisions, and subjected only to the *Gaffney/Bandemer* requirement that the jurisdiction's action not be dilutive.

There is a hint in *Johnson* that this reconciliation of the color-blindness and vote-dilution doctrines may be acceptable to the Court. *Johnson* summarily dismissed Georgia's argument that the geographically dispersed African-American population in the Eleventh Congressional District constituted a community of interest that the state, relying on traditional districting criteria, could recognize in its districting plan.²⁴² The Court noted that the state did no more than provide a "mere recitation of purported communities of interest," which plaintiffs' expert had rebutted

²⁴¹ Id.

²⁴² *Miller v Johnson*, 115 S Ct 2475, 2490 (1995).

with a "comprehensive report [that] demonstrated the fractured political, social, and economic interests within the Eleventh District's black population."²⁴³

But the Court suggested that a state could treat racial groups as communities for districting purposes if, in fact, there was more than shared race to support the claim that the racial group constituted a community: "A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests."²⁴⁴ If a group exhibits similar preferences concerning policies and programs, and tends to vote for the same candidates, that should be treated as evidence of "some common thread of relevant interests."

Moreover, the territorial contours of such a group may have little to do with smooth shape or congruence with political boundaries.²⁴⁵ The three-judge panel in *Shaw v Hunt*²⁴⁶ determined that North Carolina's congressional districting plan—including the two districts with "highly irregular and geographically non-compact" borders²⁴⁷—provided for the representation of communities of interest.²⁴⁸ Each district was characterized by "substantial, relatively high degrees of homogeneity of shared socio-economic—hence political—interests and needs among its citizens."²⁴⁹ Despite their tortured shapes, "the two districts are among the most, rather than the least, homogeneous [of North Carolina's twelve districts], in terms of the material conditions and political opinions of their citizens."²⁵⁰

In order to make a showing that it acted from political motivation when it took race into account, a jurisdiction would presumably rely on the well-developed body of case law and statistical techniques developed in the context of Section 2 litigation to demonstrate that racial or ethnic groups are politically cohesive, and that local voting is racially polarized. Minority political cohesion and the sharp cleavage between majority and minority

²⁴³ Id.

²⁴⁴ Id.

²⁴⁵ As political scientist Douglas Rae has noted, not all "relevant political cleavages run along territorial lines. Sometimes they do; sometimes they don't." Douglas W. Rae, *Reapportionment and Political Democracy*, in Nelson W. Polsby, ed, *Reapportionment in the 1970s* 91, 108-09 (University of California Press, 1971).

²⁴⁶ 861 F Supp 408 (E D NC 1994), prob jur noted, 115 S Ct 2639 (1995).

²⁴⁷ Id at 469.

²⁴⁸ Id at 470.

²⁴⁹ Id.

²⁵⁰ *Shaw*, 861 F Supp at 470.

groups that racial-bloc voting reveals would be necessary to show that race is, in fact, a significant factor in political affiliation and voting behavior in the community. Only a jurisdiction that could prove racial political cohesion and the existence of a broad political chasm separating the majority and minority could show that it acted for the political purpose of promoting the fair representation of politically salient groups, and not in reliance on unproven racial stereotypes.

The "political motivation" defense would of necessity rely on some of the components of a Section 2 claim. But it is not an argument that the Voting Rights Act, *per se*, shields race-based action, and the defense would not be limited to only those jurisdictions able to demonstrate that they would be in violation of the Voting Rights Act without some race-conscious action. The central question is whether race is politically salient in a jurisdiction so that the use of race is not the reification of stereotypes but is, instead, consistent with the longstanding practice of American jurisdictions of taking political groupings and political interests into account in the design of political institutions. The *Gingles* factors of group cohesion and polarized voting are crucial to making that showing. Indeed, any jurisdiction that could show that its preexisting electoral scheme, or a "retrogressive" change, violated the Voting Rights Act would be able to demonstrate that race is a central factor in its politics. But a jurisdiction may be able to demonstrate that race is politically salient and, therefore, that its action is politically and not racially motivated, even though the jurisdiction has not violated the Voting Rights Act. In those situations, a jurisdiction ought to be free to go beyond what the Voting Rights Act requires and voluntarily promote more proportionate representation.

This could be significant in two situations. First, because the *Gingles* preconditions limit the ability of small and residentially dispersed minorities to bring vote-dilution claims, a Voting Rights Act defense would not protect race-conscious state or local action to increase the representation of such groups.²⁵¹ The political-motivation defense, however, would allow jurisdictions to redesign their political institutions to provide greater representation to small or dispersed racial or ethnic groups, provided they can demonstrate that these groups are in fact politically cohesive, with voting patterns distinct from those of the racial majority.

²⁵¹ See notes 195-96 and accompanying text.

Second, the vote-dilution doctrine accepts many political institutions, such as small legislatures and single-member district elections, that inhibit the representation of small or residually dispersed groups. The political-motivation defense would enable a jurisdiction to expand the size of its legislature or adopt cumulative or limited voting in order to promote the representation of small or dispersed politically salient racial minorities, even though its decision not to do so would not violate the Voting Rights Act.²⁵²

The normative force of the color-blindness doctrine ultimately rests on an empirical assumption. In *Johnson's* view, race has no place in politics; therefore, government action that puts race in politics must be subject to strict judicial review. That assumes that without the government's action, race is not in politics. But political science studies, public opinion surveys, and vote-dilution cases demonstrate that even in the absence of government action race, at some times and in some places, is already in politics due to the behavior of voters.²⁵³ At that point, when a jurisdiction acts in a race-conscious manner "to alleviate the consequences of racial voting at the polls and to achieve a fair allocation of political power"²⁵⁴ between politically cohesive racial groups, the jurisdiction is acting politically, not racially. As Justice Byron White observed in *UJO*, "[w]here it occurs, voting for or against a candidate because of his race is an unfortunate practice. But it is not rare. . . . It does not follow, however, that the State is powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls."²⁵⁵

This is not to say that particular forms of race-based action to increase minority representation, such as the creation of "safe" majority-minority districts, constitute wise policy or serve to advance the political position of racial minorities. As previously noted, the efficacy of majority-minority districts in promoting the substantive representation of minority interests, as opposed to increasing the number of minority faces in legislative halls, is hotly contested. Nor is it certain whether an increase in minority

²⁵² See *Voinovich v Quilter*, 113 S Ct 1149, 1156 (1993) ("[T]he federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. But that does not mean that the State's powers are similarly limited.") (internal citation omitted).

²⁵³ See notes 170-75, 218-27 and accompanying text.

²⁵⁴ *United Jewish Organizations, Inc. v Carey*, 430 US 144, 167 (1977) ("*UJO*") (plurality opinion).

²⁵⁵ *Id.* at 166-67.

representation outweighs the negative consequences of a reinforcement of the political salience of race that may result from a legislature's race-based action. But the advisability of majority-minority districts and, indeed, the assessment of the political costs and benefits of nondilutive race-conscious action for minority representation is better left to political, not judicial, determination. Elected officials have traditionally exercised the authority to determine the structure of political institutions and the mix of political values they will advance. Elected officials are likely to have a far better grasp of the political needs and concerns of their communities and the political effects of particular systems of representation than are judges. Provided they act based on an empirically informed analysis of the political alignments within their jurisdictions and without dilutive intent, elected officials should be given discretion to determine whether a given districting plan or electoral system will enhance minority representation and whether such a plan or system ought to be adopted.

B. Vote Dilution, Color Blindness, and Federalism

Judicially imposed restrictions on state and local discretion to design political institutions have significant federalism implications. The Court has repeatedly affirmed that "it is the domain of the States, and not the federal courts, to conduct apportionment in the first place."²⁵⁶ *Johnson*, however, would limit the states' "domain" and increase the role of the federal courts in reviewing state legislative districts and, potentially, other state decisions bearing on questions of representation. Indeed, *Johnson* would be the third major constitutional constraint on state political structures—in addition to the one-person, one-vote rule and the vote-dilution doctrine itself. Any constitutional requirement limits state and local political self-determination; a new constraint that is in considerable conceptual tension with a preexisting constitutional standard is particularly problematic.

The federalism implications of the *Johnson* doctrine are, to a considerable extent, obscured by the facts of the *Johnson* case. Although the districting plan at issue in *Johnson* was formally enacted by the Georgia legislature, the Supreme Court, like the district court below, focused on the extensive role the United States Department of Justice played in pressuring Georgia to

²⁵⁶ *Voinovich*, 113 S Ct at 1156.

adopt a plan that created three African-American majority districts.²⁵⁷ In the Court's view, Georgia's plan was more attributable to the Department of Justice than to any autonomous decision of the state legislature. In a sense, *Johnson's* real target is the Department of Justice and its alleged "policy of maximizing" the number of African-American majority districts,²⁵⁸ not the states and localities that wield the formal authority in districting. Indeed, the Court's only reference to federalism in *Johnson* was to the "federalism costs exacted"²⁵⁹ by the Justice Department's expansive reading of Section 5, not the federalism costs of a new judicially imposed constitutional constraint on state and local decision making.

Districting decisions by covered jurisdictions are "heavily influenced by calculations as to whether a plan would or would not pass muster" under Section 5.²⁶⁰ Although covered jurisdictions may seek judicial review of a denial of preclearance, most jurisdictions prefer to do whatever is necessary to satisfy the Justice Department rather than risk a denial. Pursuing judicial review of a denial of preclearance would delay the effectiveness of any redistricting plan. If the reapportionment follows the decennial census and is necessary to comply with one person, one vote, then delay raises the prospect of a one-person, one-vote lawsuit and "the risk that redistricting lines will be drawn by a court."²⁶¹ A denial of preclearance is also a public relations blow, since it suggests to the public that the legislature was guilty of racial discrimination. Moreover, "Section 5 lawsuits to reverse preclearance denials do not have a track record of suc-

²⁵⁷ *Johnson*, 115 S Ct at 2483-84, 2490-94. See also *Johnson v Miller*, 864 F Supp 1354, 1362-68 (S D Ga 1994), *aff'd*, 115 S Ct 2475 (1995).

²⁵⁸ *Johnson*, 115 S Ct at 2492. But compare Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: "When it Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 Cardozo L Rev 1237, 1265-66 (1993)(finding the Department of Justice to be strict, but not unreasonable, in demanding "the same degree of responsiveness to minority claims as the jurisdiction had already shown itself willing to give to other less constitutionally weighty concerns, such as incumbency protection.")(cited in note 122); Remarks of John R. Dunne, 14 Cardozo L Rev 1127, 1128 (1993)("There is one thing the Civil Rights Division [of the Department of Justice] does not do: It does not require, because the law does not require, the maximization of minority representation. Jurisdictions are not required in all cases to create as many minority districts as possible.").

²⁵⁹ *Johnson*, 115 S Ct at 2493.

²⁶⁰ Grofman, 14 Cardozo L Rev at 1264 (cited in note 122).

²⁶¹ *Id.*

cess.²⁶² Thus, legislatures in covered jurisdictions have an enormous incentive to comply with, rather than challenge, the Justice Department's interpretation of Section 5.

By suing the state, then, the *Johnson* plaintiffs obtained the judicial review of the Justice Department's interpretation of its preclearance authority that Georgia—along with most redistricting jurisdictions—declined to seek, and that private parties could not otherwise obtain. By curbing a Justice Department denial of preclearance that the Court found went beyond the Department's statutory authority, *Johnson* in a sense vindicated state and local autonomy from federal administrative interference, even though a state was nominally the defeated party.

But the logic of *Johnson* is not limited to cases of Department of Justice prodding that arguably exceeds the Voting Rights Act's mandate. *Johnson* applies to voluntary state and local efforts to redesign political institutions to increase minority representation, as well.

The determination that the Constitution requires states and localities to exclude from consideration a factor that may be important in local politics is an unusual step, in tension with the tradition of giving states and localities considerable discretion in framing their political institutions. Until *Shaw* and *Johnson*, the Court's constraints on state and local decision making concerning representation focused on protecting the norm of equality. One person, one vote bars states and localities from giving the votes of some voters more weight than the votes of others. The vote-dilution doctrine similarly bars states and localities from adopting electoral structures with the intent and effect of undermining the political strength of some groups. Moreover, both doctrines have been tempered, at least in part, by some respect for local political decision making. Apart from congressional redistricting, which is subject to a very restrictive equal-population test, state and local government election districts may deviate somewhat from precise mathematical equality in order to promote other political values.²⁶³ More importantly, the vote-dilution doctrine has been significantly shaped by respect for a variety of state and

²⁶² Id at 1265.

²⁶³ See, for example, *Mahan v Howell*, 410 US 315 (1973)(permitting 16.4 percent deviation from population equality to enable state legislative districts to more closely respect political subdivision boundaries); *Abate v Mundt*, 403 US 182 (1971)(permitting 11.9 percent deviation from equality to enable county legislative districts to more closely respect political subdivision boundaries).

local political decisions.²⁶⁴ Only extreme instances of vote dilution are constitutionally barred.

Concern for the "federalism costs" of restricting state and local self-determination counsels a similarly restrained reading of the new color-blindness doctrine. *Johnson's* restriction on nondilutive race-conscious districting affects not only the representation of minorities but the authority of states and local governments to structure their own political institutions in light of the values and concerns that are important within a particular jurisdiction. In places where local representatives have found that race or ethnicity are important factors in local politics, and that the opportunity to elect representatives of different groups is critical to local perceptions of fairness, governments should continue to enjoy their traditional authority to shape their institutions in light of locally important political conditions—even if their purpose is to promote the greater representation of politically salient minorities—provided that their understanding of the nexus between race or ethnicity and politics is substantiated by empirical evidence and that they act without dilutive intent or effect.

The constitutional vote-dilution doctrine respects state and local discretion to implement values that may conflict with proportional representation, provided that states and localities do not intend to weaken minorities' electoral power. *Johnson's* color-blindness approach should give comparable respect to state and local decisions to make their electoral mechanisms *more* responsive to minorities, especially territorially dispersed minorities. Federalism's respect for state and local self-determination could be reconciled with *Johnson's* opposition to racial motivation by permitting a state or locality to take race into account when it can demonstrate that race already is a significant factor in the jurisdiction—that, indeed, race functions like other factors that the jurisdiction may consider in designing its electoral system. At that point, the jurisdiction's motivation is political, reflecting a desire to more fairly balance the different political forces in the community, and not based on racial stereotyping. The state or locality should be free to decide whether to make its political institutions more or less responsive to minority interests, provided it neither dilutes minority interests nor assumes without empirical evidence that race affects its politics.

²⁶⁴ See notes 36-56 and accompanying text.