

NOTES

THE CONSTITUTIONALITY OF COMPENSATING FOR LOW MINORITY VOTER TURNOUT IN DISTRICTING

THEANE EVANGELIS*

Section 2 of the Voting Rights Act guarantees minority voters an equal opportunity to elect their candidates of choice. It requires states to create effective “majority-minority” districts, in which minorities constitute the majority of voters, when voting is racially polarized and the minority population is sufficiently large, compact, and cohesive. Because voter-turnout rates traditionally have been lower in minority communities than in white ones, prevailing academic and judicial opinion holds that states must raise the population of minorities in a certain district above a simple voting-age majority in order for that district to satisfy section 2’s mandate. Theane Evangelis argues that this practice is constitutionally suspect in a situation where low minority turnout cannot be ascribed to past discriminatory practices. The Supreme Court’s holding in Shaw v. Reno dictates that “excessive reliance” on racial factors in districting triggers strict scrutiny. Under strict scrutiny, race-based government policies must be narrowly tailored to satisfy a compelling government interest in remedying past discrimination if it is to pass muster under the Equal Protection Clause of the Fourteenth Amendment. But recent empirical evidence indicates that minority voter turnout has equaled or exceeded white voter turnout in some jurisdictions, casting doubt on the widespread assumption that current low minority turnout stems from past discrimination. Because the state’s justification for augmenting a minority group’s population within a district must be remedial in order to satisfy the compelling state interest prong of the strict scrutiny test, this doubt assumes constitutional proportions. Therefore, a proper interpretation of the Voting Rights Act should not require states to compensate for low turnout when fashioning their majority-minority districts.

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INTRODUCTION

Every ten years, states are required to redraw electoral districts based on new census data.¹ That process involves navigating a confusing maze of legal limitations, both statutory—in the form of the Voting Rights Act² (VRA)—and constitutional. The constitutional pitfalls of districting have increased considerably in the last ten years with developments in the Supreme Court's equal protection jurisprudence, which severely constrain the use of race in that process.³ Tensions between the stringent demands of equal protection and the race-conscious statutory requirements of the VRA now place state legislatures in a difficult legal position when it comes time to carve out electoral districts.⁴

Section 2 of the VRA requires states to draw electoral districts that ensure minorities an equal opportunity to “participate in the political process and to elect representatives of their choice.”⁵ In order to avoid liability under the Act, states must draw “effective”⁶ majority-minority districts where racial bloc voting exists and the minority

¹ Because districts are constitutionally required to have near equal populations in order to satisfy the one-person, one-vote principle of *Reynolds v. Sims*, 377 U.S. 533 (1964), states must redraw districting plans to account for population shifts that become apparent after a census. See *id.* at 568, 583 (“Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth.”). Professor Pamela Karlan criticizes the one-person, one-vote rule of *Reynolds* for lack of substance, but recognizes its procedural importance in “interact[ing] with the decennial census to mandate periodic redistricting.” Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 *Tex. L. Rev.* 1705, 1705 (1993).

² 42 U.S.C. § 1973 (1994).

³ See *infra* Part II.

⁴ These tensions are worthy of analysis because of the fundamental questions they raise about race-conscious government policies and the basic structures of democracy. The controversy over voting rights “goes to the heart of the meaning of racial and ethnic representation in a democratic polity and how that representation is best achieved under the constraints imposed by considerations of fairness, constitutional norms, and statutory mandates.” Chandler Davidson & Bernard Grofman, Editors’ Introduction to *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*, at 3, 6-7 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter *Quiet Revolution*]. *Quiet Revolution* is a uniquely comprehensive study of the effects of the Voting Rights Act (VRA), and this Note relies heavily on its findings. For a review of *Quiet Revolution*, see generally Richard H. Pildes, *The Politics of Race: Quiet Revolution in the South*, 108 *Harv. L. Rev.* 1359 (1995).

⁵ § 1973(b). See also *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994) (“[T]he ultimate right of §2 is equality of opportunity . . .”).

⁶ See *De Grandy*, 512 U.S. at 1023-24 (evaluating districts in terms of effectiveness of minority voting power). Effective minority districts are required by the 1982 amendments of the VRA, which focus on discriminatory impact rather than discriminatory intent in districting. See § 1973(a) (prohibiting application of practices “in a manner which results” in abridgment of right to vote).

group is sufficiently large, geographically compact, and cohesive.⁷ Consequently, the issue with respect to VRA compliance is what “effective” means. Because minority voters tend to have lower rates of political participation, a simple edge in voting-age population may not result in election of the minority group’s preferred candidate.⁸ As a result, courts and commentators have assumed that effective majority-minority districts require increases in minority population to compensate for low rates of minority participation.⁹

This Note argues that such an understanding of the VRA’s statutory requirement of equal opportunity is constitutionally problematic on equal protection grounds. An understanding of the VRA as requiring compensation for low rates of participation, including low voter turnout,¹⁰ is troubling because nonremedial race-conscious placement of voters in districts may add up to excessive use of race in districting and thus trigger strict scrutiny under the Supreme Court’s equal protection doctrine. Under strict scrutiny, the constitutionality of such race-conscious state action will turn on the cause of low turnout; if the problem of low turnout is not due to past discrimination, states may be barred constitutionally from using race-conscious means to address it.

Courts,¹¹ voting-rights scholars,¹² and political scientists historically have considered low minority voter turnout to be the result of past discrimination without further inquiry, taking the causal connection between the two for granted.¹³ Over time, this assumption has

⁷ See *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (laying out three-factor test for establishing claim of vote dilution); *infra* Part I.B (discussing *Gingles* test).

⁸ See *infra* note 16.

⁹ Judge Richard Posner explains this conventional thinking in districting in *Barnett v. City of Chicago*, 141 F.3d 699, 702-03 (7th Cir. 1998). “How concentrated these [minority] groups must be in order to constitute an effective majority . . . depends on voting-related characteristics of the population, notably age, citizenship, registration, and turnout.” *Id.* at 702. This Note is concerned with the last of those factors, turnout.

¹⁰ This Note focuses on one component of political participation—voter turnout—but its argument is equally relevant to state compensation in districting for lower rates of registration, another aspect of political participation.

¹¹ See *infra* note 14.

¹² Academic treatment of the issue is cursory. For example, in a footnote, Professor Peter Rubin recognized the need for a causal connection between low turnout and past discrimination to justify supermajority majority-minority districts but assumed that such a connection often will be present: “[S]upermajorities would seem to be unjustifiable unless the low turnout is itself traceable (as it often will be) to past discrimination in voting.” Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. Pa. L. Rev. 1, 79 n.244 (2000).

¹³ See, e.g., Bernard Grofman, *Expert Witness Testimony and the Evolution of Voting Rights Case Law*, in *Controversies in Minority Voting: The Voting Rights Act in Perspective 197, 205* (Bernard Grofman & Chandler Davidson eds., 1992) [hereinafter *Controversies*] (“Lower levels of minority voter registration and election turnout relative to the

been read into the VRA,¹⁴ and race-based placement of voters has been accepted as an appropriate means for achieving the “effective” electoral opportunity that the statute mandates.¹⁵ Equal opportunity for a group to affect the outcome of an election is what matters under the effects-based framework of section 2 of the VRA. A technically majority-minority district of fifty-one percent black voters may fail to satisfy this interpretation of the VRA due to low turnout. Under this view of the VRA, the state must augment the number of minority voters in a district to remedy low turnout rates, which are presumably caused by past discrimination.¹⁶

eligible population have . . . been taken as indicators of lingering effects of discrimination.”).

¹⁴ See, e.g., *Teague v. Attala County*, 92 F.3d 283, 285, 293-95 (5th Cir. 1996) (holding “untenable” district court’s findings in section 2 case “crediting . . . the depressed level of black political participation in Attala County to black voter apathy” and instead attributing low turnout to past discrimination and present socioeconomic disadvantage); *Vecinos de Barrio Uno v. City of Holyoke*, 72 F.3d 973, 986-87 (1st Cir. 1995) (stating that low minority voter turnout can result from past discrimination); *Ketchum v. Byrne*, 740 F.2d 1398, 1413-16 (7th Cir. 1984) (same). Some courts accept the assumption that majority-minority districts require compensation for low rates of participation while ignoring causation entirely. See, e.g., *Barnett*, 141 F.3d at 702-03 (finding sixty-five percent total black population appropriate concentration for effective minority district due to low participation rates because “approach is well entrenched in the cases”).

¹⁵ See *supra* notes 5-9 and accompanying text. See also Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1404-07 (2001) (citing lower black turnout as reason why higher percentage of black voters per district needed to equalize turnout on election day).

¹⁶ Professor Pildes has described the VRA as a type of affirmative action policy, whereby a public remedy involving race-based placement of voters in districts is used to counteract private race-conscious voting in order to give minorities an equal opportunity to elect the representative of their choice. Richard H. Pildes, *Principled Limitations on Racial and Partisan Districting*, 106 Yale L.J. 2505, 2510 (1997). Courts have followed this view. See *Barnett*, 141 F.3d at 702-03 (requiring sixty-five percent black minority district in order to compensate for low participation rates); *African Am. Voting Rights Legal Def. Fund, Inc. v. Villa*, 54 F.3d 1345, 1348 n.4 (8th Cir. 1995) (holding that percentage of black voters must be increased to account for low turnout); *Ketchum*, 740 F.2d at 1415 (requiring fifteen percent increase in minority population, five percent each for youth, low registration, and low turnout); *Prosser v. Elections Bd.*, 793 F. Supp. 859, 869 (W.D. Wis. 1992) (explaining that simple fifty-one percent majority is insufficient to create effective minority district because “a disproportionate number of blacks are below voting age, and because turnout among blacks is generally much lower than among whites”). See also Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 Emory L.J. 1209, 1240 (1999) (“The belief that districts must have substantial black majorities for African-American candidates to have a greater chance of success rested on assumptions of white advantages in [voting-age population], registration, turnout and racial crossover voting.”); Grofman et al., *supra* note 15, at 1404 (“Blacks usually require more than a simple majority . . . if they are to comprise 50% of the voters . . . [because] turnout rates are often lower for blacks than whites. Thus, even if blacks constitute 50% of the overall population in a district, they often do not make up 50% of the voters . . .”).

Although it receives little attention, the cause of low minority voter turnout is critical to the constitutionality of districts drawn to account for that low turnout. This is especially true because evidence of minority voter behavior increasingly contradicts prevailing assumptions. For example, studies suggest that black¹⁷ voter turnout in some districts in the 1990s at times equaled or even surpassed turnout among white voters,¹⁸ indicating that subsequent low black voter turnout in those districts may be tied less to legacies of past discrimination than to traditional politics.¹⁹

This Note argues that the factual basis of low turnout has constitutional implications.²⁰ In cases such as *Shaw v. Reno*²¹ and its progeny, the Court has shown an increased willingness to subject race-based districting to strict scrutiny. Under the Supreme Court's current equal protection²² doctrine, a districting plan will be subjected to strict scrutiny if race is found to have been a "predominant" or "excessive" factor motivating the legislature.²³ It is therefore likely that districts with turnout-driven populations will be seen as excessively race-conscious and be subjected to exacting judicial review.²⁴

Once strict scrutiny is triggered, the prognosis for turnout-driven districts is dismal.²⁵ The two-pronged strict scrutiny analysis requires:

¹⁷ While this Note is concerned with minority voters in general, it focuses on specific minority groups, including black or Hispanic voters, where relevant to the discussion.

¹⁸ See *infra* Part III.A.3.

¹⁹ Traditional political factors might include interest in the outcome, the effect of a controversial campaign, a particularly close race, or even the weather. See *Rural W. Tenn. African-Am. Affairs Council, Inc. v. McWherter*, 836 F. Supp. 453, 458 (W.D. Tenn. 1993), vacated on other grounds by 512 U.S. 1248 (1994) ("[V]oter turnout in state legislative elections is influenced primarily by the nature of other elections taking place at the same time and secondarily by the weather.").

²⁰ The notion that empirical findings may have constitutional implications for civil rights policies is not new. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 580-82 (1990), overruled on other grounds by 515 U.S. 200, 227 (1995) (providing detailed factual description of broadcasting industry in case involving constitutional challenge to FCC affirmative action program); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-504 (1989) (detailing city's findings of past discrimination in contracting industry but finding them constitutionally insufficient). See generally Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. Pa. L. Rev. 655, 657 (1988) (discussing importance of empirical facts in constitutional doctrinal development and arguing that "standards of constitutionality should be informed by empirical truth").

²¹ 509 U.S. 630 (1993).

²² The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

²³ See *Bush v. Vera*, 517 U.S. 952, 958-59 (1996) (plurality opinion) (holding that strict scrutiny will apply where race is predominant factor motivating legislature's districting plan).

²⁴ See *infra* Part II.B.

²⁵ See *infra* Part III.

(1) a compelling government interest underlying the challenged action and (2) narrowly tailored means for achieving the purported end.²⁶ Unless districts with turnout-driven populations were designed to remedy past discrimination, they likely will not be supported by a compelling government interest and thus will fail the test's first prong.²⁷ States will need particularized, empirical findings demonstrating a close nexus between past discrimination and low minority voter turnout in order to establish a remedial purpose.²⁸ Even if such a purpose can be shown, states must still satisfy the test's second prong. To do so, they must demonstrate that increasing the percentage of minority members within a district's population is a narrowly tailored means. The exacting demands of strict scrutiny place this interpretation of equal electoral opportunity, as mandated by the VRA, in constitutional jeopardy.²⁹

This Note argues that an interpretation of the VRA that understands effective minority districts to require compensation for low minority voter turnout is constitutionally problematic. Accordingly, it argues this interpretation should be abandoned in favor of a reading that relies on voting-age population³⁰ for calibrating the appropriate

²⁶ See *infra* note 103 and accompanying text.

²⁷ See *infra* Part III.A.

²⁸ See *Shaw v. Reno*, 509 U.S. 630, 656 (1993) (requiring substantial factual basis for state's conclusion that race-based remedial action is necessary); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-500 (1989) (demanding specific evidence of past discrimination in Richmond in specific industry targeted by affirmative action program and rejecting assertion of compelling government interest in remedying general societal discrimination).

²⁹ There may be a larger problem with respect to the constitutionality of the VRA. If the practice of drawing majority-minority districts with excessive majorities to account for low turnout is required by the VRA but violates equal protection, the VRA may be unconstitutional. This is a radical position that most likely would appeal only to Justices Kennedy, Scalia, and Thomas. See *infra* note 92. A more plausible result would be that courts would interpret the VRA not to require compensation for low turnout except under permissible circumstances so as to preserve its constitutionality.

It is worth noting that the constitutionality of the VRA is by no means set in stone. Although this Note does not directly address the issue, there is a question of whether the VRA remains a constitutional exercise of congressional enforcement power under the Fifteenth Amendment. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court severely limited congressional enforcement authority under the Fourteenth Amendment—a development that could signal a similar willingness to limit congressional enforcement authority under the Fifteenth Amendment. The Court's opinion in *Boerne* raises the question of whether an enforcement statute such as the VRA will remain valid over time or whether it will be rendered unconstitutional in some of its applications by changed circumstances. For a discussion of the implications of *Boerne* on the VRA, see generally Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 *Wm. & Mary L. Rev.* 725 (1998) (arguing that sections 2 and 5 of VRA are congruent and proportional remedies).

³⁰ Voting-age population is the number of persons eighteen or older in a given population, regardless of their actual eligibility to vote. See Fed. Election Comm'n, *A Few Words About Voting Age Population (VAP)*, at <http://www.fec.gov/pages/vapwords.htm>.

level of minority population. Part I provides an overview of the VRA, with a focus on its requirement of effective minority districts ensuring equal electoral opportunity. Part II discusses the constitutional limits on the use of race in districting and asserts that those limits should require strict scrutiny review of excessively race-conscious placement of voters in districts. Part III analyzes the consequent application of strict scrutiny and argues that districts designed to compensate for low minority voter turnout should fail exacting judicial review if changing political realities reveal that low turnout is no longer due to past discrimination.

I

THE VOTING RIGHTS ACT

The VRA places hefty requirements on state districting plans. Among those requirements is a results-based mandate that minority voters have an equal opportunity to elect their representative of choice.³¹ Part I.A provides an overview of the Voting Rights Act, with a special emphasis on section 2 and the claim of vote dilution. Part I.B examines vote dilution as described by the Supreme Court in *Thornburg v. Gingles*³² and the conventional wisdom that *Gingles* requires adjustments in districting to compensate for low rates of political participation, including low turnout.

A. Background

Congress enacted the VRA in 1965 against a backdrop of massive disenfranchisement of black voters.³³ The VRA was meant to enforce

³¹ 42 U.S.C. § 1973 (1994).

³² 478 U.S. 30 (1986).

³³ The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, was “designed by Congress to banish the blight of racial discrimination in voting” *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). In many parts of the Deep South, “[b]lacks who attempted to register risked economic reprisals, violent repression, and sometimes death.” Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, in *Quiet Revolution*, supra note 4, at 21, 30. In 1964, “white resistance [remained] fierce in many areas, particularly the rural ones: average black registration in Alabama, Georgia, Louisiana, Mississippi, and South Carolina was only 22.5 percent of those eligible.” Chandler Davidson, *The Voting Rights Act: A Brief History*, in *Controversies*, supra note 13, at 7, 13. “In Mississippi . . . black voter registration increased from 6.7 percent before the act to 59.8 in 1967,” just two years after its passage. *Id.* at 21.

In the last ten years, the VRA has received intense judicial and public attention in the debate over the constitutional limitations on the use of race-conscious government policies. See, e.g., *Hunt v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Holder v. Hall*, 512 U.S. 874 (1994); *Shaw v. Reno*, 509 U.S. 630 (1993); see also Adam Cohen, Editorial, *Why Republicans Are Shamelessly in Love with the Voting Rights Act*, *N.Y. Times*, Mar. 24, 2002, § 4 (Week in Review), at 14 (commenting on renewed debate over merits of VRA

the Fifteenth Amendment, which authorizes Congress to enact “appropriate legislation” to ensure that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”³⁴

Enforcement of the VRA came in two waves. The first generation of voting-rights enforcement centered around the individual right to vote and sought to protect formal political participation by removing barriers to registration and voting such as poll taxes, literacy and other qualifying tests, and other state laws enacted to disenfranchise black voters.³⁵ While the VRA made formal participation for individual black voters possible almost immediately,³⁶ meaningful group representation proved elusive. Bloc-voting white majorities consistently outvoted black voters, using their power to dilute minority voting strength by structuring political institutions in a way that made the formal right to vote ineffective.³⁷ Voting-rights enforcement shifted

enforcement strategy of maximizing black voters within majority-minority districts). But see Abigail M. Thernstrom, *Whose Votes Count?* 9-10 (1987) (describing lack of attention to VRA in 1980s). Originally, its primary purposes were to remedy past discrimination, ensure minority enfranchisement, and prevent the dilution of minority votes. See Davidson, *supra* (providing detailed account of history of VRA and reasons for its enactment).

Different conceptions about the underlying philosophy of the VRA are possible. The VRA may be viewed primarily as an antidiscrimination measure, enacted to counter racially polarized voting and racial discrimination in voting. Under this view, race-conscious remedies are only required to the extent that this discrimination exists. For an example of this understanding of the VRA, see Rubin, *supra* note 12, at 55-88. Alternatively, the VRA could be viewed as a measure of affirmative action or empowerment, which provides a substantive entitlement to equal representation. See *supra* note 12. The language of the VRA itself, however, militates against this latter reading, since Congress has explicitly denied any guarantee of proportional representation based on race. See § 1973(b) (“[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”). This Note does not take a position on the matter.

³⁴ U.S. Const. amend. XV, § 1. The Supreme Court upheld the constitutionality of the VRA as an exercise of Congress’s enforcement powers under the Fifteenth Amendment in *Katzenbach*, 383 U.S. at 337. But see *supra* note 29.

³⁵ See § 1973(a) (prohibiting states from using “any voting qualification, or prerequisite to voting, or standard, practice, or procedure” to deny or abridge black voting rights). See also *Holder*, 512 U.S. at 893-94 (1994) (Thomas, J., concurring) (describing original VRA as intended to eradicate racial barriers to ballot access).

³⁶ “[I]n the five years after passage [of the VRA], almost as many blacks registered in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965.” Davidson, *supra* note 33, at 21.

³⁷ Vote dilution is the phenomenon whereby the weight of an individual’s vote may be increased or decreased depending on how that vote is aggregated. See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”). Vote dilution is thus possible even when disenfranchisement is

from a “first-generation,” individual rights, process-based approach concerned only with access to the ballot to a “second-generation,” group-centered, results-oriented approach, which measured the right to vote in terms of the group’s fair opportunity to elect its representative of choice.³⁸

The 1982 amendments to the VRA reflect a congressional judgment that voting-rights enforcement requires a more effects-based focus.³⁹ Section 2 of the VRA, passed as part of those amendments,⁴⁰ is primarily concerned with the effect of a districting plan on minority voting strength and prohibits fashioning electoral processes and institutions in a manner that results in dilution of minority voting strength.⁴¹ Section 2 explicitly recognizes the claim of vote dilution, stating that

no voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or politi-

no longer a problem and all voters have equal access to the ballot. See Davidson, *supra* note 33, at 22 (explaining difference between disenfranchisement and dilution). Commonly, “[d]ilution of racial minority group voting strength [is] caused by [fragmenting,] the dispersal of blacks into districts in which they constitute an ineffective minority of voters[,] or [by packing,] the concentration of blacks into districts where they constitute an excessive majority.” *Gingles*, 478 U.S. at 46 n.11 (1986). See also *Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993) (explaining how manipulation of district lines can operate in this manner). For an excellent analysis of vote dilution, see generally Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 *Harv. L. Rev.* 1663 (2001) (suggesting new framework for adapting traditional individual rights-based doctrine to group-based claim of vote dilution).

³⁸ See § 1973(a) (defining violations of VRA in terms of results). This generational metaphor for the evolution of voting-rights enforcement is used by many commentators. See, e.g., T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 *Mich. L. Rev.* 588, 629 (1993); Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 *U. Chi. Legal F.* 205, 210, 217; Pildes, *supra* note 4, at 1362-63. There is disagreement, however, as to whether this development has been a positive one. For example, Justice Thomas, together with Justice Scalia, has fervently objected to this shift. See, e.g., *Holder*, 512 U.S. at 893-914 (Thomas, J., concurring) (lamenting transformation in focus of voting-rights enforcement from equal access to ballot to effectiveness of minority representation).

³⁹ The 1982 amendments rejected the Supreme Court’s interpretation of the VRA in the plurality opinion of *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which required plaintiffs to prove intentional discrimination in order to establish a violation of the statute, *id.* at 62-65, in favor of a results test that was thought better designed to address the problem of discrimination in voting. See *Gingles*, 478 U.S. at 43-44 (explaining reasons for congressional rejection of intent test).

⁴⁰ Pub. L. No. 97-205, 96 Stat. 131 (1982) (codified at 42 U.S.C. § 1973(a) (1994)).

⁴¹ According to Professor Pildes,

[The] second generation of enforcement . . . entailed . . . reconceptions of the right to vote: from a more process-oriented focus to one that more uneasily blurred process and outcome concerns; from a more individual-centered conception to a more group-centered one, from the “negative liberty” of unfettered ballot access to the “positive liberty” of fair representation.

Pildes, *supra* note 4, at 1363.

cal subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.⁴²

The Act explains that the right to vote is abridged “if, based on the totality of circumstances, it is shown that . . . [members of a protected class of minority-group citizens] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”⁴³ Thus, what matters under the VRA is equal electoral opportunity.

B. *Thornburg v. Gingles and the Requirement of Effective Minority Districts*

In *Thornburg v. Gingles*,⁴⁴ the Supreme Court gave further content to the standards of section 2, developing a three-factor test to determine whether a particular plaintiff has stated a claim of vote dilution. Those factors are: (1) whether the minority group is large enough and sufficiently compact for the state to draw an additional majority-minority, single-member district but the state failed to do so, (2) whether the minority group is politically “cohesive,” i.e., the voting pattern of its members reflects distinct, similar interests, and (3) whether the white majority electorate votes as a bloc, usually enabling them to defeat the minority group’s preferred candidate.⁴⁵ Where the conditions exist, the state may be vulnerable to section 2 liability through a claim of vote dilution if it fails to draw a majority-minority district that is geographically compact.⁴⁶

When states create majority-minority districts,⁴⁷ they must abide by the VRA’s requirement of effectiveness: Districts must enable the

⁴² § 1973(a).

⁴³ § 1973(b).

⁴⁴ 478 U.S. 30 (1986).

⁴⁵ *Id.* at 50-51. See also Gerken, *supra* note 37, at 1674 (providing an explanation of vote dilution claims).

⁴⁶ See Rubin, *supra* note 12, at 78-83 (explaining how compliance with VRA necessitates race-conscious districting through creation of majority-minority districts when voting is sufficiently polarized along racial lines and other *Gingles*’s factors are satisfied). It is important to note that, in *Johnson v. De Grandy*, 512 U.S. 997 (1994), the Court expressly rejected the claim that section 2 requires states to create the maximum number of majority-minority districts possible in all cases in order to avoid liability. *Id.* at 1016-17.

⁴⁷ *Gingles*’s endorsement of majority-minority districts as necessary to bring about effective representation is by no means uncontroversial. See Pildes, *supra* note 4, at 1365-66 (describing ideological and policy debate over whether safe minority districts “further or frustrate the right kind of deliberative politics”). The justification for these districts is that a functioning democracy requires integration of political, especially racial, minorities, and that racial-bloc voting hinders this goal by enabling a majority to consistently defeat the minority group’s integration efforts. See *id.* Opponents of these majority-minority districts view them as unnecessary or even counterproductive. Justice Kennedy believes that

minority group to elect its preferred candidate.⁴⁸ In *Johnson v. De Grandy*,⁴⁹ the Supreme Court provided direction for lower courts determining whether a minority district is "effective" under the VRA. The Court emphasized the need for a functional analysis of minority vote dilution, stating that reliance on strict population percentages is insufficient.⁵⁰ Instead, states must take into account a variety of polit-

"[t]he assumption that majority-minority districts elect only minority representatives, or that majority-white districts elect only white representatives, is false as an empirical matter." *De Grandy*, 512 U.S. at 1027 (Kennedy, J., concurring in part and concurring in judgment). Justices Thomas and Scalia would take the argument a step further, contending that these districts have "disastrous implications" and "deepen racial divisions" by suggesting that blacks "all think alike on important matters of public policy . . ." *Holder v. Hall*, 512 U.S. 874, 944, 907, 903 (1994) (Thomas, J., concurring in judgment).

Other criticism derives from the debate over what Professor Pildes calls "substantive" versus "descriptive" representation. Those in favor of descriptive representation argue that "our primary concern should be with whether a sufficient number of officeholders physically mirror the electorate." Pildes, *supra* note 16, at 2530-31. Those who emphasize "'substantive representation' of minority interests [are concerned with] whether the policies minorities favor are 'adequately' given voice, pursued, and adopted." *Id.* at 2531. Professor Pildes argues that "[w]hile descriptive representation might in theory enhance the likelihood of substantive representation, as a practical matter in the American redistricting context, more proportional descriptive representation might be achievable only at the weighty cost of declining substantive representation." *Id.* A recent *New York Times* Op-Ed by Adam Cohen highlights the increasing disillusionment with districting strategies of the 1990s: "By concentrating black voters in some districts, the [districting] strategy [pursued by blacks and white Republicans after the 1990 census] elected a record number of black congressmen in 1992. But the remaining 'bleached' districts were more likely to elect white Republicans. While the Congressional Black Caucus grew, Republicans took control of the House for the first time in 40 years in 1994." Cohen, *supra* note 33, at 14. For a compelling argument against the so-called "bleaching" hypothesis, see generally Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 *Vand. L. Rev.* 291 (1997) (arguing that substantive representation is not sacrificed for descriptive representation).

This Note does not take a side in the debate over the virtues of majority-minority districts as tools for furthering minority interests but rather accepts majority-minority districts as the preferred policy choice under the VRA. It is important, however, to recognize that there is considerable disagreement over the merits of these districts as a means of improving minority representation in the first place.

⁴⁸ See *supra* notes 39-43 and accompanying text.

⁴⁹ 512 U.S. 997 (1994).

⁵⁰ See *id.* at 1014-24. The Court stressed the importance of a functional evaluation of equal opportunity for minority groups, which takes into account political realities, such as the degree of crossover voting by other racial groups, rather than application of rigid formulas. See also Grofman et al., *supra* note 15, at 1388 (explaining Justice O'Connor's argument that whether minority group could count on support from white voters must be considered); Rubin, *supra* note 12, at 88 ("[In complying with section 2,] a jurisdiction . . . must [attend] to the actual degree of potential crossover voting revealed by previous election results. Failure to do so may result in a small number of districts [with] unnecessarily large black populations, unjustifiably reducing the influence of black voters in surrounding districts.").

As these commentators point out, a state may end up diluting the influence of minority voters by overcompensating for low turnout. Thus, as a matter of policy, compensation

ical realities that dictate a minority group's actual opportunity to elect its candidate of choice.

This understanding of the "effectiveness" requirement focuses on the minority group's likelihood of electoral success and thus requires an adjustment in minority population to account for disparate rates of participation, i.e., registration and turnout, in the creation of effective minority districts.⁵¹ This view holds that the state's calculation of the appropriate percentage of minority population required by the VRA must factor in differing rates of turnout among racial groups.⁵² For example, black voters usually require more than a simple majority if they are to constitute fifty percent of the voters within a district on Election Day. This is because "(1) the voting age population is typically a lower proportion of the total population among blacks than

for low turnout may not be the wisest option for increasing minority voting strength. The following example is illustrative. A state deciding how to place 200 voters in electoral districts, 130 who belong to a minority group, could create two sixty-five percent minority districts (each with sixty-five minority voters and thirty-five white voters) to compensate for low levels of registration and turnout. Alternatively, the state could create two fifty-one percent minority districts (each with fifty-one minority voters and forty-nine white voters), which will leave twenty-eight minority voters who could be placed in another district. While these minority voters would not have a controlling majority in those districts, they would have some effect on politics there. This type of district may encourage coalition-building between minority and white voters, allowing the minority group to better utilize its votes, rather than wasting them. Of course, this result would only be possible if the group turned out at rates equal to or higher than white voters and if the influenced district were configured so as to make coalitions possible. See Pildes, *supra* note 4, at 1382-83 (describing "racial-backlash model" of voting in which white voters react to increasing black populations within district by voting more conservatively). Such a districting scheme actually might encourage minority voters to turn out since they are less likely to believe they can stay home and still have their candidate win (as they might be tempted to do in the case of a supermajority district).

⁵¹ For an example of this thinking, see *Barnett v. City of Chicago*, 141 F.3d 699 (7th Cir. 1998). Judge Posner writes that the effectiveness of a group's majority will "depend[] on voting-related characteristics of the population, notably age, citizenship, registration, and turnout." *Id.* at 702; see also Grofman et al., *supra* note 15, at 1389, 1393 (proposing "conceptual framework for determining the percentage minority needed to create an effective minority district"); Rubin, *supra* note 12, at 79 n.244 ("[T]he precise percentage of minority voters necessary to create an effective majority-minority district will depend on the circumstances. . ."). Thus, districting officials may choose to achieve the goal of ensuring that minority voters have an equal opportunity to elect their representative of choice through bright-line minority-percentage cutoffs or more functional formulas geared to measuring and factoring in minority political participation rates in individual jurisdictions. See *id.* at 1389 & n.25 (noting complexities of seemingly straightforward bright-line minority-percentage cutoffs). For the purposes of this Note, this distinction is irrelevant to the extent that bright-line minority percentages and functional formulas alike factor in low minority voter turnout. Whether a jurisdiction chooses a bright-line formula of, say, fifty-five percent minority across the board, or factors in low turnout through the use of a more precise formula, the state's explicit race-conscious manipulations of district populations in order to compensate for low turnout presents a constitutional problem.

⁵² Grofman et al., *supra* note 15, at 1390-91.

whites, (2) registration rates are often lower for blacks than whites, and (3) turnout rates are often lower for blacks than whites.”⁵³

II

THE CONSTITUTIONAL LIMITATIONS ON DISTRICTING: EQUAL PROTECTION AND STRICT SCRUTINY FOR RACIAL CLASSIFICATIONS

The proposition that effective minority districts require an increase in the percentage of minority population to account for low turnout might make intuitive sense, but it may not be constitutional. The Supreme Court’s current equal protection doctrine requires strict scrutiny review for race-conscious state policies, including excessively race-conscious districting.⁵⁴ Under strict scrutiny, a state policy will survive only if it furthers a compelling remedial state interest and is narrowly tailored to that end. If districts with turnout-driven populations appear excessively race-conscious, they will be subjected to strict scrutiny. And if low minority voter turnout is not due to past discrimination, the Equal Protection Clause might now prohibit state officials from using excessively race-conscious placement of voters to compensate for it when they draw their district maps.

This Part provides an overview of the constitutional limitations on districting and examines the context in which strict scrutiny applies to districting plans. Section A explains the historical development of the Court’s districting doctrine, which has subjected districting plans in which race is an excessive factor to strict scrutiny. Section B argues that, under that doctrine, explicit race-conscious placement of voters should be subject to strict scrutiny as an excessive use of race.

⁵³ *Id.* at 1404.

⁵⁴ This is because “any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995).

In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Supreme Court held that strict scrutiny applies to all racial classifications by the states. *Id.* at 493-94 (plurality opinion). The Court later extended that application to racial classifications by the federal government in *Adarand*. *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny, which apply strict scrutiny to excessively race-conscious districting, cannot be adequately discussed without reference to the core of the Court’s modern equal protection doctrine: the affirmative action cases of *Croson* and *Adarand*. See James F. Blumstein, *Shaw v. Reno* and *Miller v. Johnson*: Where We Are and Where We Are Headed, 26 *Cumb. L. Rev.* 503, 505 (1996) (explaining *Shaw* and *Miller* as extensions of *Croson* and *Adarand*).

A. *The Evolution of Equal Protection and Constitutional Limits on Districting*

The Equal Protection Clause was not always read to require strict scrutiny for race-conscious districting. In *United Jewish Organizations v. Carey*,⁵⁵ the Supreme Court upheld a race-based districting plan that divided a Hasidic Jewish community in Brooklyn, New York, in order to create a majority-black district. The Court withheld strict scrutiny because there was a benign purpose⁵⁶ for the racial classification. In particular, the Court found that it furthered the permissible goal of “prevent[ing] racial minorities from being . . . out-voted by creating districts that will afford fair representation”⁵⁷ and it had no invidious purpose, i.e., it “represented no racial slur or stigma with respect to whites or any other race.”⁵⁸ In addition, the districts in question were sufficiently compact, adhering to traditional districting principles.⁵⁹

The Court’s treatment of benign classifications in districting coexisted with an unclear standard for the permissibility of racial classifications employed by affirmative action programs designed to benefit minorities.⁶⁰ But in a major doctrinal shift, the Court abandoned its previous standard, which applied intermediate scrutiny for some benign classifications, in favor of its current equal protection doctrine,

⁵⁵ 430 U.S. 144 (1977).

⁵⁶ See *id.* at 165 (plurality opinion); *id.* at 171-72 (Brennan, J., concurring) (discussing limits on “benign” programs and stating that “circumstances exist where race may be taken into account in fashioning affirmative policies”).

⁵⁷ *Id.* at 168; see also *id.* at 161 (“[N]either the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment. Nor is . . . [t]he permissible use of racial criteria . . . confined to eliminating the effects of past discriminatory districting or apportionment.”); Aleinikoff & Issacharoff, *supra* note 38, at 593 (explaining Court’s less-demanding scrutiny of benign classifications before *Shaw*).

⁵⁸ *United Jewish Orgs.*, 430 U.S. at 165.

⁵⁹ *Id.* at 168.

⁶⁰ See *Fullilove v. Klutznick*, 448 U.S. 448, 491-92 (1980) (plurality opinion) (subjecting race-based affirmative action program to “searching” review but stopping short of imposing strict scrutiny). *Fullilove* is noteworthy in that the plurality opinion placed a heavy emphasis on Congress’s extensive findings of discrimination in public contracting and the flexibility of the program. *Id.* at 477-78. Thus, the fact that the program was federal and remedial—intended to benefit a disadvantaged group—may have influenced the Court’s decision to apply intermediate, rather than strict, scrutiny.

Fullilove’s standard of review, however, has been overruled. In *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the Court stated: “[T]o the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling.” *Id.* at 235. It refrained, however, from deciding whether the *Fullilove* program would survive its more recent strict scrutiny analysis, as articulated in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Adarand*. Thus, it is unclear whether the program’s grounding in well-reasoned congressional judgments would prevent it from being struck down.

which holds that remedial nature alone does not insulate explicit racial classifications from strict scrutiny.

The current doctrine—which applies strict scrutiny regardless of an asserted benign purpose—was first adopted by a majority of the Court in *City of Richmond v. J.A. Croson Co.*⁶¹ and was later extended to districting cases in *Shaw v. Reno*.⁶²

In *Croson*, Justice O'Connor, writing for the majority, rejected the argument that Richmond's set-aside for minority businesses should escape strict scrutiny because of its benign purpose. The Court repudiated the suggestion that the race of the preferred group should even be a factor in determining whether strict scrutiny applies.⁶³ The Court reasoned that "[t]o whatever racial group these citizens belong,

⁶¹ See *Croson*, 488 U.S. at 493-94 (plurality opinion) (rejecting lesser degree of scrutiny for benign classifications). See also Aleinikoff & Issacharoff, *supra* note 38, at 597 (explaining doctrinal development resulting in rejection of reduced scrutiny for race-based classifications). For a comprehensive analysis of the development of the Court's strict scrutiny standard of review after *Croson* and *Adarand*, see generally Rubin, *supra* note 12.

⁶² 509 U.S. 630 (1993). In developing its equal protection doctrine in the districting context, the Court relied heavily on *Croson* and subsequent affirmative action cases. See, e.g., *Bush v. Vera*, 517 U.S. 952, 958-59 (1996) (relying on *Adarand* for principles of strict scrutiny); *Shaw v. Hunt*, 517 U.S. 899, 904, 909 (1996) (citing *Adarand* and *Croson* for guidance in applying strict scrutiny); *Shaw v. Reno*, 509 U.S. at 630, 642-43, 650-51, 656 (extending *Croson's* strict scrutiny analysis to districting).

The Court's extension of *Adarand* and *Croson* to the districting context, however, is not without its critics. See Rubin, *supra* note 12, at 113 ("[The Court's] insistence upon 'consistency' in the evaluation of race-conscious government action . . . threaten[s] a cookie-cutter vision of equal protection concerned more about prohibiting the use of race than about the prevention of discrimination.").

More generally, the Court's treatment of voting rights within the individual rights model of equal protection has been criticized for ignoring the inherent group nature of voting. "It is only as collective partisans of the same political preference—whether that preference is defined by party or race or any other measure—that voters can assert their right to meaningful participation in the political process." Aleinikoff & Issacharoff, *supra* note 38, at 601. The problem is compounded in the districting context when states must decide through districting plans which groups will control a particular district.

The evolution of the Court's treatment of standing in racial gerrymandering cases, however, is a testament to the dominance of the individualized view. Initially, in *Shaw*, plaintiffs were permitted to challenge a district even though none of them lived there. See 509 U.S. at 637 (stating that three of five plaintiffs in case were registered to vote in unchallenged district). According to Professors Pildes and Niemi, this generous standing requirement indicates that the constitutional harm is general, not individual. See 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, 514 (1993). In *United States v. Hays*, 515 U.S. 737 (1995), however, a unanimous Court rejected a challenge of a Louisiana district for lack of standing because the plaintiff did not reside in the district and thus failed to demonstrate a personal denial of equal treatment. *Id.* at 745; see also *Shaw*, 517 U.S. at 904 (rejecting racial gerrymandering claims of some plaintiffs for lack of standing). This focus on the individualized harm moves the equal protection claim in racial gerrymandering cases closer to the Court's general conception of equal protection violations as harms to individuals.

⁶³ See *Croson*, 488 U.S. at 493-95.

their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking."⁶⁴ *Croson* reflects the Court's desire to "eliminat[e] entirely from governmental decisionmaking such irrelevant factors as a human being's race."⁶⁵ The Court's concern stems from a view that racial classifications are inherently divisive and may "lead to politics of racial hostility" unless limited to remedial uses.⁶⁶

This concern arose again in 1993, when the Supreme Court dramatically changed the landscape of voting rights in *Shaw v. Reno* by holding that strict scrutiny would apply to a North Carolina districting plan that consciously used race in creating a "bizarrely shaped" majority-black district.⁶⁷ In *Shaw*, the Court held that excessive reliance on race in electoral district line-drawing violates equal protection.⁶⁸ The Court's opinion also warned that race-based districting could be a form of racial gerrymandering and would not be exempt from constitutional challenge just because it was used to remedy a vote-dilution

⁶⁴ *Id.* at 493.

⁶⁵ *Id.* at 495 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 320 (1986) (Stevens, J., dissenting)).

⁶⁶ *Croson*, 488 U.S. at 493. Another factor weighing against the use of programs that classify according to race is the potential stigmatization of its beneficiaries. "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth." *Id.* at 494 (alteration in original) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.)).

This development in equal protection doctrine has also been criticized. For example, voting-rights scholars Aleinikoff and Issacharoff have stated that equal protection under *Croson* "narrowly limits the use of race-conscious measures based on a norm of equal treatment of individuals rather than the raising up of disadvantaged groups—a model that is dedicated to the pursuit of social peace rather than social justice." Aleinikoff & Issacharoff, *supra* note 38, at 600.

⁶⁷ *Shaw*, 509 U.S. at 646-49. The bizarre snakelike district tracked an interstate highway in order to include as many black neighborhoods as possible. A state legislator remarked, "[I]f you drove down the interstate with both car doors open, you'd kill most of the people in the district." *Id.* at 636 (citation omitted).

Shaw was not the first time the Court had indicated that racial gerrymandering is a violation of equal protection. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), Justice Whittaker stated in a concurring opinion that the "unlawful segregation of races of citizens" via districting violated the Equal Protection Clause. *Id.* at 349. "*Gomillion* thus supports [the] contention that district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption." *Shaw*, 509 U.S. at 645.

⁶⁸ *Shaw*, 509 U.S. at 649 (holding that separation of voters, without sufficient justification, into districts based on race violates equal protection). Professor Rubin criticizes *Shaw* on the grounds that it rhetorically "equates race-conscious districting with the constitutional anathema of segregation, eliding all distinctions essentially with a play on the verb 'to separate.'" Rubin, *supra* note 12, at 113.

problem and avoid liability under section 2 of the VRA.⁶⁹ *Shaw* did not, however, require that strict scrutiny always apply whenever racial classifications are used in districting.⁷⁰ Rather, the *Shaw* Court's focus on bizarrely shaped districts showed that it was concerned with *excessive* uses of race.⁷¹ The view was that race could be one of many factors used in drawing a districting plan but not the predominant one.⁷² Underlying the Court's decision to subject the districting plan to strict scrutiny was a belief that the use of racial classifications, though permissible in "eradicating the effects of past racial discrimination," promotes the "balkaniz[ation of society] into competing racial factions"⁷³ Thus, *Shaw* seemed to establish that excessive use of race in districting—not merely *any* use of race—is subject to strict scrutiny.⁷⁴

⁶⁹ See *Shaw*, 509 U.S. at 652 (stating that district court erred in holding that plaintiffs' racial gerrymandering claim was foreclosed because redistricting plan did not create vote dilution problem and was adopted to comply with VRA). See also Aleinikoff & Issacharoff, *supra* note 38, at 602 ("*Shaw* makes clear the fact that nondilution does not immunize districting plans from constitutional challenge.").

⁷⁰ See *Shaw*, 509 U.S. at 646 (noting that legislature is "always aware of race [among other demographic factors] when it draws district lines" and "[t]hat sort of race consciousness does not lead inevitably to impermissible race discrimination"). In fact, the Court upheld a district challenged as a racial gerrymander in *Hunt v. Cromartie*, 532 U.S. 234, 243-44 (2001) (holding that racial motivations were not dominant and accepting state's argument that partisan concerns predominated).

⁷¹ See *Shaw*, 509 U.S. at 646-48 (indicating that bizarrely shaped districts require strict scrutiny because they signal subordination of other traditional districting principles to race). See also Aleinikoff & Issacharoff, *supra* note 38, at 608-11 (offering reading of *Shaw* as strict scrutiny only for excessive reliance on race); Pildes, *supra* note 16, at 2510 (describing doctrine as requiring strict scrutiny only for excessive uses of race).

⁷² *Shaw*, 509 U.S. at 646 (listing race along with other demographic factors as considerations of which legislature permissibly may be "aware" when districting). This view harkens back to Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the landmark affirmative action case which held that the race of a college applicant can be one of the many factors considered but not the only one. *Id.* at 316-18; see also Aleinikoff & Issacharoff, *supra* note 38, at 609 (tracing this idea to *Bakke*); Pildes, *supra* note 16, at 2511 n.20 (characterizing *Shaw* as "*Bakke* of voting rights").

⁷³ *Shaw*, 509 U.S. at 656-57; cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1988) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may . . . lead to a politics of racial hostility."). See also Aleinikoff & Issacharoff, *supra* note 38, at 613 ("Underlying the Court's insistence on strict scrutiny . . . is the belief that such lines are inherently divisive . . .").

⁷⁴ Although the *Shaw* doctrine remains in flux, this Note attempts to provide a workable analysis of it. Perhaps the problem at the heart of *Shaw* is that the line between permissible and impermissible uses of race in districting is difficult to demarcate. This recalls a familiar constitutional problem with respect to civil rights policies: defining "the line between . . . 'nondiscrimination' and 'affirmative action.'" Pildes, *supra* note 16, at 2510. In districting, race-consciousness is acceptable up to the point where it ensures equal rights. "When [it] goes beyond this point, the shadow of strict scrutiny falls." *Id.* at 2510-11.

As it turns out, bizarre shape is not a prerequisite for strict scrutiny or the underlying constitutional harm. As the *Shaw* doctrine developed, the Court refined and restated the constitutional problem. In 1995, the Court subjected a Georgia congressional district to strict scrutiny in *Miller v. Johnson*,⁷⁵ explaining that bizarreness is not a “threshold showing” or a “necessary element of the constitutional wrong,” but rather “may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature’s dominant and controlling rationale in drawing its district lines.”⁷⁶

Miller thus sharpened the doctrine first articulated in *Shaw* by shifting the focus to the predominant motive of the state legislature.⁷⁷ Under this test, strict scrutiny is applied when race was “the predominant factor motivating the legislature’s [redistricting] decision.”⁷⁸ Upon a showing that race was the predominant motive, a district will receive strict scrutiny, which it will survive only if narrowly tailored to meet a compelling government interest.⁷⁹ In practice, the predominant motive test requires a showing by the plaintiff, either through direct or circumstantial evidence, that the legislature privileged racial considerations over other principles in districting.⁸⁰

⁷⁵ 515 U.S. 900 (1995).

⁷⁶ *Id.* at 912-13.

⁷⁷ *Miller*, 515 U.S. at 916 (considering whether “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district”). Professor Pildes criticizes the *Miller* “predominant motive” standard on the grounds that it “(1) fails to fit the harms at stake to appropriate principles for identifying their occurrence; (2) reflects a continuing misconceived effort to apply individual-rights approaches to expressive harms that necessarily require a different model; and (3) cannot be administered intelligibly because in the redistricting arena the question it asks is fundamentally unanswerable.” Pildes, *supra* note 16, at 2538.

⁷⁸ *Miller*, 515 U.S. at 916.

⁷⁹ *Bush v. Vera*, 517 U.S. 952, 959, 976 (1996) (plurality opinion).

⁸⁰ This method for deciphering the legislative purpose harkens back to *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). “‘Discriminatory purpose’ . . . 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 upon an identifiable group.” *Id.* at 279. See also Blumstein, *supra* note 54, at 507-08 (describing predominant motive test in terms of mixed-motive situations where government action is not explicitly race-conscious); Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 *Cumb. L. Rev.* 287, 301-02 and n.86 (1996) (stating that *Feeney* test is standard for finding legislative purpose in districting challenges).

This procedure makes sense when viewed in the larger context of the Court’s treatment of facially neutral but possibly racially motivated government action. Under *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis*, 426 U.S. 229 (1976), proving facially neutral government action is in fact racially motivated requires establishing a race-based legislative purpose. *Arlington Heights*, 429 U.S. at 264-65; *Davis*, 426 U.S. at 239-41. But see Blumstein, *supra* note 54, at 507-08 (distinguishing *Miller* test from *Arlington Heights*).

Miller made clear that excessive reliance on racial factors is akin to a racial classification deserving strict scrutiny.⁸¹ The predominant motive test makes it necessary for the Court to inquire into the motivations of the legislature as it decides whether to apply strict scrutiny. If considerations of race predominantly affected the outcome of the districting in question, strict scrutiny will apply.

B. Compensation for Turnout and Triggering Strict Scrutiny

The Court has never addressed whether districting to compensate for low minority voter turnout, in order to create effective minority districts under the VRA, constitutes “excessive reliance” on race under *Shaw* and *Miller*⁸² and therefore triggers strict scrutiny. Nevertheless, the case law in this area suggests that it does.

In *Bush v. Vera*,⁸³ the Court considered a constitutional challenge to three Texas congressional districts based on the claim that they were racially gerrymandered.⁸⁴ A majority of the Court subjected the districts to strict scrutiny, ultimately holding them unconstitutional.⁸⁵

Justice O’Connor’s plurality opinion subjected the districts to strict scrutiny because race was the legislature’s predominant motive in their creation.⁸⁶ This plurality opinion is notable because it indicated that quota-like population formulas, like bizarre shape, could trigger strict scrutiny. The opinion paid particular attention to the Texas legislature’s preoccupation with creating districts with minority populations above fifty percent.⁸⁷ This treatment of the Texas plan increases the likelihood that districts will be subjected to strict scru-

⁸¹ As Professor Blumstein explains: Proof “that race was in the computer, that the computer operator was using race as an affirmative basis for drawing district lines[,] is proof of racial classification” Blumstein, *supra* note 54, at 506.

⁸² See *supra* notes 74-81 and accompanying text.

⁸³ 517 U.S. 952 (1996).

⁸⁴ *Id.* at 956-57.

⁸⁵ The majority, however, was splintered. Justice O’Connor wrote the plurality opinion, with separate concurrences by Justice Kennedy, *id.* at 996-99 (Kennedy, J., concurring), Justice Thomas (joined by Justice Scalia), *id.* at 999-1003 (Thomas, J., concurring in judgment), and Justice O’Connor herself, *id.* at 990-95 (O’Connor, J., concurring). See *infra* note 92.

⁸⁶ *Id.* at 959.

⁸⁷ *Id.* at 969-73. Professor Grofman attributes the Court’s application of strict scrutiny to the Texas legislature’s fixation with pushing minority populations above some artificial threshold it believed necessary to create effective majority-minority districts. See Grofman *et al.*, *supra* note 15, at 1390 n.29. Justice O’Connor’s view on this type of districting is key because she is the most willing of the current *Shaw* majority (which also includes Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas) to accept race-conscious districting. Since the other Justices appear to be more eager to subject race-conscious districts to strict scrutiny, her position is a “least common denominator” of sorts. See *infra*, note 92 (discussing views of each Justice in current majority in equal protection challenges to districting).

tiny if they are motivated by a legislature's desire to manipulate minority percentages in order to push them above artificial thresholds such as fifty percent for nonremedial reasons, such as compensating for low turnout that is not a vestige of past discrimination.

In finding that race was the predominant factor motivating the legislature's districting plan, the plurality focused substantial attention on the tools used by the State to demarcate districts, in particular a computer program that permitted districters to manipulate district lines based on block-by-block racial data.⁸⁸ The Court also treated Texas's submission for Justice Department preclearance under section 5 of the VRA as further evidence of its racial motivations. The submission materials clearly reflected the State's goal of maximizing black voting strength through the creation of "safe" black districts with at least fifty percent black populations and thereby revealed the heavy emphasis placed on race.⁸⁹

Texas's blatant manipulation of the racial composition of the challenged districts' populations was apparently a driving factor in the outcome of the case.⁹⁰ The Court's decision to apply strict scrutiny rested on the State's excessive reliance on racial factors, but the Court did not find that race was the only factor.⁹¹ Rather, the predominance of racial factors tipped the scales in favor of strict scrutiny.⁹² *Vera* thereby supports the proposition that strict scrutiny will be applied to districts based on predominantly race-conscious manipulations of their population.⁹³

⁸⁸ See *Vera*, 517 U.S. at 961.

⁸⁹ *Id.* at 969 (quoting portions of preclearance submission reflecting State's preoccupation with reaching goal of at least fifty percent black population in challenged district).

⁹⁰ See *id.* at 962-63 ("[Texas] manipulated district lines to exploit unprecedentedly detailed racial data.").

⁹¹ See *id.* at 970-75 (observing that evidence did not show "race to be the sole factor considered" but did establish that other factors "were overwhelmed . . . by the state's efforts to maximize racial divisions").

⁹² *Id.* at 962-63. The apparent lack of clear doctrinal rules makes evaluating the constitutionality of state districting plans difficult. Perhaps one of the reasons for this confusion is that the majority in these cases is itself deeply fractured.

The Court's opinion in *Vera* reflects this split over when, exactly, strict scrutiny should be applied. In *Vera*, Justice O'Connor's plurality opinion stated that strict scrutiny would not be applied per se to all cases of intentional creation of majority-minority districts. *Id.* at 962. Justice Kennedy and Justice Thomas (with whom Justice Scalia joined) disagreed and would have applied strict scrutiny to any reliance on race in the districting process. See *id.* at 996 (Kennedy, J., concurring); *id.* at 999-1000 (Thomas, J., concurring in judgment). Justice O'Connor, however, authored a separate concurring opinion to her own plurality opinion specifically expressing her view that compliance with section 2 of the VRA is a compelling state interest sufficient to justify race-conscious districting. *Id.* at 990, 992.

⁹³ The excessive-reliance-on-race analysis of *Shaw v. Reno*, 509 U.S. 630 (1993), has not yet been applied specifically to population concentrations in majority-minority districts.

The argument for extending *Shaw* to districts where minorities are overrepresented to account for low voter turnout is further supported by the Court's policy justifications for strict scrutiny in cases of race-based districting. Those justifications include the fear of divisiveness caused by racial policies, as well as the belief that strict scrutiny is required to ensure that race-based government policies do not rest on simple stereotypes.

In *Shaw*, the Court reiterated its fear that "[r]acial classifications of any sort pose the risk of lasting harm to our society" and are dangerous in voting because they "may balkanize us into competing racial factions [and] carry us f[a]rther from the goal of a political system in which race no longer matters"⁹⁴ The Court's particular concern about the harm created by racially motivated districts extends logically to districts with minority populations that have been augmented to account for low minority turnout. Although increasing minority populations ensures safe minority districts in the short term, it undermines the ultimate goal of an integrated political system by eliminating incentives for interracial coalitions where they are possible.⁹⁵

The danger that districting decisions will be based on unfounded, offensive stereotypes should also weigh heavily in favor of strict scrutiny for districts with populations designed to compensate for low turnout.⁹⁶ In general, making membership in a district depend on race is potentially a product of racial stereotypes in that it presumes all

Accordingly, the exact standard by which to judge the constitutionality of a district's population is largely an unsettled question. Richard H. Pildes, *Is Voting Rights Law Now at War with Itself: Coalitional Districts Versus Safe Election Districts in the 2000s*, 80 N.C. L. Rev. (forthcoming 2002) (manuscript at 23-24, on file with the *New York University Law Review*). Professor Pildes explains that social science data of voter behavior in the 1990s shows that "coalitional" districts, with thirty-three to thirty-nine percent black registered voters, allow minority voters to elect their representative of choice in some places where a sizeable number of white voters consistently cross over to vote for minority candidates. *Id.* (manuscript at 22). "A coalitional district is defined in terms of actual electoral outcomes; [it features] a significant presence of black voters, though such voters are still a minority, but . . . has a 50-50 probability of electing the preferred candidate of those black voters [with interracial support]." *Id.* Professor Pildes argues that the VRA should permit states to draw coalitional districts because they provide a minority group an equal opportunity to elect their representative of choice. Thus, it is unclear whether a districting plan that could have created coalitional districts, but instead created safe majority-black districts, is unconstitutional as "excessively" race-conscious under *Shaw*. *Id.* (manuscript at 22-24). This question of whether majority-minority districts can be constitutional in the wake of *Shaw*, however, is beyond the scope of this Note.

⁹⁴ *Shaw*, 509 U.S. at 657.

⁹⁵ See *supra* note 93.

⁹⁶ See *United Jewish Org. v. Carey*, 430 U.S. 144, 173-74 (1977) (Brennan, J., concurring in part) ("[P]referential treatment may act to stigmatize recipient groups, for although intended to correct systemic or institutional inequities, such a policy may imply to some the recipients' inferiority and especial need for protection.")

members of a racial group think and act alike.⁹⁷ Perhaps the most troubling aspect of state compensation for low turnout without regard to its causation is its reliance on such stereotypes, as well as its inherent paternalism, which are antithetical to fundamental understandings of equal protection.⁹⁸ By assuming that minority voters will turn out at lower rates than white voters, a state displays the kind of condescension that violates equal protection.⁹⁹ Rather than basing judgments on empirical findings about the realities of political participation of different racial and ethnic groups, the state opts for a blanket assumption that minority voters are less likely to turn out. To compound the problem, the state attributes those lower levels of participation to legacies of past discrimination, ignoring the possibility that minority groups have the ability to mobilize politically as effectively as white voters. Increasing a minority group's population within a majority-minority district without inquiry into the actual political be-

⁹⁷ Justices Thomas and Scalia would take this position even further. They have objected to the Voting Rights Act in general because they believe it suggests that black voters share similar political views by virtue of their race, a racial reductionism that is especially problematic—and dangerously probable—in the area of districting. *Holder v. Hall*, 512 U.S. 874, 903, 907, 944 (1994) (Thomas, J., concurring).

⁹⁸ See *Shaw*, 509 U.S. at 643 (stating that racial classifications conflict with doctrine of equality and that they “threatened to stigmatize individuals by reason of their membership in a racial group”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (asserting that “illegitimate racial prejudice or stereotype” violates equal protection); cf. *United States v. Virginia*, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting) (criticizing majority's holding that Virginia Military Institute's male-only policy violates equal protection because it “smacks of . . . paternalism” by treating women as “discrete and insular minority”).

⁹⁹ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (“[I]t is irrelevant whether a government's racial classifications are . . . [motivated by] a sincere desire to help those thought to be disadvantaged. There can be no doubt that . . . paternalism . . . is at war with the principle of inherent equality that underlies and infuses our Constitution.”).

Justice Thomas's views on racial classifications highlight the paternalism problem:

[R]acial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called “benign” discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are “entitled” to preferences.

Id. at 241. Justice Thomas's concerns about race-preference systems also have been raised, at least to an extent, by Justice Brennan. See *United Jewish Org.*, 430 U.S. at 172-75 (Brennan, J., concurring) (supporting, generally, use of remedial, preferential racial classifications in districting context, but warning that they may disguise policy of disadvantageous treatment, stigmatize recipient group as inferior, or produce “impression of injustice”).

havior of that group is inherently paternalistic because it substitutes race-based assumptions for ascertained facts. “[T]he Constitution provides that the government may not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how they act or think.”¹⁰⁰ Compensation without substantiation is constitutionally problematic for precisely this reason. And strict scrutiny is necessary to ferret it out where it exists.

Thus, the expansion of strict scrutiny under the *Shaw* doctrine to include districts with a marked reliance on racial presumptions about voter behavior is a logical step for a Court that is already determined to apply strict scrutiny to racial classifications elsewhere, regardless of benign purpose or even facially neutral appearance. Once strict scrutiny applies, the Court’s equal protection doctrinal framework, as articulated in the affirmative action cases, will serve as the roadmap for gauging their survival.¹⁰¹

III

APPLYING STRICT SCRUTINY TO EXCESSIVELY RACE-CONSCIOUS DISTRICT POPULATIONS

When race-conscious placement of voters in districts rises to the level of “excessive reliance” on race, strict scrutiny review is triggered under the *Shaw* doctrine.¹⁰² The mechanics of strict scrutiny are well-known and relatively straightforward. Under this form of exacting judicial review, a race-conscious government policy must serve a compelling state interest and be narrowly tailored to advance that interest.¹⁰³

¹⁰⁰ *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting).

¹⁰¹ See *supra* note 62.

¹⁰² As Part II indicates, the precise point at which consideration of race becomes excessive (thus triggering strict scrutiny) is extremely difficult to identify. A first impression of the cases may lead one to conclude that the decision of whether to apply strict scrutiny simply comes down to a court’s overall impression based on the particular facts of a case. This Note, however, takes a less cynical view; it attempts to present a coherent analysis of the doctrine while recognizing that a precise prediction of the circumstances under which turnout-driven districts will trigger strict scrutiny is nearly impossible.

¹⁰³ See, e.g., *Adarand*, 515 U.S. at 219-20, 227 (explaining requirements of strict scrutiny). In *Adarand*, Justice O’Connor stated that the purpose of strict scrutiny is to ensure that government policies are colorblind, with the exception of limited instances where the state’s interest is compelling enough to justify racial classifications.

[W]henver the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection. . . . The application of strict scrutiny, in turn, determines whether a compelling governmental interest justifies the infliction of that injury.

Id. at 229-30.

This Part analyzes the application of strict scrutiny to districts whose populations are designed to compensate for low minority voter turnout. Section A demonstrates that under strict scrutiny, the state's justification for its use of race in districting must be grounded in a proper remedial purpose. Section B shows how, even if the state's creation of a "turnout-driven" district qualifies as remedial and survives the first prong of strict scrutiny, it is likely to fail the second prong for a lack of narrow tailoring.

A. *Compelling Government Interest*

Strict scrutiny requires that state programs using racial classifications be narrowly tailored to serve compelling state interests and is driven by skepticism regarding the state's purposes.¹⁰⁴ In *Croson*, Justice O'Connor listed possible impermissible purposes that may render race-based governmental policies unconstitutional: "illegitimate racial prejudice or stereotype"; "illegitimate notions of racial inferiority"; and "simple racial politics."¹⁰⁵

A possible justification for race-based districting offered by states might be racially proportional representation.¹⁰⁶ However, the Court has rejected the assertion of a compelling state interest in proportional representation.¹⁰⁷ States may also assert they have a compel-

¹⁰⁴ Skepticism is a theme that pervades the Court's cases with respect to racial classifications by government. See *Adarand*, 515 U.S. at 223; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("Indeed the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (plurality opinion) ("Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980))).

¹⁰⁵ *Croson*, 488 U.S. at 493. The Court is also fearful of divisiveness or "the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict." *Metro Broad.*, 497 U.S. at 603 (O'Connor, J., dissenting).

¹⁰⁶ Racially proportional representation is the idea that political representation in the governmental body should mirror the racial proportions in the general citizenry. Cf. *supra* note 47 (describing "descriptive" representation). See James F. Blumstein, *Racial Gerrymandering and Vote Dilution: Shaw v. Reno in Doctrinal Context*, 26 Rutgers L.J. 517, 582 (1995) (noting that after *Shaw*, some defenders of racial gerrymanders have asserted racially proportional representation as compelling state interest).

¹⁰⁷ See *Miller v. Johnson*, 515 U.S. 900, 910 (1995) (noting lower court's rejection of State's asserted compelling interest in proportional representation); see also Blumstein, *supra* note 106, at 582 ("The assertion of such a state interest [in proportional representation] exalts racial spoils politics to a compelling interest, whereas *Shaw* is premised on the view that that type of racialism is antithetical to our constitutional principles."). Even Justice Stevens, in his dissent in *Miller*, recognized that "[t]he Constitution does not mandate any form of proportional representation . . ." 515 U.S. at 932. Further, compliance with the VRA does not require states to create a proportional number of majority-minority districts. See 42 U.S.C. § 1973(b) ("[N]othing in this section establishes a right to have

ling interest in compliance with the VRA. If the VRA were read to require jurisdictions to compensate for low minority voter turnout when they draw effective minority districts, then states could respond easily to the strict scrutiny inquiry by putting forth this compelling interest as a justification. As the *Shaw* line of cases demonstrates, however, compliance with the VRA does not necessarily insulate a districting plan from constitutional challenge. In cases where states have asserted this interest, the Court has construed the requirements of the VRA narrowly to avoid the equal protection question.¹⁰⁸ The Court will not accept the assertion of compliance with the VRA as a compelling state interest without examination of the underlying state action to determine whether it violates equal protection. And if it does, the VRA should not be understood to mandate such a plan. Thus, under the Court's equal protection doctrine, it seems the only true justification for race-conscious policies is a remedial one.¹⁰⁹

1. Remedial Uses of Race: Constitutionality Hinges on Past Discrimination as the Cause of Low Turnout

The Court has acknowledged a "compelling government interest in redressing the effects of past discrimination."¹¹⁰ Remedial race-

members of a protected class elected in numbers equal to their proportion in the population.").

¹⁰⁸ See *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 328 (2000) (holding that "purpose" prong of section 5 of VRA applies only to districting plans that would dilute minority voting strength below current levels); *Bush v. Vera*, 517 U.S. 952, 979 (1996) (holding that section 2 of VRA does not require creation of majority-minority districts that rely on race more than traditional districting principles); *Miller*, 515 U.S. at 926-27 (adopting relaxed reading of mandates of sections 2 and 5 of VRA and indicating that any interpretation requiring predominantly race-conscious government action "brings the Act . . . into tension with the Fourteenth Amendment").

¹⁰⁹ See *Adarand*, 515 U.S. at 237 (affirming states' compelling interest in remedying past discrimination). An interest compelling in one context may not necessarily be so in another. For example, in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Justice Powell held that diversity may be a compelling governmental interest in a university's admissions program. See *id.* at 314. Because Justice Powell's plurality opinion was not signed by any other Justice, however, there are serious questions as to whether it has any binding precedential effect. The Supreme Court has not revisited the question since *Bakke*, and the lower courts are deeply divided as to whether the diversity justification survived the subsequent doctrinal developments in *Croson* and *Adarand*. Compare *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1200-01 (9th Cir. 2000) (accepting diversity in education as compelling governmental interest) with *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (rejecting diversity as compelling). Considering that the interest in educational diversity is highly contextual, it seems unlikely that the Court would accept similar arguments for diversity as a compelling interest in districting.

¹¹⁰ *Missouri v. Jenkins*, 515 U.S. 70, 112 (1995). See also *Adarand*, 515 U.S. at 237 ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."); *Metro Broad.*, 497 U.S. at 611 (O'Connor, J.,

based government action requires specific evidence of the nature and scope of the past discrimination against the minority group benefited by the policy.¹¹¹ If a state asserts a remedial justification for its race-based policy, it also must tailor the policy to the specific problems it identifies.¹¹²

A compelling remedial government interest in this context must meet two requirements. First, the state must identify specific discrimination; general assertions of past discrimination will not pass constitutional muster because they do not provide the legislature with sufficient guidance for tailoring a remedy.¹¹³ Second, the government must have a strong evidentiary basis for concluding that the race-based remedial action was necessary.¹¹⁴

A state's decision to increase a minority group's population within a majority-minority district to levels above the group's share of the voting-age population in order to remedy low minority voter turnout would be justified by a compelling remedial state interest if that low turnout is in fact a legacy of past discrimination. Due to the stringent requirement that the cited effects of past discrimination be specific and identified,¹¹⁵ the population figures of a districting plan founded on the assumption that low voter turnout is an element of past discrimination may become vulnerable to a constitutional challenge. Such a challenge may succeed if it can be shown that a minority group's voter turnout was equal to or greater than white voter turnout in at least one election, challenging the necessity of the state's remedial action.¹¹⁶ A minority group's *demonstrated capacity* to turn out to vote casts doubt on the argument that subsequent low turnout is due

dissenting) (“[W]e have repeatedly recognized that the Government possesses a compelling interest in remedying the effects of identified race discrimination.”); Fullilove v. Klutznick, 448 U.S. 448, 496 (1980) (Powell, J., concurring) (recognizing “compelling governmental interest in eradicating the continuing effects of past discrimination”).

Not all the Justices agree, however, that a remedial purpose justifies race-based classifications. See *supra* note 92.

¹¹¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989) (“While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.”).

¹¹² See *infra* Part III.B.

¹¹³ *Shaw v. Hunt*, 517 U.S. 899, 909 (1996). Justice Powell emphasized this point in his plurality opinion in *Wygant v. Jackson Board of Education*: “Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.” 476 U.S. 267, 276 (1986) (plurality opinion).

¹¹⁴ *Shaw*, 517 U.S. at 910.

¹¹⁵ See *supra* notes 111-12.

¹¹⁶ See *infra* Part III.A.3.

to past discrimination, suggesting instead that it may be due to simple political factors.¹¹⁷

Focusing the analysis on Hispanic voters is particularly illustrative of the problem. The constitutionality of a districting plan that factors in low turnout among nonblack minority groups may be especially weak if the state cannot show a history of discrimination against those groups. While poll taxes, literacy tests, and other restrictive voting laws clearly disenfranchised blacks in the South and elsewhere, their use against Hispanic voters is not as well established.¹¹⁸ While Hispanics no doubt suffer discrimination in some contexts, unless they have suffered from these types of voting-specific restrictions, it may be constitutionally impermissible to augment their population within a majority-Hispanic district to account for their low turnout. In *Croson*, the Court rejected the City of Richmond's affirmative action plan for Spanish-speaking people because the city did not have a history of discrimination against them.¹¹⁹ Similarly, in *Wygant v. Jackson Board of Education*, the plurality opinion limited the grounds available for remedial action based on race, rejecting "societal discrimination alone" as insufficient.¹²⁰ According to Justice Powell: "[T]he Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."¹²¹ Thus, when not addressing past discrimination, the state would have to draw majority-Hispanic districts based on simple voting-age population without the addition of voters to compensate for low turnout.

2. *The VRA's Simple Assumptions About Voter Behavior Are Insufficient*

Despite the constitutional importance of the actual cause of low minority voter turnout, simple assumptions prevail under the VRA. The VRA's statutory framework contains a presumption that low

¹¹⁷ On a general, national level, low turnout among minority voters remains a problem. See *infra* note 141. Rather than attempting to determine the cause of low minority turnout, this Note simply raises the possibility that, in some places, it may no longer be due to past discrimination. The goal is simply to demonstrate how such evidence of the causes of low turnout would have constitutional implications.

¹¹⁸ Of course, there are exceptions. In New York, for example, there is well-documented evidence of literacy tests used to disenfranchise Puerto Rican voters. *Katzenbach v. Morgan*, 384 U.S. 641, 644 & n.2, 654 & n.14 (1966). Based on this history in New York City, there may be a sufficient basis for remedially increasing the group's population in a district to compensate for low turnout, provided low turnout is still due to past discrimination.

¹¹⁹ 488 U.S. 469, 506 (1989).

¹²⁰ 476 U.S. 267, 274 (1986).

¹²¹ *Id.*

turnout is due to past discrimination.¹²² In order to state a claim of vote dilution under section 2 of the VRA, plaintiffs must show that the vestiges of past discrimination interfere with a minority group's ability to participate in the political process. The VRA assumes, however, that

disproportionate educational, employment, income level and living conditions arising from past discrimination tend to depress minority political participation [and] [w]here these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.¹²³

For VRA purposes, then, to establish that the effects of past discrimination are a barrier to minority participation, plaintiffs need only show disparate socioeconomic circumstances between minorities and whites and depressed minority participation rates.¹²⁴

The VRA framework's treatment of minority voter turnout does not satisfy the demands of strict scrutiny, however, because it ignores the underlying issue of constitutional importance: the actual cause of low turnout. Strict scrutiny review requires more specific legislative findings and proof of the causal connection between past discrimination and present low turnout in order to establish a compelling government interest in the use of a race-based remedy. Thus, while the VRA may be satisfied with the simple assertion that past discrimination is the cause of low participation in the present, strict scrutiny requires more.

Under the Court's equal protection jurisprudence, the viability of a state's plan that increases a district's population in order to compensate for low turnout will hinge on the actual cause of that depressed turnout. In some or even most places, the cause of low voter turnout may be due to the lingering effects of past discrimination. In other jurisdictions, however, that may not be the case. In the thirty-five-plus years since the enactment of the VRA, much progress has been made as a result of remedial programs, such as the Act itself, and other civil rights statutes.¹²⁵ Consequently, there is an increasing likelihood that low levels of turnout among minority voters will no longer

¹²² See *supra* note 14 and accompanying text.

¹²³ *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 866-67 (5th Cir. 1993) (quoting S. Rep. No. 97-417, at 29 n.114 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 207 n.114). It is important to note that the Senate's analysis and the Fifth Circuit's treatment occurred prior to the Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997). See *supra* note 29.

¹²⁴ *League of United Latin Am. Citizens*, 999 F.2d at 866-67.

¹²⁵ See *infra* notes 127-28 and accompanying text.

be attributable to past discrimination, but rather to traditional political factors such as a lack of voter mobilization.¹²⁶

Ultimately, the constitutionality of turnout-driven districts will turn on the facts. If evidence shows that minority voters in a particular jurisdiction have the capacity to turn out at rates equal to or greater than white voters, then the state's justification for its race-based remedy begins to unravel.

3. *Evidence Indicating That Low Turnout May Not Always Be Due to Past Discrimination*

Historically, rates of participation among black voters have been disturbingly low in some states due to disenfranchisement policies. For example, in the 1952 presidential election, fewer than 1000 people voted in the black precincts of Birmingham, Alabama.¹²⁷ In 1968, just three years after the passage of the VRA, that number rose to 10,000.¹²⁸ Though the VRA has had a significant impact on improving the rate of minority political participation, courts still accept the assumption that lower levels of turnout are due to the lingering effects of past discrimination.¹²⁹ This Note suggests that once minority voter turnout rises to levels equal to or surpassing white voter turnout in specific jurisdictions, the argument that subsequent drops in minority turnout in those jurisdictions are due to past discrimination, and thus require compensation, is questionable.¹³⁰ Indeed, a survey of actual

¹²⁶ See *infra* notes 134-40 and accompanying text.

¹²⁷ Edward G. Carmines & Robert Huckfeldt, *Party Politics and the Voting Rights Act*, in *Controversies*, *supra* note 13, at 117, 127.

¹²⁸ *Id.*

¹²⁹ Grofman, *supra* note 13, at 205.

¹³⁰ This suggestion is not novel. In *NAACP v. City of Columbia*, 850 F. Supp. 404 (D.S.C. 1993), plaintiffs suggested that black voter turnout was low because of the effect of past discrimination. *Id.* at 419-20. The district court noted the tenuous connection:

[B]lack turnout actually exceeded white turnout in 1983 and 1984 If past discrimination were depressing black turnout, one would expect to see lower participation by blacks in elections closer to that discrimination, rather than in more recent elections. . . . [But b]lacks turned out in record numbers in 1990 . . . and [i]n two county special elections, black voters significantly "out mobilized" the supporters of white candidates, and as a result elected blacks on both occasions.

Id. at 420.

The court's discussion of the varying rates of black voter turnout over time compels the conclusion that subsequent low turnout, to the extent it occurs, is due to something else. "[N]othing in the evidence suggests that the variation in black turnout can be attributed to past discrimination." *Id.* at 423. Rather, the court's appraisal of the facts attributed depressed turnout to traditional political factors:

A far more plausible explanation for low black turnout in city elections is the same as that for low turnout generally: voters are either satisfied that the City is working well, thus little interest is generated by the campaigns, or they are

minority voter behavior in recent elections shows that minority voter turnout is increasing.¹³¹ Together with political science literature offering alternative explanations for low turnout, this evidence seriously undermines conventional assumptions about the causes of low minority voter turnout.

Some political scientists argue that differences in turnout rates may be explained best by reference to political factors such as mobilization and competition in politics.¹³² A study by Steven Rosenstone and John M. Hansen concludes that “the most important drag on African-American voter turnout [in the 1970s and 1980s] was the atrophy of instruments of mobilization.”¹³³ Political mobilization also is cited as the reason for increases in turnout when they arise. For example, mobilization surrounding an affirmative action ballot initiative has been suggested as the reason for a dramatic sixty-five percent increase in black voter turnout in Florida in the 2000 presidential election.¹³⁴ Thus, political mobilization—or the lack thereof—seems to account best for turnout.

Some studies even conclude that black voter mobilization is comparatively better than that of whites, finding that “once statistical controls are introduced for blacks’ lower [socioeconomic] backgrounds, they participate at higher rates than similarly situated whites.”¹³⁵ For example, the black share of the vote in Nevada, Georgia, Michigan, and Illinois in 1998—a midterm election year—was greater than the

generally uninspired by some of the candidates. As the 1990 mayoral [election] demonstrates, a heated, hard-fought campaign will turn out the voters, both black and white.

Id. at 423-24.

¹³¹ See *infra* notes 134-40 and accompanying text.

¹³² See generally Gregory A. Caldeira et al., *The Mobilization of Voters in Congressional Elections*, 47 *J. Pol.* 490 (1985) (emphasizing importance of political mobilization in explaining rates of participation). Courts, however, tend to shy away from consideration of political mobilization issues, such as voter apathy. See *Teague v. Attala County*, 92 F.3d 283, 294-95 (5th Cir. 1996) (refusing to take judicial notice of voter apathy); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139, 145 (5th Cir. 1977) (same). But see *infra* notes 144-48 and accompanying text (discussing cases in which mobilization was considered). This potential refusal to acknowledge political explanations for low voter turnout is troubling in light of the equal protection implications demonstrated herein.

¹³³ Steven J. Rosenstone & John Mark Hansen, *Mobilization, Participation, and Democracy in America* 223 (1993).

¹³⁴ Mark Danner, *The Road to Illegitimacy*, *N.Y. Rev. of Books*, Feb. 22, 2001, at 48, 50-51; Robert Kuttner, *The Lynching of the Black Vote*, *Boston Globe*, Dec. 10, 2000, at H7.

¹³⁵ Stephen Earl Bennett, *Apathy in America, 1960-1984*, at 71 (1986) (citing studies finding “over-participation” among black voters). If true, this proposition would seriously undermine the contention that low black turnout is due to the lingering effects of past discrimination.

states' black voting-age populations.¹³⁶ In 2000, the black share of the vote exceeded black voting-age population in five states.¹³⁷ Black voter turnout increased fifty percent in Florida and in Texas, from ten percent in the presidential election of 1996 to fifteen percent in 2000.¹³⁸ In Missouri, it rose by a formidable 140%, from five percent in 1996 to twelve percent in 2000.¹³⁹ This is especially impressive considering that blacks make up approximately five percent of Missouri's population.¹⁴⁰

A thorough analysis of the empirics of racial turnout is often difficult because of the very limited public data available. The Census Bureau does not report race-based turnout data on a district-by-district basis.¹⁴¹ Therefore, it is at the discretion of states or other entities,

¹³⁶ In Nevada, where blacks make up only seven percent of the total voting-age population of the state, they comprised nine percent of the 1998 senatorial vote. David A. Bositis, Joint Center for Political and Econ. Studies, *The Black Vote in '98*, at 1 n.2 (1998). In Georgia, black voters cast twenty-nine percent of the vote in 1998, up from nineteen percent in 1994. *Id.* at 2. In Illinois, black voter turnout increased from a twelve percent share in 1994 to seventeen percent in 1998; in Michigan, black voter turnout went from thirteen percent of the total vote in 1994 to nineteen percent in 1998. *Id.* "What is especially noteworthy about the black share of the vote in each of these three states is that it is greater than the states' black voting-age populations. Georgia's black voting-age population is 26.5 percent, Illinois's is 13.9 percent, and Michigan's is 13.2 percent." *Id.*

¹³⁷ David A. Bositis, Joint Center for Political and Econ. Studies, *The Black Vote in 2000: A Preliminary Analysis 1-2* (2000) (listing five states as Florida, Missouri, Texas, Tennessee, and Mississippi).

¹³⁸ *Id.* at 1-2.

¹³⁹ *Id.* at 2.

¹⁴⁰ Robert A. Jordan, *In Black Vote, Salvation for Gore*, *Boston Globe*, Nov. 5, 2000, at D4.

There is also evidence of higher black turnout in some local elections. In a 1997 Houston mayoral election, forty-seven percent of registered middle-class black voters turned out while only forty-one percent of their white counterparts did. Alan Bernstein, *Mayoral Runoff Ahead for Brown and Mosbacher*, *Houston Chron.*, Nov. 5, 1997, at 1A (reporting high rates of turnout and citing mobilization over affirmative action referendum on ballot as motivation).

¹⁴¹ See Grofman et al., *supra* note 15, at 1389 n.25. The Census Bureau does, however, report racial turnout data on an aggregate national level. In the 2000 presidential election, 60.4% of the white voting-age population voted, as did 53.5% of blacks, and 27.5% of Hispanics. Amie Jamieson et al., *Voting and Registration in the Election of November 2000*, at 3 fig.2 (U.S. Dep't of Commerce, *Current Population Reports No. P20-542*, 2002). The Federal Election Commission also reports turnout data by race, gender, and age. Its web site reports that the 1998 midterm election reflected lower turnout nationwide for blacks and Hispanics. White turnout was 47.4%, while black turnout was 41.9%, and Hispanic turnout was 32.8%. See Fed. Election Comm'n, *Voter Registration and Turnout by Age, Gender & Race 1998*, at <http://fecweb1.fec.gov/pages/98demog/98demog.htm>. For the 1996 presidential election, 56% of whites, 51% of blacks, and 27% of Hispanics voted. In the 1992 presidential election, white turnout was 64%, black turnout was 54%, and Hispanic turnout was 29%. Twenty years earlier, in the presidential election of 1972, white turnout was 65%, black turnout was 52%, and Hispanic turnout was 38%. Fed. Election Comm'n, *Voter Registration and Turnout in Federal Elections by Race/Ethnicity 1972-1996*, at <http://www.fec.gov/pages/Raceto.htm>.

such as private organizations or trial experts, to compile this data. Currently, only South Carolina regularly collects turnout data by race.¹⁴²

In 1994, three majority-black South Carolina state legislative districts were characterized by higher rates of black turnout than white turnout. In 1996, six out of thirty-two such districts had higher rates of black turnout, and in 1998, thirteen out of thirty-two had higher rates of black turnout.¹⁴³

Brunswick County, Virginia provides a striking example of black voter turnout exceeding that of whites. In *Smith v. Brunswick County*,¹⁴⁴ the Fourth Circuit considered a section 2 challenge to a redistricting plan there. The court noted that “[t]he evidence at trial showed that throughout the period beginning in 1970 black voters have been actively involved in the election process in Brunswick County . . . [and] black voter turnout had consistently exceeded white voter turnout by 10 to 20%.”¹⁴⁵ Against this factual backdrop, if black turnout were to fall below white turnout, the state would be hard-pressed to justify compensation for lower turnout through race-based districting on grounds that the low turnout is due to past discrimination.

Tennessee may face similar constitutional constraints. In *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter*,¹⁴⁶ the District Court found that “the State’s voter turnout figures show[ed] that black voter turnout in majority-black districts in west Tennessee is higher than white turnout.”¹⁴⁷ Consequently, the court advised Tennessee that it would not have to increase the percentage of black voting-age population in majority-minority districts

Because strict scrutiny requires specific, identified effects of past discrimination, states are not permitted to pursue race-conscious policies directed towards remedying general societal discrimination. See *supra* notes 111-14 and accompanying text. Thus, these numbers are not determinative of whether any specific state will be constitutionally permitted to carve out districts in order to compensate for low turnout.

¹⁴² Grofman et al., *supra* note 15, at 1405 n.69. Usually, this data consists of estimates derived from precinct-level information on voting-age population by race and election returns. Racial data is gathered on a census-block level, and this information must be compared with precinct boundaries to come up with the voting-age population by race. Based on each precinct’s voting-age population by race, statisticians are able to estimate turnout rates. *Id.*

¹⁴³ See *id.* at 1416 tbl.8 (listing percent of black participation and percent of white participation for South Carolina majority black state house districts in general elections in 1994, 1996, and 1998).

¹⁴⁴ 984 F.2d 1393 (4th Cir. 1993).

¹⁴⁵ *Id.* at 1395.

¹⁴⁶ 836 F. Supp. 453 (W.D. Tenn. 1993), vacated on other grounds by 512 U.S. 1248 (1994).

¹⁴⁷ *Id.* at 467.

above fifty-five percent in order to compensate for low turnout and thereby render the districts effective under the VRA.¹⁴⁸ These facts nicely frame the constitutional problem. If black voter turnout in those majority-minority districts drops in the future, and if the state decides to compensate for it by increasing the percentage of black population in those districts, strict scrutiny will demand it have a compelling remedial purpose for that use of race-conscious districting. Its history of high black turnout, however, will undermine its remedial justification.

The fact that black voters turned out at higher rates than white voters in these jurisdictions suggests the final elimination of the vestiges of past discrimination in this context; consequently, low turnout in subsequent elections may be tied more to lack of political mobilization or other political causes. If so, race-conscious increases in minority population may not survive strict scrutiny.

B. Narrowly Tailored Means

Strict scrutiny requires a particular fit between the state's asserted purpose and its means.¹⁴⁹ If the compelling purpose is remedying past discrimination, the means must be evaluated in terms of that goal.¹⁵⁰ With respect to turnout-driven districts, the means in question is the increase of the minority population to compensate for low turnout. Even assuming that the state's purpose is compelling, the question remains whether the gerrymandering of minority populations is sufficiently narrowly tailored.

The Court's equal protection decisions suggest three requirements for narrow-tailoring: (1) avoidance of overinclusiveness,¹⁵¹ (2)

¹⁴⁸ *Id.* On remand, the court reaffirmed its use of the fifty-five percent baseline. *Rural W. Tenn. African-Am. Affairs Council, Inc. v. McWherter*, 877 F. Supp. 1096, 1106 n.7 (W.D. Tenn. 1995).

¹⁴⁹ See *Shaw v. Hunt*, 517 U.S. 899, 915-16 (1996) (requiring legislative action to "substantially address, if not achieve, [its] avowed purpose"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) ("Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose.").

¹⁵⁰ See *Wygant*, 476 U.S. at 280.

¹⁵¹ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989) (rejecting affirmative action program because class of beneficiaries was too broad and did not match class of victims of past discrimination).

limitation on duration,¹⁵² and (3) consideration and adoption of race-neutral alternatives wherever possible.¹⁵³

In the affirmative action context, the doctrine requires the state to direct the benefits of the program to the specific groups who are harmed by the effects of past discrimination.¹⁵⁴ This prohibition on overinclusiveness poses serious problems in the districting context if a particular locality has no history of specific discrimination against the minority group in question by means of literacy tests, poll taxes, or other disenfranchising voting laws. Thus, a state's ability to compensate for low voter turnout is limited to those instances where the state can offer concrete evidence of past voting discrimination in that jurisdiction against the specific minority group benefiting from the districting plan's compensation. If a minority group is plagued by low turnout, but was not the object of past discrimination in the jurisdiction in question, equal protection appears to bar the state from increasing the group's population as compensation for that low turnout.

A second requirement is limited duration: Race-based policies may only last as long as there is a problem to be remedied. Indeed, the Supreme Court is extremely critical of race-conscious remedies that have the capacity to outlast their utility. In *Croson*, the Court held that "[p]roper findings . . . defin[ing] both the scope of the injury and the extent of the remedy . . . serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter . . ."¹⁵⁵ Similarly, in *Wygant* the Court reiterated the importance of preventing racial classifications from lasting "long past the point required by any legitimate remedial purpose."¹⁵⁶ Awarding a permanent edge in population in a district, based solely on race and justified only by vague references to past discrimination, might therefore severely undermine the district's con-

¹⁵² See *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring) ("The temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate."); *Wygant*, 476 U.S. at 276 (worrying about "remedies that are ageless in their reach into the past, and timeless in their ability to affect the future").

¹⁵³ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237-38 (1995) (indicating that narrow tailoring requires consideration of race-neutral alternatives); *Croson*, 488 U.S. at 507 (noting that city had not considered race-neutral means).

¹⁵⁴ See *Croson*, 488 U.S. at 506 (holding Richmond's affirmative action program unconstitutional because "[t]here is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry"); *Podberesky v. Kirwan*, 38 F.3d 147, 158-59 (4th Cir. 1994) (holding that University of Maryland's affirmative action program benefiting blacks from any state was overinclusive remedy for state's discrimination against in-state blacks).

¹⁵⁵ *Croson*, 488 U.S. at 510.

¹⁵⁶ *Wygant*, 476 U.S. at 275.

stitutionality under equal protection doctrine. The durational limit, however, would most likely be the least of the district's narrow-tailoring problems: Since districting happens every ten years,¹⁵⁷ the danger that an offensive districting plan could survive forever is virtually nonexistent.

The final requirement of narrow tailoring is the consideration of race-neutral means. In *Adarand*, the Court explained that narrow tailoring requires evidence that race-neutral means will not achieve the desired remedial ends.¹⁵⁸ Narrow tailoring requires the government to consider race-neutral means before it resorts to race-based districting in order to compensate for low turnout. Tackling this problem in a race-neutral manner would appear possible since low turnout pervades our society.¹⁵⁹

For example, working class voters may encounter greater difficulty finding the time to vote in elections typically held during the work-week. To the extent that race correlates with socioeconomic class,¹⁶⁰ conducting elections on weekends or holidays, or simply holding polls open later, may alleviate circumstances that might prevent minority voters from voting.¹⁶¹ Perhaps officials also could increase

¹⁵⁷ See *supra* note 1.

¹⁵⁸ See *Adarand*, 515 U.S. at 237-38.

¹⁵⁹ Only about half of voting-age Americans vote for President. In 1996, only 49.1% cast their ballots in the presidential election. See Fed. Election Comm'n, Voter Registration and Turnout - 1996, at <http://www.fec.gov/pages/96to.htm>. In the 2000 presidential election turnout was 51.3% of voting-age population. See Fed. Election Comm'n, Voter Registration and Turnout 2000, at <http://fecweb1.fec.gov/pages/2000turnout/reg&to00.htm>.

Midterm elections turnout figures are even more dismal. In the 1998 midterm elections, overall voter turnout was only 36.4%. See Fed. Election Comm'n, Voter Registration and Turnout - 1998, at <http://www.fec.gov/pages/reg&to98.htm>.

¹⁶⁰ A socioeconomic divide between white and minority voters persists. See Eben Moglen & Pamela S. Karlan, *The Soul of a New Political Machine: The Online, the Color Line and Electronic Democracy*, 34 *Loy. L.A. L. Rev.* 1089, 1089-91 (2001) (citing important socioeconomic disparities between white and minority voters).

The fact that minorities have lower incomes than whites is well-documented. For results of the 2000 census, see Carmen DeNavas-Walt et al., *Money Income in the United States: 2000*, at 2 tbl.A (U.S. Dep't of Commerce, Current Population Reports No. P60-213, 2001). Low income Americans are less likely to participate in the political process. See R. Michael Alvarez & Jonathan Nagler, *The Likely Consequences of Internet Voting for Political Representation*, 34 *Loy. L.A. L. Rev.* 1115, 1120-22 (2001) (discussing correlation between socioeconomic status, registration, and turnout).

Socioeconomic disparities are the primary reason why internet voting is one race-neutral means that is unlikely to offer much hope for increasing minority voter turnout. For a discussion of the problem of internet voting, see generally Stephen B. Pershing, *The Voting Rights Act in the Internet Age: An Equal Access Theory for Interesting Times*, 34 *Loy. L.A. L. Rev.* 1171 (2001); Moglen & Karlan, *supra*; Alvarez & Nagler, *supra*.

¹⁶¹ The proposition that the timing of an election may affect turnout is not new. See *Lucas v. Townsend*, 486 U.S. 1301, 1302 (1988) (Kennedy, J., Circuit Justice) (enjoining Bibb County, Georgia, from holding bond referendum on nonprimary day on grounds that low minority voter turnout likely to result constituted "irreparable harm"). See also Nat'l

the overall number of polling places and distribute them evenly throughout the area. This could ensure that predominantly minority neighborhoods are not disadvantaged by a lack of nearby polling places, especially since socioeconomic disparities may make it more difficult for minority voters to find transportation to the polls.¹⁶² States also could explore new ways of liberalizing registration laws¹⁶³ or allowing provisional voting in order to increase turnout.¹⁶⁴

These suggestions indicate that strict scrutiny easily would find turnout-driven minority population levels unconstitutional for lack of narrow tailoring because of the availability of race-neutral alternatives.

It should be noted that consideration of any of the aforementioned race-neutral means represents a very aggressive approach to strict scrutiny in the sense that it requires courts not only to question actual legislative choices but also to imagine alternative legislative choices. It is unclear whether the Court would be comfortable venturing down this path of interference in matters traditionally assigned to state and local discretion. Indeed, the strongest argument against pushing the doctrine in this direction may be one of institutional competence: Courts are not well-suited to such a task. However, the likelihood that the Court would adopt such an aggressive review of the means under the narrow-tailoring test is not remote.

As the key vote in equal protection cases, Justice O'Connor deserves special attention with regard to the application of the narrow-tailoring test, because she may best signal the Court's application of the doctrine in this area. As evidenced by the cases, Justice O'Connor

Comm'n on Fed. Election Reform, *To Assure Pride and Confidence in the Electoral Process* 7, 40-42 (2001) [hereinafter *Carter-Ford Commission Report*] (recommending elections be held on national holiday to increase turnout).

¹⁶² Moglen & Karlan, *supra* note 160, at 1090-91 (calling attention to "vehicle divide" that makes it difficult for some minority voters to get to polling places).

¹⁶³ See Raymond E. Wolfinger & Steven J. Rosenstone, *Who Votes?* 61-88 (1980) (arguing that reforming and liberalizing registration laws would be best means of increasing overall voter turnout); *Carter-Ford Commission Report*, *supra* note 161, at 38 (citing studies finding same-day voter registration may have five to eight percent increase in voter turnout).

¹⁶⁴ Provisional voting allows voters whose names are not included in registration lists to vote on election day, with state officials counting the vote only after they determine the voter is in fact qualified under the state's election laws. See *Carter-Ford Commission Report*, *supra* note 161, at 6. Voters who have moved recently may not have sufficient time to register in a new jurisdiction; provisional voting would enable them to vote regardless. Provisional voting will benefit minority voters especially, to the extent that they are "members of lower-income groups, who are more likely to move than higher-income groups and . . . are thus more likely to fall off local voter rolls and bear the burden of re-registration." *Id.* at 30-31.

is highly skeptical of the use of racial classifications.¹⁶⁵ Although Justice O'Connor may be willing to accept compliance with the VRA as a compelling government interest, her aggressive application of narrow-tailoring suggests that satisfying the compelling interest requirement is not the end of the constitutional inquiry. If her viewpoint is at all indicative of the Court's treatment of race-based remedies for past discrimination, the prognosis for turnout-driven districts under the narrow-tailoring prong of strict scrutiny is not good.

CONCLUSION

Changing voter behavior is not merely a matter of concern for political scientists. Rather, the reasons for that behavior can have normative, constitutional implications. Attributing low minority voter turnout to political factors rather than past discrimination fundamentally alters the constitutional calculus for state legislatures charged with the task of reapportionment. The constitutionality of state electoral districts drawn to compensate for disparate rates of participation may hinge upon the continued relevance and validity of old explanations for low minority voter turnout. An interpretation of the VRA that treats "equal electoral opportunity" as requiring minority populations in districts be based on voting age avoids this constitutional problem. If evidence continues to point towards politics and away from past discrimination as the culprit for low turnout, more searching judicial review is necessary to ensure that state districting decisions are based on solid empirics—not suspect assumptions.

¹⁶⁵ See, e.g., *United States v. Paradise*, 480 U.S. 149, 199-201 (1987) (O'Connor, J., dissenting) (arguing that although government had compelling interest in remedying longstanding discrimination in Alabama Department of Public Safety, hiring policy should not survive strict scrutiny because race-neutral means not considered).