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EASING THE SPRING: STRICT SCRUTINY AND AFFIRMATIVE ACTION AFTER THE REDISTRICTING CASES

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Strict scrutiny's rationale and its results stand in sharp tension with one another. The reason for skepticism about the government's use of race lies in our historical experience of the enslavement, exclusion, and unfair treatment of African-Americans, Asian-Americans, and Hispanics. But strict scrutiny was the consequence, not the cause, of the Supreme Court's decisions outlawing that discrimination. It wasn't until 1964, in *McLaughlin v. Florida*,[1] that the Court "both articulated *and* applied a more rigorous review standard to racial classifications."[2] By then, the Court had essentially finished the job of eradicating explicit racial classifications, and rational basis review had proven adequate for the task. For example, in *Anderson v. Martin*,[3] decided the same Term as *McLaughlin*, the Court unanimously struck down a Louisiana law requiring that a candidate's race be indicated on the ballot. In the context of early 1960s Louisiana,[4] the law's most foreseeable effect was to furnish "a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for

* Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School. As with all my work in voting rights, many of the ideas in this piece come from innumerable conversations with Jim Blacksher, Sam Issacharoff, and Rick Pildes. In some important ways, this piece is a bookend to an earlier article, Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201 (1996), and I thank my co-author Daryl Levinson for helping me to start thinking about the relationship between voting rights law and general equal protection doctrine. Finally, thanks to Viola Canales for comments on earlier drafts.

1. 379 U.S. 184 (1964).

2. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 255 (1991).

3. 375 U.S. 399 (1964).

4. *See* Louisiana v. United States, 380 U.S. 145, 148-53 (1965) (discussing Louisiana's multifarious efforts to reduce black political power).

another,"[5] that is, to reinforce racial bloc voting. In light of its conclusions about the law's racially discriminatory impact—and its suspicions about the legislature's discriminatory purpose[6]—the Court saw no way in which the provision was "*reasonably* designed to meet *legitimate* governmental interests in informing the electorate as to candidates."[7]

As for the results of strict scrutiny, its late arrival has had an ironic consequence. Strict scrutiny has been rather useless to the groups whose mistreatment prompted its adoption.

On the one hand, strict scrutiny is generally superfluous to the kind of equal protection case minorities have brought in the strict scrutiny era. These cases usually involve challenges to facially neutral laws. In such cases, to trigger strict scrutiny, plaintiffs must first prove that the government "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[8] But "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate*," let alone a compelling, "governmental interest."[9] Thus, proof of an invidious motive by itself strips a law of its presumptive legitimacy. As a formal matter, once the plaintiff has shown a discriminatory purpose, the burden shifts to the defendants to prove that the law would have been enacted even without that purpose.[10] As a practical matter, though, proof of an invidious intent to injure

5. *Anderson*, 375 U.S. at 402.

6. *Id.* at 403 (describing how the challenged provision was added to the law in 1960 and stating that "[t]his addition to the statute in the light of 'private attitudes and pressures' towards Negroes at the time of its enactment could only result in that 'repressive effect' which 'was brought to bear only after the exercise of governmental power'") (quoting Bates v. Little Rock, 361 U.S. 516, 524 (1960)).

7. *Id.* (emphasis added).

8. Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979).

9. U.S. Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

10. Hunter v. Underwood, 471 U.S. 222, 228 (1985).

blacks or Hispanics is the ballgame.[11] Few courts, having found that sort of malevolence, are likely to uphold a law anyway.[12]

On the other hand, strict scrutiny has proved invaluable in the assault on race-conscious affirmative action. That is certainly where the Court usually deploys it.[13] Of course, it can be hard to separate a justice's view on the appropriate standard of review from her view on the underlying merits: Is skepticism about affirmative action the cause or the consequence of applying strict scrutiny to all racial classifications? Still, it seems pretty clear that the level of scrutiny the Court applies to race-conscious affirmative action is closely correlated with the outcome it reaches. It is not simply coincidence that the Court upheld the affirmative action programs in *Metro Broadcasting*[14] and *Fullilove*,[15] where it applied a more lenient test that asked whether the challenged measures were substantially related to the achievement of an important government objective, but that it expressed serious doubts about the set-aside program at issue in *Adarand Constructors, Inc. v. Pena*,[16] where it squarely held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[17]

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11. I can think of only one (perhaps) exception, *City of Richmond v. United States*, 422 U.S. 358 (1975). In *City of Richmond*, the district court found that the city had annexed outlying white suburbs for the purpose of diluting black voting strength within the city. On appeal, the Supreme Court accepted the district court's findings with respect to a discriminatory purpose, but was "nevertheless persuaded that if verifiable reasons are *now* demonstrable in support of the annexation," *id.* at 373-74 (emphasis added), the city could retain the annexed areas consistent with section 5 of the Voting Rights Act of 1965. It is unclear to me whether the Court would have reached the same conclusion in a constitutional challenge to the annexation.

12. *Cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (plurality opinion) (noting that "proving 'that the same decision would have been justified . . . is not the same as proving that the same decision would have been made'" even absent the discriminatory purpose, which is the key question in a mixed-motive case).

13. The only exception of which I am aware is a now-ancient case, *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down Virginia's criminalization of interracial marriage. It is hard to believe that by 1967, rationality review would not have accomplished the same end: what conceivable state purpose for banning interracial marriage would the Supreme Court have found "legitimate"?

14. Metro Broad., Inc. v. FCC, 497 U.S. 547, 565 (1990).

15. Fullilove v. Klutznick, 448 U.S. 448, 473 (1980); *see also id.* at 519 (Marshall, J., concurring).

16. 515 U.S. 200 (1995).

17. *Id.* at 227. That program was back before the Court this Term in *Adarand*

One of the striking features of the Supreme Court's docket is how *few* classic affirmative action cases it has taken over the years. This has left the lower courts with relatively little guidance. Not surprisingly, in the years since *Adarand*, they have reached contradictory results.[18] My own sense is that, with a little help from the parties,[19] the Supreme Court has been more than happy to stay out of the fray.

The Supreme Court, however, has not been entirely absent from the controversy over governmental uses of race. Far from it. Over the past decade, the Supreme Court has addressed the question repeatedly, in the context of race-conscious redistricting.[20] Its

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Constructors, Inc. v. Mineta, 534 U.S. 103 (2001). The Tenth Circuit found that the program, as subsequently modified, was narrowly tailored to the achievement of the compelling government purpose of combating private racial discrimination that had either impeded minority business formation or had made it more difficult for minority-owned businesses to compete for government contracts. Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1187 (10th Cir. 2000), *cert. granted sub nom.* Adarand Constructors, Inc. v. Mineta, 532 U.S. 967 (2001). The Supreme Court granted certiorari limited to the questions "[w]hether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination" and "[w]hether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest." *Mineta*, 532 U.S. at 967. After briefing and oral argument, it dismissed the petition for certiorari as improvidently granted. Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001).

18. *Compare, e.g.*, *Adarand*, 228 F.3d 1147 (upholding the constitutionality of a race-conscious highway construction contracting program), *with* Builders Ass'n of Greater Chicago v. Cook County, 256 F.3d 642 (7th Cir. 2001) (striking down a county ordinance requiring that businesses owned by women and minorities be allotted certain percentages of county construction projects as violating the Equal Protection Clause), *and* Hopwood v. Texas, 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2550 (2001) (holding that a law school's affirmative action admissions program violates the Fourteenth Amendment), *with* Smith v. University of Washington, 233 F.3d 1188, 1200 n.9 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) (asserting that a race-conscious law school admissions program that was properly designed and executed would not violate Title VI or the Equal Protection Clause).

19. *See, e.g.*, Matthew S. Lerner, Comment, *When Diversity Leads to Adversity: The Principles of Promoting Diversity in Educational Institutions, Premonitions of the* Taxman v. Board of Education *Settlement*, 47 BUFF. L. REV. 1035, 1044-49 (1999) (discussing how civil rights groups raised the money to settle, and thereby moot, an affirmative action case on which the Supreme Court had granted certiorari).

20. These cases are not easily avoided, since they involve three-judge district courts and mandatory appellate jurisdiction at the Supreme Court. *See* 28 U.S.C. § 2284 (2000) (regarding cases challenging statewide legislative and congressional redistricting); 42 U.S.C. § 1973c (1994) (regarding all cases under section 5 of the Voting Rights Act); SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 905-06 (2d ed. 2001) [hereinafter THE LAW OF DEMOCRACY]; Michael E. Solimine, *The Three-*

decisions, which are all over the map in both the literal and figurative senses of the phrase, suggest a nuanced understanding both of what triggers and of what satisfies strict scrutiny. The redistricting cases may flesh out the Court's expressed wish in *Adarand*—"to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[21] They suggest that strict scrutiny may be strict in theory, but rather pliable in practice.

The first part of this Article explores the evolution of strict scrutiny in the Court's race-conscious redistricting cases. It shows how the Court has become less trigger-happy in invoking strict scrutiny in the first place: under the predominant purpose standard, not every use of race renders a plan constitutionally suspect. Moreover, the Court has recognized an important role for the political branches' judgments about how best to safeguard equality in its articulation of what constitutes a compelling state interest. Having described some central aspects of the redistricting cases, the second part of this Article turns to the question whether, and how, the Court might translate its doctrinal innovations here into its consideration of affirmative action in higher education. In previous work, I have explained my skepticism about a trans-substantive approach: the use of race in the redistricting process has seemed distinctive to me in ways that made it both "misguided and incoherent" to use general equal protection doctrine there.[22] But I lost that battle. The Court seems to have embraced the idea that, when it comes to the government's use of race, there is one equal protection clause. It is worth taking the Court at its word, at least to see where that can lead us.

I. THE NOT-STRICTLY STRICT SCRUTINY OF THE REDISTRICTING CASES

In the three decades between the Supreme Court's entrance into the political thicket in *Baker v. Carr*[23] and its decision in *Shaw v.*

Judge District Court in Voting Rights Litigation, 30 U. MICH. J.L. REFORM 79 (1996).

21. *Adarand*, 515 U.S. at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

22. Karlan & Levinson, *supra* note *, at 1202.

23. 369 U.S. 186 (1962).

Reno,[24] the Court developed a unique set of equal protection rules for cases involving redistricting.[25] Some of those rules—for example, one person, one vote—have no real counterpart elsewhere in equal protection. Others—for example, the distinctively tolerant approach to political gerrymandering—permit the government to take actions in the redistricting process that would be forbidden elsewhere. When it came to race and representation, the Court's qualitative dilution doctrine has been explicitly group-oriented rather than individualistic.

The one significant intersection of general equal protection doctrine with racial vote dilution occurred in the Court's 1980 decision in *City of Mobile v. Bolden*,[26] where the Court held that *Washington v. Davis*[27] required that minority plaintiffs prove that the defendant jurisdiction had adopted or maintained its election system precisely because of its dilutive impact on minority voters. Two years later, Congress amended section 2 of the Voting Rights Act of 1965 in order to eliminate the purpose requirement (of course as a matter of statutory, rather than constitutional law),[28] and in *Thornburg v. Gingles*,[29] the Supreme Court adopted an expansive construction of amended section 2 that focused on the question whether minority voters had an equal opportunity to elect the candidates of their choice. In areas with significant racial bloc voting—and this includes much of the South and Southwest, as well as some northern cities—minority voters can elect their preferred candidates only from districts where they form a substantial share, often a majority or supermajority, of the electorate. Thus, the standard remedy for a section 2 violation is to create some number of majority-black or majority-Hispanic districts.

As a result of amended section 2, when the post-1990 round of decennial redistricting rolled around, states faced a substantial prospect of liability if they failed to draw majority-minority districts in areas with politically cohesive minority populations. Those

24. 509 U.S. 630 (1993).

25. For a more extensive discussion of this point, see Karlan & Levinson, *supra* note *, at 1201-02, 1204-08.

26. 446 U.S. 55 (1980).

27. 426 U.S. 229 (1976).

28. *See* 42 U.S.C. § 1973 (1994).

29. 478 U.S. 30 (1986).

jurisdictions required to seek federal preclearance under section 5 of the Act[30] confronted strong pressure from the Department of Justice as well. In several states, including North Carolina and Georgia (whose plans were to end up at the Supreme Court), the Department rejected the states' proposals until they created more majority-nonwhite districts.[31]

Redistricting has always been an unseemly process, nature red in tooth and claw, but a combination of features in the post-1990 round produced unseemly results. The Democratic politicians who controlled redistricting within many jurisdictions with large minority populations, particularly in the South, faced an exquisitely difficult problem: in the face of declining support among white voters, they needed both to preserve the seats of incumbent white legislators and to create some new majority-minority districts.[32] The technique they used, aided by computer technology and detailed census data that allowed far more fine-tuning of district lines than had previously been possible, was to painstakingly divvy up populations of black or Hispanic voters, often block by block, so as to create new majority-minority districts while leaving sufficient numbers of reliable minority Democrats in the adjacent majority-white districts held by Democratic incumbents.[33] In fact, *all* gerrymandering, including purely partisan efforts, was more surgical. Across the board, congressional district lines following the post-1990 redistricting were significantly more contorted than their

30. 42 U.S.C. § 1973c (1994). Section 5 requires specified jurisdictions (those which have a history of excluding minority citizens from full political participation) to get federal approval before using a new districting plan. For a full treatment of the section 5 preclearance process, see THE LAW OF DEMOCRACY, *supra* note 20, at 546-671.

31. *E.g.*, Shaw v. Hunt, 517 U.S. 899, 902 (1996) (North Carolina); Miller v. Johnson, 515 U.S. 900, 906-07 (1995) (Georgia); Johnson v. DeGrandy, 512 U.S. 997, 1001 n.2 (1994) (Florida).

32. *See, e.g.*, 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, 516-24 (1993) (noting that in the case of North Carolina, one view of the facts in *Shaw* suggests that the "bizarre" election district appearance at issue was due to a desire to protect incumbents *and* comply with the VRA).

33. For discussions of this phenomenon, see for example, DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS 98-119 (1997); Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 302-04 (1997) (citing sources).

predecessors.[34] The fact that many of the most irregularly shaped districts were majority-black or majority-Hispanic was in large part a function of political imperatives rather than pure necessity. For the most part, minority groups got their districts drawn last, and therefore had them squeezed into a map that had already taken shape.[35]

When the Supreme Court first confronted a challenge to one of these districts, in *Shaw v. Reno*,[36] it recognized that its pre-existing case law, which had focused on disenfranchisement and dilution, was orthogonal to the question. The Court instead recognized a new, "analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification."[37] This claim—especially as the Court made clear that only a "compelling" justification would be sufficient[38]—appeared to merge the law governing race-conscious districting back into general-purpose equal protection doctrine.

Yet, even in *Shaw v. Reno*, there were hints that the Court was tweaking conventional equal protection doctrine. It modified both what triggers strict scrutiny and what counts as a compelling state interest in important and potentially far-ranging ways. Those modifications have been amplified in its later decisions. The upshot is that there is now far more room for the use of race than the categorical statement in *Adarand* might suggest.

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34. Pildes & Niemi, *supra* note 32, at 569-75 (concluding that election districts in the 1990s were less "compact" than election districts in the 1980s).

35. One telling piece of evidence: in California, where special masters appointed by the state supreme court drew the districts, blacks and Hispanics were apparently *first* in line, and their districts were relatively *compact*. Wilson v. Eu, 823 P.2d 545, 579-80 (Cal. 1992) (appendix containing the report of the special masters who drew California's congressional and legislative districts) ("Having *first* constructed Latino and African-American congressional and state legislative districts, . . . the *remainder* of the districts allocated to Los Angeles County had to be constructed around the periphery; in some instances they became rather elongated.") (emphasis added).

36. 509 U.S. 630 (1993).

37. *Id.* at 652.

38. *See id.* at 642.

A. What Triggers Strict Scrutiny

When it came to redistricting, for all the Court's invocations of the ideal of colorblindness, the Court did not require plan drawers to ignore race. The Court distinguished redistricting from other kinds of government decision making on the grounds that "the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors."[39] That awareness, however, is not inevitable: the reason politicians who draw district lines are aware of race in a precise form is that they have obtained race-specific data from the Census Bureau.[40] It is entirely *possible* to draw district lines without regard to race at all.[41] The reason politicians don't do so is primarily that they find race very helpful for purely partisan reasons—in some places race is highly correlated with voting behavior (indeed, it can be more highly correlated than party registration), and serves as a shorthand way of figuring out the political complexion of a potential district. In addition, line-drawers face pressure from the Voting Rights Act and minority communities to provide minority voters with some districts from which they can elect the candidates of their choice. Without knowing the size and geographic distribution

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39. *Id.* at 646.

40. *Cf.* Shaw v. Hunt, 517 U.S. 899, 925 (1996) (Stevens, J., dissenting).

> I do not believe that it would make sense to apply strict scrutiny to the Federal Government's decision to require citizens to identify their race on census forms, even though that requirement would force citizens to classify themselves racially, and even though such a requirement would arguably convey an insidious message about the Government's continuing belief that race remains relevant to the formulation of public policy.

Karlan & Levinson, *supra* note *, at 1214 (describing how legislators rely on race-specific census data and suggesting that applying strict scrutiny to all government actions that describe individuals in racial terms would mark a significant expansion of existing doctrine).

41. For a particularly pointed example, see ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 84-89 (1990). Then-professor Bork was retained by a federal district court to redraw Connecticut's state legislative districts. Armed with a map, a ruler, and nothing but gross population figures, he drew a plan that "utterly ignored geographical and demographic facts," and maximized population equality, with the ironic consequence that his plan produced praise from the Democrats and consternation among Republicans.

of a minority population, it is impossible to determine whether a plan complies with the Act.

Nor is that awareness unique. Many government decision makers are aware of race and other demographic factors when they make their decisions. An admissions officer at the University of Michigan, for example, is bound to know that the Detroit public school system is over ninety percent black, and thus that an applicant who attended high school there is quite likely to be African-American. An admissions officer at the University of Texas who sees that an applicant's name is "Viola Canales" and that she grew up in McAllen, in the Rio Grande Valley, can reasonably assume that she is Hispanic. Any decision maker who encounters an individual face-to-face will have at least *some* racial or ethnic information about *some* applicants.[42] It may turn out that the Supreme Court has a somewhat naive view of the information typically available to state actors because the affirmative action cases that produced its embrace of strict scrutiny—*Croson*[43] and *Adarand*[44]—involved the highly formal and thus somewhat atypical practice of competitive bidding. In competitive bidding, anonymity is easy to achieve, and, assuming the bid meets the specifications, bids can be ranked against each other along one entirely quantifiable dimension, namely, price.[45]

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42. Of course, observations may be either indeterminate or factually incorrect. Indeed, one of the (many) reservations police departments have about collecting racial data about traffic stops is the problem with asking officers to assess race for themselves and the alternative problem with officers asking the people they stop to indicate their race. Even without access to formal data about the race of a person with whom they are dealing, however, government officials often will have a hunch about race or ethnicity. It may be virtually impossible, in any setting where the official has any degree of discretion, to be sure that race played no role in the official's decision, because it may be impossible to erase the official's knowledge or beliefs about race.

43. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (striking down a city's set-aside program as violative of the equal protection clause).

44. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

45. As I suggest later, *see infra* text accompanying notes 120-27, the admissions process at a competitive educational institution resembles redistricting far more than it resembles competitive bidding. From among those who meet the basic qualifications (as from among plans that comply with one person, one vote), there will be an array of possible classes, no one of which is clearly superior along every one of a set of distinct dimensions. Very few people argue that higher education admissions should take place exclusively along a single, entirely quantifiable dimension. Indeed, even with regard to the quantifiable elements—such as test scores or prior G.P.A.—there are often disagreements about whether and what

More significantly, the *Shaw v. Reno* Court suggested that "race consciousness does not lead inevitably to impermissible race discrimination."[46] The example of permissible, race-conscious action to which *Shaw v. Reno* pointed was *Wright v. Rockefeller*,[47] a case involving post-1960 congressional redistricting in Manhattan. According to *Shaw v. Reno*, the plan at issue in *Wright* shows that

> 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. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions.[48]

To be sure, the *Wright* Court did affirm the district court's determination that the plaintiffs had failed to show that the specific boundaries "'were drawn on racial lines.'"[49] But consider, for a moment, the facts: on a relatively small island,[50] the legislature managed to create adjacent districts with wildly different demographic (and, not coincidentally, political) complexions. The Seventeenth District—the so-called "Silk Stocking" district—was 94.9% white (and the only Republican seat).[51] The adjacent Eighteenth District—an overwhelmingly Democratic district centered on Harlem—was 86.3% black and Puerto Rican.[52] And what did these districts look like? In dissent, Justice Douglas drew a verbal picture of the boundary between the two:

> The southeast corner [of the Eighteenth District] is near the East River and from there it goes—west four blocks, north two blocks, west one block, north five blocks, west one block, north one block, west one block, north one block, west one block, north eleven blocks, west five blocks across the northern line of

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adjustments are required to reflect underlying ability or potential.

46. Shaw v. Reno, 509 U.S. 630, 646 (1993).

47. 376 U.S. 52 (1964).

48. *Shaw*, 509 U.S. at 646.

49. *Wright*, 376 U.S. at 55 (quoting the district court opinion).

50. So much for the plan having anything to do with "maintain[ing] the integrity of political subdivisions." *Shaw*, 509 U.S. at 646. No political subdivisions were involved.

51. *Wright*, 376 U.S. at 59 (Douglas, J., dissenting).

52. *Id.*

> Central Park to Morningside, north along Morningside about twelve blocks, west one block, north along Amsterdam from 122d to 150th, east two blocks, north fifteen blocks to 165th, and east to East River.[53]

People roughly familiar with the East Side during the 1960s were surely *aware* that, as one moved westward towards Fifth Avenue and Central Park, the informal boundary line between white and minority neighborhoods moved north—just like the district lines did. The eleven-sided, step-shaped boundary between the Seventeenth and Eighteenth Districts was as surgical a dissection as the districting techniques of 1961 made possible. But I would be quite surprised if someone who simply looked at the demographic information and the maps in *Wright* would see a constitutionally significant distinction between the New York plan and the North Carolina plan challenged in *Shaw*, or, even better—because it too involved carving up metropolitan areas—the Texas plan at issue in *Bush v. Vera*.[54]

Put another way, the plan in *Wright* might well reflect "community," but that community was itself racially defined.[55] It was not an accident that Harlem got a district. Were it not for the political deal cut in the state legislature—where the majority-Republican state senate insisted on getting a Republican seat in Manhattan and received Democratic support for the overall plan because it also protected black incumbent Representative Adam Clayton Powell's base in Harlem—it is entirely possible that Harlem could have been split between two districts, each of which would then have been majority white, and majority Democratic as

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53. *Id.* at 60.

54. 517 U.S. 952 (1996). In *Vera*, the Supreme Court struck down majority-black and majority-Hispanic congressional districts in Houston and Dallas. *Id.* at 973-76. Those plans were products of precisely the kind of incumbent-protecting, partisan-concerned attempt to satisfy a host of competing considerations as the *Wright* plan. The only real differences were that 1990s technology enabled the lines to be drawn a bit more finely and the parties were a little more candid about what was going on.

55. I explore the question of what "community" means in the context of legislative districting in Karlan & Levinson, *supra* note *, at 1216-20, and Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-*Shaw *Era*, 26 CUMB. L. REV. 287, 302-05 (1995). *See also* Stephen J. Malone, Note, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 VA. L. REV. 461 (1997) (extensively examining the concept of "communities of interest").

well.[56] Race, along with politics, incumbent protection, and a host of other factors, played *some* role in the creation and configuration of the districts.

In fact, as the *Shaw v. Reno* Court formulated its test, it refused to express a view "as to whether 'the intentional creation of majority-minority districts, without more,' always gives rise to an equal protection claim."[57] Instead, it kept describing the constitutionally suspect plans as those that "rationally can be viewed *only* as an effort to segregate,"[58] "rationally cannot be understood as *anything other than* an effort to 'segregat[e],'"[59] and "created *solely* to effectuate the perceived common interests of one racial group."[60] Why the hedging or limitation? If general equal protection doctrine is to apply, why doesn't the intentional reliance on race trigger strict scrutiny automatically? After all, two years later in *Adarand*, the Court announced a categorical rule: "*[A]ll* racial classifications ... must be analyzed by a reviewing court under strict scrutiny."[61] Is it that "racial classification" is a term of art, so that the government can use race as long as that use does not rise to the level of being the preeminent factor?

The Court's subsequent cases suggest the answer is "yes"—some uses of race are insufficient to trigger strict scrutiny. That principle debuted in *Miller v. Johnson*[62]—a decision announced less than three weeks after *Adarand*—and was recently given real teeth in *Easley v. Cromartie*.[63]

Miller involved a challenge to Georgia's creation of two new majority-black congressional districts. (A third district was the successor to a majority-black district created as a result of voting rights litigation in the 1980s.)[64] *Miller* purported to rely on general

56. The plaintiffs in *Wright* were Manhattan Democrats. Their clear aim was to force a redrawing of the district lines between the Seventeenth and Eighteenth Districts, moving blacks and Puerto Ricans into the former, thereby changing its partisan composition. *See Wright*, 376 U.S. at 53-54.

57. Shaw v. Reno, 509 U.S. 630, 649 (1993) (quoting dissent).

58. *Id.* at 642 (emphasis added).

59. *Id.* at 646-47 (emphasis added).

60. *Id.* at 648 (emphasis added). I have not bothered to cite the many other, purely repetitive formulations of the question.

61. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (emphasis added).

62. 515 U.S. 900 (1995).

63. 532 U.S. 234 (2001).

64. For a detailed account of Georgia's redistricting history, see Pamela S. Karlan, *The*

equal protection principles, but it subtly changed the focus. Consider the critical passage:

> Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. Shaw, [509 U.S. at 646]; see *Personnel Administrator of Mass. v. Feeney*, [442 U.S. 256, 279 1979)] ("'Discriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects") (footnotes and citation omitted). The distinction between being aware of racial considerations and being motivated by them may be difficult to make. ... The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines."[65]

I shall put to the side the Court's creative extension of *Feeney*—no one has ever alleged in any of the post-*Shaw* cases that the state created majority-nonwhite districts because of their "adverse effects" on anyone. Indeed, the plaintiffs in the racial redistricting cases have assiduously declined to raise claims of vote dilution at all.[66] What is more significant for our purpose is the Court's introduction of a "predominant factor" test: only if the

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Fire Next Time: Reapportionment After the 2000 Census, 50 STAN. L. REV. 731, 745-47 (1998).

65. *Miller*, 515 U.S. at 916.

66. I explore this point in extensive detail elsewhere. Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2278-79, 2284-87 (1998).

legislature "subordinate[s]" permissible principles to a racial end has it acted with a discriminatory purpose.

That had not previously been the law. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court had squarely refused to rest its analysis on the comparative centrality of different motives:

> Rarely can it be said that a legislature ... made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.[67]

Moreover, as I suggested earlier in explaining the superfluousness of strict scrutiny to claims by racial minorities, the *Arlington Heights* Court did not suggest that proof of a racially discriminatory purpose triggered strict scrutiny. Rather,

> [p]roof that the decision by the Village was motivated in part by a racially discriminatory purpose would ... have shifted to the [defendant] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose.[68]

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67. 429 U.S. 252, 265-66 (1977) (citations omitted). In a footnote, the Court elaborated by quoting its observation in *McGinnis v. Royster*, 410 U.S. 263, 276-77 (1973), that: "The search for legislative purpose is often elusive enough ... without a requirement that primacy be ascertained. Legislation is frequently multipurposed: the removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute." *Arlington Heights*, 429 U.S. at 265 n.11.

68. *Arlington Heights*, 429 U.S. at 270 n.21.

Miller substitutes a strict scrutiny trigger—which will require the government to advance a compelling purpose, rather than simply to show that it would have taken the challenged action anyway for some legitimate reason—but it then limits this trigger to cases where race "subordinated" other factors, rather than also abandoning judicial deference in cases where race was just "a" motivating factor.

In part, this might reflect the Court's implicit recognition that uses of race that are not intended to injure should be treated differently even if there is no compelling justification for using race. The Court's opinion leaves this unclear. What is clear, though, is that the prior case law had not required proof of predominance.

The concept of predominance is, in any case, problematic when it comes to redistricting. If "predominant" really means categorically preferred to all other goals, then race is *never* the predominant factor in any plan drawn by politicians. Three factors the Court inexplicably left off its list of traditional districting principles—compliance with one person, one vote; partisan advantage; and protection of incumbents—are always going to be as important.[69] Moreover, the concept is further complicated by *Miller*'s reassurance that "[a] State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests."[70] What does this mean, especially in light of the Court's somewhat contradictory claims that race fails to correlate with any common thread of politically salient interests (in the *Shaw* cases) and that plaintiffs must prove that the minority community is politically cohesive (in cases under the Voting Rights Act)?[71]

In each of the post-*Miller* cases to come before the Court on the merits, the defendants have argued that race was not the predominant factor in explaining the configuration of the challenged districts. Instead, they argued that political considerations—primarily incumbent protection—played a more decisive role. In *Bush v. Vera*[72] and *Shaw v. Hunt*,[73] the Court rejected that

69. *See* Karlan, *supra* note 55, at 302-03.
70. *Miller*, 515 U.S. at 920.
71. *See* Karlan & Levinson, *supra* note *, at 1216-20.
72. 517 U.S. 952 (1996).
73. 517 U.S. 899 (1996).

claim, finding that the ways in which race was used belied that protestation.[74] But last Term, in *Easley v. Cromartie*,[75] the Court accepted the defendant's argument.[76]

Cromartie involved a challenge to a redrawn version of North Carolina's Twelfth Congressional District, the district earlier challenged in *Shaw v. Reno* and *Shaw v. Hunt*.[77] Justice Breyer's opinion for the Court in *Cromartie* sharpened the distinction between race "simply hav[ing] been '*a* motivation for the drawing of a majority minority district'"[78]—which would be entirely permissible—and race being the "predominant factor," a showing that would trigger strict scrutiny. The Court then performed a painstakingly thorough review of the record, going beyond the district court's findings to examine the entire testimony of the expert witness on which the trial court had relied. Ultimately, it concluded that the legislature's motivation in drawing the boundaries as it had was predominantly political, not racial, and that the district court's conclusion to the contrary was clearly erroneous.[79]

Much of the Court's discussion focused on the difficulty of teasing apart political and racial considerations in jurisdictions where voting behavior is strongly correlated with race.[80] For present purposes, the most interesting part of the Court's discussion is its treatment of one of the pieces of direct evidence relied on by the district court. One of the leaders of the redistricting process, State Senator Roy Cooper, testified before the legislative committee considering the plan that:

> Those of you who dealt with Redistricting before realize that you cannot solve each problem that you encounter and everyone can find a problem with this Plan. However, I think that overall it

74. *Vera*, 517 U.S. at 972-73; *Hunt*, 517 U.S. at 906-07.

75. 532 U.S. 234 (2001).

76. *Id.* at 246-48.

77. *Id.* at 237.

78. *Id.* at 241 (quoting Bush v. Vera, 517 U.S. 952, 959 (1996)).

79. *Id.* at 257-58. Like virtually all of the *Shaw* cases decided on plenary review of the merits (rather than summarily), the decision in *Hunt v. Cromartie* was 5-4. Interestingly, the dissent, written by Justice Thomas, did *not* argue that race had in fact been the predominant motivation. Rather, it argued that the Court had misapplied the clearly erroneous standard. *Id.* at 259 (Thomas, J., dissenting).

80. *Id.* at 241-43 (opinion of the Court).

> provides for a fair, geographic, racial and partisan balance throughout the State of North Carolina. I think in order to come to an agreement all sides had to give a little bit, but I think we've reached an agreement that we can live with.[81]

The Supreme Court held that Senator Cooper's reference to the "racial balance" of the plan—its preservation of the 10-to-2 black/white balance in the State's twelve-member congressional delegation—showed "that the legislature considered race, along with other partisan and geographic considerations," but concluded that this "says little or nothing about whether race played a *predominant* role comparatively speaking."[82]

That the legislature "considered" race is, of course, not precisely the same thing as saying that the legislature was "aware" of race. The former at least suggests some level of volition as to the consequences of its decision, whereas the latter need not. Put in *Feeney* terms, it seems quite clear that the Supreme Court is prepared to conclude that North Carolina selected the challenged plan "at least in part 'because of,' not merely 'in spite of,'" the racial composition of the districts. Yet the Court did not apply strict scrutiny. When race was just one factor among many, the Court seemed prepared, at least this time, to let race play a role in the process. The desire to assure some representation for the state's substantial black population did not strike the Court as the kind of motive that should strip the state's decisions of their presumption of constitutionality.

B. What Counts As a Compelling Justification

The Supreme Court's discussions of what constitutes a compelling state interest justifying the use of race in the redistricting process may also mark a promising turn in equal protection doctrine. In suggesting that compliance with sections 2 and 5 of the Voting Rights Act can constitute a compelling state interest,[83] the Court has raised the possibility that congressional or executive understandings of equality that go beyond what the

81. *Id.* at 253.
82. *Id.*
83. *E.g.*, Shaw v. Hunt, 517 U.S. 899, 915 (1996).

Constitution itself requires can provide a justification for race-conscious state action.

Only the purposeful dilution of minority voting strength violates the Constitution.[84] The Voting Rights Act, however, prohibits state and local governments from using electoral arrangements that have a discriminatory impact regardless of the government's motivation.[85] Section 2 forbids using an arrangement that "*results* in a denial or abridgement of the right... to vote"; a violation occurs if minority voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[86] Section 5 applies only to a statutorily defined subset of jurisdictions.[87] These "covered

84. Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 481 (1997) (citing City of Mobile v. Bolden, 446 U.S. 55, 62 (1980)). Ironically, no proof of discriminatory purpose is required for the quantitative claim of dilution through malapportionment. *See* James U. Blacksher & Larry T. Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden*: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 4, 19 (1982) (noting that claims of one person, one vote are easier to bring than claims of racial discrimination against black voters).

85. Thornburg v. Gingles, 478 U.S. 30, 35 (1986) (discussing section 2 of the Voting Rights Act as amended). A particularly striking illustration comes from another provision of the Act: the ban on literacy tests. 42 U.S.C. § 1973aa (1994). In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court unanimously held that the 1970 amendment to the Voting Rights Act that banned literacy tests nationwide was an appropriate use of congressional enforcement power under the Fifteenth Amendment. Arizona had challenged that provision on the ground that its literacy test was administered in a nondiscriminatory manner. The case produced five separate opinions, because the Justices fractured on an unrelated provision of the Act dealing with guaranteeing eighteen-year-olds the right to vote. Justice Brennan's opinion for himself and two other Justices declared that "Congress could legitimately have concluded that the use of literacy tests anywhere within the United States has the inevitable effect of denying the vote to members of racial minorities whose inability to pass such tests is the direct consequence of previous governmental discrimination in education." *Id.* at 235. Justice Brennan concluded that "Congressional power to remedy the evils resulting from state-sponsored racial discrimination does not end when the subject of that discrimination removes himself from the jurisdiction in which the injury occurred." *Id.* at 233. Similarly, in *Gaston County v. United States*, 395 U.S. 285 (1969), the Court upheld the suspension of that county's literacy test without any showing that the test was implemented in a racially discriminatory manner. In part, that decision rested on the fact that the county's previous maintenance of a de jure segregated school system had provided its black citizens with an inferior education that "in turn deprived them of an equal chance to pass the literacy test." *Id.* at 291. The Court, however, found "no legal significance" to the county's claim that some residents' inability to pass the test was a result of their having received their education "in other counties or States also maintaining segregated and unequal school systems," rather than in Gaston County itself. *Id.* at 293 n.9.

86. 42 U.S.C. § 1973 (1994) (emphasis added).

87. 42 U.S.C. § 1973b(b) (1994) (setting out the formula); 28 C.F.R. pt. 51 app. (2001)

jurisdictions" cannot make any changes in their district lines until the new lines have been precleared by either the Department of Justice or the U.S. District Court for the District of Columbia. Preclearance is conditioned on the jurisdiction's proving that the new plan will not have a "discriminatory *effect*."[88] For purposes of section 5, effect is defined in comparative terms: the proposed plan is compared to the existing plan, and the reviewing authority asks whether the plan will have a "retrogressive" effect on minority voting strength by making minority voters worse off.[89] Thus, both the results test of section 2 and the retrogressive effects test of section 5 go beyond what the Constitution itself would reach.

"The 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."[90] Section 2 claims involve an indivisible blend of state action and private choice.[91] The pure state action is the drawing of district lines. The private action involves individual voters choosing which candidates to support. The mechanism that produces inequality is racial bloc voting—the decision by white voters and minority voters to support competing candidates. If racial bloc voting occurs, then the white-preferred candidate will win in any jurisdiction where whites are a numerical majority of the electorate.

(listing the actual jurisdictions). Basically the formula looks at two factors: whether, on one of three specified dates, a jurisdiction conditioned the right to vote by imposing a literacy "test or device" (which includes use of English language-only voting materials in a jurisdiction with large numbers of non-English speakers); and whether, on that date, either less than fifty percent of the persons of voting age were registered to vote or less than fifty percent of such persons voted in the presidential election.

88. 42 U.S.C. § 1973c (1994) (emphasis added).

89. Section 5 also forbids adopting a new plan with a retrogressive purpose, regardless of its effect. Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000). That standard, however, not only does not go beyond what the Constitution itself forbids, it actually requires preclearance of some purposefully discriminatory plans that would violate the Constitution. For a comprehensive treatment of section 5, see THE LAW OF DEMOCRACY, *supra* note 20, at 546-671.

90. *Thornburg*, 478 U.S. at 47.

91. *Cf.* Anderson v. Martin, 375 U.S. 399, 403 (1964) (stating, in the context of a Louisiana statute whose foreseeable purpose would be to encourage racial bloc voting, that "[t]he crucial factor is the interplay of governmental and private action") (quoting NAACP v. Alabama, 357 U.S. 449, 463 (1958)).

The relationship between state action and private choice in the electoral arena, however, is extremely tangled. Although any particular episode of racial bloc voting involves individual decision making, the distinctive preferences of white and minority voters are not entirely independent of state action. To the extent that racially correlated differences in political preferences are the product of socioeconomic disparities produced by inferior access to schools, government services, and the like, state action has *caused* polarized voting. Even more directly, past purposeful state discrimination in the election process itself—*Anderson v. Martin*[92] being a particularly clear example— is likely to have affected white voters' attitudes by communicating to them the idea that minority voters' attempts to gain political power should be resisted.[93]

In contrast to its powers with respect to employers or places of public accommodation, the government cannot regulate individual voters' choices to eradicate either overt racial bias or racially correlated preferences. So the Voting Rights Act neutralizes the consequences of bloc voting by changing the aspect of voting that *is* within the government's control, namely, the boundaries of electoral districts.[94] It requires states to draw plans that enable geographically concentrated, politically cohesive minority communities to elect representatives of their choice even in the face of continued white bloc voting. Such plans do not occur by accident; they require paying attention to race in the redistricting process.

Although the Supreme Court has upheld the constitutionality of the retrogressive effects test of section 5,[95] the Court has never

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92. 375 U.S. 399 (1964). I discuss the case in the introduction to this Article, *supra* text accompanying notes 3-7.

93. That this sort of intentional discrimination is not ancient history is shown by the post-1980 round of redistricting, in which influential legislators made such statements as "I don't want to draw nigger districts" (comment made by state Rep. Joe Mack Wilson, Chairman of the Georgia House Permanent Standing Committee on Legislative and Congressional Reapportionment, explaining the decision not to draw a majority-black district centered on Atlanta) and "We already have a nigger mayor and we don't need another nigger bigshot" (comment by state Rep. Charles Emile Bruneau, member of the joint conference committee responsible for drawing Louisiana's congressional districts, explaining why he opposed creating a majority-black district centered on New Orleans). THE LAW OF DEMOCRACY, *supra* note 20, at 653, 941 (reprinting these statements).

94. T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 634 (1993).

95. City of Rome v. United States, 446 U.S. 156, 173-78 (1980).

squarely ruled on the constitutionality of the results test of section 2. Nonetheless, in *Bush v. Vera*,[96] five Justices indicated both that states should be permitted "to assume the constitutionality of § 2 of the VRA, including the 1982 amendments" that introduced the results test,[97] and that "the States have a compelling interest in complying with the results test as this Court has interpreted it."[98] In part to avoid placing states in an impossible straitjacket, the Court held that "deference is due to [states'] reasonable fears of, and to their reasonable efforts to avoid, § 2 liability."[99]

I do not want to rehash the entire question of the continued constitutionality of the Voting Rights Act here.[100] For present purposes, it is enough simply to sketch out three theories under which an effects test might reflect an appropriate use of Congress's enforcement powers. First, under an "internal" theory, the Act might be intended to get at purposeful discrimination within the electoral system itself. Congress might conclude that the risk that dilutive plans are in fact motivated by racially discriminatory purposes is sufficiently great to forbid all dilution as a prophylactic matter. Second, under an "external" theory, Congress might impose an effects test to respond to prior illegal discrimination outside the electoral process that either produces contemporary racial bloc voting or otherwise reduces minority political strength. Finally, under a prospective theory, Congress might decide that equal access to the political process can prevent future unconstitutional

96. 517 U.S. 952 (1996).

97. *Id.* at 992 (O'Connor, J., concurring). The opinions in *Vera* are somewhat tangled. Justice O'Connor announced the judgment of the Court, striking down the three challenged Texas districts, and also wrote an opinion for herself, the Chief Justice, and Justice Kennedy that explicitly left these issues open. She then wrote a concurring opinion that effectively resolved the issues because she adopted a position that created a five-Justice bloc given the dissenters' position. The four consistent dissenters to the entire *Shaw* enterprise—initially Justices White, Blackmun, Stevens, and Souter, and now Justices Stevens, Souter, Ginsburg, and Breyer—have never questioned the constitutionality of amended section 2 and have consistently argued that compliance with sections 2 and 5 is a compelling state interest. *See, e.g.*, *id.* at 1033 (Stevens, J., dissenting); *id.* at 1065 (Souter, J., dissenting).

98. *Id.* at 992 (O'Connor, J., concurring).

99. *Id.* at 978 (opinion of O'Connor, J.).

100. For an extensive discussion of this issue, see THE LAW OF DEMOCRACY, *supra* note 20, at 859-66; Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1737 (2001); Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WM. & MARY L. REV. 725 (1998); Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 749-52 (1998).

discrimination by making legislative bodies more responsive to issues important to the minority community. As the Court recognized in *Katzenbach v. Morgan*,[101] "enhanced political power will be helpful in gaining nondiscriminatory treatment" in "the provision or administration of governmental services, such as public schools, public housing and law enforcement."[102] Regulation of the political process represents a decision to combat the risk of unconstitutional discrimination on the wholesale level, by providing all citizens with an equal opportunity to participate effectively in the political process, rather than leaving all enforcement to the retail level by enacting laws that impose equal treatment obligations in discrete areas of state government activity such as schools, public employment, or housing.[103]

In *Bush v. Vera*,[104] the Court concluded that compliance with the Voting Rights Act required Texas to take race into account in its congressional redistricting. The State had a strong basis in evidence for concluding that section 2 required it to draw a plurality-black, majority-minority district in Dallas.[105] Moreover, because Harris County "had, for two decades, contained a congressional district in which African-American voters had succeeded in selecting representatives of their choice, all of whom were African-Americans," the nonretrogression principle of section 5 "mandate[d] that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions."[106] Where the plan at issue in *Vera* ran afoul of the Constitution was in its failure to engage in narrow tailoring: The district the State actually drew in Dallas deviated too greatly from the kind of district section 2 might have required, because the actual district was not reasonably compact, and the district the state drew in Harris County went beyond "maintenance" of black voting strength because it significantly increased the percentage of black voters within the district.

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101. 384 U.S. 641 (1966).
102. *Id.* at 652.
103. Karlan, *supra* note 100, at 740.
104. 517 U.S. 952 (1996).
105. *Id.* at 994-95 (O'Connor, J., concurring).
106. *Id.* at 982-83 (opinion of O'Connor, J.).

Two lower courts, however, have held that challenged districts survived strict scrutiny because the Voting Rights Act arguably required the creation of *some* majority-minority districts and the challenged districts were narrowly tailored given the political context in which they were drawn. In *King v. State Board of Elections*,[107] the district court concluded that "racial considerations predominated over all other factors in the configuration of the [majority-Hispanic] Fourth Congressional District," thereby triggering strict scrutiny.[108] Ultimately, the court concluded that the district was narrowly tailored to serve the State's compelling interest in complying with section 2. First, the State had a strong basis in evidence for concluding that the creation of a majority-Hispanic district was required, in light of the size and location of the Hispanic population and the prevalence of racial bloc voting within Chicago.[109] Second, the irregularities in the district's shape—it connected two geographically separated Hispanic communities by means of a long, narrow corridor—served to preserve the configurations of three already existent majority-black districts and "[i]n the absence of evidence that those districts are unconstitutionally drawn, the preservation of existing districts was a valid secondary consideration."[110]

In the other case—the lower court consideration of *Easley v. Cromartie*[111] itself—the three-judge district court had upheld the state's creation of the majority-black First Congressional District. As it had with respect to the Twelfth District—the district ultimately approved by the Supreme Court—the district court found that race "predominated" in the construction of the First District.[112] Nevertheless, the district court held that "there was a strong basis for the General Assembly to have believed" that the elements of a section 2 claim existed given a large, geographically compact, politically cohesive black community "in the area encompassed by

107. 979 F. Supp. 582 (N.D. Ill. 1996) (three-judge court) (*King I*), *vacated and remanded in light of* Bush v. Vera, 519 U.S. 978 (1996).

108. *Id.* at 605.

109. King v. State Bd. of Elections, 979 F. Supp. 619, 624-27 (N.D. Ill. 1997) (three-judge court) (*King II*), *summarily aff'd*, 522 U.S. 1087 (1998).

110. *Id.* at 625 n.4.

111. 532 U.S. 234 (2001).

112. The district court's decision is unreported. An excerpted version is reprinted in THE LAW OF DEMOCRACY, *supra* note 20, at 942-45.

District 1" and the degree of racial bloc voting. It also found that the district was narrowly tailored, despite some "jutting irregularities," because "the splitting of counties and the lack of compactness display the interplay" between the need to comply with section 2 and the desire to protect both the incumbent in the previous version of the First District and an incumbent in the adjacent Third District.[113]

With its decision in *Cromartie*, the Supreme Court signed off on the post-1990 round of redistricting litigation just in time for the next round.[114] The guidance it has given to state and local governments is reminiscent of nothing so much as Yogi Berra's famous suggestion that "when you come to a fork in the road, take it."[115] States must continue to take race into account to avoid dilution under the Voting Rights Act, but they cannot overemphasize it. Given that the Court remains sharply divided, that it continues to have mandatory appellate jurisdiction over challenges to state legislative and congressional plans,[116] that it seems to have committed itself to conducting serious factual review, and that *Shaw* cases will remain a stalking horse for various partisan interests, the deluge of cases is likely to continue.

The Voting Rights Act and its aspiration of creating truly representative legislative bodies has survived nearly a decade's worth of searching judicial review. In the process, the Court has been forced to confront the consequences that expansive resort to strict scrutiny might produce, and it has blinked. First, the Court has significantly tightened the trigger for strict scrutiny: under *Adarand*, all racial classifications must be analyzed under strict scrutiny, but under *Shaw* and its progeny, only when race predominates and subordinates race-neutral considerations does it prompt heightened scrutiny. Second, it has recognized that compliance with federal law can constitute a compelling state interest for taking race into account even when the federal law goes

113. The plaintiffs did not appeal the district court's holding with respect to the First District.

114. The first judicial decision reviewing a post-2000 plan was handed down less than three weeks after *Cromartie*. *See* Page v. Bartels, 144 F. Supp. 2d 346 (D.N.J. 2001) (three-judge court) (upholding a state legislative redistricting).

115. BARTLETT'S FAMILIAR QUOTATIONS 754, ¶ 15 (Justin Kaplan ed., 16th ed. 1992).

116. *See supra* note 20.

beyond what the Constitution itself requires. It has permitted states to take race into account to prevent their election systems from having a disparate impact on minority voters. In short, the Court has been unwilling to use strict scrutiny to dismantle the crown jewel of the Second Reconstruction. Faced with the prospect of a wholesale ouster of minority representatives from federal and state legislative bodies, the Court has created a more forbearant version of strict scrutiny. The question is whether that version has legs beyond redistricting.

II. FROM LEGISLATIVE BODIES TO STUDENT BODIES: CAN THE REDISTRICTING DECISIONS SHED LIGHT ON AFFIRMATIVE ACTION IN HIGHER EDUCATION?

Despite several recent invitations,[117] the Supreme Court has not returned to the question of affirmative action in higher education since its 1978 decision in *Regents of the University of California v. Bakke*.[118] There has been a lot of water under the bridge since then, including the Court's categorical imposition of strict scrutiny in *Adarand*.[119] But with the redistricting cases, there has now been so much water under the proverbial bridge that perhaps a different channel has been carved. In this part, I suggest reasons to think that affirmative action in the higher education admissions process resembles redistricting—therefore calling for a softer form of scrutiny—more than it resembles the competitive bidding process at issue in cases like *Croson* and *Adarand*.

A. What Triggers Strict Scrutiny?

Redistricting and admissions to competitive educational institutions share a set of characteristics that suggests that race plays a complicated role in each. To understand why, let us begin

117. *E.g.*, Texas v. Hopwood, 121 S. Ct. 2550 (2001); Smith v. University of Wash. Law Sch., 532 U.S. 1051 (2001); Texas v. Hopwood, 518 U.S. 1033 (1996). The Fifth and Ninth Circuits each noted their explicit disagreement with one another. Hopwood v. Texas, 236 F.3d 256, 275 n.66 (5th Cir. 2000), *cert. denied*, 121 S. Ct. at 2550; Smith v. University of Wash. Law Sch., 233 F.3d 1188, 1200 n.9 (9th Cir. 2000), *cert. denied*, 532 U.S. at 1051.

118. 438 U.S. 265 (1978).

119. 515 U.S. 200 (1995). Among other things, *Adarand* cast doubt on the Court's earlier embrace of a diversity rationale in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

by considering the nature of the decision process absent the use of race. Both redistricting and admissions to a state's flagship educational institutions[120] still would demand looking at more than numbers, and for similar sorts of reasons.

One person, one vote is a nice, easy-to-quantify starting point for drawing districts, but there are a huge number of equally compliant plans that will produce dramatically different legislative bodies. It would be possible to choose among equipopulous plans at random.[121] But not all equipopulous plans will make sense on the ground: some plans will split real communities, unite dissimilar groups, ignore physical and political boundaries, place incumbents in unfamiliar districts, or produce very disproportionate partisan balance. Some plans will simply produce legislative bodies that are more "representative" than others. Thus, even most proponents of computer-driven apolitical redistricting processes would require including other variables in the formula, such as geographic compactness, respect for subdivision boundaries, and respect for community lines. In the real world, where redistricting remains a fiercely political process, even monoracial communities consider such additional factors as partisan advantage and balance, and protection of incumbents. In any event, slavish pursuit of maximum population equality involves a spurious faith in statistics—the census figures are themselves essentially a static estimate of a constantly changing reality and no one seriously believes that individuals in districts with over a half million people in them suffer any real injury if the districts differ by a few hundred residents.[122]

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120. Most of the real battle over affirmative action concerns the admission to a relatively small number of professional schools and elite undergraduate institutions, since most other institutions are not sufficiently selective in the first place.

121. For discussions of the various proposals and scholarship regarding random districting, see Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1696-1703 (1993), and Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 61-63 (1985) (discussing the way this could be accomplished but opposing the idea). *See also* Bush v. Vera, 517 U.S. 952, 1057, 1070-72, 1077 (1996) (Souter, J., dissenting) (suggesting that random districting might be the only way to make *Shaw* manageable).

122. *See* Karlan, *supra* note 64, at 735-36. The Supreme Court held to the contrary in *Karcher v. Daggett*, 462 U.S. 725 (1983), where it struck down New Jersey's post-1980 congressional redistricting on grounds of one person, one vote, when the difference in

There are both pluralist and republican reasons for having a multidimensional redistricting process.[123] The pluralist reasons focus on the fair representation of distinct interests within the legislative process. As Justice Harlan trenchantly observed, "people are not ciphers."[124] Thus, "legislators can represent their electors only by speaking for their interests—economic, social, [and] political."[125] A redistricting process that does not consider those interests in deciding where to draw lines risks failing to enable their representation within the legislature. The republican reasons focus on enhancing the quality of legislative deliberation: a more widely representative legislative body is more likely to contain the various perspectives that can contribute to wise policymaking.

Similarly, in higher education, elite institutions *could* rely entirely on a few raw or mechanically adjusted numbers. Indeed, virtually everywhere such numbers form a starting point in the admissions process and are used to separate those who are capable of benefitting from and contributing to the school's educational programs from those who are not (or who are markedly less likely to be). At most elite institutions, however, it would be possible to produce entering classes with vastly different characteristics, each made up entirely of well-qualified students. The numbers themselves, even when adjusted, may offer a spurious precision with respect to particular applicants. A school, like a legislature, may decide that a variety of other factors beyond standardized test scores and grade point averages will enhance its various missions. In that regard, it might decide, even in the complete absence of racial considerations, to take into account factors such as geographic diversity, choice of specialization, distinctive extracurricular experiences, nonquantifiable evidence that an applicant's future promise is not adequately signaled by her past performance, and the like. Moreover, along the same vaguely venal lines as incumbent protection and partisanship, a school may decide to

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population between the largest and smallest districts—the former had 527,472 residents while the latter had 523,798, a deviation of roughly six-tenths of one percent—was infinitesimal. The *Karcher* decision clearly was informed by the fact that the minimal but avoidable population deviations were in service of a naked political gerrymander.

123. For a more extensive discussion of this point see Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 96-99.

124. Reynolds v. Sims, 377 U.S. 533, 623 (1964) (Harlan, J., dissenting).

125. *Id.* at 623-24.

grant preferences to children of alumni or other financial or political supporters.

The reasons for going beyond the numbers are both "pluralist" and "republican." Within the institution, using multidimensional admissions criteria may be important for programmatic purposes: faculty in diverse disciplines need students to teach; the quality of discussion and the learning experience will be enhanced by students and faculty being exposed to a variety of viewpoints which may be correlated with different admissions criteria; and there may be a variety of co- and extracurricular activities that depend on there being students with different interests and talents. In the broader world, the institution's continued vitality may depend on there being broad political support for its mission. Such support may be enhanced in a diverse jurisdiction by providing access to students from different constituencies.[126] Finally, to the extent that public higher education aims to produce social, economic, and political leaders in a complex and diverse society, admissions officers might conclude that factors other than quantifiable academic performance are relevant. For instance, an applicant with exceptional artistic talent who did poorly in high school science classes, or a student with a demonstrated commitment to public interest law practice whose college transcript is marred by his terrible performance during his freshman year might be a more desirable applicant than someone with even a significantly better index number.

Now introduce race into the mix: In redistricting, courts have expressed a skepticism about strong race essentialism,[127] but they have also recognized that race may in fact be highly correlated with political affiliation,[128] and with the presence of distinct, somehow organic "communities." When this is so, pluralist politics may

126. The question of the political imperatives behind flagship institution admissions is discussed in Samuel Issacharoff, Bakke *in the Admissions Office and the Courts: Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669 (1998).

127. Miller v. Johnson, 515 U.S. 900, 911-12 (1995) ("When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls.") (internal quotation marks omitted).

128. *See* Easley v. Cromartie, 532 U.S. 234, 242 (2001). Proof of distinctive race-correlated, if not necessarily racially caused, differences in preference among candidates is the sine qua non of any section 2 vote dilution case.

suggest—and the Voting Rights Act may even require—taking race into account and drawing majority-nonwhite districts. The redistricting decisions recognize that awareness of race cannot be removed entirely from the process; as long as race does not subordinate other considerations, taking it into account does not trigger strict scrutiny.

It is possible to see Justice Powell's opinion in *Bakke* as taking a similar tack. That opinion expresses a similar ambivalence about race: there is something disquieting and perhaps offensive about assuming that an applicant's race says something relevant about her views or, perhaps, even her experiences. At the same time, racial diversity and a desegregated educational environment are likely to change the educational process in a salutary direction.

In a multidimensional admissions process, race is *a* factor, but it does not subordinate such apparently traditional, race-neutral criteria[129] as prior academic achievement and promise, and the admission of a well-rounded class. On the other hand, in a more rigid admissions process, race appears to predominate. The difference between the two maps onto the distinction the Court has recently made in the redistricting process. If not all awareness and use of race triggers strict scrutiny in the redistricting process, then why should it do so in the admissions process?

B. What Counts as a Compelling Interest?

The redistricting cases also suggest a potentially fruitful new line of argument with regard to the compelling state interest inquiry. If a reasonable attempt to comply with a federally mandated effects test can serve as an appropriate justification for race consciousness

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129. I use the term "apparently," because it is not entirely clear that many of the contemporary criteria are traditional—the era of their imposition being roughly contemporaneous with the dramatic expansion in the pool of applicants for higher education—or that the criteria are always race-neutral in both purpose and effect. For example, preference for alumni children perpetuates past de jure discrimination to the extent that it benefits descendants of individuals who attended the school at a time when minority applicants were excluded.

My colleague Rick Banks has written a thoughtful and extensive discussion of the relationship among admissions criteria, understandings of merit, racial exclusion, and the distribution and production of social value. R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029 (2001).

in the districting process, then perhaps it can do so in the admissions process as well.

So-called section 602 regulations provide one possible counterpart to the Voting Rights Act. Virtually all public institutions of higher education are subject to Title VI of the Civil Rights Act of 1964,[130] which forbids racial discrimination in programs receiving federal funds. Section 601, like the Constitution, forbids only intentional discrimination.[131] Under section 602, however, which authorizes federal agencies issuing rules or regulations "to effectuate the provisions of [section 601],"[132] at least forty federal agencies, including the Department of Education, have adopted regulations that prohibit practices that have a discriminatory effect.[133] The Department of Education's regulations provide, among other things, that recipients of federal funds cannot "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin,"[134] and make clear that admissions practices are among the covered actions.[135] Moreover, "[e]ven in the absence of ... prior discrimination [by the particular institution or program], a recipient ... may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin."[136] Thus, the Department of Education's regulations, like sections 2 and 5 of the Voting Rights Act, embody a results test.

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130. 42 U.S.C. §§ 2000d to 2000d-6 (1994 & Supp. V 1999).

131. Alexander v. Sandoval, 532 U.S. 275, 280 (2001).

132. 42 U.S.C. § 2000d-1 (1994 & Supp. V 1999).

133. Unlike sections 2 and 5 of the Voting Rights Act, which have each been held to provide an implied private right of action for aggrieved individuals, section 602-based disparate impact regulations do not give rise to a private cause of action. *See Alexander*, 532 U.S. at 275. Nevertheless, they can be enforced through the cut-off of federal funds and other administrative enforcement.

In one important sense, section 5 resembles section 602. The private cause of action under section 5 normally forces a jurisdiction into a federal administrative process to determine whether the change has a discriminatory effect. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 570 (1969). The substantive decision is not subject to judicial review. *See* Morris v. Gressette, 432 U.S. 491 (1977).

134. 34 C.F.R. § 103.3(b)(2) (2001).

135. *Id.* § 100.4(d)(1).

136. *Id.* § 100.3(b)(6)(ii).

Ironically, section 602-based disparate impact regulations are analogous to section 2 of the Voting Rights Act in another respect: Although a number of the Court's decisions rest on an assumption that the federal government can promulgate effects-based regulations under section 602, the Court has never squarely held that. Still, in *Alexander v. Choate*,[137] the Court declared that Title VI has "delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constitut[e] sufficiently significant social problems, and [are] readily enough remediable, to warrant altering the practices of the federal grantees that have produced those impacts,"[138] and at least five Justices agreed in *Guardians Association v. Civil Service Commission*[139] that regulations promulgated under section 602 may proscribe activities that have a disparate impact on racial groups, even though they are not forbidden by section 601.[140] But, just as states have a compelling interest in complying with the presumptively constitutional Voting Rights Act, so too, educational institutions should be permitted to assume that section 602 regulations represent a valid exercise of federal executive power. If they do, then state institutions should have a compelling interest in adhering to them.

An educational institution could reasonably fear being found in violation of the Department of Education's regulations if it implemented an admissions policy that resulted in the wholesale exclusion of black or Hispanic applicants, particularly because it might be difficult to show that such a policy pursued some other valid goal. In order to avoid violating the regulations, *some* level of race-consciousness might be necessary. Further, like section 2 of the Voting Rights Act, the Department of Education's regulations do not require proof of prior intentional, unconstitutional behavior by the specific government entity in order to justify race-conscious affirmative action. In light of the federal government's determination that full effectuation of the straightforward

137. 469 U.S. 287 (1985).

138. *Id.* at 293-94.

139. 463 U.S. 582 (1983).

140. *See* Alexander v. Sandoval, 532 U.S. 275, 282 (2001) (describing the lineup in *Guardians*). Thus, *Sandoval* assumed the validity of such regulations in the context of a case regarding whether a private right of action could be found.

constitutional (and statutory) command to avoid purposeful racial discrimination requires prohibiting state action that has a discriminatory impact as well, compliance with these rules by public educational institutions, like compliance by state redistricting authorities, ought to be considered a compelling state interest.

As in redistricting, the question of narrow tailoring is likely to be the issue least amenable to broad statements of principle. It may turn out that many affirmative action plans, like many legislative districts, get struck down not because the institution was forbidden from relying on race altogether, but because it relied too much, and in too visible a way, on racial factors. As Alexander Aleinikoff and Samuel Issacharoff observed at the very outset of the *Shaw* cases:

> [The *Shaw* cases'] inconclusive resolution of the ultimate issue whether race may ever be justifiably relied upon in redistricting reaffirms the messy jurisprudence of compromise that has guided the center of the Court since [*Bakke*]. The heart of this jurisprudence is a never quite satisfactory accommodation between deeply individualistic notions of appropriate treatment and a politically charged conception of the representational legitimacy of principal institutions in our society.[141]

That ambivalence means that admissions, like reapportionment, may turn out to be "one area in which appearances do matter."[142] A process that too greatly formalizes the role of race—by, for example, setting different cutoff scores for white and minority applicants or using separate admissions committees—may trouble the courts far more than a process that produces an entering class with a similar demographic composition through more apparently holistic methods.[143] At the same time, a process that produces a completely monoracial class in a multiracial society will produce an opposite, and perhaps equal, disquiet.

Finally, the essentially prospective nature of both the redistricting and the admissions processes should shift the Court's

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141. Aleinikoff & Issacharoff, *supra* note 94, at 592; *see also* Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2511 n.20 (1997).

142. Shaw v. Reno, 509 U.S. 630, 647 (1993).

143. *See* Issacharoff, *supra* note 121.

approach to the question of narrow tailoring. Redistricting and admissions are periodic activities—once a decade, the authorities redraw district boundaries; once a year, they choose a new entering class. Thus, neither activity is amenable to a theory in which race can be taken into account only to provide a remedy to identifiable victims of prior unconstitutional discrimination in the process itself. Moreover, the present-day reality is that a truly race-blind process in either arena is likely to produce a far more monochromatic result than the current system, and the more quantitative the process, the more monochromatic the result. The Court's implicitly preferred alternative—to use some sort of race-neutral process to produce a racially representative result—may be both incoherent and inefficient. Redistricting is *already* formally race neutral in the sense that the lines on the map contain no racial references at all (unlike countries with explicitly racial representation systems). What offended the Court was the appearance that racial considerations nonetheless played too great a role. Similarly, using even a formally race-neutral admissions standard, if the standard were picked precisely because of the racial results it would produce, may offend the Court if the intention is too blatant. In any event, redistricting based on "communities of interest" or class-based affirmative action would certainly be constructed differently if the racial representativeness of the relevant institutions were not an issue. It appears, therefore, that race will often play a role even in facially neutral decisions.

CONCLUSION

Whether or not there is only one equal protection clause,[144] the redistricting cases suggest there is definitely more than one kind of strict scrutiny. Faced with the prospect of applying a form of strict scrutiny that threatened to resegregate state legislatures and congressional delegations, the Supreme Court has been unwilling

144. *Cf.* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 246 (1995) (Stevens, J., dissenting) (reiterating the claim that "there is . . . only one Equal Protection Clause" rather than a series of discrete tests to be applied based on the kind of governmental classification at issue); *see also* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989) (suggesting that the Supreme Court has defined discriminatory purpose differently in such different contexts as schools, voting, and employment).

to apply strict scrutiny strictly. It has constricted the domain in which strict scrutiny comes into play, permitting race to be taken into account when it is one factor among many and its inclusion produces districts that do not deviate too obviously from the sorts of districts created for other groups. It has also broadened the interests that can justify race-conscious redistricting, by holding that compliance with the Voting Rights Act's results tests can serve as a compelling state interest. The understanding of political equality embodied in the Act goes beyond what the Constitution itself demands. It requires states to arrange their electoral institutions to minimize the lingering effects of prior unconstitutional discrimination not otherwise chargeable to them,[145] as well as to mitigate the impact of racially polarized voting that involves otherwise constitutionally protected private choice. In short, the theory of strict scrutiny yielded to the need for an electoral system that is equally open to members of minority groups. My hope is that when the Court confronts the role race plays in admissions to elite educational institutions, it takes a similar tack and permits those institutions to pursue equality and provide equal opportunities to participate as well.

145. *See supra* note 85 (discussing how the Court upheld the nationwide ban on literacy tests in part on the basis of the fact that some voters would be unable to pass even fairly administered tests because they had received inferior educations during the era of de jure segregation, even in other jurisdictions).