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CAN MINORITY VOTING RIGHTS SURVIVE
MILLER v. JOHNSON?

Laughlin McDonald*

INTRODUCTION

In Miller v. Johnson¹ a sharply divided Court invalidated Georgia’s majority-Black Eleventh Congressional District on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment.² The Court held first that the State’s plan was a constitutionally suspect racial classification because “race was the predominant factor in drawing . . . [the] Eleventh District” and the State “subordinated to racial objectives” its traditional districting principles.³ Then, applying strict scrutiny, the “most rigorous and exacting standard of constitutional review,”⁴ the Court concluded that the Eleventh District was not drawn to promote a compelling state interest.⁵ The Court had no occasion to address the issue of narrow tailoring because the State’s plan “was not required by the Voting Rights Act under a correct reading of the statute.”⁶

Although Miller is a confusing decision and obscures the law surrounding redistricting, it is widely perceived as casting doubt on the constitutionality of all majority-minority districts.⁷ More omi-

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¹ Miller, 115 S. Ct. at 2489.
² Id. at 2490.
³ Id.
⁴ Id. at 2491.
⁵ Id. at 2491.
⁶ Such was the view of the three-judge court in Lopez v. Monterey County, which
nously, *Miller* calls into question the present Court’s basic commitment to continued enforcement of the Voting Rights Act.

Part I of this Article reviews the congressional redistricting process in Georgia, particularly the State’s efforts to comply with the Voting Rights Act and avoid the dilution of minority voting strength. Part II describes the plaintiffs’ constitutional challenge and the State’s asserted defenses, or more accurately its lack of asserted defenses. Part III argues that the decision of the majority rests upon wholly false assumptions about the colorblindness of the political process and the harm caused by remedial redistricting. Part IV notes the expansion in *Miller* of the cause of action first recognized in *Shaw v. Reno*. Part V comments on the lack of clear, fair standards in *Miller* and how that will impact upon legislative decision making and litigation. Part VI discusses the negative impact of the decision, which allows, for the first time, local federal district courts directly to review the preclearance decisions of the Attorney General on the administration of section 5 of the Voting Rights Act. Part VII argues that *Miller* has the potential for purging substantial numbers of minorities from elected office in the South and wiping out many of the gains so painstakingly won under the Voting Rights Act over the last thirty years.

I. CONGRESSIONAL REDISTRICTING IN GEORGIA: TRYING TO COMPLY WITH THE VOTING RIGHTS ACT

As a result of the 1990 census, Georgia’s congressional delegation increased from ten to eleven members. Only one of the preexisting districts, the Fifth, had been majority Black. It was also the only district represented by an African American, John Lewis, despite the fact that African Americans were twenty-seven percent of the population of the state.

At the beginning of the 1990s redistricting process, state officials agreed to submit a plan that would increase the number of majority-Black congressional districts from one to two. The adoption of that...
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goal was due in large measure to the increased number of Blacks serving in the General Assembly and their advocacy of greater racial fairness in congressional redistricting.13

The State also believed that it had an obligation under the Voting Rights Act to avoid diluting minority voting strength. Both houses, for example, adopted redistricting guidelines in 1991 which included: complying with the one person, one vote rule, using single member districts only, drawing districts that were contiguous, avoiding the dilution of minority voting strength—complying with sections 2 and 5 of the Voting Rights Act; maintaining the integrity of political subdivisions where possible, protecting incumbents, and preserving the core of existing districts.14

A. The Importance of Section 2

Section 2 provides that a challenged practice is unlawful if it “results” in minority voters having “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”15 In Thornburg v. Gingles,16 the Court held that “[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure, interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”17

The legislative history of section 2, particularly the 1982 Senate report, indicates that “a variety of factors, depending upon the kind of rule, practice, or procedure called into question,” are relevant in determining a violation.18 After reviewing the factors discussed in

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13. Trans., supra note 12, at 124. Members of the General Assembly’s Black Caucus urged the creation of three majority-minority congressional districts. Miller, 115 S. Ct. at 2484; Johnson, 864 F. Supp. at 1360-61; Trans., supra note 12, vol. IV, at 101, 247-48; id., vol. III, at 234-35. The Black Caucus reasoned that because of racial bloc voting and the history of past discrimination, three majority-minority districts were needed to provide Blacks with equal electoral opportunities that were roughly proportional to the Black percentage of the State’s population. Id., vol. IV, at 228.


17. Id. at 47.

18. S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982). Typical factors identified in the Senate report include: the extent of any history of discrimination in the jurisdiction that touched the right of the members of the minority group to participate in the democratic
the Senate report, the Court in Gingles identified three preconditions for a section 2 challenge to a multimember legislative redistricting plan: (1) whether the minority group is sufficiently large and geographically compact to constitute a majority in one or more single member districts; (2) whether the minority group is politically cohesive, i.e., votes as a bloc; and (3) whether the majority also votes as a bloc "usually to defeat the minority's preferred candidate." Ultimately, section 2 "requires the court's overall judgment, based on the totality of circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is... 'minimized or canceled out.'"

The State's concern over section 2 was far from merely academic. Between 1974 and 1990, section 2 vote dilution lawsuits were filed against forty cities and fifty-seven counties in Georgia challenging their at-large systems of elections. As a result of the litigation, all but one of the cities, and fifty-three of the counties, changed to district systems containing majority Black districts. The number of Black elected officials in the State grew from three in 1964 to approximately 500 in 1990, the majority (eighty-eight percent) of whom were elected to city and county offices. This increase can be traced directly to the gradual demise of at-large elections and the increased use of districts containing effective Black-voting majorities.

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20. S. REP. NO. 417, supra note 18, at 29 n.118. See Johnson v. De Grandy, 114 S. Ct. 2647, 2656-57 (1994) ("the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts").


23. McDonald et al., supra note 21, at 89; JOINT CTR. FOR POLITICAL AND ECONOMIC STUDIES, NATIONAL ROSTER OF BLACK ELECTED OFFICIALs 10, 129 (1990).

As it began redistricting in 1991, the State was aware not just of the requirements of section 2, but also the fact that majority-minority districts were generally necessary to provide Blacks a realistic opportunity to elect candidates of their choice. In its brief to the Supreme Court, the State acknowledged that other than Andrew Young in 1972 "[i]n the 500 or so other congressional elections held in Georgia over the past century, no black candidate has ever won in a majority white district."25 "Surely," the State argued, "the General Assembly was entitled to assume, as a simple empirical matter, that this compelling historical pattern was likely to continue in the immediate future."26 In enacting congressional redistricting, therefore, the State had an obvious incentive to adopt a non-dilutive plan and insulate itself from a possible section 2 vote dilution challenge.

B. The State’s Prior Failures to Comply with Section 5

As concerned as it was with section 2, the State was even more concerned with complying with section 5. Section 5 requires “covered” jurisdictions, such as Georgia, to submit their proposed changes in voting to the United States Attorney General or to the United States District Court for the District of Columbia for preclearance.27 Whether preclearance is administrative or judicial, the jurisdiction has the burden of proving that a proposed change

26. Id. at 36.
does not have a discriminatory purpose or effect. 28 One of the purposes of section 5 was to prevent covered jurisdictions from adopting new forms of discrimination to replace those, such as literacy and good character tests for voting, invalidated by other provisions of the Voting Rights Act. 29 Virtually all voting changes are subject to preclearance, including congressional redistricting plans. 30

The State was particularly concerned with section 5 because all of its prior congressional redistricting plans had run afoul of preclearance. Georgia's 1931 congressional reapportionment was invalidated in Wesberry v. Sanders, 31 a 1964 case, on one person, one vote grounds. 32 The redistricting that followed, based on the 1970 census, was the first congressional redistricting in the State subject to section 5 review.

The congressional plan initially passed by the State in 1971 discriminated against racial minorities in several ways and was rejected by the Attorney General under section 5. The plan divided the concentration of the Black population in the metropolitan Atlanta area into the Fourth, Fifth, and Sixth Districts to ensure that the Fifth District would be majority White. 33 The plan also moved the residences of Blacks who were regarded as potential candidates from the Fifth to the Sixth District, i.e., Atlanta Vice-Mayor Maynard Jackson and Andrew Young, who had run for the Fifth District in 1970. 34 The State drew another plan increasing the percentage of Blacks in the Fifth District to forty-four percent and the plan was precleared. 35

The State's 1981 congressional plan was also rejected under section 5 as the product of intentional discrimination. Based on the 1980 census, the 1971 plan was malapportioned. 36 All of the districts were majority White, with the exception of the Fifth District which was 50.3% Black based upon total population. 37 The new 1982 plan maintained White majorities in nine of the ten districts and

32. Id. at 7-8, 17-18.
34. Stip., supra note 33, ¶ 172, 180; Busbee, 549 F. Supp. at 500.
36. Stip., supra note 33, ¶ 187 (explaining that the previously existing 1972 plan did not satisfy the one person, one vote standard required by the Fourteenth Amendment).
increased the Black population in the Fifth to 57.3%. While Blacks were a majority (fifty-two percent) of the voting age population (VAP) in the Fifth District, they were a minority (forty-six percent) of registered voters. This plan, as did the 1971 plan, split the concentrated Black population in the metropolitan Atlanta area into three districts, the Fourth, Fifth, and Sixth, to minimize minority voting strength.

The State submitted the plan for section 5 preclearance and the Attorney General objected. The State then filed a declaratory judgment action in the District Court for the District of Columbia, which also denied preclearance. The Senate had passed a congressional plan containing a sixty-nine percent majority-Black Fifth District, but the House rejected it. Joe Mack Wilson, Chair of the House Reapportionment Committee—a person who played an instrumental role in congressional redistricting—frankly explained to his colleagues, “I don’t want to draw nigger districts.” He generally opposed legislation favorable to Blacks, which he referred to contemptuously as “nigger legislation.”

The Speaker of the House, Thomas Murphy, was also opposed to the Senate’s Fifth District because he felt “we were gerrymandering a district to create a black district where a black would certainly be elected.” He “refused to appoint black persons to the conference committee [to resolve the dispute between the House and Senate] solely because they might support a plan which would allow black voters, in one district, an opportunity to elect a candidate of their choice.”

The District Court for the District of Columbia concluded—on the basis of “overt racial Statements, the conscious minimizing of Black voting strength, historical discrimination and the absence of a legitimate non-racial reason for adoption of the plan”—that the State’s submission had a discriminatory purpose in violation of section 5. The State submitted a remedial plan to the court that

38. Id.
39. Id. at 499.
41. Stip., supra note 33, ¶ 183.
42. Id. ¶ 186.
43. Id. ¶ 215.
44. Id. ¶¶ 216-18.
46. Stip., supra note 33, ¶ 199; Busbee, 549 F. Supp. at 500.
47. Busbee, 549 F. Supp. at 509-10.
49. Busbee, 549 F. Supp. at 517. As for Joe Mack Wilson, the court concluded that he “is a racist.” Id. at 500.
increased the Black VAP in the Fifth District to sixty percent, and that plan was precleared.\(^50\) In deciding to add a second majority-Black congressional district in 1991, the State was determined to comply with section 5 and to avoid the embarrassment it had experienced in 1982.\(^51\)

C. Drawing the Lines

The General Assembly held redistricting hearings throughout the State in April, May, and August of 1991. At the first public hearing in April, the Chairman of the Georgia Republican Party submitted a plan creating a majority, fifty-nine percent Black district extending from southern DeKalb County to Augusta.\(^52\) That plan was entered on the state’s computer as LINDA.TEMPLATE, and became the model for the Eleventh District.\(^53\)

The American Civil Liberties Union (ACLU) prepared a plan for the Black Caucus that contained three majority-minority districts.\(^54\) Entered on the state’s computer as MCKINNEY.BMCCONGRESS, it was also referred to as the “Max-Black” or “Max” plan.\(^55\) The plan had broad support among Blacks, and was endorsed by the National Association for the Advancement of Colored People (NAACP), the Georgia Association of Black Elected Officials, Concerned Black Clergy, and the Southern Christian Leadership Conference.\(^56\)

The General Assembly went into special session from August 19 to September 5, 1991, for the purpose of redistricting. Many congressional plans were proposed and introduced during the public hearings, the work sessions of the redistricting committees, and the special session of the legislature. All the proposed plans included one, two, or three majority-Black districts.\(^57\) The Black Caucus plan was introduced in the House in committee and offered as an amendment on the floor but was never adopted.\(^58\)

\(^50\) Stip., supra note 33, ¶ 238; BARONE ET AL., supra note 35, at 289.

\(^51\) Bob Hanner, Chair of the House Reapportionment Committee, testified that “we started off this process saying that we were going to meet the mandates of the Justice Department, and the one person/one vote, and not have the purpose of effectively diluting minority strength. And that was a positive thing the committee wanted to do.” Trans., supra note 12, vol. III, at 220.


\(^54\) Miller, 115 S. Ct. at 2484.

\(^55\) Id. (In spite of its name, the number of majority-Black districts (3 out of 11) was roughly proportional to the percent (27%) of Black population in the state).


\(^57\) Jt. App., supra note 14, at 13.

1. The First Plan

The State submitted its first congressional redistricting plan to the Department of Justice for preclearance under section 5 on October 1, 1991. The plan contained two majority-minority districts (the Fifth, 57.8% Black VAP, and the Eleventh, 56.6% Black VAP), and a third district, the Second with 35.4% Black VAP. The Eleventh District in the first plan was not modeled after the Black Caucus plan, but "almost exactly" after LINDA.TEMPLATE.60

The Attorney General objected to the plan on January 21, 1992 on the grounds that: "elections in the State of Georgia are characterized by a pattern of racially polarized voting"; "the Georgia legislative leadership was predisposed to limit black voting potential to two black majority districts"; the leadership did not make a good faith attempt to "recognize the black voting potential of the large concentration of minorities in southwest Georgia"; and, the State had provided only pretextual reasons for failing to include in the Eleventh District the minority population in Baldwin County.61

2. The Second Plan

After the section 5 objection, the reapportionment committees and the General Assembly considered numerous other plans.62 The Senate passed a plan, REDRAW.SREDRAW2, containing three majority-Black districts and a change that increased the Black VAP in the Eleventh District from 56.6% to 58.7%. Under the Senate plan, the Eleventh District included concentrations of Black population in southern Dekalb County, Augusta, and Savannah.63 The conference committee rejected the Senate's plan.64

The State enacted a second plan and submitted it for preclearance, again containing two majority Black districts (the Fifth, 57.5% Black VAP, and the Eleventh, 58% Black VAP) and a third district, the Second, with 45% Black VAP.65 Once again, the Eleventh

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63. Id. at 62, 98.
District was modeled on LINDA.TEMPLATE, and included minority population from Baldwin County.66

The Attorney General objected to the second plan on March 20, 1992 on the grounds that: the State remained “predisposed to limit Black voting potential to two Black majority voting age population districts”; “alternatives including one adopted by the Senate included a large number of Black voters from Screven, Effingham and Chatham Counties in the 11th Congressional District”;67 and the State had provided “no legitimate reason” for its failure to include in a majority-Black congressional district the second largest concentration of Blacks in the state.68

The State, with the memory of its 1981 redistricting still fresh in its mind, decided not to seek judicial preclearance of its plan from the District Court for the District of Columbia.69 According to the State’s chief legal advisor during redistricting, the chances of winning judicial approval “were very much harmed by the Busbee case, that we were in a similar situation because of the Senate’s action” in adopting a plan containing three majority Black districts.70 The Chair of the House Reapportionment Committee also thought that the plan passed by the Senate would cause the court to reject the State’s first and second plans.71

3. The Third Plan

The State of Georgia submitted a third plan to the Attorney General containing three majority Black districts (the Fifth, 57.5% Black VAP, the Eleventh, 60.4% Black VAP, and the Second, 52.3% Black VAP) on April 1, 1992.72 Similar to the first and second plans, the third plan maintained the southern DeKalb to Augusta core of the Eleventh District. It also incorporated features of the Senate plan (REDRAW.SREDDRAW2) and included portions of Savannah in the Eleventh District.73 The plan was similar to the “Max-Black” plan proposed by the Black Caucus in that it contained three majority-

67. Another alternative plan relied on by the Department of Justice in denying preclearance was the three-seat Black Caucus plan. Miller, 115 S. Ct. at 2484.
68. Id. at 115 S. Ct. at 2484; Jt. App., supra note 14, at 120, 124-26;
69. Miller, 115 S. Ct. at 2484.
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Black districts. But as Judge Edmondson found in his dissenting opinion, the third plan was "significantly different in shape in many ways" and was precleared on April 2, 1992.

II. THE CHALLENGE TO THE ELEVENTH DISTRICT

The plaintiffs in Miller were White residents of the Eleventh District, one of whom was an unsuccessful candidate in the 1992 Democratic primary for the Eleventh District. He was defeated in a runoff by Cynthia McKinney, an African American. The defendants were various state officials, and two separate defendant intervenors—the United States and a group of Black and White residents of the district ("the Abrams intervenors").

By way of relief, the plaintiffs sought a reconfigured, i.e., bleached, Eleventh District in which a White would presumably win. The plaintiffs, in a seemingly implicit concession that racial bloc voting exists in the State, explained in their brief to the Supreme Court that "Plaintiff DeLoach . . . lost the 1992 democratic congressional runoff election to the current representative in the Eleventh, and desires to run again without the outcome being predetermined on the basis of race."

The district court, in a two-to-one decision, held the Eleventh District unconstitutional. A majority of the Supreme Court affirmed the district court finding that "race was . . . the predominant, overriding factor explaining the General Assembly's decision to attach to the Eleventh District various appendages containing dense majority-Black populations," and that as a result the district "cannot be upheld unless it satisfies strict scrutiny."

The majority acknowledged that "[t]here is a 'significant State interest in eradicating the effects of past racial discrimination.'"
Georgia, however, refused to argue directly that it had a compelling interest in drawing the Eleventh District as a majority-Black district to eradicate the effects of past discrimination or to avoid a section 2 violation. The State was involved in other voting rights litigation and did not want to make admissions in *Miller* that might damage its position in the other cases. Accordingly, it equivocated over the importance of race in redistricting.

The State acknowledged "Georgia's history of segregation" and "that that history is related to some extent to the degree of segregation that exists as a matter of fact in Georgia politics today." It also acknowledged, as noted above, the "simple empirical matter" that majority-Black districts were necessary to provide minorities a realistic opportunity for election. But the State's bottom line in the litigation was that "race may be considered, and was considered here, simply to be sure that the resulting distribution of political power was reasonably fair and representative of the State's people."

The majority of the Court ignored even these concessions and concluded that "the State's true interest in designing the Eleventh District was creating a third majority-Black district to satisfy the Justice Department's preclearance demands." Those demands, according to the majority, were based on the Attorney General's unconstitutional "policy of maximizing majority-Black districts,"

meet statutory requirements, state legislatures must sometimes consider race as a factor highly relevant to the drawing of district lines." 115 S. Ct. at 2500 (Ginsburg, J., dissenting).


83. *Id. at 36.*

84. *Id.*

85. *Miller, 115 S. Ct. at 2490.*

86. *Id. at 2492.* In reaching this conclusion, the majority relied upon the findings of the district court which, in turn, relied heavily upon the hearsay statements of Representative Tyrone Brooks made on the floor of the Georgia House during the redistricting process. He stated that "the Attorney General... specifically told the states covered by the Act that wherever possible, you must draw majority Black districts." *Johnson v. Miller, 864 F. Supp. 1354, 1361 (S.D. Ga. 1994).* The best evidence of the Attorney General's policy consists, not of third-party characterizations, but of the regulations for the administration of section 5 and the statements of the Attorney General herself.

The former make no mention of "maximization," *see* 28 C.F.R. §§ 51.51-51.61 (1991). The Attorney General's stated policy is that "[T]he Section 5 process is tailored to the specifics of each case, and no general requirement of maximization—or of
and, thus, did not provide the State a compelling interest in adopting its redistricting plan.

Although the ultimate configuration of the Eleventh District was clearly influenced by the objections of the Attorney General, the State had a “true interest,” which it announced at the very beginning of the redistricting process, in creating the district as majority Black to avoid minority vote dilution. The State’s decision not to argue that it had a compelling interest in eradicating the effects of past discrimination or in complying with section 2 was made by its lawyers as a matter of litigation strategy. A majority of the Court erroneously conflated this post hoc legal posturing with the State’s real and admitted interest in not diluting minority voting strength.87

III. FALSE ASSUMPTIONS ABOUT COLOR BLINDNESS AND HARM

The greatest flaw in the majority’s analysis in Miller is its refusal to consider, or even to mention, the evidence of racial discrimination in Georgia and its continuing effects, in the form of racial bloc voting.88 As a consequence, the very premise upon which the opinion rests—that the political process is colorblind—is entirely false.

According to the majority, taking race into account in redistricting harms individuals as well as society. Individuals are harmed because of “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.’”89 Society is allegedly harmed because “‘[r]acial gerrymandering . . . may balkanize us into competing racial factions.’”90

Race, however, is not a “stereotype” or an “assumption” in Georgia. It is a reality. In addition, there is no credible evidence that proportionality—is imposed.” Brief for the United States at 35, United States v. Johnson, 115 S. Ct. 2475 (1995) (No. 94-929). The Attorney General does consider “the relationship between the number of majority-minority districts and the minority’s percentage of the population,” id. at 36, but that is a relationship the Court has held to be “obviously” relevant to the question of minority vote dilution. Johnson v. De Grandy, 114 S. Ct. 2647, 2661 (1994).


88. Justice Ginsburg supplied this omission in her dissenting opinion. See Miller, 115 S. Ct. at 2486 (quoting Shaw v. Reno, 113 S. Ct. 2816, 2827 (1993)).

89. Id. at 2486 (quoting Shaw v. Reno, 113 S. Ct. 2816, 2827 (1993)).

90. Id.
the creation of highly integrated districts, such as the Eleventh District, have caused social harm or balkanization.

**A. Race Is No Stereotype in Georgia**

Racial discrimination in Georgia was so apparent that the three-judge court took judicial notice of it. It held that evidence of discrimination "against black people in the State of Georgia need not be presented for purposes of this case." The court took judicial notice that:

No one can deny that State and local governments of Georgia in the past utilized widespread, pervasive practices to segregate the races which had the effect of repressing Black citizens, individually and as a group.

... By law, public schools and public housing were segregated according to race. Public recreational facilities were segregated. Miscegenation was prohibited. Ordinances required segregation in public transportation, restaurants, hotels, restrooms, theaters, and other such facilities, even drinking fountains.

... Public services were allocated along racial lines. ... In public employment, black workers were often paid less than white workers for the same job. In addition, methods of jury selection were developed to exclude Black people from jury service.

Georgia's history on voting rights includes discrimination against Black citizens. From the State's first Constitution—which barred Blacks from voting altogether—through recent times, the State has employed various means of destroying or diluting Black voting strength. For example, literacy tests (enacted as late as 1958) and property requirements were early means of excluding large numbers of Blacks from the voting process. Also, White primaries unconstitutionally prevented Blacks from voting in primary elections at the state and county level.

Even after Black citizens were provided access to voting, the State used various means to minimize their voting power. For example, until 1962, the county unit system was used to undermine

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the voting strength of counties with large Black populations. Congressional districts have been drawn in the past to discriminate against Black citizens by minimizing their voting potential. State plans discriminated by packing an excessive number of Black citizens into a single district or splitting large and contiguous groups of Black citizens between multiple districts.9 The parties themselves, far from denying it, stipulated to much of this history and its continuing effects.

A continuing pattern of racial discrimination in voting in the state was so self-evident that the court refused to accept as exhibits seventeen consent decrees offered by the Abrams intervenors entered between 1977 and 1993 in section 2 challenges brought against jurisdictions located in whole or in part within the Eleventh District. The court ruled that the decrees showed "a pattern of racial discrimination in Voting Rights that we have already taken judicial notice of."94

While the decrees themselves were disallowed as exhibits, the parties stipulated that "voting rights litigation against the jurisdiction [located in whole or in part in the present Eleventh District] resulted in changes in the challenged electoral system(s) and/or judicial findings of racial bloc voting" in Baldwin County, Milledgeville, Burke County, Effingham County, Butts County, Greene County, Henry County, Jefferson County, Jenkins County, Putnam County, Richmond County, Augusta, Screven County, Twiggs County, Wilkes County, Waynesboro, and Warrenton.95

92. J.S. App. supra note 91, at 119-20. Even moderate politicians waged openly racist campaigns into the 1960s. In his 1962 run for governor, Carl Sanders had a "Segregation" plank in his platform declaring that:

My record in support of legislation over the years to maintain segregation is long, continuing, and well-known. It is not one of empty oratory, but concrete results. It rests upon law and order and the consent of the governed. As your governor, every legal means and every lawful resource available will be utilized to the fullest to strengthen and to maintain Georgia's traditional separation, sponsored by the responsible leadership of the State, and passed almost unanimously by the General Assembly. Legal attacks against Georgia's institutions in the federal courts will be resisted, and with every available defense.


93. See, e.g., Stip., supra note 33, ¶ 5 (showing that of Georgia's 1992 VAP, Whites registered at 70.22%, Blacks at 59.8%); id. ¶¶ 76-103 (detailing the history of discrimination in voting); id. ¶¶ 104-29 (describing segregation in educational institutions); id. ¶¶ 130-134 (noting other forms of racial discrimination); id. ¶¶ 135-55 (stipulating to racial disparities in income, education, unemployment, and poverty status); Miller, 115 S. Ct. at 2475; Jt. App., supra note 14, at 9-33.


95. Stip., supra note 33, ¶ 103. The court also refused on similar grounds of
Courts have also made findings of racial bloc voting in Bleckley, Carroll, Colquitt, DeKalb, Dougherty, and Fulton Counties.96

The experts who testified for both sides, while they disagreed as to degree, did agree that voting in Georgia today is racially polarized. Allan Lichtman, an expert for the United States, examined more than 300 elections spanning an approximately twenty-year period.97 He used the standard statistical techniques of ecological regression and extreme case analysis, and examined four sets, or levels, of Black/White contests: (1) county level contests throughout the state, (2) county level contests within the Eleventh and Second Districts, (3) six statewide elections partitioned within the boundaries of the Eleventh and Second Districts, and (4) the 1992 Eleventh and Second District elections.98

As for level one, Lichtman’s analysis showed “strong” patterns of racial bloc voting, with Blacks and Whites voting “overwhelmingly” for candidates of their own race.99 Level two and three analysis also showed “strong” patterns of racial bloc voting.100 In five of the six statewide contests in the Eleventh District, at least eighty-nine percent of Blacks voted for Black candidates, and at least seventy-four percent of Whites voted for White candidates.101 The exception to the pattern was the 1992 Democratic primary for labor commissioner in which the Black candidate got forty-five percent of the White vote, and ninety-six percent of the Black vote. In the ensuing primary run-off, the Black candidate got only twenty-six percent of the White vote, and ninety-two percent of the Black vote.102

The 1992 primary and run-off in the Eleventh District were also racially polarized. In the primary, which involved one White and four Black candidates, the White candidate, DeLoach, was the first choice among Whites with forty-five percent of the White vote. McKinney, who was the leading vote-getter over all, was second among Whites with twenty percent of the White vote.103 In the run-
off, Whites increased their support of DeLoach to seventy-seven percent. McKinney's White vote support increased to just twenty-three percent.\textsuperscript{104}

Lichtman also testified that Blacks have a lower socioeconomic status than Whites, which status has served as a barrier to their participation in the political process.\textsuperscript{105} In the 1988 and 1992 presidential elections, Black turnout was fourteen to fifteen percent lower than White turnout.\textsuperscript{106} In the 1992 elections in the Eleventh District, Blacks were 51.5\% of all voters in the primary, but only forty-six to forty-seven percent of voters in the run-off.\textsuperscript{107}

The State's expert, Joseph Katz, performed an independent homogeneous precinct analysis to estimate "average racial voting patterns."\textsuperscript{108} He agreed that "[w]hites tend to vote for white candidates and blacks tend to vote for black candidates."\textsuperscript{109} He concluded that Whites vote for White candidates in the range of seventy-one to seventy-three percent.\textsuperscript{110} He did not believe a Black candidate had an even (fifty percent) chance to win until a district contained at least fifty percent of Black registered voters.\textsuperscript{111}

The plaintiffs' expert, Ronald Weber, agreed there was "some evidence" of racial polarization in voting.\textsuperscript{112} Taking into account judicial elections involving appointed Black incumbents, he did not think the racial bloc voting was "very strong."\textsuperscript{113}

Experienced local politicians also testified that voting was racially polarized. Representative Tyrone Brooks said that "[r]acially polarized voting in this state is a reality, and we cannot run from that."\textsuperscript{114} Lieutenant Governor Pierre Howard testified that "there are still a lot of whites in Georgia, I'm sure, who won't vote for a black candidate, and I'm sure that there are black [voters] who won't vote
for a white candidate." Intervenor Luscious Abrams, a Burke County farmer who has worked in a number of local political campaigns, testified that "a black will not win out of a majority white district." Kathleen Wilde, a former ACLU staff attorney with extensive experience in voting rights litigation in Georgia who was called as a witness by the plaintiffs, said that "[r]acial polarization in voting is sufficiently strong throughout the state that majority white districts have historically elected white candidates, both state wide and in districting systems."

Of the forty Black members of the Georgia General Assembly, only one was elected from a majority-White district. Of the thirty-one Black members of the House, twenty-six were elected from districts that were sixty percent or more Black. Of the nine Black members of the Senate, eight were elected from districts that were sixty percent or more Black. While only one Black was elected from a majority-White district, Whites won in sixteen (twenty-nine percent) of the fifty-five majority-Black House and Senate districts. With the exception of judicial elections in which Blacks were first appointed and ran as incumbents, no Black has ever been elected to a statewide office in Georgia.

In its prior decisions, the Court stressed that a history of discrimination was highly relevant to the issue of minority political participation and in evaluating the lawfulness of voting practices under constitutional and statutory standards. In Rogers v. Lodge, for example, the Court noted that a history of discrimination touches on or influences voter registration, education, participation in party affairs, and socioeconomic status, all of which affect political participation. In White v. Register, the Court invalidated at-large elections in Bexar County, Texas in part because of the history of discrimination and its continuing affects on the minority community. And in Thornburg v. Gingles, the Court described as "[t]he essence" of vote dilution the adverse interaction of an electoral

115. Id. at 220.
practice "with social and historical conditions."\textsuperscript{125}

The majority in \textit{Miller} chose to ignore the history of discrimination in Georgia and indulged the purest fiction of a color-blind political process.\textsuperscript{126} No decision that blinds itself to reality in this fashion can command respect or claim to be reliable.

\textbf{B. The Absence of Harm}

When it amended section 2 in 1982, Congress concluded that there was no factual basis for contending that majority-minority districts increased racial tensions or caused other harm. Critics of the 1982 amendment argued that a results standard for section 2 would "deepen the tensions, fragmentation and outright resentment among racial groups,"\textsuperscript{127} "pit race against race,"\textsuperscript{128} "exacerbate, race consciousness,"\textsuperscript{129} "foster polarization,"\textsuperscript{130} and "compel the worst tendencies toward race-based allegiances and divisions."\textsuperscript{131} Opponents also argued that the amendment would limit the political opportunities of minorities by allowing them "to become isolated" in single-member districts, and "prevent[ing] minority members from exercising influence on the political system beyond the bounds of their quota."\textsuperscript{132} Dissenting members of the Senate subcommittee similarly argued that adoption of a results standard for section 2 would lead to the creation of majority-minority districts, or "political ghettos for minorities."\textsuperscript{133}

Congress weighed and rejected these arguments on the ground that there was no evidence to support them. It concluded that the amendment would not "be a divisive factor in local communities by emphasizing the role of racial politics."\textsuperscript{134} The testimony and other evidence presented to the subcommittee belied the speculative

\begin{footnotesize}
\begin{enumerate}
\item[125.] \textit{Id.} at 47.
\item[126.] As one scholar has observed, the color blind model of politics in the South, i.e., "[t]he arguments that Blacks need not run in 'safe' minority districts to be elected, that White voters increasingly support Black politicians, that racial bloc voting is now unusual—all turn out to be among the great myths currently distorting public discussion." Richard H. Pildes, \textit{The Politics of Race}, 108 HARV. L. REV. 1359, 1367 (1995).
\item[128.] \textit{Id.} at 745 (statement of Michael Levin).
\item[129.] \textit{Id.} at 1250 (statement of Henry Abraham).
\item[130.] \textit{Id.} at 1328 (statement of Donald L. Horowitz).
\item[131.] \textit{Id.} at 1449 (letter from William Van Alstyne).
\item[132.] \textit{Id.} at 511 (statement of Edward J. Erler), 1115 (statement of Robert M. Brinson).
\item[133.] S. REP. NO. 417, \textit{supra} note 18, at 103 (additional views of Sen. Orrin G. Hatch of Utah).
\item[134.] \textit{Id.} at 32-33.
\end{enumerate}
\end{footnotesize}
"assumptions" that the amendment of section 2 would limit the political opportunities of minorities. The subcommittee found there was "an extensive, reliable and reassuring track record of court decisions using the very standard which the Committee bill would codify."

The Supreme Court has said that where Congress has assessed and weighed conflicting factors in an area such as voting rights in which it has a specially informed legislative competence, it is not the duty of the Court "to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." There clearly is a basis upon which Congress could determine that majority-minority districts were neither stigmatizing nor racially polarizing. In striking down the Eleventh District, the Court ignored its own precedents as well as the determinations of Congress.

The decisions of district courts in the post-Shaw v. Reno redistricting cases support the findings of Congress. In Johnson v. Miller the three-judge court, even though it invalidated the Eleventh District, concluded that "the plaintiffs suffered no individual harm; the 1992 congressional redistricting plans had no adverse consequences for these white voters." A parade of witnesses testified that the Eleventh District had not increased racial tension, caused segregation, imposed a racial stigma, deprived anyone of representation, caused harm, or guaranteed Blacks a congressional seat. The district court acknowledged that under the Court's pre-Shaw decisions, "this lack of concrete, individual harm would deny them [the plaintiffs] standing to sue."

The Supreme Court did not disturb the district court's finding of no harm.

The district court in Hays v. Louisiana, while holding unconstitutional congressional redistricting in Louisiana, nonetheless acknowledged "the great benefits that are derived by an increase in minority representation in government." Minority elected officials

135. Id. at 31-32.
136. Id. at 32.
141. Ironically, as Justice Stevens pointed out in his dissenting opinion, the majority's "representational harms" analysis in Miller is premised on the very assumptions and stereotypes it purports to reject, i.e., that voters of a particular race think alike, share the same political interests, etc. See Miller, 115 S. Ct. at 2497-98 (Stevens, J., dissenting).
143. 862 F. Supp. at 128 (Shaw, J., concurring).
"have shown that they perform admirably," that their efforts in government "provide positive role models for all black citizens," and that they "insure that the legal obstacles to minority advancement in all areas of life will be eliminated."^{144}

The majority-minority congressional districts in the South are in fact the most racially integrated districts in the country. They contain substantial numbers of White voters, an average of forty-five percent.^{145} Moreover, Blacks in the South continue to be represented more often by White than by Black members of Congress, fifty-eight percent versus forty-two percent.^{146} No one familiar with segregation could ever confuse existing redistricting plans, with their highly integrated districts, with racial segregation under which Blacks were not allowed to vote or run for office.^{147}

Whites are also frequently elected from majority-minority districts. During the 1970s, Whites won in forty-one percent of the majority-Black districts in the House, and in seventy-five percent of the majority-Black districts in the Senate in seven southern states (Alabama, Georgia, Louisiana, Mississippi, North Carolina (Senate only), South Carolina, and Virginia).^{148} In the 1980s in the same states, Whites won in twenty-three percent of the majority-Black House districts and in thirty-eight percent of the majority-Black Senate districts.^{149} Given these levels of White success, racially integrated majority-minority districts cannot be dismissed simply as "quotas" or segregated seats for minorities.

The evidence also suggests that integrated majority-minority districts have promoted the formation of biracial coalitions and actually dampened racial bloc voting. In Mississippi, after the creation of the majority-Black Second Congressional District, Mike Espy, an African American, was elected in 1986 with about twelve percent of the White vote. In 1988, he won re-election with forty

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144. Id.
146. Id. at 12.
147. See Breedlove v. Suttles, 302 U.S. 277 (1937) (upholding the constitutionality of Georgia's poll tax for voting); Grove v. Townsend, 295 U.S. 45 (1935) (approving the exclusion of Blacks from participating in Democratic primary elections in Texas); Giles v. Harris, 189 U.S. 475 (1903) (approving the disenfranchisement of Black voters in Alabama).
148. See Lisa Handley & Bernard Grofman, The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations, in QUIET REVOLUTION, supra note 21, at 335, 345 (containing a table presenting the percentage of Blacks elected to Congress from majority-Black districts).
149. Id.
percent of the White vote\textsuperscript{150} and sixty-six percent of the vote overall.\textsuperscript{151} According to one veteran observer of the voting rights scene, the increased willingness of Whites in Mississippi to vote for a Black candidate in a racially integrated congressional district suggests that the creation of majority-minority districts and the subsequent election of minority candidates reduces White fear and harmful stereotyping of minority candidates, ameliorates the racial balkanization of American society and promotes a political system in which race does not matter as much as it did before.\textsuperscript{152}

In Georgia, the Second and Eleventh Congressional Districts became majority Black for the first time in 1992.\textsuperscript{153} From 1984 to 1990, only one percent of White voters in the precincts within the Second, and four percent of White voters in the precincts within the Eleventh, voted for minority candidates in statewide elections. An encouraging increase in White crossover voting occurred in 1992. Twenty-nine percent of White voters in the Second and thirty-seven percent of White voters in the Eleventh voted for minority candidates in statewide elections that year.\textsuperscript{154}

The majority-Black Second Congressional District in Louisiana was created in 1983 as a result of litigation under section 2 of the Voting Rights Act.\textsuperscript{155} In 1984, only eight percent of Whites voted for the Black candidate in the Democratic congressional primary in the Second District. In the 1990 election, forty-four percent of White voters voted for Black candidates, and in the 1992 election seventy-four percent of Whites voted for Black candidates.\textsuperscript{156} From 1986 to 1990 White voting for Black congressional candidates in Louisiana's majority-White Fourth Congressional District ranged from three percent (three elections) to twenty-two percent (one election). After the district became a majority-minority district in 1992\textsuperscript{157} White voting for Black candidates rose to fifty-eight percent.\textsuperscript{158}

The voting trends in Georgia, Louisiana, and Mississippi, states included within the coverage of section 5 because of their long

\textsuperscript{150} John Dittmer, \textit{Local People: The Struggle for Civil Rights in Mississippi} 426 (1994).
\textsuperscript{151} 44 CONG. Q. ALMANAC, 100th Cong., 2d Sess. app. at 3A, 31A (1988).
\textsuperscript{153} See Miller, 115 S. Ct. at 2483-84 (detailing the districting process that resulted in the creation of the majority-Black districts).
\textsuperscript{154} DOJ Ex. 24, \textit{supra} note 98, at Tables I-III.
\textsuperscript{156} Declaration of Richard Engstrom at Chart One, Hays v. Louisiana, 862 F. Supp. 119 (W.D. La. 1994). (The years between 1984 and 1990 did not involve any Black/White congressional elections that could be included in the analysis).
\textsuperscript{157} Hays, 839 F. Supp. at 1196 n.21.
\textsuperscript{158} See Declaration of Richard Engstrom, \textit{supra} note 156.
histories of discrimination against minorities in voting, undermine the argument that highly integrated majority-minority districts have increased polarization. To the contrary, they hold out the promise, perhaps for the first time in the South's troubled history, of meaningful biracial politics.

IV. THE EXPANSION OF SHAW V. RENO

Miller significantly expanded the "racial gerrymandering" cause of action derived from the Fourteenth Amendment as first recognized in Shaw v. Reno. In Shaw, the Court held that "a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification," is subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. The Court in Shaw appeared to hold that, to establish a claim and invoke strict scrutiny, a plaintiff had to establish three elements: (1) the challenged plan was "bizarre" or "irrational" on its face, and not merely "somewhat irregular," (2) the plan was "unexplainable on grounds other than


160. As Justices Stevens and Ginsburg recognized, Georgia's congressional plan was a form of "racial integration," Miller, 115 S. Ct. at 2498 (Stevens, J., dissenting), designed to ensure the inclusion of Blacks in the political process. Id. at 2500 (Ginsburg, J., dissenting).

161. C. Vann Woodward has argued that a similar opportunity existed during the brief Populist movement of the 1890s before the South capitulated to extreme racism and during which "Negroes and native [Whites] achieved a greater comity of mind and harmony of political purpose than ever before or since in the South." C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 64 (2d ed. 1966). Whatever the opportunity for racial justice and cooperation it held out, the Populist movement in Georgia failed in large measure because of the demagogic and destructive use of the race issue by White state and local politicians at the time. C. VANN WOODWARD, TOM WATSON: AGRARIAN REBEL 189 (1973).

162. 113 S. Ct. 2816 (1993). Prior to Shaw, the Court had recognized Fourteenth Amendment Equal Protection claims only to enforce the one person, one vote requirement, and to prevent the dilution of minority voting strength. E.g., Miller, 115 S. Ct. at 2502; White v. Regester, 412 U.S. 755 (1973); Reynolds v. Sims, 377 U.S. 533 (1964). For a discussion of Shaw, see Parker, supra note 152, at 1, where the author noted:

[T]he Supreme Court, by a 5-to-4 vote, held for the first time that plaintiffs could challenge bizarrely-shaped majority-minority districts as an equal protection violation, even though the redistricting plan was racially neutral on its face and there were no allegations that the plan was adopted for a racially discriminatory purpose or had a racially discriminatory effect.

163. Shaw, 113 S. Ct. at 2832.

164. Id. at 2825, 2832.

165. Id. at 2826.
race," and (3) the "only" possible explanation for the plan was a purpose to "segregate" the races for purposes of voting.\textsuperscript{167} Stated succinctly, the conjunction of bizarre shape, race consciousness, and harm appeared to be the essential predicates for a claim under Shaw.\textsuperscript{168}

Moreover, the Court did not indicate that bizarre shape alone raised constitutional concerns or triggered strict scrutiny. It reaffirmed that "compactness" was not "constitutionally required."\textsuperscript{169} Nor did Shaw condemn the consideration of race in redistricting per se. According to Shaw, "race-conscious redistricting is not always unconstitutional."\textsuperscript{170}

Shaw did not overrule United Jewish Organizations of Williamsburg, Inc. v. Carey,\textsuperscript{171} which upheld without subjecting to strict scrutiny a state's legislative redistricting plan that "deliberately used race in a purposeful manner" to create majority-minority districts.\textsuperscript{172} The Court found no constitutional violation because there was no dilution of the plaintiffs' voting strength.\textsuperscript{173} Shaw distinguished United Jewish Organizations on the grounds that the plaintiffs in United Jewish Organizations "did not allege that the plan, on its face, was so highly irregular that it rationally could be understood only as an effort to segregate voters by race."\textsuperscript{174} Thus, in its discussion of United Jewish Organizations, Shaw underscored that the consideration of race in redistricting was constitutionally suspect only in the context of bizarre district shape and harm to voters.\textsuperscript{175}

\textsuperscript{166} Id. at 2825.
\textsuperscript{167} Id. at 2832.
\textsuperscript{168} The Shaw Court repeatedly stated that its holding was limited only to districting plans that were "bizarre," "facially "irrational," "highly irregular," "extremely irregular," "dramatically irregular," or "tortured." 113 S. Ct. at 2818, 2820, 2824-27, 2829, 2831-32, 2842-43, 2845, 2848. By its terms, the decision appeared to apply only to the "rare" and "exceptional cases." Id. at 2825-26.
\textsuperscript{169} Shaw, 113 S. Ct. at 2827. See Gaffney v. Cummings, 412 U.S. 735, 752 n.18 (1973) ("compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for State legislative districts").
\textsuperscript{170} Shaw, 113 S. Ct. at 2824, 2826.
\textsuperscript{171} 430 U.S. 144 (1977).
\textsuperscript{172} Id. at 165.
\textsuperscript{173} Id. at 165-66 (White, J., joined by Stevens, J., and Rehnquist, J.); id. at 179-80 (Stewart, J., concurring, joined by Powell, J.).
\textsuperscript{174} Shaw, 113 S. Ct. at 2829.
\textsuperscript{175} Commentators agreed that "Shaw is best read as an exceptional doctrine for aberrational contexts rather than as a prelude to a sweeping constitutional condemnation of race-conscious redistricting." Richard H. Pildes & Richard G. Niemi, Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno, 92 MICH. L. REV. 483, 495 (1993). According to Professors Pildes and Niemi, the unique harm communicated by a bizarre district was "the social impression that race consciousness has overridden all other, traditionally
Shaw also recognized that "redistricting 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, religion and political persuasion, and a variety of other demographic factors." Because race is inherent in redistricting, Shaw repeatedly stressed that it must be the "only" factor driving the process to trigger strict scrutiny.

In Miller, however, the Court went far beyond the rule it appeared to adopt in Shaw, and added further confusion to the law of redistricting. The Court held that proof of a bizarre district shape was not a threshold requirement for a Shaw challenge, but was only one method of proving an impermissible racial purpose. A plaintiff may show either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.

Shaw, with its emphasis on aesthetics or district appearance, was, admittedly, highly problematic. Different judges can look at the identical district and reach totally different conclusions about whether or not it is bizarre. Two members of the three-judge court found the Eleventh District to be bizarre, while the third member concluded that it was not. Not a single member of the Supreme Court found the Eleventh District to be bizarre.

\[\text{Trans., supra note 12, vol. II, at 265.}\]

\[\text{id. at 2824 (classification "solely on the basis of race"); id. at 2825 (action "unexplainable on grounds other than race"); id. at 2826 ("anything other than an effort" to segregate voters); id. at 2827 ("created solely" on the basis of race); id. at 2828 ("cannot be understood as anything other than an effort to separate voters" along racial grounds).}\]

\[\text{id. at 2488.}\]

\[\text{id. at 2502 ("Georgia's Eleventh District is hardly 'bizarre,' 'extremely irregular,' or 'irrational on its face.'") (Ginsburg, J., dissenting).}\]

\[\text{id. at 2489 ("the geometric shape of the Eleventh District may not seem bizarre on its face"); id. at 2502 ("Georgia's Eleventh District is hardly 'bizarre,' 'extremely irregular,' or 'irrational on its face.'")(Ginsburg, J., dissenting).}\]
Despite Shaw's obvious shortcomings, as Justice Ginsburg noted, the decision's "[g]enuine attention to traditional districting practices and avoidance of bizarre configuration seemed . . . to provide a safe harbor."\textsuperscript{182} Under Miller, that is no longer the case.

V. THE LACK OF FAIR AND RELIABLE STANDARDS IN REDISTRICTING

Although the "predominant" use of race is constitutionally suspect, the Court did not, as Justice O'Connor's decisive concurring opinion indicates, hold that race could not be taken into account in redistricting. She described the Court's standard as "a demanding one."\textsuperscript{183} To invoke strict scrutiny, "a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices."\textsuperscript{184} Given this standard, "the vast majority of the Nation's 435 congressional districts, where presumably the states have drawn the boundaries in accordance with their customary districting principles," would not be thrown into doubt, "even though race may well have been considered in the

\textsuperscript{182} Miller, 115 S. Ct. at 2507.

\textsuperscript{183} Id. at 2497.

\textsuperscript{184} Id. Justice Kennedy's opinion for the majority is to the same effect: "A plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." Id. at 2488.
The essence of the Court's decision was to make "extreme instances of gerrymandering subject to meaningful judicial review."\(^{186}\)

It is far from clear, however, when taking race into account in redistricting would be permissible and when it would not. A legislature may properly "be aware of racial demographics," but it may not allow race to predominate in the redistricting process.\(^{187}\) A state "is free to recognize communities that have a particular racial make-up, provided its action is directed toward some common thread of relevant interests."\(^{188}\) As the Court itself acknowledged, however, it may prove difficult to make a distinction between awareness of racial make-up and motivation based on race in drawing district lines.\(^{189}\)

The difficulty in applying \textit{Miller} is evident from the sharp disagreement among the members of the Court. Four members concluded in dissent that "[t]he record before us does not show that race . . . overwhelmed traditional districting practices in Georgia."\(^{190}\) The district "reflects significant consideration of 'traditional districting factors (such as keeping political subdivisions intact) and the usual political process of compromise and trades for a variety of..."\(^{191}\)

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185. \textit{Id.} at 2497. Justice Ginsburg, purportedly expressing the views of the Court as a whole, said that "state legislatures may recognize communities that have a particular racial or ethnic makeup, even in the absence of any compulsion to do so, in order to account for interests common to or shared by the persons grouped together." \textit{Id.} at 2500. This view is consistent with that expressed by Justice O'Connor in her opinion, concurring in the judgment in Davis v. Bandemer, 478 U.S. 109 (1986), in which she noted that one of the essential purposes of redistricting was to "reconcile the competing claims of political, religious, ethnic, racial, occupational and socioeconomic groups." \textit{Id.} at 147. Other members of the Court have expressed similar views in other cases. \textit{See} Mobile v. Bolden, 446 U.S. at 87 (legislators "necessarily make judgments about the probability that the members of certain identifiable groups, whether racial, ethnic, economic, or religious, will vote in the same way") (Stevens, J., concurring in judgment); United Jewish Organizations of Williamsburg, Inc. v. Carey, 430 U.S. 144, 176 n.4 (1977) ("It would be naive to suppose that racial considerations do not enter into apportionment decisions") (Brennan, J., concurring); Beer v. United States, 425 U.S. 130, 144 (1976) ("[L]awmakers are quite aware that the districts they create will have a white or a black majority; and with each new district comes the unavoidable choice as to the racial composition of the district") (White, J., dissenting). As the Court noted in \textit{Shaw v. Reno} "when members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes." 113 S. Ct. at 2626.

186. \textit{Miller}, 115 S. Ct. at 2497.

187. \textit{Id.} at 2488.

188. \textit{Id.} at 2490.

189. \textit{Id.} at 2488 ("[t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make").

190. \textit{Id.} at 2502 (Ginsburg, Stevens, Breyer, Souter, JJ., dissenting).
nonracial reasons.'\textsuperscript{191} As in any redistricting, partisan political concerns and the purely personal preferences of individual legislators also influenced the Eleventh District's boundaries.\textsuperscript{192} Speaker Murphy, for example, an ardent Democrat, advised the chair of the House Reapportionment Committee that he (Murphy) would not support any plan that included Harrelson County (Murphy's county of residence) in the Sixth Congressional District. The sole reason for excluding Harrelson County was that the Sixth District was represented by Newt Gingrich, a Republican.\textsuperscript{193} According to Murphy, "Congressman Gingrich and I never got along. We didn't talk. We didn't like each other and I just wanted out of his district."\textsuperscript{194} As a result of accommodating Murphy, "all the counties got split in the Sixth."\textsuperscript{195}

The configuration of the Eleventh District was affected by numerous nonracial factors. The district was drawn in an irregular manner near the eastern border of DeKalb County to accommodate the request of an incumbent senator that the majority-White precinct in which his son lived be included in the district.\textsuperscript{196} The district was drawn in a narrow corridor through Effingham County at the request of a White state representative.\textsuperscript{197} It was drawn in Chatham County by "the narrowest means possible" at the request of another White legislator.\textsuperscript{198} The portion of the Eleventh District in Henry County is narrow because the State made the decision to follow precinct lines.\textsuperscript{199} The State made the decision to keep several rural majority-White counties in the district intact, even though, according to the State's demographer, it resulted in drawing more irregular lines elsewhere, i.e., making "them a little bit more crooked and maybe not follow the major thoroughfare all the way through," in

\textsuperscript{191} Id. at 2503 (quoting Johnson v. Miller, 864 F. Supp. 1354, 1397 n.5 (S.D. Ga. 1994) (Edmondson, J., dissenting)). The total land area of the Eleventh District "is about average for the State;" its miles of border are "in line with Georgia's Second District"; of the 22 counties in the district, eight are divided, "about the state average;" 71% of the district's boundaries follow the borders of political subdivisions, average for the state as a whole; 83% of the district's area is composed of intact counties, "above average for the State's congressional districts;" and, the district's "boundaries largely follow precinct lines." Id. at 2503.

\textsuperscript{192} See id. (Ginsburg, J., dissenting).

\textsuperscript{193} Trans., supra note 12, vol. II, at 73, 75, 77.

\textsuperscript{194} Id. at 77.

\textsuperscript{195} Id., vol. III, at 729. Murphy intervened in redistricting on other occasions, none of which were related to race. He moved precinct lines in DeKalb County as a personal favor to the Lieutenant Governor. On another occasion, Murphy moved precinct lines in Gwinnett County at the request of a House colleague. Id., vol. II, at 78-79.


\textsuperscript{197} 115 S. Ct. at 2503.

\textsuperscript{198} Id. at 2504.

\textsuperscript{199} Trans., supra note 12, vol. I, at 207-09.
urban areas such as Augusta and Savannah. As Murphy noted, redistricting is "vastly different" from other matters that come before the General Assembly because "it's not just a one-issue thing. There's [sic] hundreds of issues because there are hundreds of people wanting their property and their county in a different district." Given the record in Miller, there clearly is a basis upon which a court could conclude—as four members of the Supreme Court did—that the State had not subordinated all its traditional redistricting principles to race.

A. DeWitt v. Wilson

The Court added to the difficulty of determining the permissible role of race in redistricting by summarily affirming, on the same day it decided Miller, a district court decision rejecting a claim, identical to Miller, that California's legislative redistricting was a racial gerrymander. The California plan was drawn by a panel of three special masters after the legislature deadlocked over redistricting, and was approved by the Supreme Court of California. The masters undeniably took race into account as a predominant factor in drawing their plan and frequently subordinated the state's traditional redistricting principles to race.

The special masters, whose report is published as an appendix to the decision of the Supreme Court of California approving the plan, drew districts to maximize the number of majority-minority districts. According to the Supreme Court of California, the masters engaged in "successful efforts to maximize the actual and potential voting strength of all geographically compact minority groups of significant voting population." The masters gave "federal Voting Rights Act requirements . . . the highest possible consideration." Because they were unaware of patterns of racial bloc voting, they chose to "draw boundaries that will withstand section 2 challenges under any foreseeable combination of factual circumstances and legal rulings."

200. Id. at 29-30, 143-44. See Johnson v. Miller, 864 F. Supp. 1354, 1396 (S.D. Ga. 1994) (Edmondson, J., dissenting) ("the Eleventh makes curious turns in some areas . . . but, in these areas most of the lines follow existing city boundaries or major highways and roads").


204. Id. at 559.

205. Id. at 563.

206. Id. at 565.
Justice Mosk of the Supreme Court of California lamented in dissent that "in some instances the masters apparently believed they could perform their duty only by the affirmative use of racial quotas." Despite the deliberate creation of majority-minority districts, the three-judge court found that strict scrutiny was not required because the masters "sought to balance the many traditional redistricting principles, including the requirements of the Voting Rights Act."

If there is a clear basis upon which to distinguish DeWitt from Miller, other than the fact that the redistricting plan in the former was drawn by special masters and in the latter by a legislature, it is not apparent. Justice Ginsburg was surely correct in warning that the amorphous standard enunciated in Miller "renders redistricting perilous work for state legislatures."

B. An Invitation to Redistricting Litigation

Justice Ginsburg further characterized the decision of the majority in Miller as an "invitation to litigation." It is proving to be just that. On remand in Miller, for example, the plaintiffs promptly moved to add parties to challenge the majority-Black Second Congressional District. The three-judge court, as promptly, granted the motion. One member of the panel seemed prepared to rule from the bench that the district was unconstitutional.

Two residents of the majority-Black Third Congressional District in Virginia filed a post-Miller lawsuit claiming that race was "the overriding" factor in redistricting in that state. A similar challenge was filed against the Fourth Congressional District in Illinois. Shaw/Miller challenges are also pending against the Third

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207. Id. at 615.
208. DeWitt v. Wilson, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994). The three-judge court also found that the plan would survive even if strict scrutiny were applied. Id. at 1415.
209. Miller, 115 S. Ct. at 2507. One voting rights expert accused the Court of acting "terribly irresponsibly. They haven't offered any safe harbor. There is nothing you can do in redistricting now that can keep you from getting sued." Holly Idelson, It's Back to the Drawing Board On Minority Districts, CONG. Q., Oct. 7, 1995, at 3065.
211. Transcript of Hearing, supra note 76, at 3.
212. Id. at 66 ("I really don't see that it takes long to look at this horse [the Second District] . . . . I don't think it will take a long evidentiary hearing to conclude what we have already concluded [about the Eleventh District"] (comments of Judge Edenfield).
Congressional District in Florida, and the Twelfth Congressional District in New York.

Within days of the Miller decision, the Governor of Georgia called the legislature into special session to redistrict the Congress. The General Assembly began its deliberations on August 14, 1995. After several weeks of fruitless wrangling and uncertainty over the standards applicable in redistricting, the legislature adjourned without adopting a plan. The Chair of the Senate Reapportionment Committee said that "[w]e have heard from five different attorneys and we have received five different interpretations." She admitted that "[n]obody knows what they're doing." Following the legislative deadlock, the district court, in another divided decision, redrew the State's congressional districts. That decision, which abolished two of the State's three majority-Black districts, has been appealed by the Abrams' intervenors and the United States.

While the Georgia legislature was unable to redraw its congressional districts, it did pass new plans for the Senate and the House. Although legislative redistricting was not an issue in Miller, and no court has suggested that the House and Senate plans were unconstitutional, the Governor included legislative redistricting in his call for a special session. Once the legislature was in session, one of the attorneys representing the plaintiffs in Miller advised House and Senate redistricting committees that "[w]e are prepared to initiate litigation on . . . a number of legislative districts." According to one media account, the Miller plaintiffs' lawyer identified "17 house and seven senate districts across the state. Fourteen of those districts are represented by black lawmakers." The same account predicted that "[r]edrawing 24 of the 54 mostly black legislative districts would almost certainly lead to a reduction in the number of black members of the Legislature." By the time it adjourned, the General Assembly passed new plans deconstructing

218. Idelson, supra note 209, at 3067.
220. Id.
224. Id.
225. Id.
nine formerly majority-Black districts in the House and two formerly majority-Black districts in the Senate. 226 These plans on their face are retrogressive.227

The former Speaker of the South Carolina House announced immediately after Miller that “I think it would be fairly easy for any plaintiff in South Carolina to attack any of the three plans [congressional, House, senate] which have been adopted and prevail.”228 The three plans, all of which contain majority-Black districts, were adopted as a result of litigation and section 5 preclearance.229 It did not take long for someone to accept the former Speaker’s invitation to litigate. On September 28, 1995, five South Carolina residents, including a state senator, filed a lawsuit challenging the Senate redistricting plan.230 A similar suit challenging the House plan was filed several months later.231

Even consent decrees in section 2 cases are now regarded by some jurisdictions as vulnerable to Shaw/Miller challenges. In Wilson v. Mayor and Board of Aldermen, for example, the defendants filed a motion for relief from the judgment on the grounds that “Miller calls into question the constitutionality of the apportionment plan adopted by the defendants pursuant to the Consent Judgment.”232

C. Shaw/Miller: A Double Standard

Shaw and Miller are fairly open to the charge that they embody an impermissible double standard.233 Prior to Shaw, the Court had never held that a majority-White district, by reason of its shape alone, was constitutionally suspect.234 There is, however, a long and con-

228. Scoppe, supra note 7, at A1 (alteration in original).
233. See Jamin B. Raskin, Gerrymander Hypocrisy; Supreme Court’s Double Standard, NATION, Feb. 6, 1995, at 167 (“Racial double standards are nothing new in American law, but the Supreme Court’s voting rights jurisprudence has turned farcical.”).
234. The Court in Shaw, 113 S. Ct. at 2823, 2826, relied heavily upon Gomillion v. Lightfoot, 364 U.S. 339 (1960), but Gomillion was a Fifteenth Amendment case and the voting practice it condemned was not a legislative redistricting plan but a racially discriminatory municipal de-annexation that excluded nearly all of the city’s Blacks
tinuing tradition in America of drawing strangely shaped majority-
White districts for incumbency protection and other reasons.

District Six in Texas created in the 1960s was known as “Tiger”
Teague’s district after the representative of the same name and
“spanned an ungainly rural and urban corridor running from Dallas
to Houston.”235 The old Eighth Congressional District in Louisiana
was “certainly bizarre . . . [and] was crafted for the purpose of
ensuring the re-election of Congressman Gillis Long.”236 Oddly
shaped majority-White districts drawn in the 1990s, include District
Four in Tennessee (ninety-six percent White) (“the 4th is a long,
sprawling district, extending nearly 300 miles . . . from east to west it
touches four States—Mississippi, Alabama, Kentucky, and
Virginia);237 District Eleven in Virginia (eighty-one percent White),
which “[has] a shape that vaguely recalls the human digestive
tract”;238 District Nine in Washington (eighty-five percent White),
whose “‘Main Street’ is a sixty-mile stretch of Interstate 5”;239 District
Thirteen in Ohio (ninety-four percent White), which “centers around
two distinct sets of communities . . . [t]he Ohio Turnpike is all that
connects the two”;240 District Three in Massachusetts (ninety-four
percent White), which was “dubbed the ‘Ivy League’ district
because it stretches from the town of Princeton in central
Massachusetts to Dartmouth on the southeastern coast. (The schools
by those names are located elsewhere.).”241 Majority-White districts,
no matter how strange their shape, have always been regarded as
immune from challenge under the accepted principle that
compactness was not a constitutional requirement.242

Vera v. Richards243 is a stark example of a dual standard at work
in redistricting post-Shaw. The plaintiffs challenged twenty-four of
Texas’ thirty congressional districts, eighteen of which are majority
White.244 The district court invalidated only three districts, the only
two that were majority Black (the Eighteenth and the Thirtieth), and
one that was majority Latino (the Twenty-Ninth). The court

from the electorate. 364 U.S. at 341.
237. POLITICS IN AMERICA, supra note 177, at 1418.
238. Id. at 1602.
239. Id. at 1635.
240. Id. at 1210.
241. Id. at 724.
244. Id. at 1309; Brief for Appellant at 2, Lawson v. Vera, 115 S. Ct. 2639 (1995) (No.
94-806).
admitted that the other districts were irregular or bizarre in shape, but held that they were constitutional because they were "disfigured less to favor or disadvantage one race or ethnic group than to promote the re-election of incumbents." Thus, only oddly shaped majority-minority districts in Texas were held subject to strict scrutiny.

Prior to *Miller*, voting districts were routinely drawn to accommodate the interests of various racial or ethnic groups, e.g., Irish Catholics in San Francisco, Italian-Americans in South Philadelphia, Polish-Americans in Chicago, and Anglo-Saxons in North Georgia. Georgia's Ninth Congressional District, which is ninety-five percent White, was created in 1980 to preserve in one district the distinctive White community in the mountain counties. The district was again drawn as a majority-White district during the 1990 redistricting process, and for the same reasons as in 1980. A member of the House Reapportionment Committee acknowledged that the residents "are predominantly of an Anglo-Saxon bloodline," and the Ninth District was "drawn purposefully to maintain it as one district, an area that has a distinct culture and heritage."

No court has ever held or suggested that the majority-White Ninth District was unconstitutional or constitutionally suspect. To apply a different standard in redistricting to African Americans based upon speculative assumptions about segregation and harm, as did the majority in *Miller*, is to deny African Americans the recognition given to Whites. It also denies racial minorities the same opportunities to organize politically that exist as a matter of right for Whites. To apply a dual standard in redistricting in the name of colorblindness or the Fourteenth Amendment, whose very purpose was to guarantee equal treatment for Blacks, is a stunning irony.

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245. *Vera*, 861 F. Supp. at 1309 n.4 ("[t]o call these [other challenged] districts 'configured' in any sense that implies order would be a misnomer"). A simple visual inspection shows, for example, that District Six (89% White) and District Twelve (87% White) are as, or more, strangely shaped than any of the districts held to be unconstitutional. Brief for Appellants, Addendum, Comparison of Selected Texas Congressional Districts, Lawson v. *Vera*, 115 S. Ct. 2639 (1995) (No. 94-806).

246. *Id.* at 1309 (footnote omitted).


248. See *Busbee v. Smith*, 549 F. Supp. 494, 499 (D.D.C. 1982) (noting that the state "placed cohesive white communities throughout the State of Georgia into single Congressional districts... [for example, the so-called 'mountain counties' of North Georgia"]).


250. In the first case construing the Fourteenth Amendment, the Court declared that

[w]e doubt very much whether any action of a State not directed by way of
Justice O’Connor denied that the Constitution “treat[s] efforts to create majority-minority districts less favorably than similar efforts on behalf of other groups.” But in practice there is complete legislative and judicial tolerance of majority-White districts. Constitutional suspicion and strict scrutiny have been reserved exclusively for those that are majority minority.

VI. REWRITING THE LAW OF SECTION 5

The Court in Miller also substantially rewrote the law prohibiting local judicial review of the section 5 determinations of the Attorney General. The district court acknowledged that “decisions of the Attorney General are not reviewable by this Court.” Nonetheless, it directly reviewed the section 5 determination of the Attorney General and held that it was “improper . . . because it compelled legislative efforts not reasonably necessary/narrowly tailored to the written dictates of the Voting Rights Act.” According to the district court, “DOJ [Department of Justice] stretched the VRA [Voting Rights Act] farther than intended by Congress or allowed by the Constitution.” Because the Attorney General was “wrong” in his interpretation of section 5, the State had “no compelling interest” in complying with the objection. The discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.

The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873). See Sugarman v. Dougall, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting) (a paramount purpose of the Fourteenth Amendment was “to overrule explicitly the Dred Scott decision”).

251. See A. Leon Higginbotham, Jr., et al., Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences, 62 FORDHAM L. REV. 1593, 1646 (1994) (“[n]ow, 120 years after the Slaughter-House Cases, the Fourteenth Amendment may be used to thwart rather than to assure effective use of the ballot by African Americans”).

252. Miller, 115 S. Ct. at 2497.


255. Id. at 1383.

256. Id. at 1383-84 (“DOJ clearly disregarded” applicable Voting Rights Act regulations).

257. Id. at 1382.
majority also held that "Georgia’s current redistricting plan exceeds what is reasonably necessary to avoid retrogression under section 5." The Supreme Court affirmed, noting that the challenged plan "was not required by the Voting Rights Act under a correct reading of the statute."

The Court had previously held that the merits of a section 5 determination were not reviewable by a local federal district court. In Morris v. Gressette, the Court said that no matter how erroneous the Attorney General’s decision not to interpose an objection to a voting change might be, minority citizens could not bring a civil action to challenge it. In Morris, moreover, the Attorney General’s failure to object had been based upon a misinterpretation of law later clarified by the Court, i.e., that in making a section 5 determination the Attorney General was required to defer to a finding by a district court that a redistricting plan was constitutional.

In responding to the dissent’s suggestion that an Attorney General might trade preclearance for the promise of electoral college votes, Justice Powell’s majority opinion in Morris noted that: “Congress like the courts operates on the assumption that the Attorney General of the United States will perform faithfully his statutory responsibilities.” Justice Powell also rejected even limited review of the Attorney General’s exercise of section 5 authority:

[It was argued] that there should be limited judicial review only when the Attorney General improperly relinquishes his responsibilities to evaluate independently the submitted legislation in light of the standards established by § 5 . . . . For the reasons Stated in text, we think Congress intended to preclude all judicial review of the Attorney General’s exercise of discretion or failure to act.

Morris recognized, of course, that the Attorney General’s interpretation of the Voting Rights Act is not binding upon the courts in cases within their jurisdiction. It noted that under the Act, states were free to seek a declaratory judgment from a three-judge

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258. Id. at 1384.
259. Miller, 115 S. Ct. at 2491.
261. Id. at 497 & n.8.
262. Id. at 506 n.23.
263. Id. at 507 n.24 (emphasis added).
264. Id. at 505; accord Presley v. Etowah County Comms’n, 502 U.S. 491, 500 (1992) (a local three-judge court may determine section 5 coverage independent of the Attorney General because coverage, as opposed to the merits of a submission, is an issue within the jurisdiction of a local three-judge court to consider).
Minority Voting Rights
court in the District of Columbia even after an objection from the
Attorney General. In such an action, the issue is heard de novo and
decided on the basis of the evidence presented to the court—not
upon an administrative record. The validity of the enactment is
thereby challenged in a traditional constitutional suit, rather than as
a review of the Attorney General’s discretion.

In South Carolina v. Katzenbach, the Court approved the venue
provisions of section 5 as an appropriate exercise of congressional
Act continued to vest the District of Columbia courts and the
Attorney General with exclusive jurisdiction to determine the merits
of section 5 submissions on the grounds that it was necessary to
provide uniform interpretation and application of the Act’s standards and to continue to insure decision making free from local
pressures.

Even where the Attorney General has precleared a voting
change, voters who are aggrieved can still bring a judicial challenge under section 2 of the Voting Rights Act. Again, in such an action
the issue is not the correctness of the Attorney General’s decision but
the validity or invalidity of the challenged electoral practice.

Miller did not overrule Morris v. Gressette—indeed, Miller did
not even mention Morris by name. Since it would violate the Court’s
own canons of construction to overrule precedent sub silentio,

Elections, 393 U.S. 544, 555-56 & n.19 (1969); United States v. Bd. of Supervisors, 429
266. Morris, 432 U.S. at 506-07.
268. Id. at 331-32. See also Perkins v. Matthews, 400 U.S. 379, 385 (1971) ("Congress
expressly reserved [section 5 determinations] for consideration by the District Court for
the District of Columbia or the Attorney General").
the likelihood that recurring problems will be resolved in a consistent and expeditious
way."). Congress also limited venue to the District Court for the District of Columbia
for suits by covered jurisdictions seeking a bailout of the preclearance requirements
based in part on the belief that such limitation was "necessary to provide uniform
interpretation of the bailout standards." S. REP. NO. 417, supra note 18, at 58. For a
discussion of the bailout provisions, see McDonald, supra note 27, at 47-53.
under section 2 portions of a legislative redistricting plan precleared by the Attorney
General under section 5), aff’d sub nom. Thornburg v. Gingles, 478 U.S. 30 (1986). See also
congressional redistricting that had been precleared by the Attorney General under
section 5).
272. See Vasquez v. Hillery, 474 U.S. 254, 266 (1986) ("the careful observer will
discern that any detours from the straight path of stare decisis in our past have occurred
Morris must be regarded as binding. It is far from clear, however, what limitations, if any, in light of Morris, the Court has placed on local judicial review. Is review reserved only for those exceptional cases in which deference to the Attorney General would, as the majority indicated, "raise serious constitutional questions?" Or is review appropriate whenever the Attorney General's objection was not required "under a correct reading of the statute," or if there is "no reasonable basis" for the objection, or if the objection requires a jurisdiction to do something that is "race-based," e.g., adopt "race-based districting?" All of these are circumstances under which the majority indicated review might also be warranted.

If local review in a Miller-type action is available to determine if there is a "reasonable basis" for an objection, then every objection would be subject to review for reasonableness. If requiring a jurisdiction to take action that is "race-based" is enough to trigger local judicial review, then virtually every determination under section 5 would also be reviewable. The Attorney General has no authority under the statute to object, except on the basis of race (or membership in a language minority). Thus, anything a jurisdiction might be required to do as a consequence of an objection would itself be race-based.

Miller is also ambiguous as to the standard of review to be applied by a local district court once it exercises jurisdiction. Is deference required whenever there is a "reasonable basis" for an objection? Is an objection that requires a jurisdiction to take action that is "race-based" for that reason "inherently suspect"? If so, then virtually every objection by the Attorney General would be presumptively unconstitutional.

The majority decision in Miller not only breaches, to an admittedly unknown extent, the centralized section 5 review process established by Congress, but it provides an incentive for litigation and noncompliance with preclearance. Would-be plaintiffs now have an entirely new cause of action in local federal district courts to challenge remedies designed to cure section 5 violations on the ground that the Attorney General's objection was "wrong" or "unreasonable" or improper under a "correct" reading of the statute. Covered jurisdictions now have less incentive to comply with section 5 objections. They know that if they are sued in the local

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for articulable reasons".

273. Miller, 115 S. Ct. at 2491.
274. Id.
275. Id. at 2492.
276. Id.
278. Miller, 115 S. Ct. at 2492.
courts for failure to comply they will get judicial review of the objection and perhaps a decision that the Attorney General’s position on the merits “exceeds” her authority.

Moreover, covered jurisdictions, whose historic treatment of minority voting rights was described by the Supreme Court as one of “unremitting and ingenious defiance of the Constitution,” can hardly be expected to vigorously defend lawsuits challenging the Attorney General’s objections to their voting practices under section 5.

The State’s half-hearted defense of its congressional redistricting plan in Miller is a case in point. If such cases are to be defended adequately, it would likely be by defendant intervenors, such as minorities in the jurisdiction or the Attorney General. But requiring minorities to bear the burden of section 5 enforcement would reverse the regulatory scheme established by Congress which was “to shift the advantage of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims.”

When it extended section 5 in 1982, Congress found that “[c]ontinued progress toward equal opportunity in the electoral process will be halted if we abandon the Act’s crucial safeguards now . . . . The gains are fragile.” Those words are equally true today. By approving local review of the determinations of the Attorney General, the majority in Miller has substantially weakened the safeguards of section 5 and broken with the Court’s prior decisions giving the statute “the broadest possible scope” in combating racial discrimination.

A. “Secret Agents” and the ACLU

In reviewing the section 5 objection of the Attorney General, the district court was sharply critical of the role of the Black Caucus, the Department of Justice (DOJ), and the ACLU in the preclearance process. Members of the legislature who communicated with the DOJ were labeled as “partisan ‘informants’” and “secret agents.”

The court concluded that the State would never have enacted the Eleventh District “but for DOJ demands.” There was “a direct

280. Id. at 328.
281. S. REP. NO. 417, supra note 18, at 10.
284. Id. at 1380; see also id. at 1383 (stating that the Eleventh District was designed to comply with “DOJ’s demands”); id. at 1385 (concluding that the Department of Justice used section 5 “as a tool for forcing” the State to draw majority Black districts).
link between the ‘Max-Black’ plan formulated by the ACLU and the preclearance requirements imposed by DOJ.” The “considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment. “[U]nfortunate” communications between the DOJ and the ACLU “created the impression that the ACLU and the Black Caucus wielded significant influence with DOJ’s Civil Rights Division and significant control over Georgia’s redistricting efforts. The State’s leaders were understandably nonplused. The ACLU was exuberant. Georgia officials and citizens were mystified.”

The court’s strongest and most emotionally laden condemnation of the Department of Justice was reserved for the hearing on remand following the decision of the Supreme Court. According to one member of the district court, “[t]he positions taken by the Department of Justice . . . are, in my view, no red herring. They go to the center of the reason for this litigation. Not a herring at all, but a Mackerel that is dead on the beach shining and stinking in the moonlight.”

As the redistricting chronology described above reveals, the district court’s premise that the Department of Justice (with the connivance of the ACLU) forced the State to create the Eleventh as a majority-Black district rests in part upon facts that are either distorted or plainly wrong. The ultimate configuration of the Eleventh District was undeniably influenced by the existence of alternative redistricting plans, such as the Black Caucus/ACLU and Senate plans, and by the section 5 objections of the Attorney General. But just as undeniably, the Eleventh District was conceived and first enacted as a majority-Black district by the Georgia legislature itself, prior to any direct intervention by the Attorney General.

Moreover, the Eleventh District as passed by the legislature was not the Black Caucus/ACLU plan. As Justice Ginsburg concluded,

285. Id. at 1368.
286. Id.
287. Id. While one may argue whether members of the Black Caucus are in fact among the state’s political “leaders,” one cannot deny, as the district court appears to do, that they are “Georgia officials and citizens” of the State.
288. Transcript of Hearing, supra note 76, at 109-10 (comments of Judge Bowen). The court’s hostility to the preclearance process in Georgia evokes memories of the bitter dissent from Justice Black in South Carolina v. Katzenbach, 383 U.S. 301, 360 (1966), that section 5 was a humiliating and unwarranted interference with state’s rights and treated the covered southern jurisdictions as “little more than conquered provinces.”
the State, not some third party, "chose to adopt the plan here in controversy." 290

The district court's criticism of "partisan 'informants,'" "secret agents," and the ACLU is a misguided attack upon the Department of Justice for making a factual investigation of the State's submissions. The section 5 regulations provide for comments by persons potentially affected by voting changes. 291 The regulations also allow for persons making comments to request confidentiality. 292 The purpose of the confidentiality provision is to provide protection to "people closely associated with the [legislative] decisionmakers and whose livelihoods might be in jeopardy if their contact with the Department of Justice were to be revealed." 293

Because section 5 depends largely on voluntary compliance and because the DOJ does not have infinite resources with which to investigate submissions, comments from affected minorities in the covered jurisdictions are essential to the adequate enforcement of the statute. The DOJ obviously cannot rely on the submitting jurisdictions to point out ways in which their proposed voting changes might violate the substantive provisions of section 5. It is difficult to conceive how section 5 decisionmaking could be reliable if, as the district court seems to suggest, the Attorney General were permitted to receive information only from a submitting jurisdiction. Section 5 would become virtually meaningless if racial minorities, for whose benefit the statute was passed, were barred from communicating with the Attorney General about proposed voting changes, or if their communications could be dismissed, as they were by the district court in Miller, simply as "unfortunate" or an "embarrassment."

VII. Miller Threatens to Purge Minorities from Office

Miller, with its attack on majority-minority districts, threatens to
wipe out the gains in minority office-holding in the South achieved over the last thirty years. *Quiet Revolution*, a collaborative effort by twenty-seven political scientists, historians, and lawyers funded by the National Science Foundation, is by far the most comprehensive and systematic study to date of the Voting Rights Act. It examined the impact of the Act in eight southern states covered in whole or in part by the preclearance provisions of section 5. The three principal conclusions of the study are:

First, the increase in the number of Blacks elected to office in the South is a product of the increase in the number of majority-Black districts and not of Blacks winning in majority-White districts. Second, even today Black populations well above fifty percent appear necessary if Blacks are to have a realistic opportunity to elect representatives of their choice in the South. Third, the increase in the number of Black districts in the South is primarily the result not of redistricting changes based on population shifts as reflected in the decennial census but, rather, of those required by the Voting Rights Act of 1965 and its 1982 amendments. Federal intervention of this nature, as well as voting rights suits brought by private litigants, was primarily responsible for the significant increase in southern black officeholding.

VIII. PRIOR STUDIES ARE GENERALLY CONSISTENT WITH THESE FINDINGS

As an illustration of the findings of *Quiet Revolution*, of the seventeen African Americans elected to Congress in 1992 and 1994 from the eleven states of the old Confederacy, all were elected from

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294. See Pildes, supra note 126, at 1362, noting that: Utterly free of ideological cant, *Quiet Revolution* presents the most sober, comprehensive, and significant empirical study of the precise effects of the VRA ever undertaken. With its rigorous methodology and systematic approach *Quiet Revolution* immediately renders obsolete prior academic, judicial, and media accounts of the Act that rest on more anecdotal or speculative assertions.

295. McDonald et al., supra note 21, at 17. The states are Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia. Five counties in Florida are also covered by section 5, but that state was not included in the study. No portions of Arkansas or Tennessee, the other two Confederate States, are covered by section 5. 28 C.F.R. app. § 51 (1995).

296. Handley & Grofman, supra note 148, at 335-36.

minority-minority districts. For minorities to win in these states, it has generally been necessary for them to run in districts with a majority-minority population.

The only Black in the twentieth century to win a seat in Congress from a majority-White district in one of the southern States covered by section 5 was Andrew Young. He was elected in 1972 from the Fifth Congressional District located in the Atlanta metropolitan area and in which Whites constituted over fifty percent of the population. Still, voting was strongly racially polarized and he got only twenty-five percent of the White vote. In 1990, Young ran for Governor of Georgia. In both the primary and runoff he again got about one-fourth of the White vote, but running statewide, where Blacks made up twenty-seven percent of the population, he was defeated.

Abolition of majority-minority districts would likely result in the elimination of most, if not all, of the African American members of Congress from the South. The results in the rest of the country could be almost as dramatic. Of the twenty-two Black members of the House elected outside the South, only three were elected from majority-White congressional districts.

A pattern of minority office-holding similar to that in Congress exists for southern state legislatures. Throughout the 1970s and 1980s, only about one percent of majority-White districts elected a Black representative. Blacks who were elected were overwhelmingly elected from majority-Black districts. As of 1988, no Blacks were elected from majority-White districts in Alabama, Arkansas, Louisiana, Mississippi, and South Carolina.

The same pattern that an increase in the number of majority-minority districts increases the number of elected minority officials, is repeated for southern cities and counties. As noted in Quiet Revolution:

[We] reaffirm the standard view that at-large elections have deleterious effects on black representation for cities with white majorities and a black population of at least 10 percent . . . . [D]ramatic gains in black representation followed abolition of at-large elections—gains much greater than in cities that

299. McDonald et al., supra note 21, at 85.
300. Id.
303. See id. at 346.
remained at large. (The negative impact of at-large elections is felt in county government too...)

This pattern of minority office-holding, being confined almost exclusively to highly integrated majority-minority districts in the South, is the direct result of racially polarized voting patterns that have prevailed long after the abolition of literacy tests, White primaries, and the poll tax. Destroying these districts, in the name of the Fourteenth Amendment, no less, would likely return Georgia and the South to the days when legislative bodies were largely, or exclusively, White.

CONCLUSION

In 1868, Blacks were elected to the Georgia General Assembly for the first time in the state's history. Thirty-two Blacks were elected to the General Assembly that year, twenty-nine in the House and three in the Senate. Both houses soon passed resolutions excluding them on the grounds that they were “ineligible” to serve under the state constitution. The Speaker of the House ensured passage of the resolution in the lower chamber by ruling that the Black members could not vote on the issue of their expulsion. In an eerie replay of that history, the Georgia General Assembly some one hundred years later, acting again upon a supposed constitutional mandate, i.e., Miller, abolished nine majority-Black House and two majority-Black Senate districts. And across the South, Blacks and other racial minorities, with the sanction of the Supreme Court, are threatened with expulsion from Congress through the systematic destruction of majority-minority electoral districts. This process of twentieth-century disfranchisement, evoking as it does the racial

305. John Lewis, an experienced politician who represents the Fifth Congressional District in Atlanta, called the current attack on majority-minority districts “the greatest threat to the Voting Rights Act since it was written in August 6, 1965. If it wasn’t for the Voting Rights Act, it would still be primarily white men in blue suits in Congress.” Laughlin McDonald, Voting Rights and the Court: Drawing the Lines, 15 S. CHANGES, Fall 1993, at 5.
307. Id. at 61.
308. Id. at 61-62; House Journal, Aug. 26, 1868, at 222; Sept. 3, 1868, at 242-43; Senate Journal, Sept. 7, 1868, at 243-44; Sept. 11, 1868, at 2732-33; Sept. 12, 1868, at 277-78. Four mulattoes had also been elected to the House and were originally targeted for expulsion, but they were granted the status of honorary White men and were allowed to keep their seats. BARTLEY, supra note 306, at 62.
backlash of the nineteenth century, if unchecked, will inevitably lead to a purge of minority-elected officials at every level of government. The consequences for minorities and for the nation as a whole could be as tragic as they were a hundred years ago.